National Reporter System—United States Series

THE FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 217

PERMANENT EDITION

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

DECEMBER, 1914—JANUARY, 1915

ST. PAUL
WEST PUBLISHING CO.
1915

COPYRIGHT, 1914
BY
WEST PUBLISHING COMPANY

COPYRIGHT, 1915
BY
WEST PUBLISHING COMPANY

(217 FED.)

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

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

SECOND CIRCUIT

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

THIRD CIRCUIT

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

FOURTH CIRCUIT

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

FIFTH CIRCUIT

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

SIXTH CIRCUIT

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

SEVENTH CIRCUIT

Hon. JAMES CLARK McREYNOLDS, Circuit Justice ....Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.

Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
Hon. J. OTIS HUMPRHEY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin .....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin .....Madison, Wis.

EIGHTH CIRCUIT

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

NINTH CIRCUIT

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

*

CASES REPORTED

	Page
Abbott v. S. B. & B. W. Fleischer, Inc. (D. C.)	828
Adams Exp. Co., Gimbel Bros. v. (D. C.)	318
American Malting Co. v. Keitel (D. C.)	672
American Sulphite Pulp Co. v. Hinckley Fibre Co. (D. C.)	57
American Sulphite Pulp Co. v. St. Regis Paper Co. (D. C.)	51
American Woolen Co. v. Stewart (C. C. A.)	1
Andrews, Withoft v. (D. C.)	421
Angell, The Emma F., two cases (D. C.)	311
Ankeny, Wright v. (D. C.)	985
Ankeny, Wright v. (D. C.)	988
Archbald v. United States (D. C.)	165
Arizona Mut. Savings & Loan Ass'n, Clark v. (D. C.)	640
Armour & Co. v. Harcrow (C. C. A.)	224
Asbestos Shingle, Slate & Sheathing Co. v. Rock Fibre Mfg. Co. (D. C.)	66
Ashland Electric Power & Light Co. v. Ashland (D. C.)	158
Associated Pipe Line Co., Kern Trading & Oil Co. v. (D. C.)	273
Aumiller, Shenk v. (D. C.)	969
Baltimore & O. R. Co., Potomac Milling & Ice Co. v. (D. C.)	665
Barges Nos. 8, 9, and 27 (C. C. A.)	344
Barthels Mfg. Co., United Lace & Braid Mfg. Co. v. (D. C.)	175
Bateman v. Southern Oregon Co. (C. C. A.)	933
Batterman Co., Odell v. (D. C.)	305
B. Borchardt Co., Yaryan Naval Stores Co. v. (C. C. A.)	758
Beatson Copper Co. v. Pedrin (C. C. A.)	43
Behrens, Illinois Cent. R. Co. v. (C. C. A.)	967
Bell, Smith v. (C. C. A.)	243
Belsteel Co. v. Lorain Steel Co. (D. C.)	412
Benner Line v. Pendleton (C. C. A.)	497
Bergdoll v. Harrigan (C. C. A.)	943
Big Vein Pocahontas Coal Co., Boswell v. (D. C.)	822
Bliss v. Spangler (C. C. A.)	394
Board of Com'rs of Weld County, Colo., Union Pac. R. Co. v. (C. C. A.)	540
Boarman, United States v. (C. C. A.)	757
Bond Bottle Sealing Co., Crown Cork & Seal Co. of Baltimore City v. (D. C.)	891
Borchardt Co., Yaryan Naval Stores Co. v. (C. C. A.)	758
Boswell v. Big Vein Pocahontas Coal Co. (D. C.)	822
Boyd, Hirlinger v. (C. C. A.)	546
Boyd v. Wall (C. C. A.)	550
Boyd v. Wall (C. C. A.)	555
Brahenberg, Cache Creek Min. Co. v. (C. C. A.)	240
Brannan, United States v. (C. C. A.)	849
Bravis v. Chicago, M. & St. P. R. Co. (C. C. A.)	234
Brefo, In re (D. C.)	131
British American Cedar Co., In re (D. C.)	163
Brotherhood of Locomotive Engineers, Georgia & F. R. Co. v. (C. C. A.)	755
Bryan, Tucker v. (C. C. A.)	576
Buffalo Specialty Co. v. Vancleef (D. C.)	91
Bullock, W. H. McElwain Co. v. (C. C. A.)	962
Burr Mfg. & Supply Co., In re (C. C. A.)	16
Busch v. Stromberg-Carlson Tel. Mfg. Co. (C. C. A.)	328
Butte Electric R. Co., Grosso v. (D. C.)	422
Bynum v. Scott (D. C.)	122
Cache Creek Min. Co. v. Brahenberg (C. C. A.)	240
Calypso, The (D. C.)	669
Campbell, Spokane & I. E. R. Co. v. (C. C. A.)	518
Canton Ins. Office v. Independent Transp. Co. (C. C. A.)	213
Carey v. Wimpee (D. C.)	155
Carlson, International Harvester Co. of America v. (C. C. A.)	736
Carr Co., Diamond Patent Co. v. (C. C. A.)	400
Centaur Film Co., Motion Picture Patents Co. v. (D. C.)	247
Centi, In re (D. C.)	833
Chandler, In re (C. C. A.)	38
Chan Fooi, Ex parte (D. C.)	308
Chehalis County, United States v. (D. C.)	281
Chicago, M. & St. P. R. Co., Bravis v. (C. C. A.)	234
Chicago, M. & St. P. R. Co., Mastoras v. (D. C.)	153
Chicago, M. & St. P. R. Co., Tralich v. (D. C.)	675
Chicago, St. P., M. & O. R. Co. v. Kroloff (C. C. A.)	525
Chicago, St. P., M. & O. R. Co. v. Rorvig (C. C. A.)	953
City of Ashland, Ashland Electric Power & Light Co. v. (D. C.)	158
City of Harrisburg v. New York Continental Jewell Filtration Co. (C. C. A.)	366
City of Lee's Summit v. Jewel Tea Co. (C. C. A.)	965
City of Philadelphia, Harrison v. (D. C.)	107
City of Tacoma, Puget Sound Traction, Light & Power Co. v. (D. C.)	265
Clark v. Arizona Mut. Savings & Loan Ass'n (D. C.)	640
Clark v. Hamilton (C. C. A.)	229
Clark, Jr., Electric Co. v. United States Electrical Tool Co. (D. C.)	252
Clark, Schiebel Toy & Novelty Co. v., three cases (C. C. A.)	760

Page

Clayton, Pitts Banking Co. v. (C. C. A.).. 38
Clements, James v. (C. C. A.)..... 51
Clinchfield Coal Corp. v. Steinman (C. C. A.)..... 875
Columbia Mfg. Co., Troy Laundry Machinery Co. v. (D. C.)..... 787
Columbia River Packers' Ass'n v. McGowan (C. C. A.)..... 196
Concrete Fibre Co., Wood v. (D. C.)..... 585
Conner, Midland Val. R. Co. v. (C. C. A.) 956
Conner v. Stumpp & Walters Co. (D. C.).. 72
Consolidated Coal Co. of Maryland, Teti v. (D. C.)..... 443
Consolidated Coal Co. of Maryland, Tomaino v. (D. C.)..... 443
Consolidated Louisiana Lumber Co., Southern Pine Lumber Co. v. (C. C. A.)..... 719
Cooper, United States v. (D. C.)..... 846
Coudon, Whitaker v. (D. C.)..... 139
Crocker, In re (D. C.)..... 167
Crown Cork & Seal Co. of Baltimore City v. Bond Bottle Sealing Co. (D. C.)..... 891
Crown Cork & Seal Co. of Baltimore City v. Sterling Cork & Seal Co. (C. C. A.).. 381
Cunard S. S. Co., Fill v. (D. C.)..... 84
Curle, In re (D. C.)..... 688
Curtin, The (C. C. A.)..... 245
Cutting, Withoft v. (D. C.)..... 421

Dampskibsselskabet Dannebrog v. Randall (D. C.)..... 902
Davis, In re (D. C.)..... 113
Davis Sewing Mach. Co. v. New Departure Mfg. Co. (C. C. A.)..... 775
Davis, Standard Home Co. v. (D. C.)..... 904
Diamond Patent Co. v. S. E. Carr Co. (C. C. A.)..... 400
Di Cola, In re (C. C. A.)..... 743
Donahoo, Moore v. (C. C. A.)..... 177
Douglas County, Midland Guaranty & Trust Co. v. (C. C. A.)..... 358
Dredge A, The (D. C.)..... 617
Dreyer v. Perkins (C. C. A.)..... 889
Duckworth Co., Farmers' Oil & Guano Co. v. (C. C. A.)..... 362
Duehay, Thompson v. (D. C.)..... 484
Dunsmuir v. Scott (C. C. A.)..... 200

Eadie v. North Pacific S. S. Co. (D. C.).. 662
East Coast Lumber Co., In re (C. C. A.).. 576
Eastern Oil & Rendering Co. v. Thompson (C. C. A.)..... 204
Edith, The (D. C.)..... 300
Edwards, In re (D. C.)..... 102
Elenore, The (C. C. A.)..... 753
Elmore Cotton Mills, In re (D. C.)..... 808
Elmore Cotton Mills, In re (D. C.) 810
Emma F. Angell, The, two cases (D. C.).. 311
Erie Baking Co. v. Hubbard Mill. Co. (C. C. A.)..... 759

Fairbanks, Morse & Co. v. Nelson (C. C. A.) 218
Farmers' Oil & Guano Co. v. Duckworth Co. (C. C. A.) 362
Fidelity Title & Trust Co., Kansas City Pipe Line Co. v., three cases (C. C. A.).. 187
Fidelity Trust Co. v. Washington-Oregon Corp. (D. C.)..... 588
Fill v. Cunard S. S. Co. (D. C.)..... 84

Page

Fleischer, Inc., Abbott v. (D. C.)..... 828
Foreman-Blades Lumber Co., Parrish v. (C. C. A.)..... 335
Franklin v. Monning Dry Goods Co. (C. C. A.) 929
Fulkerson v. Shaffer (C. C. A.)..... 355

Gardiner Inv. Co., Jackson Co. v. (C. C. A.) 350
General Electric Co., Sundh Electric Co. v. (D. C.)..... 583
Georgia & F. R. Co. v. Brotherhood of Locomotive Engineers (C. C. A.)..... 755
Gidionsen, Louisiana Excursion Co. v. (C. C. A.)..... 751
Gimbel Bros. v. Adams Exp. Co. (D. C.) .. 318
Grand Manan, The, four cases (D. C.).... 926
Great Lakes Towing Co., United States v. (D. C.)..... 656
Great Northern R. Co. v. Harman (C. C. A.) 959
Grier v. Union Nat. Life Ins. Co. (D. C.).. 287
Grier v. Union Nat. Life Ins. Co. (D. C.).. 293
Grosso v. Butte Electric R. Co. (D. C.).. 422

Hall, Hermann v. (C. C. A.)..... 947
Hall-Epps Clothing Co., Rawlins v. (C. C. A.) 884
Hamilton, Clark v. (C. C. A.)..... 229
Hammond, Stearns Salt & Lumber Co. v. (C. C. A.)..... 559
Harcrow, Armour & Co. v. (C. C. A.)..... 224
Harkins, Potlatch Lumber Co. v. (C. C. A.) 22
Harman, Great Northern R. Co. v. (C. C. A.) 959
Harrigan, Bergdoll v. (C. C. A.)..... 943
Harris, Luxury Fruit Co. v. (C. C. A.).... 740
Harris v. Marsh (C. C. A.)..... 555
Harrison v. Philadelphia (D. C.)..... 107
Haskell Golf Ball Co., Sporting Goods Sales Co. v. (C. C. A.)..... 407
Hawkins, United States v. (C. C. A.)..... 11
Hayden v. Perfection Cooler Co. (D. C.)... 171
H. Batterman Co., Odell v. (D. C.)..... 305
Hermann v. Hall (C. C. A.)..... 947
Hidden v. Washington-Oregon Corp. (D. C.) 303
Hill, United States v. (D. C.)..... 841
Hinckley Fibre Co., American Sulphite Pulp Co. v. (D. C.)..... 57
Hirlinger v. Boyd (C. C. A.)..... 546
H. Krantz Mfg. Co., New York Slate Works v. (D. C.)..... 587
Hocking Val. R. Co. v. New York Coal Co. (C. C. A.)..... 727
Houston v. United States (C. C. A.)..... 852
Hvoslet v. United States (D. C.)..... 680
Hubbard Mill Co., Erie Baking Co. v. (C. C. A.)..... 759

Illinois Cent. R. Co. v. Behrens (C. C. A.) 967
Independent Transp. Co., Canton Ins. Office v. (C. C. A.)..... 213
International Harvester Co. of America v. Carlson (C. C. A.)..... 736
Iowa Land & Trust Co. v. United States (C. C. A.)..... 11

Jackson Co. v. Gardiner Inv. Co. (C. C. A.)..350
James v. Clements (C. C. A.)..... 51

	Page
James Clark, Jr., Electric Co. v. United States Electrical Tool Co. (D. C.)	252
Jewel Tea Co., City of Lee's Summit v. (C. C. A.)	965
Johnson, The Mattie L. (D. C.)	117
Johnson v. Wilson (D. C.)	99
Julius Bros., In re (C. C. A.)	3
Kansas City Pipe Line Co. v. Fidelity Title & Trust Co., three cases (C. C. A.)	187
Kansas Natural Gas Co., Landon v. (C. C. A.)	187
Keitel, American Malting Co. v. (D. C.)	672
Kern Trading & Oil Co. v. Associated Pipe Line Co. (D. C.)	273
Kinnane Co., In re (D. C.)	488
Krantz Mfg. Co., New York Slate Works v. (D. C.)	587
Kroloff, Chicago, St. P. M. & O. R. Co. v. (C. C. A.)	525
Lam Fuk Tak, Ex parte (D. C.)	468
Lam Pui, Ex parte (D. C.)	456
Landon v. Kansas Natural Gas Co. (C. C. A.)	187
Landon v. McPherson (C. C. A.)	187
Lane v. Sargent (C. C. A.)	237
Lane Lumber Co., In re (C. C. A.)	546
Lane Lumber Co., In re (C. C. A.)	550
Lane Lumber Co., In re (C. C. A.)	555
Lee Lash Co. v. Northwestern Consol. Mill. Co. (D. C.)	315
Lee Leong v. United States (C. C. A.)	48
Lewis, Leonhardt & Co. v. Southern R. Co. (C. C. A.)	321
Lewis, Pacific Live Stock Co. v. (D. C.)	95
Lew Lin Shew, Ex parte (D. C.)	317
Li Chiong, United States v. (C. C. A.)	45
Lorain Steel Co., Belsteel Co. v. (D. C.)	412
Louisiana Excursion Co. v. Gidionsen (C. C. A.)	751
Lovewell v. Schoolfield (C. C. A.)	689
Luten v. Sharp (D. C.)	76
Luxury Fruit Co. v. Harris (C. C. A.)	740
McCaskey Register Co. v. Mantz (D. C.)	415
McCutchen, United States v. (D. C.)	650
McDonald, United States v. (D. C.)	686
McElwain Co. v. Bullock (C. C. A.)	962
McGowan, Columbia River Packers' Ass'n v. (C. C. A.)	196
McKinnon v. New York Assets Realization Co. (C. C. A.)	339
McPherson, Landon v. (C. C. A.)	187
Maia, The (D. C.)	135
Maling v. Maling (D. C.)	127
Malschick, In re (D. C.)	492
Manhattan Canning Co. v. Wilson (C. C. A.)	41
Mantz, McCaskey Register Co. v. (D. C.)	415
Marsh, Harris v. (C. C. A.)	555
Mastoras v. Chicago, M. & St. P. R. Co. (D. C.)	153
Mattie L. Johnson, The (D. C.)	117
Merrell-Soule Co. v. Natural Dry Milk Co. (D. C.)	578
Meyersdale Coal Co., New York & Philadelphia Coal & Coke Co. v. (C. C. A.)	747
Midland Guaranty & Trust Co. v. Douglas County (C. C. A.)	358
Midland Val. R. Co. v. Conner (C. C. A.)	956
Miguel di Larrinaga, The (D. C.)	678
Missouri, K. & T. R. Co., Royal Brewing Co. v. (D. C.)	146
Monning Dry Goods Co, Franklin v. (C. C. A.)	929
Moore v. Donahoo (C. C. A.)	177
Motion Picture Patents Co. v. Centaur Film Co. (D. C.)	247
Mutual Life Ins. Co. of New York v. Powell (C. C. A.)	565
Nashville, C. & St. L. Ry., United States v. (D. C.)	254
Natural Dry Milk Co., Merrell-Soule Co. v. (D. C.)	578
Nelson, Fairbanks, Morse & Co. v. (C. C. A.)	218
Ness, United States v. (D. C.)	169
New Departure Mfg. Co., Davis Sewing Mach. Co. v. (C. C. A.)	775
New York Assets Realization Co., McKinnon v. (C. C. A.)	339
New York City R. Co., Pennsylvania Steel Co. v., four cases (D. C.)	423
New York Coal Co., Hocking Val. R. Co. v. (C. C. A.)	727
New York Continental Jewell Filtration Co., City of Harrisburg v. (C. C. A.)	366
New York Slate Works v. H. Krantz Mfg. Co. (D. C.)	587
New York & Philadelphia Coal & Coke Co. v. Meyersdale Coal Co. (C. C. A.)	747
Norfolk Sand & Gravel Corp. v. Ohio Locomotive Crane Co. (C. C. A.)	25
Northern Commercial Co. v. United States (C. C. A.)	30
Northern Commercial Co. v. United States (C. C. A.)	33
North Pacific S. S. Co., Eadie v. (D. C.)	662
Northwestern Consol. Mill. Co., Lee Lash Co. v. (D. C.)	315
Oceania Vance, The (D. C.)	973
Odell v. H. Batterman Co. (D. C.)	305
Ohio Locomotive Crane Co., Norfolk Sand & Gravel Corp. v. (C. C. A.)	25
Pacific Live Stock Co. v. Lewis (D. C.)	95
Parrish v. Foreman-Blades Lumber Co. (C. C. A.)	385
Peck v. Richter (C. C. A.)	880
Pedrin, Beatson Copper Co. v. (C. C. A.)	43
Pejepscot, The (D. C.)	150
Pendleton, Benner Line v. (C. C. A.)	497
Pennsylvania Steel Co. v. New York City R. Co., four cases (D. C.)	423
Perfection Cooler Co., Hayden v. (D. C.)	171
Perkins, Dreyer v. (C. C. A.)	889
Perkins, Prudence Coal Co. v. (C. C. A.)	569
Perkins Lumber Co., In re (C. C. A.)	889
Pitts Banking Co. v. Clayton (C. C. A.)	38
Planter, The (D. C.)	161
Pocohuntas, The (D. C.)	135
Porter, In re (C. C. A.)	16
Postal Tel. Co., Western Union Tel. Co. v. (C. C. A.)	533
Potlatch Lumber Co. v. Harkins (C. C. A.)	22
Potomac Milling & Ice Co. v. Baltimore & O. R. Co. (D. C.)	665

	Page
Powell, Mutual Life Ins. Co. of New York v. (C. C. A.)	565
Protector, The (D. C.)	117
Prudence Coal Co. v. Perkins (C. C. A.)	569
Puget Sound Traction, Light & Power Co. v. Tacoma (D. C.)	265
Raflo, In re (D. C.)	313
Randall, Dampskibsselskabet Dannebrog v. (D. C.)	902
Random Knitting Co., Steber Mach. Co. v. (D. C.)	796
Rawlins v. Hall-Epps Clothing Co. (C. C. A.)	884
Read, Spencer v. (C. C. A.)	508
Richter, Peck v. (C. C. A.)	880
Rock Fibre Mfg. Co., Asbestos Shingle, Slate & Sheathing Co. v. (D. C.)	66
Rorvig, Chicago, St. P., M. & O. R. Co. v. (C. C. A.)	953
Royal Brewing Co. v. Missouri, K. & T. R. Co. (D. C.)	146
St. Louis, I. M. & S. R. Co. v. United States (D. C.)	80
St. Regis Paper Co., American Sulphite Pulp Co. v. (D. C.)	51
Samson, The (C. C. A.)	344
Sargent, Lane v. (C. C. A.)	237
S. B. & B. W. Fleischer, Inc., Abbott v. (D. C.)	828
Schiebel Toy & Novelty Co. v. Clark, three cases (C. C. A.)	760
Schoolfield, Lovewell v. (C. C. A.)	689
Schrape, In re (D. C.)	142
Schwartz v. United States (C. C. A.)	866
Schweitzer, In re (D. C.)	495
Scoric v. United States (C. C. A.)	871
Scott, Bynum v. (D. C.)	122
Scott, Dunsmuir v. (C. C. A.)	200
S. E. Carr Co., Diamond Patent Co. v. (C. C. A.)	400
Shaffer, Fulkerson v. (C. C. A.)	355
Sharp, Luten v. (D. C.)	76
Shenk v. Aumiller (D. C.)	969
Smith, The Wilbert L. (D. C.)	981
Smith v. Bell (C. C. A.)	243
Smith, United States v. (D. C.)	839
Solveig, The (D. C.)	805
Southern Oregon Co., Bateman v. (C. C. A.)	933
Southern Pine Lumber Co. v. Consolidated Louisiana Lumber Co. (C. C. A.)	719
Southern R. Co., Lewis, Leonhardt & Co. v. (C. C. A.)	321
Southwestern Surety Ins. Co. v. Wells (D. C.)	294
Southwestern Telegraph & Telephone Co., Whitted v. (D. C.)	835
Spangler, Bliss v. (C. C. A.)	394
Spencer v. Read (C. C. A.)	508
Spokane & I. E. R. Co. v. Campbell (C. C. A.)	518
Sporting Goods Sales Co. v. Haskell Golf Ball Co. (C. C. A.)	407
Standard Home Co. v. Davis (D. C.)	904
Stearns Salt & Lumber Co. v. Hammond (C. C. A.)	559
Steber Mach. Co. v. Random Knitting Co. (D. C.)	796
Steinman, Clinchfield Coal Corp. v. (C. C. A.)	875
Sterling Cork & Seal Co., Crown Cork & Seal Co. of Baltimore City v. (C. C. A.)	381
Stewart, American Woolen Co. v. (C. C. A.)	1
Stromberg-Carlson Tel. Mfg. Co., Busch v. (C. C. A.)	328
Stumpp & Walters Co., Conner v. (D. C.)	72
Sundh Electric Co. v. General Electric Co. (D. C.)	583
Suprenant, In re (D. C.)	470
Teaser, The (D. C.)	920
Teti v. Consolidated Coal Co. of Maryland (D. C.)	443
Thames & Mersey Marine Ins. Co. v. United States (D. C.)	683
Thames & Mersey Marine Ins. Co. v. United States (D. C.)	685
Thompson v. Duehay (D. C.)	485
Thompson, Eastern Oil & Rendering Co. v. (C. C. A.)	204
Tillicum, The (D. C.)	976
Todd v. Whitaker (D. C.)	319
Tomaino v. Consolidated Coal Co. of Maryland (D. C.)	443
Tralich v. Chicago, M. & St. P. R. Co. (D. C.)	675
Transit, The (D. C.)	87
Troy Laundry Machinery Co. v. Columbia Mfg. Co. (D. C.)	787
Tsunezo Kusano, United States v. (C. C. A.)	50
Tsurukichi Nakao, United States v. (C. C. A.)	49
Tucker v. Bryan (C. C. A.)	576
Two Cases of Chloro-Naptholeum Disinfectant, United States v. (D. C.)	477
Union Nat. Life Ins. Co., Grier v. (D. C.)	287
Union Nat. Life Ins. Co., Grier v. (D. C.)	293
Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo. (C. C. A.)	540
United Lace & Braid Mfg. Co. v. Barthels Mfg. Co. (D. C.)	175
United States, Archbald v. (D. C.)	165
United States v. Boarman (C. C. A.)	757
United States v. Brannan (C. C. A.)	849
United States v. Chehalis County (D. C.)	281
United States v. Cooper (D. C.)	846
United States v. Great Lakes Towing Co. (D. C.)	656
United States v. Hawkins (C. C. A.)	11
United States v. Hill (D. C.)	841
United States, Houston v. (C. C. A.)	852
United States, Hvoslef v. (D. C.)	680
United States, Iowa Land & Trust Co. v. (C. C. A.)	11
United States, Lee Leong v. (C. C. A.)	48
United States v. Li Chiong (C. C. A.)	45
United States v. McCutchen (D. C.)	650
United States v. McDonald (D. C.)	686
United States v. Nashville, C. & St. L. Ry. (D. C.)	254
United States v. Ness (D. C.)	169
United States, Northern Commercial Co. v. (C. C. A.)	30

	Page
United States, Northern Commercial Co. v. (C. C. A.)	33
United States, St. Louis, I. M. & S. R. Co. v. (D. C.)	80
United States, Schwartz v. (C. C. A.)	866
United States, Scoric v. (C. C. A.)	871
United States v. Smith (D. C.)	839
United States, Thames & Mersey Marine Ins. Co. v. (D. C.)	683
United States, Thames & Mersey Marine Ins. Co. v. (D. C.)	685
United States v. Tsunezo Kusano (C. C. A.)	50
United States v. Tsurukichi Nakao (C. C. A.)	49
United States v. Two Cases of Chloro-Naptholeum Disinfectant (D. C.)	477
United States Electrical Tool Co., James Clark, Jr., Electric Co. v. (D. C.)	252
Vancleef, Buffalo Specialty Co. v. (D. C.)	91
Virginian, The (D. C.)	604
Wall, Boyd v. (C. C. A.)	550
Wall, Boyd v. (C. C. A.)	555
Washington-Oregon Corp., Fidelity Trust Co. v. (D. C.)	588
Washington-Oregon Corp., Hidden v. (D. C.)	303
Wells, Southwestern Surety Ins. Co. v. (D. C.)	294
Western Union Tel. Co. v. Postal Tel. Co. (C. C. A.)	533
Whitaker v. Coudon (D. C.)	139
Whitaker, Todd v. (D. C.)	319
Whitted v. Southwestern Telegraph & Telephone Co. (D. C.)	835
W. H. McElwain Co. v. Bullock (C. C. A.)	962
Wiener, In re (D. C.)	173
Wilbert L. Smith, The (D. C.)	981
Wilckens v. Wilckens (C. C. A.)	208
Wilson, Johnson v. (D. C.)	99
Wilson, Manhattan Canning Co. v. (C. C. A.)	41
Wimpee, Carey v. (D. C.)	155
Withoft v. Andrews (D. C.)	421
Withoft v. Cutting (D. C.)	421
Wright v. Ankeny (D. C.)	985
Wright v. Ankeny (D. C.)	988
Wood v. Concrete Fibre Co. (D. C.)	585
Yaryan Naval Stores Co. v. B. Borchardt Co. (C. C. A.)	758

†

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

AMERICAN WOOLEN CO. v. STEWART.

(Circuit Court of Appeals, First Circuit. October 16, 1914.)

No. 1060.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—DANGEROUS MACHINE—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to an inexperienced servant in defendant's woolen mill, by having his hand drawn between the carding and hickey rolls of a finishing machine on which he was employed, while he was attempting to remove waste from the hickey roll, as he had seen others do, evidence *held* to require submission to the jury of the question of defendant's negligence in failing to warn plaintiff 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.*]

2. NEGLIGENCE (§ 97*)—INJURIES TO SERVANT—INSTRUCTIONS—COMPARATIVE NEGLIGENCE.

In an action for injuries to a servant by getting his hand caught between the rolls of a wool-finishing machine, the court charged that if defendant was careless in giving plaintiff proper instructions, and plaintiff was heedless, his heedlessness, co-operating with that of the defendant, would not prevent recovery because the injury would not be the sole result of the boy's fault, the fundamental fault being that of defendant in not giving him proper instructions. *Held* erroneous, as submitting the doctrine of comparative negligence, which is not a part of the law of New Hampshire, where the accident occurred.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 93, 162; Dec. Dig. § 97.*]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by Andrew G. Stewart, by his next friend, against the American Woolen Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Robert L. Manning, of Manchester, N. H. (Jones, Warren, Wilson & Manning, of Manchester, N. H., on the brief), for plaintiff in error.

Alexander Murchie, of Concord, N. H. (D. J. Harrigan, of Hillsboro, N. H., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

---

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

BINGHAM, Circuit Judge. The plaintiff, Andrew G. Stewart, a minor, brings this action by his father, and next friend, against the American Woolen Company to recover damages for injuries received on the 10th of June, 1913, while in the employment of that company, by reason of his hand being drawn between the carding and the hickey rolls of a finishing machine; it being one of four machines constituting a set of cards upon which he was employed.

The declaration contained two counts. The case proceeded to trial upon the second count, the first having been waived. The second count was framed under the employers' liability statute of New Hampshire (chapter 163, Laws of 1911), and the negligence complained of was, among other things, the failure of the defendant to warn and instruct the plaintiff as to the dangers of his employment and the manner of doing his work. The jury returned a verdict for the plaintiff.

The case is now here on the defendant's bill of exceptions, and the errors assigned are to the refusal of the court to direct a verdict for the defendant at the close of all the evidence, and to the court's failure to properly instruct the jury upon the question of contributory negligence.

At the time the accident occurred, the New Hampshire statute under which this action was brought provided that, in an action for personal injuries sustained by an employé, while engaged in manual labor in an employment of the character here in question, it should not be a defense that the injury was caused by the negligence of a fellow employé, or that the employé assumed the risk of injury, and that the burden of proving contributory negligence should be upon the defendant. Boody v. Co., 77 N. H. 208, 90 Atl. 859.

[1] We are of the opinion that the first assignment of error cannot be sustained. We have examined the evidence as to the defendant's negligence and the plaintiff's freedom from fault, and, without going into a detailed discussion of it, it seems to us that—inasmuch as it appears the plaintiff was a boy 16 years of age, that he had had little or no experience about machinery, that he was acting in the performance of his duty in attempting to remove the waste from the hickey roll, that he had seen others, including the servant who was delegated to instruct him as to the method of doing his work, remove waste with their hands from the cards while they were in motion, that he had not been warned of the danger of doing the work in this way, or instructed as to any other method or way of doing it, that the machinery was complicated, that he had worked about the machines but a brief period, and that he was injured on his first attempt to remove the waste from the hickey roll—the trial court was fully justified in submitting the case to the jury. Lapelle v. Paper Co., 71 N. H. 346, 51 Atl. 1068; Disalets v. Co., 74 N. H. 440, 69 Atl. 263; Goodale v. York, 74 N. H. 454, 69 Atl. 525; Driscoll v. Rolfe, 75 N. H. 586, 71 Atl. 379; Lane v. Manchester Mills, 75 N. H. 102, 71 Atl. 629.

[2] The second error complained of arises on the defendant's exception to the charge of the court to the jury, wherein he said:

"If you should find that the defendant was careless in not discharging its duty in respect to giving sufficient instructions to the boy, and you should find the boy was heedless, that they were heedless because at fault in not sufficiently impressing upon the boy's mind the dangers, his heedlessness, co-

operating under such circumstances as that, would not prevent his recovering, because the injury would not be the sole result of the fault of the boy. There would be the fundamental fault of the defendant in not giving the boy proper instructions."

This instruction is manifestly erroneous. It is a statement of the doctrine of comparative negligence which is not a part of the common law of New Hampshire, nor in any way recognized by the provisions of the act under which this action is brought. It allowed the jury to find a verdict for the plaintiff, notwithstanding they might find that he was negligent and that his negligence contributed to his injury.

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; and the plaintiff in error recovers its costs in this court.

In re JULIUS BROS.

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

No. 203.

1. BANKRUPTCY (§ 100*)—ADJUDICATION IN INVOLUNTARY PROCEEDINGS—EFFECT AS ESTOPPEL.

   If a petition in involuntary bankruptcy charges different acts of bankruptcy, and the adjudication does not show upon which one it proceeded, it does not render either charge res judicata in the further proceedings.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

2. BANKRUPTCY (§ 407*)—GROUNDS FOR REFUSING DISCHARGE—FRAUDULENT TRANSFER OF PROPERTY.

   The provision of Bankr. Act 1898 (Act July 1, 1898, c. 541) § 14b (4), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496), making a transfer of property by a debtor, within four months prior to bankruptcy, with intent to hinder, delay, or defraud his creditors, ground for denying a discharge, includes two classes of transfers: First, those made with actual fraudulent intent; and, second, those where from the terms of the agreement, or the nature of the transaction itself, the fraudulent intent is presumed as an inference of law. But a bona fide transfer of property for a valuable consideration is not within the provision, although it may in fact hinder and delay creditors, or result in a preference; the statute recognizing the distinction between an intent to defraud and an intent to prefer, which latter is not made ground for denial of a discharge.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

3. BANKRUPTCY (§ 407*)—RIGHT TO DISCHARGE—FRAUDULENT TRANSFER OF PROPERTY.

   The sale and transfer by the members of an insolvent mercantile partnership, within four months prior to bankruptcy proceedings against them, of all their property for its full value to a corporation organized by friends, who were not creditors, for the purpose of making the purchase, and the placing of the proceeds in the hands of an attorney to be used in discharging their indebtedness as far as possible, without preference, by payment of his pro rata share to each creditor who would accept the same in composition of his claim, was not a transfer with intent

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

to hinder, delay, or defraud creditors, which barred the right of the partners to a discharge under Bankr. Act 1898 (Act July 1, 1898, c. 541) § 14b (4), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1496).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

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

This is an appeal from an order and decree entered in the United States District Court for the Southern District of New York denying the petition of George Julius and Simon Julius trading as Julius Bros., bankrupts, for their discharge. This decree was entered on October 24, 1913.

The bankrupts are brothers and were engaged as copartners in the manufacturing of waists in the borough of Manhattan, in the city of New York, under the firm name of Julius Bros. On June 7, 1910, the entire stock in trade, machinery, fixtures, and accounts receivable were transferred by bill of sale to a corporation organized for the purpose by friends of the bankrupts, none of whom were creditors. The purchase price, $1,550, was put into the hands of their counsel to distribute among such of the creditors as were willing to accept 25 per cent., and was paid over to all the creditors with the exception of the two protesting creditors. The nonassenting creditors thereafter obtained judgments against the bankrupts. On July 23, 1910, Peter Pressman obtained judgment for $599.45. On July 27, 1910, Frank & Sons obtained judgment for $405.71. Executions were returned unsatisfied. These creditors, in conjunction with one Herzog, on a claim for costs assigned to him, thereupon filed a petition in involuntary bankruptcy, on September 15, 1910, and adjudication was ordered on September 30, 1910. Schedules were filed January 13, 1911, setting out as sole liabilities the above judgments and no assets.

For opinion below, see 209 Fed. 371.

Malcolm Sundheimer, of New York City, for appellants.

Harry L. Herzog, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The discharge of the bankrupts has been refused, and we are asked to determine on this appeal whether error was committed in denying them their discharge. The granting of a discharge is not a matter which is optional or discretionary with the court. The statute provides that the judge shall hear the application for a discharge and shall discharge the applicant unless statutory cause for refusing the discharge is shown. It is made the duty of the court to refuse to discharge a bankrupt if it appears that he has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition, transferred, removed, destroyed or concealed or permitted to be removed, destroyed or concealed, any of his property with intent to hinder, delay, or defraud his creditors." Bankr. Act 1898, § 14b, as amended by Act Cong. Feb. 5, 1903, 32 Stat. 797.

It is necessary, therefore, to consider whether the bankrupts did within four months of the filing of the petition in bankruptcy make a

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

transfer of their property with intent to hinder, delay, or defraud their creditors within the meaning of the Bankruptcy Act. The special master thought they had, and his finding was confirmed by the District Judge. We think both the special master and the District Judge reached the conclusion with no little reluctance. The special master stated that he was "satisfied that these bankrupts made an honest failure and an honest attempt to settle, but the method of settlement adopted was at fault." And the District Judge in his opinion said, after stating that the transfer was "fraudulent" within the meaning of the act and that notwithstanding the fact that the bankrupts may have thought they had the right to make it "because fraud is not synonymous with personal sin, and a man may honestly justify quite illegal purposes. Nor is it one's inward justification of his conduct which counts, for this is not a court of conscience; it is wholly a question of whether the things proposed did in fact result in depriving the creditors of their rights."

In all that was done we have no reason to doubt the entire good faith of these bankrupts, and of their counsel, throughout the whole of this unfortunate difficulty. The bankrupts apparently made an honest failure, and acting under the advice of a committee of their creditors and a lawyer, who represented them and the majority of the creditors jointly they attempted, in order to save expense, to adjust their trouble through a common-law composition agreement. But unhappily a few of the creditors declined to agree to it. In all such cases a single creditor is in a position where he can make a good deal of trouble, if so disposed.

The other creditors, when they knew all the circumstances connected with the failure, were willing to accept 25 cents on the dollar and to settle their claims on that basis. The record shows that while the matter was pending Mr. Herzog, an attorney acting for certain creditors, went to see the attorney who was acting for the bankrupts, and stated to him that he would not consent to the proposed terms "unless he was going to get something in addition for his client"—that "whenever he got into a bankruptcy matter his client ought to be treated upon a separate basis or a better basis than anybody else, because when they represented creditors they were treated that way." He was informed that what he sought he could not obtain, that no one creditor would be given more than another, and that the settlement "was going through in the right way or it was not going through at all." To this Herzog is said to have replied that "he had to make a showing, and that the only showing he could make was to show dollars and cents, and by getting his clients a better settlement than anybody else." He was informed that there was money deposited for him "which would be available to him the same as anybody else." To this he replied that he would not take it, "but would fight the thing through the court. and made various threats." The record also discloses that one of the objecting creditors stated to the attorney for the creditors' committee that he would sign the composition agreement of 25 cents "cash extra on the side." The proposal was indignantly rejected.

Instead of coming into the bankruptcy court and offering a composi-

tion in the statutory manner, thereby avoiding any attempt of one creditor to secure an advantage over another, a plan had been conceived of forming a corporation to purchase the assets of this insolvent partnership for $1,500.

The creditors' committee had reported that "everything was worth about $1,250," but "they wanted to make it a round sum, and they thought, if we could pay 25 cents on the dollar cash, all the creditors would come in, and that is how the sum of 25 cents cash was arrived at. That was the way that was arrived at, and that amounted to $1,550." The consideration, therefore, amounted to a few hundred dollars in excess of what the creditors' committee thought the assets were worth at the time. Four individuals, none of them creditors, but each a friend of the bankrupts, furnished this money and received in return stock representing that amount in the new corporation.

[1] The petition upon which Julius Bros. were adjudged bankrupts alleged two grounds for proceeding against them in involuntary bankruptcy:

(1) That these persons had transferred their property with intent to hinder, delay, or defraud their creditors.

(2) That while insolvent they transferred their property with intent to prefer creditors.

Julius Bros. did not appear or interpose any defense, and they were accordingly duly adjudicated bankrupts. From that decree no appeal was ever taken, and it must be taken as having conclusively established their status as bankrupts; the court having had jurisdiction. But the rule is that if the petition charges different acts of bankruptcy, as it did in this case, and the adjudication does not show upon which one of them it proceeded, and that is the case here, it does not render either charge res judicata in the further proceedings. In re Letson, 157 Fed. 78, 84 C. C. A. 582 (1907).

When the bankrupts subsequently and in due course asked for their discharge, it was refused, on the ground that they had made a transfer of their property with intent to hinder, delay, and defraud creditors; and from this order the appeal has been taken, and that question is therefore properly before this court, and is now to be determined.

[2] The courts make a distinction between a conveyance intended to hinder, delay, and defraud creditors and one executed with an intent to prefer some creditors over others. The Bankruptcy Act recognizes such a distinction between the intent to defraud and the intent to prefer. See Van Iderstine v. National Discount Co., 227 U. S. 575, 582, 33 Sup. Ct. 343, 57 L. Ed. 652 (1913). There is no necessary connection between the two. The act provides that a bankrupt shall be denied his discharge if he has transferred his property with intent to hinder, delay, or defraud his creditors; but it does not refuse him his discharge, if he has made a conveyance for the purpose of giving a preference. Under certain circumstances, if he has given a preference, the transfer may be avoided, and the fact that a preference has been given is in itself an act of bankruptcy. And the sole question

now is, not whether the transfer gave a preference, but whether it was made with the intent to hinder, delay, or defraud creditors.

The words used in the act, "with intent to hinder, delay or defraud his creditors," have been borrowed from the statute of 13 Eliz. c. 5, relating to fraudulent conveyances, and have no doubt the same meaning in the Bankruptcy Act that the courts have given to them when used in the statute of Elizabeth. It is noteworthy that the old English statute, after enacting that transfers made with intent to hinder, delay, or defraud creditors should be "utterly void," went on to provide that this rule should not apply to bona fide transfers for a good consideration, and the courts have construed "a good consideration" in this connection to mean one founded on value. In the case at bar the transfer was made in entire good faith and for a valuable consideration.

The intent to defraud is something distinct from the mere intent to delay or hinder. But there is no distinction between delaying and hindering. The statute must be construed according to its reasonable intent and object, "and by a reasonable construction only such hindrance and delay as will operate as a fraud come within its operation." Bump on Fraudulent Conveyances (3d Ed.) p. 20. This author, after stating that the presence of intent is essential, goes on to explain that:

"The transfer must also be devised and contrived of malice, fraud, covin, collusion, or guile." Id. p. 22.

There are two classes of transfers under the act:

(1) Those which have been entered into with actual fraudulent intent.

(2) Those where, from the terms of the agreement or the nature of the transaction itself, the fraudulent intent is presumed to exist as an inference of law.

In the one class the fraudulent intent is always a question of fact, and in the other it is a question of law. Thus if one who is insolvent makes a voluntary transfer of his property, receiving no valuable consideration therefor, the law will infer the intent, even though he may have made the transfer with an honest motive. In such cases no evidence of intention can be received to change that presumption. Such a conveyance necessarily operates to hinder, delay, or defraud the creditors, and the grantor will in such a case be presumed to intend the natural and necessary consequences of his acts.

The law applicable to the facts of the case now before us may be found correctly laid down in the following statement:

"One in debt may sell his property, although the effect of the sale is to hinder creditors, if the sale is not made for that purpose, and a debtor, although in failing circumstances or insolvent, may dispose of his property in good faith to obtain money to meet his obligations, although such sale may in fact hinder and delay his creditors." 20 Cyc. 464, 465, and cases cited.

[3] We think this principle is decisive of this case. There was no intent to defraud, and no intent to hinder or delay, creditors. On the contrary, the intent was to sell the property for full value and use the entire proceeds to discharge as far as possible the obligations of the debtors, without a preference to any one over another.

The Supreme Court of Massachusetts more than 100 years ago had a case before it which in principle resembles that now before the court. In Hatch v. Smith, 5 Mass. 42 (1809), it appears that one Smith was insolvent, but desirous of satisfying his creditors, as far as the circumstances permitted. He decided that, if there was a general assent on the part of his creditors, he would make an assignment of the bulk of his property, probably all except his household furniture, to be equally paid pro rata to and among such creditors as should become parties to the agreement. The creditors were to release Smith from any further liability to them. The creditors generally assented, and the transfer of the property was made. One of the creditors, the plaintiff, Hatch, refused his assent. The transaction was entered into with deliberation, apparent fairness, and no corrupt intention. There was no resulting trust of any kind for the benefit of Smith, the insolvent. There was an absolute conveyance of Smith's interest to the use of such creditors as were parties to the contract. The amount of the debts due from the insolvent greatly exceeded the value of the property conveyed for their satisfaction. It is not necessary to consider the various objections which were made to this arrangement by the objecting creditor. They were carefully considered by the court and all were regarded as untenable. The conclusion of the court was stated as follows:

"We do not think that the contract between Smith and his creditors can be construed to have been made with an intent to defeat or delay his creditors."

In the course of the opinion the court made the following statement, which we adopt and apply to the case now before us:

"There was certainly nothing wrong, when Smith found himself in insolvent circumstances, to disclose his situation to his creditors, and to propose to pay them, in equal proportion, as far as his ability extended, and to obtain therefor a discharge from his debts. On the part of his creditors there was nothing iniquitous in acceding to such a proposal. And if there were any of Smith's creditors, who disliked the terms which were offered, and preferred the chance of obtaining satisfaction by other means, it was competent and right for them to refuse. But there seems no good reason why such refusal should prevent Smith and the other creditors from executing an accommodation, which appears so humane and just. Still, however, if any of the reasons, offered on the part of the plaintiff, are available to the purpose, for which they were intended—to show that the contract is void, as it respects the creditors who are not parties to it—the plaintiff must prevail, and the persons summoned as trustees adjudged to be so."

The learned District Judge seems to have relied upon South Danvers National Bank v. Stevens, 5 App. Div. 392, 39 N. Y. Supp. 298 (1896), where the Appellate Division of the Supreme Court of New York said:

"In addition, we think, with the learned trial judge, that the assignment was fraudulent in fact. There is no doubt as to a debtor's right to go to creditors with a view of effecting an amicable settlement, and in the course thereof informing such creditors that a failure to compromise will necessitate an assignment. But this is quite another thing from doing what was done here, namely, formally executing an assignment and then using it as a weapon for the purpose of coercing a creditor into an agreement by which he gives to the committee having charge of carrying out a composition the right to discharge the debt, and thus foregoing the right which the creditor has, not only to receive a distributive share of his debtor's property, but also to proceed for the balance against such debtor."

That statement must be construed in the light of the facts as they existed in the case then before the court. A partnership was insolvent, and in September, 1891, made an agreement in writing with its creditors that it would place its affairs in the hands of a committee of its creditors, who should realize upon its assets and divide the proceeds equitably among the creditors. One of the creditors declined to accede to the arrangement, and began an action against the parties on a note given by them. That action was commenced in March, 1892. Thereupon the committee of the creditors suggested that the firm make a general assignment, so that the creditor who had commenced the action might not secure a preference, and on June 16th the assignment was executed, and the attorney for the firm at once informed the plaintiff's attorney that the assignment had been made and *would be used unless the plaintiff made a settlement.* No agreement was reached and the plaintiff recovered his judgment on July 7th, and on the next day the assignment was filed. It was perfectly evident that the purpose of the assignment was to force the plaintiff to make a settlement. Such an assignment, of course, could not be sustained. Its very purpose was to hinder and delay the creditor. But the facts in that case are so entirely unlike the facts in the case at bar that the decision is not applicable to the present case.

In Sargent v. Blake, 160 Fed. 57, 61, 87 C. C. A. 213, 217 (17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58 (1908), an insolvent partner conveyed his interest in the partnership property to his partner, and the latter immediately thereafter paid to the mother of the insolvent $3,731.90 for the money which she had loaned to the son to put into the partnership business. There was no intent on the part of either partner to hinder, delay, or defraud creditors to any greater extent than the payment to the mother would necessarily hinder or prevent them from collecting their debts. The Circuit Court of Appeals in the Eighth Circuit held that the transfer was not illegal, as having been made with intent to hinder or defraud the creditors, and said, through Judge Sanborn:

"The only evidence that Maxwell intended to hinder or defraud the creditors of the partnership is that, while the firm and the partners were insolvent, King conveyed his interest to Maxwell, and the latter paid his mother in preference to his other creditors. The only way in which Maxwell could have made this payment in bad faith would have been to have made it in whole or in part in secret trust for himself, or with the actual intent to hinder or defraud the creditors of the company more than the mere payment of the debt to his mother out of the property of the former partnership, in preference to the claims of the partnership creditors, must necessarily have delayed or prevented their collection of their claims, and there was no evidence of any such trust or intent. The evidence was that he intended to pay his mother in preference to the partnership and to other creditors, that his mother had loaned him the money to engage in and conduct the partnership business, that he had purchased the interest of his partner, and that, as soon as the business and the property became his, he paid her the debt which he owed her. The facts that the payment to Mrs. Sargent had the inevitable effect to deprive the creditors of the partnership of an opportunity which they would otherwise have had to collect their claims in whole or in part, and that Maxwell knew that this would be its effect, and hence must have intended that result, do not establish the fact that he intended to hinder, delay, or defraud those creditors within the meaning of

section 67e. It is every intent to hinder, delay, and defraud creditors unlawfully only, not every intent to hinder or delay them in collecting, or to prevent them from collecting, their claims, that avails to avoid a transfer under that section. An insolvent debtor has the jus disponendi of his property until the commencement of proceedings in bankruptcy against him. He has the legal right to secure and pay his debts with it, provided always the security or the payment is not violative of any of the acts of Congress or any of the laws of the land. A preference of one creditor over others by such a payment or by such security, which is free from actual or constructive fraud, and from any purpose to affect other creditors injuriously beyond the necessary effect of the security or preference, is valid and lawful, and it cannot evidence such intent to hinder, delay, or defraud creditors as will make it void or voidable under section 67e. Coder v. Arts, 152 Fed. 943, 947, 82 C. C. A. 91 [15 L. R. A. (N. S.) 372]; Sabin v. Columbia River Lbr. & Fuel Co., 25 Or. 15, 34 Pac. 692, 695, 42 Am. St. Rep. 756; Lampson & Powers v. Arnold, 19 Iowa, 479, 484; Stewart v. Dunham, 115 U. S. 61, 66, 5 Sup. Ct. 1163, 29 L. Ed. 329."

So in the case at bar we regard it as a matter of no consequence, as far as the precise question now under consideration is concerned, that the sale of the assets at their full value may have hindered or delayed the protesting creditors. There was no intention to defraud the creditors; neither was there any intention to hinder or delay them, or to force them to a settlement. If as a result they have been hindered and delayed, it is nothing more than the inevitable result which follows from the sale by an insolvent, where the proceeds are used to pay certain creditors in preference to others. Such sales under certain circumstances can be set aside on the ground of the preference, but in the absence of the fraudulent intent they do not warrant the court in refusing to discharge the bankrupts. The insolvents had the jus disponendi of the partnership property at the time, and they transferred it to pay partnership debts. The plan to form the corporation and to purchase the assets for $1,550 and to pay all the creditors 25 cents on the dollar, including the two objecting creditors, was conceived before the interview with the attorney for the objecting creditors was held, at which the latter declined to consent to the settlement because his demands for a secret additional sum beyond that to be paid to the other creditors was refused, and a few days afterwards the corporation was organized in accordance with the previous understanding. The course the objecting creditors took had no influence whatever upon what was done by the insolvent partners, who were acting with the approval of the creditors' committee.

The decree below must be reversed, and the cause remanded, with directions to grant the bankrupts their discharge; and it is so ordered.

IOWA LAND & TRUST CO. et al. v. UNITED STATES et al.

UNITED STATES v. HAWKINS et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1914.)

Nos. 4001, 4077.

1. INDIANS (§ 13*)—LANDS—VALIDITY OF PATENTS—FRAUDULENT ENROLLMENT OF DECEASED PERSON.
   The father of a child which had died in 1898, by false and perjured testimony that the child was a living freedman member of the Creek Tribe of Indians on April 1, 1899, procured his enrollment as such by the Commission under Act June 28, 1898, c. 517, 30 Stat. 495, Act March 1, 1901, c. 676, 31 Stat. 861, and the Supplemental Agreement with the Creek Nation of June 30, 1902, c. 1323, 32 Stat. 500, and the subsequent issuance in his name of patents to an allotment of land under said acts, which land the parents, as his heirs, sold and conveyed. *Held* that, there being no such person in existence on April 1, 1899, his enrollment and the patents issued to him were wholly void and conveyed no title, and no subsequent grantee could acquire any title or rights thereunder.
   [Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.*]

2. VENDOR AND PURCHASE (§ 220*)—BONA FIDE PURCHASERS—LIMITATION OF DOCTRINE.
   The equitable doctrine of bona fide purchaser without notice does not apply, where there is a total absence of title in the vendor.
   [Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 461–465, 720; Dec. Dig. § 220.*]

3. INDIANS (§ 18*)—LANDS—VALIDITY OF PATENT.
   Act April 26, 1906, c. 1876, § 5, 34 Stat. 138, and Act June 25, 1910, c. 431, § 32, 36 Stat. 863, which provide for the contingency of the death of an Indian allottee before the deed becomes effective, and that in such case the land shall inure to and vest in his heirs, both assume the existence of a legal allottee, and neither has any application where there never was such an allottee in existence.
   [Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.*]

4. INDIANS (§ 13*)—PATENTS TO ALLOTMENT—SUIT FOR CANCELLATION—FINDING OF COMMISSION.
   A finding by the Commission to the Five Civilized Tribes of Indians that a person was entitled to enrollment as a member of a tribe and to an allotment of land, in proceedings wholly ex parte, is not conclusive against the United States, when it sues to cancel the resulting patent on the ground that it was obtained by means of false and fraudulent proofs.
   [Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by the United States against James Hawkins, Ella Hawkins, the Boynton Land, Mining & Investment Company, the Iowa Land & Trust Company, E. S. Warner, L. C. Hivick, M. I. Seifried, W. H. Manes, and J. P. Hivick. From the decree there were cross-appeals by the United States and by the Iowa Land & Trust Company and E. S. Warner. Reversed on appeal of United States. Affirmed on appeal of other parties.

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

In No. 4001:

Charles F. Runyan, of Muskogee, Okl., for appellants.

C. C. Herndon, Asst. U. S. Atty., of Muskogee, Okl. (John B. Meserve and D. H. Linebaugh, both of Muskogee, Okl., on the brief), for the United States.

In No. 4077:

C. C. Herndon, Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, of Muskogee, Okl., on the brief), for the United States.

N. A. Gibson, of Muskogee, Okl., for appellees Hivick and others.

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

CARLAND, Circuit Judge. [1] Chester Hawkins was born January 1, 1897, and died May 27, 1898. He was the son of James and Ella Hawkins. On or about the 19th day of January, 1904, James Hawkins appeared before the Commission to the Five Civilized Tribes and filed therewith proof tending to show that the said Chester Hawkins was a freedman member of the Creek Nation or Tribe of Indians, and was in fact living and entitled to enrollment on the 1st day of April, 1899, as provided in the act of June 28, 1898 (30 Stat. 495), and the act of March 1, 1901 (31 Stat. 861), and the Supplemental Agreement of the Creek Nation of June 30, 1902 (32 Stat. 500). The Commission, accepting as true the proof offered by said James Hawkins, admitted to enrollment said Chester Hawkins as a freedman citizen of the Creek Nation, entitled to an allotment of land under the several acts of Congress above referred to. On or about June 6, 1904, said James Hawkins made application to the Commission to have allotted to Chester Hawkins the northwest quarter of section 14, township 12 north, range 13 east. On the same day certificates of allotment were issued to the said Chester Hawkins and delivered to James Hawkins, allotting forty (40) acres of said land as a homestead and 120 acres as surplus land. On August 20, 1904, a homestead deed or patent was issued to Chester Hawkins by P. Porter, Principal Chief of the Muskogee (Creek) Nation, conveying to said Chester Hawkins the southeast quarter of the northwest quarter of section 14, township 12 north, range 13 east. On the 30th day of August, 1904, an allotment deed was issued by the Muskogee or Creek Nation, signed by P. Porter, Principal Chief, as aforesaid, conveying to Chester Hawkins the west half of the northwest quarter and the northeast quarter of the northwest quarter, section 14, township 12 north, range 13, which deeds were approved by the honorable Secretary of the Interior October 26, 1904, and were filed for record November 4, 1904. James Hawkins and Ella Hawkins conveyed the land in question to the Iowa Land & Trust Company for the consideration of $300. On the 17th day of March, 1909, James Hawkins and Ella Hawkins conveyed the same property for the consideration of $1 to E. S. Warner, who was the president of the Iowa Land & Trust Company. June 3, 1910, the Iowa Land & Trust Company executed and delivered an oil and gas lease on said land to L. C. Hivick and M. I. Seifried.

The evidence submitted by James Hawkins, upon which Chester Hawkins was admitted to enrollment by the Commission to the Five Civilized Tribes, was false and perjured; Chester Hawkins having died as hereinbefore stated. The United States brought this action in the court below in its own behalf and in behalf of the Creek Tribe or Nation of Indians, for the purpose of having the patents issued to Chester Hawkins declared void and canceled. The trial court granted the relief prayed for except as to the lessees of the Iowa Land & Trust Company, holding that the patents were void as against the other defendants, and that the Iowa Land & Trust Company had actual notice that Chester Hawkins was not living on April 1, 1899. It decided that the lessees of the Iowa Land & Trust Company were innocent purchasers, so to speak. The United States has appealed from so much of the decree as was in favor of the lessees of the Iowa Land & Trust Company—No. 4077. The Iowa Land & Trust Company and E. S. Warner have appealed from the decree against them—No. 4001. All other defendants either filed a disclaimer or defaulted.

As we view the case, we do not think that it is one where the defense of innocent purchaser may be applied. Chester Hawkins, having died before April 1, 1899, must be considered as having had no existence, so far as being a citizen of the Creek Nation entitled to an allotment of land under any law of Congress. The patents issued by the Creek Nation ran to a person not in being, and therefore conveyed no title whatever. There being no ancestor entitled to an allotment of land, there was no land to which the heirs of Chester Hawkins were entitled. As we understand the Creek Agreement, in cases where the ancestor dies before allotment, but after enrollment, the lands were to be conveyed directly to the heirs; therefore there was no pretense in this case that the heirs were seeking an allotment as representatives of a deceased ancestor. There can be no question but that the patents were void. The only question is as to whether a case is presented where under any circumstance an innocent purchaser of the land can be protected. If no title passed from the Creek Nation, then the vendees of James and Ella Hawkins obtained no title, nor did the lessees of the Iowa Land & Trust Company.

[2] We do not see how there can be any escape from this conclusion. The equitable doctrine of a bona fide purchaser without notice does not apply where there is a total absence of title in the vendor. The good faith of a purchaser cannot create a title where none exists. Tiffany's Real Property, § 380 (Ed. 1903); Jones' Law of Real Property, § 223; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543. See, also, Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388; Vattier v. Hine, 7 Pet. 252, 8 L. Ed. 675; Sampeyreac v. United States, 7 Pet. 222, 8 L. Ed. 665; Lindblom v. Rocks, 146 Fed. 660, 77 C. C. A. 86; Texas Lumber Mfg. Co. v. Branch, 60 Fed. 201, 8 C. C. A. 562; Dodge v. Briggs (C. C.) 27 Fed. 160; Oakley v. Ballard, Fed. Cas. No. 10,393.

We are of the opinion that, as Chester Hawkins never had any existence so far as being entitled to an allotment of land is concerned, and having died before April 1, 1899, he was, so far as being an applicant for a patent to the land in controversy, a myth, and that the

language used by the Supreme Court in Moffatt v. United States, 112 U. S. 31, 5 Sup. Ct. 14, 28 L. Ed. 623, is pertinent. We quote from the opinion in the case as follows:

"The patents, being issued to fictitious parties, could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent bona fide purchaser is protected. A subsequent purchaser is bound to know whether there was, in fact, a patentee, a person once in being, and not a mere myth, and he will always be presumed to take his conveyance upon the knowledge of the truth in this respect. To the application of this doctrine of a bona fide purchaser there must be a genuine instrument having a legal existence, as well as one appearing on its face to pass the title. It cannot arise on a forged instrument, or one executed to fictitious parties; that is, to no parties at all, however much deceived thereby the purchaser may be. Even in the case of negotiable instruments, where the doctrine is carried farthest for the protection of subsequent parties acquiring title to the paper, it cannot be invoked if the instrument be not genuine, or if it be executed without authority from its supposed maker. Floyd's Acceptances, 7 Wall. 666, 676 [19 L. Ed. 169]; March v. Fulton County, 10 Wall. 676, 683 [19 L. Ed. 1040]."

We think the present case comes clearly within the principles above announced. McLeod v. United States, 187 Fed. 261, 109 C. C. A. 207, and McClure v. United States, 187 Fed. 265, 111 C. C. A. 1, are cases where the Court of Appeals of the Ninth Circuit held for cancellation patents to land even where the land had been conveyed to bona fide purchasers.

It is claimed, however, that this court in the case of United States v. Jacobs, 195 Fed. 707, 115 C. C. A. 507, decided that the bona fide purchaser had a right to rely upon the finding of the Commission to the Five Civilized Tribes, that Pearlie Jacobs in that case was a living member of the tribe on April 1, 1899. We think the present case is clearly distinguishable from United States v. Jacobs, supra, in this respect: It appears from the opinion in that case that Pearlie Jacobs was a freedman member of the Creek Nation or Tribe of Indians and had been enrolled, but that she died before an allotment was made to her, and that under the law the heirs applied for the allotment and patents were issued to them. So far as a bona fide purchaser is concerned, the fact that the heirs of Pearlie Jacobs made an application for an allotment as representatives of a deceased ancestor, and that patents issued to them direct, presents a very different case from the one at bar. In the case cited the title to the land undoubtedly passed. The grantees were in being as held by this court. The bona fide purchaser dealing with the heirs, who had the apparent title on the face of the patent, would have a right to rely upon the judgment or finding of the Commission to the Five Civilized Tribes that the patentees were entitled to the land. In the case at bar there was no instrument which conveyed in any way the title to the land in question from the Cherokee Nation to James and Ella Hawkins. We therefore think that this is a case where the patents must be held to be void, even as against an innocent purchaser, if any such exists.

[3] It is claimed that section 5 of the Act of Congress of April

26, 1906 (34 Stat. 137), and section 32 of the Act of Congress of June 25, 1910 (36 Stat. 855), relieve the case of the difficulties which have been mentioned. These laws have no application where there is no allottee. The language used in section 5 assumes that there is in existence a legal allottee, and provides for the contingency of the death of the allottee before the patent becomes effective. This law provides that, if the death of the allottee occurs before the patent becomes effective, the land shall inure to and vest in his heirs. Section 32 is to the same effect. It assumes that deeds have been issued to a legal allottee, who has died before the approval of the deed. Neither section deals with the case where there never was an allottee in existence.

[4] It is urged, also, in the present case, that the United States cannot cancel the patents in question because the fraud alleged was not extrinsic to the matter tried at the hearing before the Commission. To support this position the following cases are cited: Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95; United States v. Throckmorton, 98 U. S. 61, 65, 66, 25 L. Ed. 93; Vance v. Burbank, 101 U. S. 514, 519, 25 L. Ed. 929; Steel v. St. Louis Smelt. & Ref. Co., 106 U. S. 447, 453, 1 Sup. Ct. 389, 27 L. Ed. 226; Moffat v. United States, 112 U. S. 24, 32, 5 Sup. Ct. 10, 28 L. Ed. 623; United States v. Minor, 114 U. S. 233, 242, 5 Sup. Ct. 826, 29 L. Ed. 110 But the Supreme Court has often held that the rule above announced is not applicable to ex parte proceedings in the United States Land Office, and that the finding of the land officers in such proceedings, although not open to collateral attack, is not conclusive against the government, when it sues to cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 826, 29 L. Ed. 110; McCaskill Co. v. United States, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; Washington Securities Co. v. United States, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220. In the case last cited it was said that:

"No doubt those officers found from the proofs submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents; but the proceedings were not adversary in any true sense of the term. The applications and proofs of the entrymen were strictly ex parte. The government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the government, save in the sense that the land officers did so."

In the case at bar the hearing before the Commission to the Five Civilized Tribes was purely ex parte. The United States or the Creek Nation was not represented, and no issue was framed or tried.

From what has been said, it results that the decree below in favor of the lessees of the Iowa Land & Trust Company should be reversed, and the case remanded, with instructions to render a decree in favor of the United States against all defendants; and it is so ordered.

HOOK, Circuit Judge. I doubt that a deed or patent to a dead man is so utterly void that his heirs can convey no valid interest to

an innocent purchaser. The ancient ceremony at the transfer of land, which required a living grantee, does not prevail in this country, and the rule based on it should give way. So much for the case of the lessees. In other respects I concur in the foregoing opinion.

In re BURR MFG. & SUPPLY CO.

In re PORTER.

(Circuit Court of Appeals, Second Circuit. August 31, 1914.)

Nos. 279, 280.

1. BANKRUPTCY (§ 36*) — PROCEDURE — POWER OF COURT TO VACATE ORDER AFTER TERM.

The general rule that a court has no power to set aside or modify its judgments or decrees after the term at which the same were entered does not apply to orders and decrees in a bankruptcy proceeding as to which there are no separate terms.

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

2. JUDICIAL SALES (§ 31*)—EFFECT OF CONFIRMATION.

While confirmation of a sale made under an order of court does not pass the legal title, it vests the full equitable title to the property in the purchaser.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59–67; Dec. Dig. § 31.*]

3. JUDICIAL SALES (§ 35*)—VACATION—GROUNDS.

A judicial sale may be vacated for cause, even after confirmation; but public policy requires that there should be stability in such sales, and a sale should not be set aside, except for reasons for which equity should set aside a sale between individuals.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 72, 73; Dec. Dig. § 35.*]

4. JUDICIAL SALES (§ 42*)—PERSONS WHO MAY QUESTION VALIDITY.

One must be a party who is interested and injuriously affected by a judicial sale, to entitle him to apply to have it vacated.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 80, 81; Dec. Dig. § 42.*]

5. BANKRUPTCY (§ 311*)—SECURED DEBTS—WAIVER OF SECURITY.

A secured creditor of a bankrupt, who proves his debt as unsecured, waives his security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497–500; Dec. Dig. § 311.*]

6. JUDICIAL SALES (§ 31*)—IRREGULARITIES IN PROCEEDINGS—PERSONS WHO MAY QUESTION VALIDITY—LACHES.

Defects of form or irregularities in an order of sale or notice are cured by confirmation, and even in case of serious irregularities a party who, with knowledge of the same, fails to object before confirmation, loses his right by his laches, and cannot thereafter ask a vacation of the sale on that ground.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 59–67; Dec. Dig. § 31.*]

---

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

7. JUDICIAL SALES (§ 39*)—VACATION—INADEQUACY OF PRICE.

Inadequacy of price alone is not sufficient ground for setting aside a sale after confirmation, unless the inadequacy is so great as to raise a presumption of fraud or to shock the conscience of the court.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 77; Dec. Dig. § 39.*]

8. BANKRUPTCY (§ 269*)—SALE OF REALTY BY TRUSTEE—GROUNDS FOR VACATION.

The difference between $6,250, for which property was first sold by a trustee in bankruptcy, and $8,500, which it brought on a resale, *held* not to show such a gross inadequacy of price as to justify the vacation of the confirmation and the setting aside of the first sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. § 269.*]

Petitions to Revise Orders of the District Court of the United States for the Eastern District of New York.

Petitions to review and revise an order of the United States District Court for the Eastern District of New York setting aside a previous order confirming a sale, and also to review and revise an order confirming a resale held pursuant to the before mentioned order, and to vacate and set aside the order confirming the resale. Both petitions were consolidated and heard on a single record by order of this court.

For opinion below, see 209 Fed. 138.

The bankrupt corporation owned an equity in certain real estate situate at Nos. 96–98 Lexington avenue, borough of Brooklyn, city of New York. This real estate was incumbered by three mortgages as follows: A first mortgage of $4,250, held by the Bond & Mortgage Guaranty Company; a second mortgage of $2,000, held by Louisa P. Boaz; a third mortgage, held by William J. Myers, as trustee. The second mortgagee, whose mortgage was open, began foreclosure proceedings immediately after the petition in bankruptcy was filed. The trustee in bankruptcy made application to sell the property, and thereupon the referee, without notice to any mortgagee, made an order of sale free and clear of all liens. No mortgagee had notice of the sale and no mortgagee was present at the sale. There is no contention that due notice of sale was not sent to and received by the general creditors.

The property was put up for sale on August 5, 1913. The petitioner, Porter, bid $5,000, and his bid was the sole bid. The bid was then and there rejected by the trustee. The petitioner asserted that there was no authority to reject the bid, and demanded a deed, which was refused. The petitioner, Porter, thereupon moved the court, upon notice only to the trustee, for confirmation of the sale. The trustee and the attorney for the second mortgagee, who appeared voluntarily, protested against confirmation. The court adjourned the hearing, upon the motion to confirm, for two weeks. When the matter again came before the court, the petitioner, Porter, announced his readiness to pay $6,250, instead of $5,000, by buying up the second mortgage. The trustee objected to such private sale, and at the same time produced a Mr. Koehler in person, and stated he was willing to pay $7,500 for the property, and deposited with the court a certified check of 10 per cent. of this amount. The court, however, signed an order allowing the petitioner, Porter, to get the property for $6,250, the amount of the first and second mortgages.

The third mortgagee then came into court and asked for a resale and that the alleged confirmation of the sale to the petitioner, Porter, be vacated. The third mortgagee being a trustee for several beneficiaries, one of the beneficiaries also appeared and asked the same relief, and the trustee of the bankrupt likewise asked the same relief. The court set the alleged sale aside, vacated the alleged confirmation, and directed a new sale. At the resale one Herman Schomaker bid $8,500 for the property, and his bid was accepted, and

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

the sale to him confirmed. The deed transferring the property to Schomaker was delivered to him in January, 1914.

The case now comes up on the petitions of Porter to review and revise the orders made.

Franklin Taylor, of New York City (Joseph J. Zeiger, of Brooklyn, N. Y., of counsel), for petitioner.

Henry A. Blumenthal, of New York City, for trustee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question in this case is whether the action of the District Court vacating a sale of the property herein involved to the petitioner, Porter, and directing a new sale, shall stand. The sale made to Porter had been confirmed, only to be subsequently vacated. The purpose of a sale is that it shall be final, and the presumption is that a court, before confirming a sale made under its authority and in accordance with its directions, has observed due precaution to see that no wrong has been accomplished in and by the manner in which it was conducted. But it may sometimes happen that a court is imposed upon, or for some reason fails to perform its full duty in respect to such a sale, and when that happens a necessity may arise to vacate the sale, although it has been confirmed. We proceed to inquire whether the facts in this case justified the court below in its action, and whether Porter, the purchaser at the first sale, is or is not entitled to the benefit of his purchase.

[1] The confirmation order having been made at one term, and the order vacating it made at another term presided over by another judge, we are asked to hold that the court had no power to vacate its order, upon the theory that, after the expiration of the term in which an order, judgment, or decree is made, errors can be corrected only by an appellate court. In Bronsen v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797 (1881), Mr. Justice Miller, speaking for the court, said:

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist they can only be corrected by such proceeding by writ of error or appeal as may be allowed in a court which, by law, can review the decision."

It is, of course, true that as a general rule the power of the court to modify its orders expires with the term. But there are no terms in bankruptcy, and the principle which the learned counsel invokes that a court has no power to vacate its order other than at the term in which it was granted is inapplicable to the facts of this case. In Sandusky v. National Bank, 23 Wall. 289, 23 L. Ed. 155 (1874), Chief Justice Waite, speaking for the court, said:

"A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms.

Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

[2] The confirmation of the sale did not pass the legal title to Porter, but it had the effect of vesting in him the full equitable title to the property. Before confirmation a sale is not in a technical and legal sense a sale. Until confirmation an accepted bidder is merely a preferred proposer. But a confirmation has the effect of completing the sale, and while it does not pass the legal title it vests the full equitable title to the property in the purchaser, even though the deed executed in pursuance thereof is irregular, and even if no deed whatever is made. Stang v. Redden (C. C.) 28 Fed. 11; Henry v. McKerlie, 78 Mo. 416; 17 Am. & Eng. Encyc. Law, p. 993.

[3] After a sale has been confirmed, it may be vacated for cause. But public policy requires that there should be stability in judicial sales. The Ruby (D. C.) 38 Fed. 622; Duncanson v. Manson, 3 App. D. C. 250; Quigley v. Breckenridge, 180 Ill. 627, 54 N. E. 580; Virginia F. & M. Ins. Co. v. Cottrell, 85 Va. 857, 9 S. E. 132, 17 Am. St. Rep. 108. They are not to be disturbed for slight causes. Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732. And courts are not to be astute in finding out objection to them. Cunningham v. Schley, 6 Gill (Md.) 207; Gibbs v. Cunningham, 1 Md. Ch. 44.

"The order of confirmation gives to the sale the judicial sanction of the court, and when made it relates back to the time of the sale, and cures all defects and irregularities, except those founded on want of jurisdiction or fraud. As the contract is then complete, the sale will not be set aside, except for the same reasons for which equity would set aside a sale between individuals; but relief will be given when such reasons do exist, as, for example, where there has been fraud or mutual mistake." 24 Cyc. 36, 37.

We discover in the facts herein involved no grounds upon which a sale between individuals could be set aside. The reasons given for setting the sale aside were: That the original order of sale was not correct in form; that the proof of notice of sale was indefinite, and, while it made a prima facie compliance with the law, yet the notices did not seem to have been received; that as the parties had appeared they should have been served personally or by attorney rather than by mail; that the order of confirmation was not on notice to the parties whose rights were cut off. The District Judge declared he was unwilling "to find an estoppel where there are so many conflicting equities and where the purchaser was told at the sale that his bid would not be accepted."

The reasons assigned are wholly insufficient to justify the court in the action taken.

[4] It cannot be important that the mortgagees received no notice of the sale, for no one of the mortgagees is in a position where he can be heard to attack the sale. Any party interested may apply to have a judicial sale vacated, unless by his acts or his laches he has become estopped. But he must be a party who is interested and injuriously affected by the sale. Dufour v. Leftwich, 33 La. Ann. 1471; Gilmer v. Nicholson, 21 La. Ann. 589; Presstman v. Mason, 68 Md. 78, 11 Atl.

764; Klapneck v. Keltz, 50 W. Va. 331, 40 S. E. 570. The mortgagees are without interest, because the order confirming the sale was upon condition that the purchaser, Porter, should "accept title subject to such, if any, liens as may be on the property." Moreover the first mortgagee had agreed to renew his mortgage with the purchaser for the full amount at an advance in the rate of interest. The second mortgage was paid under the agreement the amount bid being sufficient to pay the first and second mortgages. And the third mortgage had been surrendered or waived. The fact that the third mortgagee did not surrender his mortgage until after the sale is not important. The material fact is that his interest as a mortgagee did not exist at the time when the sale was vacated.

[5] The third mortgage was discharged by the mortgagee proving his claim against the bankrupt's estate. A secured creditor does not waive his security by proving his debt in the bankruptcy proceedings, if he proves it as a secured debt. But if he proves his debt as unsecured he waives the security. See Black on Bankruptcy, § 562. The third mortgagee proved his claim as an unsecured claim for the full amount, and expressly relinquished his security to the trustee in bankruptcy, stating in his proof of claim that the debt had been secured by the mortgage, "all of which is surrendered herein to the trustee." This surrender was made on August 29, 1913. It also appears that he had received a dividend.

[6] If the original order of sale was "not correct in form," if the proof of notice of sale was "indefinite," such irregularities and defects were cured by the order confirming the sale. Nevada Nickel Syndicate v. National Nickel Co. (C. C.) 103 Fed. 391; Watson v. Tromble, 33 Neb. 450, 50 N. W. 331, 29 Am. St. Rep. 492; Neligh v. Keene, 16 Neb. 407, 20 N. W. 277; Cargile v. Ragan, 65 Ala. 287; Mechanics' Savings, etc., Ass'n v. O'Connor, 29 Ohio St. 651. Even in the case of serious irregularities, a party loses his right to object by failing to make timely protest. If he has knowledge of the defects prior to confirmation, and makes no protest, he loses his right by his laches, and cannot come in afterwards with a request to have the proceeding vacated. 2 Freeman on Executions, § 340.

[7] It is said that Porter's bid was grossly inadequate and such as to shock the conscience, and that on this ground alone the court was justified in setting aside the sale. The court in its order did not assign the inadequacy of the amount Porter agreed to pay as a reason for its action, but it seems to have implied it, for its order was made conditional, and was only to become effective upon the agreement of the objecting parties "to bid or produce a bid of not less than $7,500 (they have offered to bid $8,500) and consent to have the balance over liens and expenses go into the estate generally." The condition which the court attached to its order makes it plain that it could not have attached any serious importance to the reasons it mentioned in the earlier part of its opinion for vacating the order confirming the sale. The court seems to have been under the impression that the fact that a larger sum would be realized on a resale was sufficient justification for setting aside the first sale, when taken into consideration with the other circumstances.

The form of the order shows that the court did not regard the other circumstances alone as sufficient to set aside the sale.

[8] The rule is that inadequacy of price, standing alone, is not sufficient ground for setting aside a sale, unless the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the court. The difference between $6,250, for which the property was first sold, and $7,500, for which the court was willing to sell on the resale, and the difference between the amount of the first sale and the amount of $8,500, realized at the resale, does not show that gross inadequacy which warrants a resale. The cases which illustrate what is meant by inadequacy which shocks the conscience are cases where the difference in value was very much greater than the difference existing in this case. In Lankford v. Jackson, 21 Ala. 650, property worth $1,000 was sold for $6. In Daly v. Ely, 51 N. J. Eq. 104, 26 Atl. 263, property worth $2,500 was sold for $50. In Hardin v. Smith, 49 Tex. 420, property worth from $2 to $5 an acre was sold for 28 cents per acre. And perhaps a sale for a half or a third of actual value may be within the rule. Sinnett v. Cralle, 4 W. Va. 600. But such a difference in value as is shown in the case at bar cannot be regarded as coming within the rule, even when taken in connection with the circumstances already noted. The circumstances relied upon raise no presumption of fraud or unfairness.

Before confirmation, if the inadequacy of the price be great, slight circumstances of unfairness on the part of the party benefited will be sufficient to prevent confirmation, and will justify the opening of the sale for further bids. In Ballentyne v. Smith, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803 (1905), this course was allowed, the property being worth at least seven times more than the sum bid. But the case is different after the sale has been confirmed, and the court below seems to have lost sight of this distinction. After a sale has been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties. In Morrison v. Burnette, 154 Fed. 617, 624, 83 C. C. A. 391, 398 (1907) the Circuit Court of Appeals in the Eighth Circuit declared that:

"The rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale, or in opening the latter and receiving subsequent bids."

The court considered the rule so firmly established as to be no longer debatable, and in that view of the matter we concur. The cases are there collected, and need not be repeated here. And in view of the established principles there can be no doubt that the court below has committed a serious error in vacating the order confirming the sale made to the petitioner.

The order which set aside and avoided the sale to the petitioner, and all proceedings based thereon, and which directed a new sale of the property, and the order confirming the resale, are hereby reversed.

The case is remanded to the trial court, with directions to reinstate the order of sale to the petitioner and the order confirming the sale, and to take further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

POTLATCH LUMBER CO. v. HARKINS.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1914. Rehearing Denied November 17, 1914.)

No. 2374.

1. MASTER AND SERVANT (§ 270*)—ACTION FOR INJURY TO SERVANT—EVIDENCE—PROOF OF USAGE.

In an action to recover for the injury or death of an employé, charged to have been due to the negligence of the employer in using a machine which was unsuitable for the purpose to which it was applied, it is competent for plaintiff to show that such use was not customary, where evidence is also introduced to show that the machine, when so used, was more dangerous to employés than those in common use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. § 270.*]

2. EVIDENCE (§ 471*)—SUBJECTS OF EXPERT TESTIMONY—NEGLIGENCE.

In such suit an objection was properly sustained to questions on cross-examination calling for the opinion of the witness as to whether the manner in which the work was done was not the most "practicable," and as to whether the machine was not "reasonably safe."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

3. MASTER AND SERVANT (§ 293*)—ACTION FOR INJURY TO SERVANT—INSTRUCTIONS.

Instructions given in an action for injury to an employé considered, and, taken together, *held* not erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160; Dec. Dig. § 293.*]

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

Action at law by Susan Harkins against the Potlatch Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward J. Cannon, George M. Ferris, and Charles E. Swan, all of Spokane, Wash., Walter H. Linforth, of San Francisco, Cal., and Black & Wernette, of Cœur d'Alene, Idaho, for plaintiff in error.

Robert H. Elder and Ed. S. Elder, both of Cœur d'Alene, Idaho, for defendant in error.

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

GILBERT, Circuit Judge. The defendant in error recovered a judgment against the plaintiff in error for damages on account of the death of her husband, who was killed while employed by the plaintiff in error in skidding logs. The crew of which the deceased was a

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

member was engaged in skidding logs with a Marion steam loader. The deceased, with two others, had dragged the cable with which the logs were skidded out about 400 feet, to a point where they attached the cable to a log. The men, under the direction of the foremen, stationed themselves at intervals alongside and near the route the log was to travel. This was done for the purpose of signaling to the engineer. The timber was on a hillside, with a grade of about 10 per cent. As the log was being hauled in, it started to run, and in its course it struck and upset a tree, which fell upon the deceased. Negligence is alleged, in that the Marion steam loader was not suitable or adapted to be used as a skidding machine, and was not equipped with the proper appliances commonly used on skidding machines, and was a dangerous, unsafe machine for performing the work of skidding logs, in that it was not provided with a whistle cord or any device for the purpose of giving signals, and was not provided with a haul-back line.

Error is assigned to the denial of the motion of the plaintiff in error for an instructed verdict in its favor, on the ground that there was no proof that the death of the deceased was caused by the negligence of the plaintiff in error, that the Marion steam loader was a reasonably safe machine, such as was in general use throughout the country, and that the deceased assumed all risks and dangers incident to the operation thereof. It is now argued that the evidence shows conclusively that the machine so used and the methods adopted at the time of the accident were the same as those adopted and used under similar circumstances and conditions all over the country, and that common usage is the supreme test of due care in the selection of appliances and the adoption of methods for conducting one's business. But this argument ignores testimony which tended to prove that, while the machine was in general use for loading logs on cars, it was not used for skidding purposes, and that increased hazard attended its use for that purpose. We are not convinced, therefore, that the court below erred in denying the motion, there being testimony to go to the jury tending to show the negligence of the plaintiff in error; testimony to the effect that the Marion steam loader was not commonly or generally used for skidding purposes; that it was a loading machine, and intended to be used only in loading on a car logs lying within a radius of 75 feet therefrom, and by means of a short cable. There was testimony of men of experience in logging that they had never seen the machine used for skidding purposes; that when so used there was no way of giving signals, except by shouting or waving the hand; that a machine used for skidding is equipped with a whistle cord for signaling purposes and a haul-back line; that such a machine has two drums, one for the cable which draws the log, the other for the haul-back line; and that the haul-back line is used for two purposes, one to carry the cable out into the timber, the other to hold the log in its course as it is being drawn by the cable. There was evidence that, if a haul-back line had been used in drawing the log which occasioned the death of the deceased, the log would have been held to its course and the accident would not have occurred.

[1] It is true that employers are not insurers, and that the party charging negligence does not prove it merely by showing that the machine is not in common use, for it may be that the machine used is safer than those which are in common use; but it is competent to show that the machine is unusual, and at the same time more dangerous than those in common use. Although there is conflict in the decisions, the better doctrine is well stated by the Circuit Court of Appeals for the Third Circuit in American Locomotive Co. v. White, 205 Fed. 260, 123 C. C. A. 464, as follows:

"The part that usage should play in controversies like the case before us has been much debated, and the decisions thereon have by no means been uniform. Confining ourselves for the present to the point now in issue, we state as our opinion that a servant may be permitted to prove the common usage of the business, when he charges the master with negligence in doing some act that departs from the usage; but the proof should be accompanied by evidence that the departure complained of has increased the danger. The increased danger may appear from the circumstances of the act in controversy, or (in a proper case) it may be shown by the direct testimony of witnesses."

See, also, Chicago & Great Western Ry. Co. v. Egan, 159 Fed. 40, 86 C. C. A. 230; McGeehan v. Hughes, 217 Pa. 121, 66 Atl. 238; Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114.

As to assumption of risk, it does not appear from the evidence that the deceased so appreciated the risk of his employment that the case should have been taken from the jury. The deceased had been working as a carpenter about the logging camp, and about two weeks before the accident he had been assigned to work at skidding logs with the Marion steam loader. Prior to that time, he had done no work with that kind of machine. The court, under proper instructions, submitted to the jury the question whether he assumed the risk.

[2] It is assigned as error that the court sustained the objection to the question asked the witness Younkin on cross-examination:

"As a matter of fact, they were doing that work there that morning in the most practicable and customary and usual manner under the circumstances. Isn't that true?"

The objection was sustained on the ground that the question was leading, and the court said that he would not permit either side to ask leading questions of the witness, inasmuch as he was then the foreman in the employment of the plaintiff in error and was the son-in-law of the defendant in error. We need not discuss the ground on which the ruling was made. We think there was no error, for the reason that the question called for the opinion of the witness as to whether or not the method of doing the work was the most "practicable." In 17 Cyc. 56, it is said:

"The issue of negligence can in most cases well be determined by the judgment of a jury, and the inference, conclusion, or judgment of witnesses is rejected. This rule has been applied, for example, * * * as to conduct—as whether it was cautious, dangerous, in the line of duty, necessary, negligent, proper, prudent, reasonable, professionally skillful, safe, usual, or unusual, and whether such conduct constituted good management."

Decisions in point are Atchison, T. & S. F. R. Co. v. Myers, 63 Fed. 793, 11 C. C. A. 439; Hunt v. Kile, 98 Fed. 49, 38 C. C. A. 641; Seese v. Northern Pacific R. Co. (C. C.) 39 Fed. 487; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Henion v. New York, N. H. & H. R. Co., 79 Fed. 903, 25 C. C. A. 223.

The foregoing considerations and authorities are applicable, also, to the contention that the court below erred in sustaining objections to questions propounded to witnesses as to whether or not the machine known as the Marion steam loader was a reasonably safe machine for the purpose of skidding logs within a radius of 500 feet.

[3] At the close of the instructions to the jury, counsel for plaintiff in error excepted to that portion thereof "which stated that the question for the jury to decide was whether the use of the Marion steam loader as it was being used at the time of this accident was more hazardous than if used with a haul-back." The court expressed his understanding that the charge had not been so given, and in fact it had not. The court said:

"To explain: Suppose the defendant had employed some other method by which certainly this accident could not have happened, and yet that method had been attended with danger of other accidents; that is, accidents of different kinds. As an illustration, if horses had been employed for hauling in these logs, this particular accident, of course, would not have occurred. It could not have occurred in just this way; but the question still remains whether this method is more hazardous, and unreasonably hazardous—more hazardous than the method of skidding the logs by the use of horses. So, referring to the matter of using a signal device and haul-back line, possibly this particular accident might have been avoided. But you would not be justified in concluding that this is an improper method, or a negligent method, simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely, whether this method was more hazardous than the other referred to, namely, the haul-back."

We find no error in the instructions so given, especially when it is considered in the light of the other instructions, which covered all questions involved in the case. It was necessary for the court to submit to the jury the question whether the machine in use was unusual, and whether it was more hazardous than the machine equipped with a haul-back line. We find no error.

The judgment is affirmed.

NORFOLK SAND & GRAVEL CORPORATION v. OHIO LOCOMOTIVE CRANE CO.

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

No. 1248.

1. EVIDENCE (§ 441*)—EXTRINSIC EVIDENCE OF CONTRACTS—OFFER AND ACCEPTANCE.

Where a proposal to purchase an electric crane provided that the terms were 50 per cent. cash 30 days, balance in four notes of equal amount, payable 3, 6, 9, and 12 months, at 6 per cent., and that all communications between the parties, whether verbal or written, with reference to

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

the subject of the contract, were superseded by the proposal and its acceptance by the purchaser, followed by its approval by an officer of the seller, should constitute a binding contract, and no modification should be binding on either party, unless it should be in writing, signed and accepted in the same manner as the original contract, a letter written by the seller's Southern representative, confirming an agreement as a part of the proposal that the seller should take an electric machine of the buyer and allow $2,300 on the price of the new one, not accepted or signed by any of the seller's officers, and not shown to have been submitted to the seller for acceptance, was ineffective to supersede the terms specified in the accepted proposal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763, 1765–1845, 2030–2047; Dec. Dig. § 441.*]

2. PRINCIPAL AND AGENT (§ 173*)—ACTS OF AGENT—RATIFICATION—EVIDENCE.

In an action for the balance of the price of a crane, evidence *held* insufficient to show a ratification by the seller of an agreement of its agent to accept an old crane owned by the buyer as part payment.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 659–661; Dec. Dig. § 173.*]

3. SALES (§ 418*)—BREACH OF CONTRACT—DAMAGES.

For the breach of a seller's contract the buyer may recover such damages as are the natural, proximate, and certain consequences thereof, but cannot recover those which are remote, speculative, and contingent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

4. SALES (§ 420*)—BREACH OF CONTRACT—ELEMENTS OF DAMAGES.

Where it is doubtful whether items of damage claimed by a buyer from the seller's breach of contract are the natural, proximate, and certain consequences of the breach, or are remote, speculative, and contingent, the question must be determined as one of fact.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1202; Dec. Dig. § 420.*]

5. SALES (§ 418*)—BREACH OF CONTRACT—DAMAGES—LOSS OF PROFITS.

In an action for the price of a locomotive crane, the buyer was not entitled to recover on a counterclaim the estimated extra cost of unloading gravel by reason of the failure of the crane to work properly, or the expense of demurrage due to the same cause.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174–1201; Dec. Dig. § 418.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by the Ohio Locomotive Crane Company against the Norfolk Sand & Gravel Corporation. Judgment for plaintiff for less than the relief demanded. Defendant brings error, and plaintiff assigns cross-error. Affirmed.

Albert L. Roper and Ralph H. Riddleberger, both of Norfolk, Va. (Riddleberger & Roper, of Norfolk, Va., on the brief), for plaintiff in error.

William H. White, Jr., and W. H. T. Loyall, both of Norfolk, Va. (Loyall, Taylor & White, of Norfolk, Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges.

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

WOODS, Circuit Judge. This action for $4,800, the alleged contract price of a hoisting crane and a cab, was tried under consent by the court without a jury, and resulted in a judgment in favor of the plaintiff for the amount claimed, less $709.48 allowed to the defendant on its claim of damages for breach of the contract as to the motive power. The assignments of error bring up the defenses which were rejected by the District Court. In passing on these the principle must be applied that all findings of fact by the District Judge having reasonable support in the evidence must be accepted as true.

The defendant's first claim is a credit of $2,300, which it is alleged the plaintiff contracted to allow for an old crane which the new one was to displace. G. W. Butt was the agent at Norfolk of the Ohio Locomotive Crane Company, through whom the negotiations for the sale of the crane began. On April 11, 1912, the Ohio Company signed a paper partly printed and partly written called "Proposal No. 2328," signed in its name, "per Chas. F. Michael, Sec'y," indorsed or "accepted" by the Norfolk Company April 15, 1912, "per Geo. W. Roper, V. P.," and "approved" by the Ohio Company, "per Chas. F. Michael, Sec'y," April 17, 1912. The contract thus made contained these stipulations:

"The terms of payment are 50 per cent. cash 30 days from date of invoice, balance in 4 notes of equal amount, payable 3, 6, 9, and 12 months from date of invoice, said notes to bear 6 per cent. interest."

"All previous communications between the parties hereto, whether verbal or written, with reference to the subject-matter herein dealt with, shall be superseded by this proposal, and its acceptance by the purchaser (or by a duly authorized agent of the purchaser), followed by its approval by an officer of the company, whose signature it must bear shall make it a binding contract; however the proposal, unless accepted by the purchaser within thirty days from its date, may, at the option of the company and without notice, be declared void and withdrawn."

"No modification of the contract shall be binding upon either party, unless such modification shall be in writing, signed and accepted in the same manner as the original contract."

In a letter dated April 13, 1912, addressed to the Norfolk Company and signed in the name of the Ohio Company, "by G. W. Butt, So. Representative," is found this stipulation:

"Confirming agreement and making part of proposal No. 2328, we will take the electric machine completed that you are now using as part payment on the locomotive crane we are to furnish; the allowance price being $2,300 as it now stands."

[1] The finding of the District Judge that this paper was not sent to the Ohio Company with the proposal and was not approved by an officer of the company is well supported by the evidence. The defendant was under the duty to ascertain the extent of Butt's authority. So far from the conduct of the plaintiff leading the defendant to suppose that Butt had authority to make the terms of sale, it very explicitly negatived such authority. The requirement that the contract be in writing and be sent to the Ohio Company for the approval of an officer plainly notified defendant that Butt's representation extended no further than taking and submitting to his principal a written offer. The letter relied on by defendant as part of the offer was not only a separate document,

but it purported to supersede the provision of the formal instrument that 50 per cent. cash should be paid in 30 days by the totally different provision that the plaintiff should take the old machine at a valuation of $2,300. The defendant, having been thus put on notice not to rely on Butt's promise, must take the consequences of his failure to send the letter to the plaintiff along with the formal contract for approval of its terms. The plaintiff having submitted to the defendant a written offer of sale clear in all its terms, and the defendant having accepted it in writing, no unauthorized promise of Butt can affect the right of the plaintiff to enforce the contract. If there be loss, the defendant must bear it, since it was its own fault that it was deceived by Butt's letter. National Safe Deposit Co. v. Hibbs, 229 U. S. 391, 33 Sup. Ct. 818, 57 L. Ed. 1241.

[2] 2. The defendant next contends that the evidence admits of no other reasonable inference than that the plaintiff by its conduct ratified Butt's agreement to accept the old machine as part payment of the purchase money. On July 10, 1912, after the crane had been set up, the plaintiff wrote, calling attention to the payments provided for in the contract. In reply Mr. Roper, vice president of the defendant company, wrote a letter mentioning the failure of the machine to come up to specifications, and saying:

"I do not quite understand the meaning of the third paragraph of your letter, on second page. In accordance with our contract, you were to allow us $2,300, which practically represented the cash payment for our old crane. This matter was taken up by us with your representative and made a portion of an agreement or proposal numbered 2328."

To this the plaintiff answered as follows:

"We are in receipt of your letter of the 15th inst., contents of which have been very carefully noted, and, as we thought these matters could be best explained to you verbally, we have arranged to have our Mr. Rogers call upon you, having left here last evening, feeling that he will be able to satisfy you on the several points you have raised. Therefore we will await Mr. Rogers' report."

Rogers, being delayed by other work, did not get to Norfolk until September. It appears from the correspondence that all matters of difference were discussed by him with defendants and Butt, but it does not appear that he made any concession as to the terms of payment.

The following extract from a letter of the vice president of the Norfolk Company, dated November 18th, shows clearly that he regarded the difference as to the terms and manner of payment in abeyance pending the efforts of the Ohio Company to make the machine work satisfactorily:

"Mr. Herndon spoke to me with respect to settlement for the machine, and I told him that, as soon as this motor could be changed and the machine put in shape as contemplated, we would be more than glad to take up with you question of settlement. I told him that the delay was caused by your failure to send machine properly equipped, and that this delay on your part caused us to be involved in a lawsuit, which will result in a great deal of expense. I suggested to Mr. Herndon that as soon as the machine was altered in accordance with his views, with the motor in the new position, it would be better for some member of your firm to take the matter of settlement up with

us in person. I believe you will find this the best way, especially in view of the seeming misunderstanding on your part with respect to the old machine."

It is true that ratification may be implied from silence or failure to repudiate after knowledge of the unauthorized act of an agent. Feild v. Farrington, 77 U. S. (10 Wall.) 141, 19 L. Ed. 923; Insurance Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653. But whether silence or failure to repudiate amounts to ratification is a question of fact depending on circumstances. Supervisors v. Schenck, 72 U. S. (5 Wall.) 772, 18 L. Ed. 556; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746. The entire correspondence, and especially the defendant's letter, tends strongly to support the conclusion of the District Judge that the difference as to the manner and terms of payment was understood by both parties as remaining open until the machine was made to work satisfactorily.

3. The question of damages is not free from difficulty. The District Judge filed two separate papers as his findings of fact, but as both were filed before the judgment was entered, and are referred to as the basis of the judgment, they must be read together as one paper. In the first of these papers items to the amount of $709.48 are allowed to the defendant as follows:

Material, and other items necessary to alteration of machine (not disputed)	$394 48
Loss while machine could not be used at all during period in which alterations were being made, 21 days at $15 a day	315 00

The following items were disallowed:

Higher cost of operation of machine that was inadequate and not in accordance with contract:	
Extra cost of unloading 15,971 cu. yds. of gravel @ .0389¢	$621 27
Extra cost of unloading 32,907 cu. yds. of sand @ .02¢	658 14
Amount paid Southern Transportation Co. demurrage for overtime on gravel barges which could not be discharged in time allowed on account of slowness and inadequacy of hoist (vouchers 1083, 1326 and 1495)	202 50

In the second paper filed, referring to these disallowed items, among other things, the court found "that the defendant proved certain damages in offset as set forth in statements Nos. 1, 2, 3, and 4, to be read as part of this finding," etc., and then repeats his disallowance of the items. The argument in favor of allowing the defendant these items may be thus summarized: The evidence shows beyond dispute that the extra cost of handling the gravel and sand was incurred, and that the demurrage was paid, because of the failure of the machine to do the full work contemplated by the contract, and the District Judge by the special finding above mentioned has so held. From this the inference is drawn that the District Court could not have rejected the items, except on the theory that the damages were too remote, and that in this the court committed error of law.

[3, 4] The argument is, we think, unsound. The courts, it is true, hold as a principle of law that damages which were in the contemplation of the parties, and actually resulted, as the natural, proximate, and certain consequence of a breach of the contract, are recoverable, and

that remote, speculative, or contingent damages are not. It is also true that there are many claims for damages falling so clearly and distinctly on one or the other side of the line that the courts fix their status as a matter of law. But the rule is well established that in the intermediate region of doubt the question whether the damages fall on one or the other side is one of fact. United States v. Morgan, 52 U. S. (11 How.) 154, 13 L. Ed. 643; Benjamin v. Hillard, 64 U. S. (23 How.) 149, 16 L. Ed. 518; Hutchins v. Munn, 209 U. S. 246, 28 Sup. Ct. 504, 52 L. Ed. 776; Herencia v. Guzman, 219 U. S. 44, 31 Sup. Ct. 135, 55 L. Ed. 81. Numerous authorities on these familiar rules are collated in 53 L. R. A. 33, note.

[5] The damages disallowed in this case are in this region of doubt. There was no definite evidence as to the profits or losses of the business, and the charge for extra cost of unloading rested on estimate and not certain data. There was no evidence showing that the plaintiff had notice that the slow work of the machine due to inadequate power would result in the expense of demurrage. In addition to this there was evidence tending to show that the defendant might have minimized the damage by using the old machine at an expense of about $300 until the new could be made satisfactory, and also that the failure of the machine to give satisfaction was due to the lack of skill in operation, rather than lack of adequate power in the motor furnished by the plaintiff. No doubt the District Judge took all these matters into consideration in holding that, while proof had been made that the defendant suffered the damages mentioned in the disallowed items, yet those allowed represented in amount all that could be reasonably charged to the plaintiff as the proximate result of its failure to furnish an adequate motor. Enough has been said to show that this conclusion is not without support in the evidence. This being so, the findings are conclusive.

Looking at the entire record, we think all the special findings of fact made by the court had reasonable support in the evidence, and the judgment must therefore be affirmed.

Affirmed.

NORTHERN COMMERCIAL CO. v. UNITED STATES.

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

No. 2294.

WHARVES (§ 3*)—LICENSE TAXES—"PUBLIC WHARF."

Where plaintiff, a transportation corporation, operated a wharf in connection with its business as common carrier, in which it carried goods for all shippers and stored the goods on its wharf in Alaska, such wharf was a public one, though it did not make a separate charge for wharfage apart from the freight charge for transporting the goods, within Code Cr. Proc. Alaska, § 460, as amended by Pol. Code Alaska, § 29, imposing a license tax on persons maintaining public docks, wharves, and warehouses in Alaska.

[Ed. Note.—For other cases, see Wharves, Dec. Dig. § 3.*

For other definitions, see Words and Phrases, First and Second Series, Public Wharf.]

---

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

In Error to and on Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; Edward E. Cushaman and Peter D. Overfield, Judges.

Submission of controversy between the United States of America and the Northern Commercial Company. From a judgment in favor of the United States, the Commercial Company brings error and appeals. Affirmed.

See, also, 217 Fed. 33.

Under the provisions of chapter 28 of the Code of Civil Procedure of Alaska, which declares that parties to a question in controversy which might be the subject of an action in a court of record may submit the same to the determination of such court without action, by setting forth in writing the facts upon which the controversy depends, and verifying the same by the oaths of the parties, the parties to the present controversy stipulated the facts in regard to the same in substance as follows: That the defendant, the plaintiff in error herein, a corporation incorporated under the laws of the state of New Jersey, is carrying on a general merchandise and transportation business in the territory of Alaska. That section 460 of the Code of Criminal Procedure of Alaska, as amended by section 29 of the Political Code, provides that any person or persons, corporation, or company, prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska, shall first apply for permission so to do from the District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and transportation as follows, to wit: Public docks, wharves, and warehouses, 10 cents per ton on freight handled or stored. That during the last three years the defendant has been carrying on a merchandise and transportation business in Alaska, and has handled a large amount of freight, for itself and its shippers, a portion of which freight has been landed at Chena for transportation from that point by rail to the town of Fairbanks. That the defendant contends that it does not maintain or conduct a public dock, wharf, or warehouse at Fairbanks, but it does maintain at Fairbanks warehouses within which it stores merchandise belonging to it, and which it transports by its steamboats from points outside of Alaska to Fairbanks, and in which at times it stores general merchandise belonging to it and its shippers. That its wharf and warehouse at Fairbanks is on the river bank, at which steamers owned by defendant land and unload the freight belonging to the defendant and its shippers, but that no wharfage charge, dockage charge, or storage charge is made for freight so handled upon said wharf. That the defendant does not accept goods on storage for hire, nor does it permit boats other than its own to land at its warehouse and docks for the purpose of unloading goods for hire. That the defendant contends that it should not be compelled to pay a license fee of 10 cents per ton on freight handled or stored by it, but that the United States contends otherwise, and consents that the controversy be submitted to the court for construction. It was further stipulated between the parties that there has been no effort on the part of defendant to avoid payment of the license aforesaid, if defendant is lawfully chargeable therewith. It was further stipulated that, in the event that the court should determine that defendant should pay the license fee, thereupon a referee might be appointed to ascertain the amount of tonnage upon which said fee should be paid, and report to the court, which report should be subject to review by the court as in other matters.

Upon the hearing the court ruled that the defendant is liable for the payment of a license fee or tax of 10 cents per ton on freight handled on its wharf at Fairbanks, consigned and belonging to persons or corporations other than the defendant herein; and the court, for the purpose of having all matters in controversy between the parties made a part of the record, with the consent of the parties, ordered that the statement of facts be supplemented by adding thereto a supplemental paragraph, to be considered as part of the original statement of facts, which paragraph is as follows:

"That since the filing of the original statement of facts in this action, and

during the years 1907, 1908, 1909, 1910, and 1911, defendant has been conducting a wharf in Fairbanks, in the same manner as set forth in the original statement of facts herein, and in connection with these years it is consented that the court, in determining this action, shall determine whether or not the said defendant is liable to pay a license tax or fee on the amount of freight handled upon its wharf at Fairbanks, belonging, consigned to, or consigned by persons or corporations other than the defendant herein, during said years, and the amount thereof; that is to say, that the court shall have jurisdiction in the present action to determine the controversy between the parties plaintiff and defendant from the year 1905 down to and including the year 1911."

Thereafter the court made an interlocutory order appointing a referee, and directed that he take testimony as to the number of tons of freight belonging or consigned to or by persons or corporations other than the defendant during the several years mentioned in the amended and agreed statement of facts. Upon the report of the referee it was adjudged that the defendant pay to the United States a license fee of 10 cents per ton upon the amount of such freight, so handled on its public wharf, amounting to the sum of $2,199.94. From that judgment the present appeal is taken.

Lloyd S. Ackerman, of San Francisco, Cal., and McGowan & Clark, of Fairbanks, Alaska, for plaintiff in error and appellant.

James J. Crossley, U. S. Atty., of Fairbanks, Alaska.

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

GILBERT, Circuit Judge (after stating the facts as above). The question here presented is whether the wharf used by the plaintiff in error was a public wharf, such as to be subject to the license tax under the statute. In John J. Sesnon Co. v. United States, 182 Fed. 573, 105 C. C. A. 111, we held that the laws of Alaska imposing license taxes on different kinds of business are to be construed liberally, to carry out the purposes of their enactment. In Transportation Co. v. Parkersburg, 107 U. S. 691, 699, 2 Sup. Ct. 732, 27 L. Ed. 584, a private wharf was defined to be a wharf which the owner has constructed and reserves for his private use. The wharf maintained by the plaintiff in error does not come within this definition. It is a wharf which the plaintiff in error operates in connection with its business of a common carrier. In that business it carries the goods of all shippers. It transports upon its vessels goods for the public, and it stores such goods on its wharf, and, while it makes no separate charge for wharfage, it must be assumed that the freight money pays for all services rendered, including the use of the wharf. In John J. Sesnon Co. v. United States, we approved the following instruction which was given to the jury:

"The business of conducting a wharf is a business incident and part of the lighterage business, and you will remember that if they, as a lighterage company, received freight, without any discrimination, as to persons, or as to consignees, from all persons, all comers, all those who applied for the benefit of their lighter plant and their lighter services, why, then, it was a public wharf. If they only landed freight for their own purposes, for their own uses, why then, of course, it would be a private wharf, and would not be subject to a license."

We think it should be held that a wharf is a public wharf, within the terms of the statute, if the public are allowed to use it.

The judgment is affirmed.

NORTHERN COMMERCIAL CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2293.

1. SUBMISSION OF CONTROVERSY (§ 14*)—RIGHT TO APPEAL—ESTOPPEL TO OBJECT.

Where both parties treated a dispute as one suitable to be submitted to the court without action as a civil controversy, as authorized by Code Civ. Proc. Alaska, c. 28, and it was determined at the trial on that theory without objection, and judgment rendered in favor of defendant, it could not object on appeal that plaintiff was not entitled to have the judgment reviewed, because the subject of the controversy was not one which the parties could lawfully submit to the court for determination without action.

[Ed. Note.—For other cases, see Submission of Controversy, Cent. Dig. § 15; Dec. Dig. § 14.*]

2. STATUTES (§ 217*)—CONSTRUCTION.

Where a statute is ambiguous, the court may put itself as far as possible in the light that the Legislature enjoyed, including the history of the times, to discover the legislative intent, but not so where the language is clear and the meaning obvious.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

3. STATUTES (§ 225*)—CONSTRUCTION—EARLIER ACTS.

Statutes relating to the same subject, including earlier acts which have expired or been repealed, must be construed in pari materia.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. § 225.*]

4. STATUTES (§§ 197, 206*)—CONSTRUCTION—"OR"—"AND."

In construing a statute, effect, if possible, must be given to every word and phrase, so as to render the statute a harmonious whole, and the words "or" and "and" may be convertible, if the sense requires it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 275, 283; Dec. Dig. §§ 197, 206.*

For other definitions, see Words and Phrases, First and Second Series, And; Or.]

5. SHIPPING (§ 6*)—LICENSE TAXES—STATUTES—CONSTRUCTION—"NOT PAYING LICENSE OR TAX ELSEWHERE."

Act June 13, 1902, c. 1082, 32 Stat. 385, divided the district of Alaska into three recording and judicial divisions, and Code Cr. Proc. Alaska, § 460, provides that transportation lines, propelled by mechanical power, registered in the district of Alaska, or "not paying license or tax elsewhere," shall pay a license tonnage tax on each vessel, and shall obtain a license to prosecute such business from a district court, or a subdivision thereof, within the district of Alaska. *Held*, that the words "not paying license or tax elsewhere" should be construed as limited to the payment of a license tax under the act in one of the districts of Alaska, and hence a transportation line operating vessels within Alaskan and Canadian waters and paying a tax in Canada was not for that reason exempt from liability for the tax imposed by section 460.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 12–15; Dec. Dig. § 6.*]

6. SHIPPING (§ 6*)—BARGES—LICENSE TAXES—STATUTE—CONSTRUCTION.

Code Cr. Proc. Alaska, § 460, imposing a license tax on freight and passenger transportation lines propelled by mechanical power, registered

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

in the District of Alaska, includes barges operated by craft propelled by mechanical power.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 12–15; Dec. Dig. § 6.*]

In Error to and on Appeal from the District Court of the United States for the Fourth Division of the Territory of Alaska; Edward E. Cushman and Peter D. Overfield, Judges.

Submission of controversy between the United States and the Northern Commercial Company and Northern Navigation Company. From a judgment in favor of the United States, the companies named appeal and bring error. Affirmed.

See, also, 217 Fed. 30.

This cause was presented to the trial court, under the title of United States of America v. Northern Commercial Company and Northern Navigation Company, upon an agreed statement of facts, in pursuance of the provisions of chapter 28 of the Code of Civil Procedure of Alaska, whereby it appears that, during the years 1905 and 1906, the defendant the Northern Commercial Company operated certain sternwheel steamboats for transportation purposes on the Yukon river and its tributaries, plying between ports in the district of Alaska and ports in Yukon Territory, Canada, for the operation of which no licenses were procured, and during the same years operated certain other steamboats on the Yukon river and its tributaries, and in the Bering Sea, at points between St. Michael and Fairbanks, Alaska, for which operation licenses were procured in pursuance of section 460 of the Code of Criminal Procedure of the District of Alaska; that for the boats operated between points in Alaska and points in Canada the company was compelled to and did pay to the Canadian government a tax of 8 cents per ton gross, and that the United States was also exacting a tonnage tax of $1 net, customhouse measurement, upon the same vessels, which the Transportation Company resists, claiming that it should not be required to pay such license of $1 per ton on any such river steamboats not operated wholly upon the waters of Alaska. The stipulation setting forth the agreed statement was filed in court October 27, 1906. The cause was not brought on for trial until August 19, 1911, and on the 24th of that month the parties, by order of court, were permitted to amend their statement of facts to cover also the years 1907 to 1911, inclusive.

The statute under which the license tax of $1 net is claimed to be due the government is section 460, supra, and provides that any person, corporation, or company prosecuting any of the following lines of business within the district of Alaska shall first obtain license to do so from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows:

"Freight and passenger transportation lines, propelled by mechanical power, registered in the district of Alaska, or not paying license or tax elsewhere, and river and lake steamers, as well as transportation lines doing business wholly within the district of Alaska, one dollar per ton per annum on net tonnage, custom-house measurement, of each vessel.

* * * * * * * * * *

"Ships and shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, registered in Alaska or not paying license or tax elsewhere, one dollar per ton per annum on net tonnage, customhouse measurement, of each vessel."

The judgment of the trial court being in favor of the government, the defendants prosecute both an appeal and a writ of error.

---

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

Thomas McGowan and John A. Clark, both of Fairbanks, Alaska, and Lloyd S. Ackerman, William Thomas, Louis S. Beedy, James Lanagan, all of San Francisco, Cal., for appellants and plaintiffs in error.

James J. Crossley, U. S. Atty., and Louis R. Gillette, Asst. U. S. Atty., both of Fairbanks, Alaska.

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

WOLVERTON, District Judge (after stating the facts as above). [1] Preliminarily, the government challenges the right of the defendants to prosecute either an appeal or a writ of error to this court, on the ground that the subject of controversy is not one which the parties could lawfully submit to the court for determination without an action.

Chapter 28 of the Code of Civil Procedure provides for the submission to the court by the parties involved of a question in controversy which might be the subject of an action, and relates to civil actions or controversies. It is urged that the proceeding is in effect an application for a license, coupled with a protest against being required to take one out as a prerequisite to transacting the particular business desired to be engaged in. But we do not so regard it. It is manifest that there was a dispute between the parties as to whether the defendants were liable to the payment of the $1 net tonnage tax, the government contending for and the defendants against the proposition, and it was no doubt the purpose of the parties by the stipulation to submit the question or controversy to the court for its adjudication.

Were the controversy such as that a civil action would lie, there could scarcely be a doubt that a submission could be had under the statute. We have been cited to no statute by virtue of which a civil action will lie for the recovery of the license tax; but the omission to take out such a license and pay the tax is made a misdemeanor, punishable by fine and imprisonment. However, the parties have seen fit to treat the dispute as one suitable to be submitted to the court for determination, without action, as a civil controversy, and we are not disposed, after the government has acquired the judgment of the court on that theory, to deny the defendants their remedy by appeal or the prosecution of a writ of error from such judgment. It would be unjust that the government should obtain an advantage upon a given theory, and then perpetuate the advantage by a repudiation of such theory. It should be further remarked that the question as to whether the cause was one suitable to be so submitted to the trial court was not once raised in that court.

The principal question arising from the controversy is whether the defendant companies were required by the statute noticed in the statement to procure a license and to pay the tonnage tax imposed during the years involved. This depends wholly upon the proper construction of the statute.

[2] As a premise, certain well-established principles of construction may be recounted. The court may with propriety, where the language of the statute appears to be ambiguous or the meaning doubtful, put itself so far as possible in the light that the lawmakers enjoyed, and

view the situation as it appeared to them, and thereby ascertain and discover the purpose and intendment of the enactment from the language employed, in connection with the attending conditions and circumstances, including the history of the times. United States v. Union Pacific Railroad Co., 91 U. S. 72, 79, 23 L. Ed. 224; Platt v. Union Pacific Railroad Co., 99 U. S. 48, 64, 25 L. Ed. 424; Smith v. Townsend, 148 U. S. 490, 494, 13 Sup. Ct. 634, 37 L. Ed. 533.

It is scarcely necessary to observe that, where the language of the statute is clear and unambiguous, no resort to the rule is essential, for, the meaning being obvious, the statute construes itself.

[3] Statutes relating to the same subject-matter must be construed in pari materia. This may include the earlier acts and such as have expired or been repealed as well. Sections 43 and 48, Endlich on the Interpretation of Statutes.

[4] Effect, if possible, must be given to every word and phase of the statute, so as to render it a harmonious whole; and the words "or" and "and" are sometimes convertible, as the sense may require.

[5] The principal difficulty attending the construction of the present statute hinges about the words "or not paying license or tax elsewhere." The statute was adopted as an amendment of a preceding statute, which read, "Freight and passenger transportation lines, propelled by mechanical power on inland waters, one dollar per ton per annum on net tonnage, customhouse measurement, of each vessel;" the clause relating to ships and shipping being the same as now, with the words "registered in Alaska or not paying license or tax elsewhere" omitted. Act March 3, 1899, c. 429, 30 Stat. 1336.

The later statute, or the one under consideration, was adopted June 6, 1900. 31 Stat. 321, c. 786. It is comprised in an act making provision for a civil government for Alaska, which by its fourth section establishes a District Court, consisting of three divisions, to be presided over by a judge for each division.

By a still later act, approved June 13, 1902 (32 Stat. 385, c. 1082), the district of Alaska was divided into three recording and judicial divisions.

That the statute was intended to require license of vessels doing a transportation business partly on waters of Alaska and partly on waters elsewhere is evidenced by the provision, "as well as transportation lines doing business wholly within the District of Alaska." True, when Congress passed the act, it was doubtless known to it that steamboats and other craft were plying on the Yukon river between points in Alaska and points in Canada, a foreign country, as well as between points wholly in Alaska; but it must be considered that Congress was legislating for the district of Alaska, the object being to provide revenue for carrying on its governmental affairs, and the new statute has added another subject touching which revenue may be exacted.

Plaintiffs in error insist that the words "or not paying license or tax elsewhere" must be given a general application, and that the intendment of the statute is that they shall relate to the payment of a license or tax in Canada, or other place outside the territory of Alaska, as well as in Alaska.

It may be that Congress was apprised that such vessels would be subject to a tax in Canada; but, in view of the fact that they were made the subject of license for revenue in the district of Alaska, it can hardly be supposed that it intended, at the same stroke of the pen, to exempt from license the very subject designed by it for producing revenue at home, or to make such revenue dependent upon whether some foreign country should exact a tax upon the same subject. Under such a construction the legislation for revenue purposes might prove entirely futile, and, indeed, it would in the present case as to the added subject, as all the vessels plying on the Yukon between Alaska and Canada are subject to a tax in Canada.

Looking further into the statute, the transportation lines are required to apply for and obtain the license from a District Court, or a subdivision thereof, in the district; there being three judicial divisions, as we have seen. It seems, therefore, more in consonance with the purpose of Congress to interpret the clause as being addressed to the court as well as for the delimitation of the license, and if the transportation line or lines are paying the license or tax in some other judicial division of the territory, then it or they would not be further subject to the license tax. In other words, these words simply qualify the subject designated for license, so that the tax may not be imposed in more than one judicial subdivision of the territory. This is the only rational rendition which will give practical effect to the statute, and at the same time give meaning and effect to all the words of the statute. The clause relating to ships and shipping would seem to bear out this construction. It was simply designed to make ocean and coastwise vessels doing a local business subjects of a license tax for territorial revenue purposes, and it was not intended to exempt such vessels from the tax because they might be paying a license or tax somewhere else in the United States or foreign countries. It is only where they are paying a license or tax in some other judicial division of the territory that they will be thus exempt.

We have not overlooked the grammatical construction given the statute by Professor Gayley. It is interesting and academically instructive, but where the language is ambiguous, or its meaning involved, such construction must give way to the settled rules of legal construction.

[6] Another question submitted is whether the statute applies to barges. If used in connection with mechanical-power propelled craft, there exists no reason why they should not also be subject to the same license or tax. As the tug and tow are often one in legal parlance, so when a barge is pushed forward through means of a vessel propelled by mechanical power, and used for transportation of freight or passengers, the two vessels are in practical effect one, and must submit to the license or tax.

The judgment of the trial court will be affirmed.

PITTS BANKING CO. v. CLAYTON.

In re CHANDLER.

(Circuit Court of Appeals, Fifth Circuit. October 5, 1914.)

No. 2505.

EVIDENCE (§ 575*)—COMPETENCY—TESTIMONY GIVEN BY WITNESS IN PRIOR PROCEEDING.

Where a bankrupt, as a witness for the plaintiff in an action by his trustee to recover preferences, gave testimony favorable to defendant, plaintiff was entitled to show that he had given contradictory testimony on a hearing before the referee for the purposes of impeachment, but such testimony was not admissible to prove the facts alleged, and its submission to the jury generally to be considered by them on the issues was prejudicial error.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2407–2409; Dec. Dig. § 575.*]

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

Action at law by Cook Clayton, as trustee in bankruptcy of Gray Chandler, against the Pitts Banking Company. Judgment for plaintiff, and defendant brings error. Reversed.

John R. L. Smith, of Macon, Ga., and J. T. Hill, of Cordele, Ga., for plaintiff in error.

Andrew H. Heyward and J. N. Talley, both of Macon, Ga., for defendant in error.

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

FOSTER, District Judge. In this matter Cook Clayton, trustee of Gray Chandler, bankrupt, filed his suit against the Pitts Banking Company to recover $1,732.45, the aggregate of some six or more payments made to the bank within four months of the adjudication and alleged to be preferential. The bank admitted receiving payments aggregating $748.42 on certain notes of Chandler, but denied knowledge of his insolvency at the time, or that same constituted preferences. At the close of the evidence the bank moved for a directed verdict in its favor, which was denied. On the trial the plaintiff offered Chandler as a witness. He testified that his business was running along as usual in November, 1910, and he was paying some of his debts, and thought if his goods could be sold at a reasonable profit he would break even, and that the bank was not pressing him. Certain evidence given by him before the referee on a previous occasion, tending to contradict his statement that the bank was not pressing him, was then read to him. He was cross-examined by the court concerning the discrepancy, and attempted an explanation, which apparently was not satisfactory. He was then admonished as follows:

"This is a very serious matter, Mr. Chandler; you are sworn to tell the truth, the whole truth, and nothing but the truth, and not to do that is to

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

commit perjury, and perjury is a punishable offense; a man doesn't commit perjury in this court, if the court knows it, without having to undergo a trial for it."

In the course of his charge the court took occasion to say:

"You must bear in mind the testimony of all the witnesses, and you must consider the testimony of the bankrupt himself. How was it that he testified on direct examination here, after being put up by Mr. Talley for the trustee as his witness, that the bank did not push him for money? Did he try to convey the impression to the jury that the bank had no reason to know his condition? Yet when we turn to the evidence before the referee it is as follows: 'Q. Didn't they know you were in pretty bad shape financially? A. Yes, sir.' That is an important fact within itself. 'Q. Didn't they know you were in pretty bad shape financially? A. Yes, sir. Q. Who knew that, the cashier? A. The cashier and the directors both knew it, I suppose. Q. How did they know it? A. I had been owing the bank some money some time. Q. Did you have some talks with them just before you left about your condition—tell them you were pretty hard-pressed? A. No, sir. Q. They had been pressing you for payment? A. Yes, sir; they had been squeezing, pushing, wanting money.' Now he tells you the securities wanted that. Is that true? Take the whole case together, the testimony before the referee, did he tell the truth then? If that was the truth, did the bank have a reasonable opportunity to know his financial condition and otherwise that this payment was a preference? Didn't it know that he was in pretty bad shape? He said the directors and cashier both knew it. What is the truth about it? That is for you gentlemen to find."

Defendant excepted to this portion of the charge upon the ground that the report of Gray Chandler's testimony before the referee was not in evidence, and the following colloquy took place:

"The Court: Was not that testimony put in evidence?

"Counsel for Plaintiff: No, sir; but Gray Chandler admitted on the stand here to have so testified before the referee.

"The Court: I withdraw what I said about the evidence taken before the referee, and you will only bear in mind, gentlemen, that portion which Gray Chandler testified to be true here."

Defendant again excepted on the ground that it was not proper to submit either his admission as to what he testified before the referee or the report of the testimony before the referee as evidence of the fact, as it could only be admitted for the purpose of tearing down what he testified to on the stand. Thereupon the court further charged the jury as follows:

"I will modify my charge in that respect, gentlemen. *The evidence which he recited from the stand here that he gave before the referee may or may not be sufficient, as you may regard it in connection with all the other testimony in the case, to show that in point of fact the bank was 'pushing and squeezing' him.* (Italics ours.) You must take his evidence here on that subject in connection with all the other evidence in the case and determine what is the truth. If you believe from his evidence here that he testified one way there, and you see from his evidence and bearing and everything else connected with his manner of giving testimony here that he was leaning improperly toward the defendant here, you can consider it, and take together all the circumstances, and regard that as a circumstance, with the other facts in the case, as illuminative of your efforts to find out what is the truth, viz.: Was the bank pushing him or was it not pushing him?"

The defendant then excepted to said portion of said charge, and instructions as so modified, upon the grounds previously urged, with some amplification. The court declined to further modify the charge, and the

case went to the jury, and resulted in a verdict for plaintiff, on which judgment was subsequently entered. Defendant assigns as errors the overruling of its motion to direct and the remarks of the judge above quoted.

In the view we take of the case, it is unnecessary to further recite or analyze the testimony, except to say that but for the evidence of Chandler given before the referee there was nothing to indicate that the bank was pressing him for payment of his notes. On the contrary, both he and the cashier, who was the only officer in active charge of the bank, testify that it was not pressing him. The importance of Chandler's testimony before the referee had been accentuated by the cross-examination of the court and the admonition to the witness. In this situation it was vitally essential to the defendant that the jury be charged clearly regarding the probative effect of Chandler's former testimony. No objection was raised to its use to show his contradictory statements, and no point is now made on that ground, but in any event it could only be used to impeach his credibility, and could have no effect to prove the facts therein shown. As to this the text-writers agree, and the rule is thus clearly stated by Mr. Jones:

"In some states the statute broadly provides that the one producing a witness may show that at other times he has made statements inconsistent with his present testimony. But under these statutes the courts have frequently rejected such testimony unless surprise or hostility was shown. And when received the courts hold that such statements are admissible *only for the purpose of impeachment* and not to prove the truth of the facts stated in the declaration." Jones on Evidence, paragraph 855.

The portion of the charge complained of was prejudicial to the defendant. To this the judge's attention was called by timely exception. There is nothing in the charge as originally given that would tend to offset or neutralize the effect of the above quoted remarks, and the subsequent modifications do not help matters. On the contrary, they could have no other effect than to give the jury to understand that they might consider Chandler's evidence before the referee as sufficient to show that in point of fact the bank was "pushing and squeezing" him, and that it was an important fact on which recovery might depend.

The charge was error. As for this reason the judgment must be reversed, it is unnecessary to pass on the other assignment.

Reversed and remanded.

MANHATTAN CANNING CO. v. WILSON.

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

No. 2377.

1. SEAMEN (§§ 11, 21*)—INJURY IN SERVICE—SUIT FOR CURE AND WAGES.
It is not a defense, to a suit by a seaman to recover for the cost of medical attendance and care while disabled by an injury and wages during such time, that he had been guilty of a violation of the shipping articles, which would have warranted his discharge, where the master, although having knowledge of the fact, did not discharge him.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39-44, 92-110, 187; Dec. Dig. §§ 11, 21.*
Rights and liabilities of seamen as to medical treatment, see note to The Cuzco, 83 C. C. A. 186.]

2. SEAMEN (§ 18*)—WAGES—EXTRA WAGES FOR IMPROPER DISCHARGE—CONSTRUCTION OF STATUTE.
Rev. St. § 4527 (U. S. Comp. St. 1901, p. 3077), which provides that a seaman improperly discharged before commencement of the voyage, or before he has earned a month's wages, shall be entitled to one month's wages in addition to those earned, is not applicable to a case where a seaman was taken from the vessel to a hospital, because disabled, but was not discharged.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 76–82; Dec. Dig. § 18.*]

3. SEAMEN (§ 6*)—"COMMENCEMENT OF VOYAGE."
When a vessel with all her cargo aboard left her dock to be towed to a buoy in the bay for a temporary mooring, her voyage commenced.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 8–18; Dec. Dig. § 6.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in admiralty by J. W. Wilson against the Manhattan Canning Company. Decree for libelant, and respondent appeals. Affirmed.

For opinion below, see 210 Fed. 898.

Charles W. Dorr, Hiram E. Hadley, Clyde M. Hadley, and Frederick W. Dorr, all of Seattle, Wash., for appellant.

James Kiefer, of Seattle, Wash., for appellee.

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

GILBERT, Circuit Judge. The appellant employed the appellee in the capacity of cook on the brig Harriet G., at $80 a month, for a voyage from Seattle, Wash., to Port Heiden, Alaska, and return, not exceeding six months. The appellee signed shipping articles before a shipping commissioner on April 21, 1913. On April 23, 1913, the brig, having received all her cargo, left her dock in the port of Seattle, and was towed by a tug to a buoy in the bay. Immediately after she left the dock, the appellee fell from the companion way leading from the poop deck to the main deck, and sustained serious injuries.

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

At his request he was taken to a hospital and remained there until May 5, 1913. The decree of the court below awarded the appellee $30.60 for hospital services, $50 for medical attendance, and $440 for his wages from April 21, 1913, to the end of the voyage.

[1] The appellee on the day before the accident had brought aboard five gallons of whisky, and the appellant contends that thereby he violated the provision of the shipping articles that no grog was allowed, "and none to be brought on board by the crew," and that he was drunk at the time of the accident, and the appellant cites cases to the proposition that a seaman may be discharged for drunkenness in the home port before the voyage has begun. But the evidence shows that the master overlooked the appellee's breach of the shipping articles in bringing the liquor aboard, and promptly confiscated the whisky, and that the appellee was not discharged, although another cook was employed to take his place before the vessel left the harbor. Nor are we convinced that the court below and the commissioner erred in concluding upon the evidence that the appellee was not drunk, or appreciably under the influence of liquor, at the time of the accident.

[2] It is contended that the appellee's employment ceased before the commencement of the voyage, and that he was not entitled to wages for the voyage, or for wages for more than one month, and that the question of his wages is controlled by section 4527 of the Revised Statutes (U. S. Comp. St. 1901, p. 3077). That section provides:

"Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned."

Conceding that this statute, which was repealed as to vessels engaged in the coastwise trade by Act June 9, 1874, c. 260, 18 Stat. 64 (U. S. Comp. St. 1901, p. 3064), was as to seamen shipped before a shipping commissioner on such vessels revived by the amendment of August 19, 1890 (26 Stat. 320, c. 801) and the amendment of February 18, 1895 (28 Stat. 667, c. 97 [U. S. Comp. St. 1901, p. 3065]), it is not, in our opinion, applicable to the present case for the reason that the appellee was not discharged, and so far as the record shows he was guilty of no fault justifying discharge.

[3] Moreover, the accident occurred after the commencement of the voyage. The voyage commenced when the vessel, with her cargo aboard, left the dock on her way to the buoy. Carver's Carriage by Sea (5th Ed.) § 148; Bowen v. Hope Ins. Co., 20 Pick. (37 Mass.) 275, 32 Am. Dec. 213; Cockrane v. Fisher, 1 C. M. & R. 809; Sun. Mut. Ins. Co. v. Mississippi Valley Transp. Co. (C. C.) 17 Fed. 919. In Barker v. McAndrew, 18 C. B. & S. 759–772, Willes, J., said:

"The commencement of the voyage is the commencement to do that for which the shipowner is to be paid freight."

We do not say that an actual formal discharge would be necessary in order to entitle an owner to discharge his obligation to a seaman by paying him a month's wages, as provided for in section 4527. The conduct of the master or owner, or the existing circumstances, might be such as in law to discharge a seaman from his contract. But that is not the present case, and it is not alleged in the answer that the appellee was discharged. Through no gross negligence of his own, the appellee was injured while engaged in the performance of his duties, and after the voyage had commenced. The case comes within the rule that a vessel and her owners are liable in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wages at least as long as the voyage is continued. The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760; The New York, 204 Fed. 764, 123 C. C. A. 214; The Santa Clara (D. C.) 206 Fed. 179; The Nyack, 199 Fed. 383, 118 C. C. A. 67.

The appellee invokes the power of this court on the appeal to add to the decree a provision for the payment of his maintenance during the time of his disability. But we find nothing in the record to justify such an award. There is no proof that the appellee expended any sum or incurred a debt for maintenance, or that the hospital charges did not cover all costs of maintenance.

The decree is affirmed.

BEATSON COPPER CO. v. PEDRIN.

(Circuit Court of Appeals, Ninth Circuit. October 5, 1914. Rehearing Denied November 17, 1914.)

No. 2360.

1. APPEAL AND ERROR (§§ 272, 501*)—REVIEW—GIVING OR REFUSAL OF INSTRUCTIONS—EXCEPTIONS.

   The giving or refusal of instructions cannot be reviewed by an appellate court, unless exceptions thereto were taken in open court while the jury were at the bar, and such fact must be shown by the record.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611–1619, 2300–2305; Dec. Dig. §§ 272, 501.*]

2. MASTER AND SERVANT (§ 270*)—ACTION FOR INJURY TO SERVANT—EVIDENCE.

   In an action for an injury to a mine employé against the employer, evidence to show the rule or custom prevailing in such workings with respect to the inspection of walls after a shot, and the person whose duty it was to attend to the same, *held* competent.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913–927, 932; Dec. Dig. § 270.*]

3. MASTER AND SERVANT (§ 284*)—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

   Evidence in an action for injury to a mine employé *held* such as to make it proper to submit the case to the jury.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000–1090, 1092–1132; Dec. Dig. § 284.*]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

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

Action at law by John Pedrin against the Beatson Copper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Boryer, of Cordova, Alaska, and Myrick & Deering, of San Francisco, Cal., for plaintiff in error.

T. C. West, of San Francisco, Cal., and E. E. Ritchie, of Valdez, Alaska, for defendant in error.

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

ROSS, Circuit Judge. This action was brought by the defendant in error as plaintiff in the court below to recover damages for personal injuries sustained by him while working in a mine of the Beatson Copper Company through its alleged negligence, which alleged negligence was denied by the company, the plaintiff in error here, in addition to which it set up in its answer the defenses of assumption of risk and contributory negligence on the part of the plaintiff and negligence of his fellow servants. The trial resulted in a verdict for the plaintiff, the case being brought here by writ of error.

[1] The points mainly relied upon in argument by the counsel for the plaintiff in error relate to the giving and refusal to give certain instructions to the jury, which, upon reference to the record, we find we are precluded from considering, for the reason that the action of the court in the respects complained of was not seasonably excepted to; the record showing that the case was submitted to the jury on the 11th of November, 1913, and that the defendant's exceptions were not entered until November 14, 1913—the bill of exceptions reciting:

"It having been stipulated between the attorneys for plaintiff and defendant in the presence of the jury before it had retired, and in the presence of the court, that the plaintiff and defendant have until the 16th day of November, 1913, to make and take exceptions to instructions given and refused."

In the case of Arizona & N. M. Ry. Co. v. Clark, 207 Fed. 817, 125 C. C. A. 305, we said:

"There are various assignments of error in respect to giving and refusal to give certain instructions to the jury, which we are precluded from considering for the reason that exceptions thereto were not seasonably taken. The record shows that, after the jury had been instructed and retired in charge of the bailiffs, certain exceptions were taken by counsel for the respective parties, and the record shows that: 'Before the jury retired to consider of their verdict the court granted permission to the defendant to embody in its bill of exceptions, if it should tender one, its objections to the instructions of the court to the jury more at length and in detail.' That none of such exceptions can be here considered was distinctly decided by this court in the case of Western Union Tel. Co. v. Baker, 85 Fed. 690, 29 C. C. A. 392, and has been so held by many other federal courts. See the numerous cases cited in that last mentioned, and in Star Co. v. Madden, 188 Fed. 910, 110 C. C. A. 652, where is set out the rule laid down by the Supreme Court in Phelps v. Mayer, 15 How. 161, 14 L. Ed. 643, as follows: 'It has been repeatedly decided by this court that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster II, which provides for the proceeding by exception, requires, in explicit terms, that this should be done, and, if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error. It need not

be drawn out in form and signed before the jury retire; but it must be taken in open court, and must appear, by the certificate of the judge who authenticates it, to have been so taken. Nor is this a mere formal or technical provision. It was introduced and is adhered to for purposes of justice.' "

[2] In the present case the record shows that the plaintiff was an experienced miner and had been working at the place where the accident occurred about two weeks prior to its happening. The place was what is spoken of in the record as a "glory hole," and was from 14 to 15 feet wide, from 10 to 12 feet deep, and about 20 feet long. Working there were two drillers, who, after drilling and loading the holes, fired the shots, and the plaintiff and another mucker, whose duty it was to remove the broken rock and earth—when necessary breaking, or "bulldozing," as the operation is spoken of by witnesses, the larger pieces of rock in order to do so. This shift of four men was in charge of a shift boss named Green. On the trial one Gleason, a witness on behalf of the plaintiff, was asked this question:

"Now, where a shot is fired in the walls of a mine, particularly an open mine or a glory hole, is there any rule about making an inspection of the surrounding walls immediately afterwards?"

To which objection, interposed by the defendant, was overruled by the court, and its ruling also assigned as error; the answer of the witness being:

"The rule is that a man has got to bar down his ground to make it safe, not to have loose ground in the walls after a blast; that is, if a man is going to work under it."

And a like objection, ruling, and assignment were made in respect to this other question to the witness:

"Where work is being done under the direction of a foreman or shift boss, who looks after that? A. Why, the foreman or shift boss, who is in charge."

[3] We see no error in those rulings, nor any error in the ruling of the trial court in denying the motion made on behalf of the defendant upon the conclusion of the plaintiff's evidence, and also upon the conclusion of the entire evidence in the case, for a directed verdict in its favor. The evidence, we think, was such as to make the case a proper one for submission to the jury under appropriate instructions.

The judgment is affirmed.

UNITED STATES v. LI CHIONG.

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

No. 2317.

ALIENS (§ 32*)—IMMIGRATION—CHINESE—RIGHT TO ENTER—DECISION OF IMMIGRATION AUTHORITIES.

Since the collector of customs, in determining the right of a Chinese person to land, may act on his own information and discretion, and such action, however taken, is conclusive, subject to the right of appeal to the Secretary of the Treasury, the fact that the collector, in determining that

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

relator was not entitled to enter, failed to give to relator's certificate identifying him as a merchant, issued under Act May 6, 1882, c. 126, § 6, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 (U. S. Comp. St. 1901, p. 1307), the effect to which it was legally entitled, but, considering all the testimony, rejected the certificate as evidence of relator's right to land, did not entitle relator to his discharge on habeas corpus.

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

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

Appeal from the District Court of the United States for the Territory of Hawaii; Sanford B. Dole, Judge.

Application by Li Chiong for a writ of habeas corpus to obtain his discharge from custody of the immigration authorities, after having been denied his right to enter the United States on a merchant's certificate. From an order granting the writ, and directing that petitioner be allowed to enter, the United States appeals. Reversed and remanded.

The United States appeals from the judgment of the District Court of the Territory of Hawaii, discharging upon writ of habeas corpus the appellee, a Chinese alien, from the custody of the immigration authorities, who held him for the purpose of preventing him from entering the United States, under the Chinese Exclusion Act. The appellee presented to the immigration inspector at Honolulu a certificate, as provided by section 6 of the act of 1882, as amended by the act of 1884, issued by the Chinese consul general at Manila and viséed by the insular collector of customs at that port, certifying that the appellee was a merchant, and was interested in a business firm in Manila, and had pursued the occupation of merchant since 1904. The certificate was issued on October 9, 1911, and was viséed three days later. The appellee, upon receiving the certificate, left the Philippine Islands for China, and there resided some 18 months, after which he took passage for the United States. The immigration authorities denied his right to land, on the ground that it had been 1 year and 7 months since the certificate was issued, and he had not visited his business at Manila, except briefly, while his steamer was stopping at that port en route to the United States, and that he had not followed a mercantile pursuit since the date of the certificate, and that there was nothing to show that he would follow that pursuit if allowed to enter the United States.

The petition for the writ set forth these facts, and alleged that the hearing had before the immigration officers was not a full and fair hearing, but was only the semblance of a hearing, and that the appellee was denied and refused the right to have counsel and an interpreter during the examination, and that the certificate was not given the weight to which it was by law entitled, but that decision was rendered directly contrary to the certificate and to the evidence. The trial court upon the hearing ruled that the appellee was entitled to his discharge from custody upon the ground that the immigration officers had denied the legal validity of the certificate, which the statute declared should be prima facie evidence of the facts set forth therein, and the "sole evidence permissible on the part of the person so producing the same to establish the right of entry into the United States." The court said: "From this we find that all that the petitioner had to do was to produce his certificate. In fact, he should not have been permitted to do anything more than to exhibit his certificate, leaving it to the government to controvert and disprove the same. This has not been done, except as the government may have considered the petitioner's testimony to have controverted and disproved the certificate, and the facts therein stated, which cannot be said to have happened. The inspector in charge has, in the view of this court, mistaken the law of the case."

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

John W. Preston, U. S. Atty., and Earl H. Pier, Sp. Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

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

GILBERT, Circuit Judge (after stating the facts as above). The decision of the case on appeal is ruled by Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108. In that case the court quoted and adopted the language of the District Court in Re Lee Lung, 102 Fed. 132, 134, as follows:

"These cases establish the doctrine that the collector of customs, in determining the right of Chinese persons to land, may act upon his own information and discretion, and that such action, however taken, is conclusive of the matter, subject to the right of appeal to the Secretary of the Treasury; that his decision, if he decides not to hear testimony, or not to give effect to evidence which the laws of Congress have provided, shall be sufficient to establish the right to land in the first instance, or decides not to decide, is conclusive."

Answering the argument that the statute makes such a certificate evidence which the immigration officers have no power to disregard, the court said:

"But jurisdiction is given to the collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper."

Applying the doctrine of that case, there is no room to question the authority of the immigration officers to do as they did in this case, upon consideration of all the testimony, reject the evidence of the certificate notwithstanding that by an act of Congress it was made prima facie evidence of the right of the applicant to land in the United States, and to decide as they did, to deny controlling effect to evidence which the laws of Congress have provided should be but prima facie sufficient to establish the right to land.

It follows that the judgment of the court below must be reversed, and the cause remanded, with instructions to remand the appellee to the custody of the officers from whom he was taken.

LEE LEONG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1914. Rehearing Denied November 17, 1914.)

No. 2331.

1. HABEAS CORPUS (§ 54*)—PETITION—SUFFICIENCY—DEPORTATION OF CHINESE.

A petition by a Chinese person, who has been ordered deported, for a writ of habeas corpus, which alleges that petitioner was not given a fair hearing, but does not state wherein or in what respect such hearing was denied, is insufficient to sustain jurisdiction to issue the writ.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 51; Dec. Dig. § 54.*

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

2. ALIENS (§ 46*)—IMMIGRATION—EFFECT OF TERRITORIAL STATUTE.

Act Hawaii April 17, 1911, which authorizes the secretary of the territory, when satisfied that a person was born in the Hawaiian Islands, to issue to such person a certificate showing that fact, which shall be prima facie evidence thereof, cannot affect the laws of the United States in regard to the immigration of aliens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

Appeal from the District Court of the United States for the Territory of Hawaii; Chas. F. Clemons, Judge.

In the matter of the petition of Lee Leong for writ of habeas corpus. From an order denying the writ, petitioner appeals. Affirmed.

The appellant appeals from an order of deportation made by the District Court of the United States for the territory of Hawaii, upon a hearing on the return to a writ of habeas corpus. The petition for the writ alleged that the appellant was born in the territory of Hawaii January 21, 1888, of Chinese parents there residing; that about four years later he was taken by his parents to China, and there remained until February, 1913, when he left for Honolulu; that upon February 21, 1912, the secretary of the territory of Hawaii, after application, and upon due hearing as provided by law, issued a certificate certifying that the appellant was born in the Hawaiian Islands on or about January 21, 1888. The petition further alleged that the appellant was given but the semblance of a hearing before the immigration officers, to determine whether he should be allowed to land, and that said hearing was not a fair and bona fide hearing, but that the proceedings were conducted in an illegal and improper manner, and not in accordance with the acts of Congress. Upon the hearing, testimony of witnesses was taken, and the immigration officers thereupon denied the right of the appellant to land, and ordered him deported to China.

Andrews & Quarls, of Honolulu, Hawaii (George S. Curry, of Honolulu, Hawaii, and James A. Ballentine, of San Francisco, Cal., of counsel), for appellant.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] It is not specified in the petition for the writ wherein or in what respect the appellant was denied a fair and impartial hearing. The allega-

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

tions in that respect are not sufficient to sustain jurisdiction to issue the writ.

[2] But counsel for the appellant urge that the decision was contrary to law, in that the immigration officers denied to the certificate of birth that consideration which in law it was entitled to receive. The certificate was issued under an act of the Legislature of Hawaii approved April 17, 1911, which provides in substance that the secretary of the territory of Hawaii may, whenever satisfied that any person was born within the Hawaiian Islands, cause to be issued to such person a certificate showing that fact. It provides that the application shall be on sworn petition and accompanied by affidavits of witnesses, and that the secretary may examine under oath any applicant or persons cognizant of the facts regarding the application, and it further provides that any certificate so issued shall be prima facie evidence of the facts therein stated.

Two grounds may be suggested on which it should be held that there was no error in denying to the certificate a controlling effect on the hearing. In the first place, no act of the territory of Hawaii can avail to affect the laws of the United States in regard to the emigration of aliens. Williams v. United States, 137 U. S. 113, 11 Sup. Ct. 43, 34 L. Ed. 590. In the second place, assuming that the certificate of the secretary of the territory of Hawaii was, as the law declared it to be, prima facie evidence of the facts recited, there is in the record ample evidence to justify the immigration officers in ruling that the prima facie presumption was overcome. This was the conclusion of the court below, and we find no error therein. Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108.

The judgment is affirmed.

UNITED STATES v. TSURUKICHI NAKAO.

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

No. 2318.

ALIENS (§ 46*)—IMMIGRATION—RE-ENTRY OF DOMICILED ALIEN.

The provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 499), respecting the admission and deportation of an alien, apply to an alien who, having remained in this country for more than three years after first entry, and having gone abroad, although for a temporary purpose, with the intention of returning, again seeks admittance to the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. § 46.*]

Appeal from the District Court of the United States for the Territory of Hawaii; Sanford B. Dole, Judge.

In the matter of the application of Tsurukichi Nakao for writ of habeas corpus. From an order granting the writ, the United States appeals. Reversed.

The appellee, a subject of the Emperor of Japan, came to the Hawaiian Islands in November, 1892, and remained there until November, 1908, when he

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

returned to Japan, not intending to abandon or surrender his right to come again to Hawaii as a domiciled alien. He returned to Honolulu on May 23, 1913. The medical officers of the United States Public Health and Marine Hospital Service found that he was afflicted with trachoma. He was thereupon denied the right to land in the territory of Hawaii. The Board of Special Inquiry found that he was not a domiciled alien. He took an appeal from that decision to the Secretary of Labor. On the appeal the decision was affirmed. On a petition alleging that the Board of Special Inquiry committed an error of law, by reason of the fact that the evidence adduced before the Board affirmatively showed that the appellee was a domiciled alien, within the meaning of the laws of the United States, the court below issued a writ of habeas corpus, and upon the hearing on the return thereto ordered that the appellee be discharged from custody.

John W. Preston, U. S. Atty., and Earl H. Pier, Sp. Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

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

GILBERT, Circuit Judge (after stating the facts as above). The judgment of the court below must be reversed, on the authority of Lapina v. Williams, Commissioner of Immigration, 232 U. S. 78, 34 Sup. Ct. 196, 58 L. Ed. 515, holding that the provisions of the Immigration Act of 1907 respecting admission and deportation apply to an alien who, having remained in this country for more than three years after first entry, and having gone abroad for a temporary purpose, with the intention of returning again, seeks admittance to the United States.

The judgment is reversed, and the cause is remanded to the court below, with instruction to remand the appellee to the custody of the officers from whom he was taken.

UNITED STATES v. TSUNEZO KUSANO.

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

No. 2319.

Appeal from the District Court of the United States for the Territory of Hawaii; Sanford B. Dole, Judge.

In the matter of the application of Tsunezo Kusano for writ of habeas corpus. From an order granting the writ, the United States appeals. Reversed.

John W. Preston, U. S. Atty., of San Francisco, Cal., and Earl H. Pier, Sp. Asst. U. S. Atty., of San Francisco, Cal., for appellant.

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

GILBERT, Circuit Judge. The facts set forth in the petition for the writ of habeas corpus in this case are identical with those which were under consideration in United States v. Tsurukichi Nakao, 217 Fed. 49, which has just been decided by this court.

Upon the grounds stated in the opinion in that case, the judgment of the court below is reversed, and the cause remanded to the court below, with instructions to remand the appellee to the custody of the officers from whom he was taken.

JAMES v. CLEMENTS et al. (No. 2544.)

(Circuit Court of Appeals, Fifth Circuit. October 5, 1914.)

COURTS (§ 356*)—FEDERAL COURTS—REHEARING—DEATH OF JUDGE AFTER SUBMISSION OF CAUSE.

On the death of one of the judges of the Circuit Court of Appeals, after a cause has been argued and submitted, where the remaining judges are not fully agreed on the case, a rehearing will be granted that it may be submitted before a full bench.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*]

On petition for rehearing. Granted.

For former opinion, see 211 Fed. 972, 128 C. C. A. 470.

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

PER CURIAM. In the opinion and decision heretofore rendered in this case (211 Fed. 972, 128 C. C. A. 470), a majority of the judges held that the bill of exceptions found in the record was not sufficiently well taken to bring all the evidence properly before the court for consideration, and thereupon affirmed the judgment of the lower court without passing upon certain assignments of error to the rulings of the trial judge, refusing instructions to the jury affecting the merits of the case. On the application for rehearing and on consideration we concluded that our ruling rejecting the bill of exceptions was erroneous, and that we should re-examine and consider the case, giving full effect to said bill of exceptions, and thereon render the proper judgment without further briefs or argument.

Before reaching a final conclusion the death of Judge Shelby, who constituted a part of the court in the case, supervened, leaving only two judges to determine the matter, and they not fully concurring on certain points necessarily arising under the assignments of error.

Under these circumstances and that justice may be done, we feel compelled to grant the rehearing asked and order the case restored to the docket for reassignment and submission before a full bench.

And it is so ordered

AMERICAN SULPHITE PULP CO. v. ST. REGIS PAPER CO.

(District Court, N. D. New York. October 8, 1914.)

Nos. 7187, 7188, 7185, 7184, and 7180.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PULP DIGESTER.

The Russell reissue patent, No. 11,282 (original No. 445,235), for a pulp-digester, having a continuous lining or coat of acid-resisting cementitious material applied in a plastic condition to the interior of the outer shell, is valid, and is infringed by a structure in which the described continuous lining of cement is used, whether applied directly to the outer shell or separated therefrom by a lead lining, or by a course of brick, or by both.

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

In Equity. Separate suits by the American Sulphite Pulp Company against the St. Regis Paper Company, against the Union Bag & Paper Company, against the Newton Falls Paper Company, against the Malone Paper Company, and against the Carthage Sulphite Pulp Company. On final hearing. Decrees for complainant.

Suits in equity for an accounting and to recover damages for alleged infringement of United States letters patent No. 11,282, dated November 15, 1892, and granted to George F. Russell, assignor to the American Sulphite Pulp Company, complainant.

Frank T. Benner and Alex. P. Browne, both of Boston, Mass., for complainant.

Samuel R. Betts, of New York City, for defendants.

RAY, District Judge. The original patent, No. 445,235, was granted to George F. Russell January 27, 1891, on application filed October 18, 1890. The patent is stated to be for "improvements in pulp-digesters" and the claims read as follows:

"1. The improved pulp-digester herein described, having an outer shell, *A*, a continuous lining or coat, *B*, of cement, as described, applied to the interior of said shell, for the purpose set forth.

"2. The improved pulp-digester herein described, having an outer shell, *A*, a continuous lining or coat, *B*, of cement, substantially as described, applied to the interior of the said shell, and an interior lining of tiles, *C*, all substantially as set forth."

Claim 2 differs from claim 1, in that it adds the "interior lining of tiles." Both claims call for the following elements: (1) "Outer shell, *A*," which is described as "ordinarily constructed of metal, such as iron, steel, or brass, which is liable to be injuriously affected by the acid solution employed." It is *upon* the interior of *this shell* of the digester that Russell forms "a *continuous lining,* or coat, *B,* of acid-resisting material, applied in a plastic condition," which is the second element of both claims. The second claim has an added element, viz., an "interior lining of tiles." The patent says:

"Again, it has been customary to supplement the brick or tile linings heretofore in use with a lining of sheet lead interposed between the brick or tile lining and the digester shell. This feature may be entirely dispensed with when my improvement is adopted. I mean to be understood that the digester linings comprising a layer or coat of masonry or brick work laid in cement, to which I have just referred, have always been, so far as I know, supplemented by a lining of sheet lead interposed between the brick or tile lining and the digester shell."

The only possible invention in Russell or improvement over the prior art is the use of the "continuous lining or coat, *B,* of acid-resisting material applied in a plastic condition." The patent says:

"This lining or coat is of the nature of cement and may be composed of any material or mixture of materials which is acid-resisting and capable of being made plastic and adhesive to the shell of the digester and so compact as to prevent the acid solution from reaching the iron shell in consequence of the high steam pressure required in practice."

The prior art taught the use of a plastic acid-resisting lining for open vessels, but not used in cooking sulphite pulp; the iron or steel shell; a

lining of lead next the shell, which lining is acid-resisting; and also a supplemental lining next the lead, made of a layer of masonry or brick work laid in cement. It was said by the Circuit Court of Appeals, in effect, that it constituted invention to use a *continuous* lining or coat of acid-resisting cementitious material in a closed vessel when the contents are subjected to great pressure, even if such material under the pressure of the heat in an open vessel had proved effectual to prevent the acid contained in the cooking pulp from reaching the metal vessel. American Sulphite Pulp Co. v. De Grasse Paper Co., 157 Fed. 660, 662, 87 C. C. A. 260.

By this decision of the Circuit Court of Appeals this court is, of course, bound. It seems clear from the record that the one question here is whether or not the defendants use the cementitious lining of the patent in suit? In his brief defendants' counsel describes the structures used by these defendants as follows:

"There is no dispute as to defendants' structure, which is described in testimony of complainant's witness Connor (C. R., pp. 11–16). It is shown in the colored drawing submitted herewith, entitled 'Defendant's Structure Non-Antem Lining (All Five Cases).' The usual metal digester shell is lined next to its inside surface with a substantial lining of lead $^3/_{16}$ of an inch thick. This is a massive lining, one square foot of which weighs 12 pounds (see Defendant's Exhibit No. 12, Non-Antem Digester Lead Lining, a piece of the lead lining shown the court on argument, and filed). All witnesses admit that such a lead lining while remaining intact is a perfect protection to the shell against the acid, and complainant's expert witness Carmichael admits that in a digester of dimensions 15 feet by 42 feet the weight of such a lead lining $^3/_{16}$ of an inch thick would be about 26,000 pounds (C. R., p. 37). See, also, stipulation (C. R., p. 37) as to cost of lead and putting in, making it over $1,900 for a digester of that size, and that the lead in the digester of St. Regis Paper Company, defendant, 14x38 feet, weighed 19,606 pounds; the cost for lead and putting in being over $1,400. Emphasis is laid on this item of structure and this testimony, as showing that the lead lining is massive and expensive, a perfect protection while intact, covering the entire shell, and conforming to the Meurer patent, under which defendants are licensed and working.

"Next inside the lead lining above described was one inch of cement grout. The next layer was of vitrified brick laid edgewise, the brick being 2½ inches thick. The next internal layer was another inch of cement grout, and the next layer, called the 'pulp course,' coming next to the pulp, was of digester or vitrified brick 2½ inches thick. Note particularly that the first interior course of brick was laid up in cement gradually, and the grout was merely poured in between the brick and the lead lining of the shell, not compacted or pressed in in any way; also that the same method was followed in connection with the pulp course of brick, viz., the brick laid up gradually in cement, and the inch of grout between the two courses of brick poured in loose and not compacted. Particular attention is called to this as differing from the defendant's method of digester lining construction in the De Grasse Case, where a layer of brick 4 inches in thickness was built up inside the digester shell about 4 inches distant from the shell itself, and into that 4 inches of space was poured grout with brick inserted therein and pressed into the grout as a filler, for the purpose of lessening the amount of cement used."

In the Mitscherlich patent, No. 284,319, we had the outer shell of metal, a thin continuous sheet or lining of lead (acid proof), and then a lining of brick work laid in cement. Russell omits the lead lining and has not only brick-work lining, but a course of cement between the brick work and the shell. These defendants have (1) the metal shell;

(2) a lead lining; (3) a continuous lining of cement grout one inch thick; (4) a layer of vitrified brick laid edgewise in cement; (5) another continuous lining of cement one inch thick, and, lastly, coming next the pulp, a layer of brick laid in cement, 2½ inches thick. It is conceded on all hands that the cement between the bricks used in laying the brick will separate from the brick more or less, allowing the acid to pass through, and that frequent pointing is necessary. The brick used are acid proof. When we consider that the patentable feature of Russell is the continuous lining or course of acid-proof cement (and he made it a substitute, if desired, for the lead lining), I cannot see that infringement is defeated by using the lead lining and any number of courses of brick laid in cement, so long as defendants use these two continuous courses of acid-proof cement, and it is conceded that they are used.

In American Sulphite Pulp Co. v. De Grasse Paper Co., 151 Fed. 47, this court held that the Russell patent, in view of the prior art, did not disclose patentable invention in using the lining of acid-proof cement under the great pressure to which it is subjected in a pulp-digester, inasmuch as its acid-resisting power under a pressure of 212 degrees in an open vessel was well known; that the transfer of such a lining from an open to a closed vessel, where subjected to a much greater pressure, did not constitute invention; that it involved a mere experiment, which would have occurred to any one skilled in the art. This view, as stated, was overruled by the Circuit Court of Appeals.

The defendants claim that their digesters are made under the patent to Eugene Meurer, No. 514,374, dated February 6, 1894, applied for December 30, 1892. The patent in suit is dated November 15, 1892, on application (for reissue) filed June 24, 1892. The Meurer patent calls for, in combination with the outer shell of a pulp-digester, or similar vessel, of a lead lining fitted as a continuous sheet against the inner face of the shell and an inner lining of acid-proof blocks *fitted against* the lead lining. The specification says:

"The present invention seeks to provide the digester with a lead lining which shall be free from the difficulty mentioned; and to this end I propose to mold sheets of lead against the inner face of the shell of the digester and fuse the edges of these sheets together, so as to form one continuous sheet in intimate contact with the shell, and without the use of cement or of rivets for attaching such lining to the shell. This leaves the lead lining comparatively unaffected by the motions of contraction and expansion imparted to the metal shell by changes of temperature. An interior lining of acid-proof brick built up against the lead lining will operate to protect this latter lining from collapse whenever the digester is blown out."

The Meurer claim reads:

"The combination with the outer shell of a pulp-digester or similar vessel of a lead lining fitted as a continuous sheet against the inner face of the shell and an inner lining of acid-proof blocks fitted against the lead lining."

It will be noted that this patent makes no mention of a continuous lining or course of cement (of any thickness) between the lead lining and the "inner lining of acid-proof blocks fitted against the lead lining," unless it be included in or covered by the words "fitted against" the lead lining. But an inch of cement grout, be it of the consistency

of buttermilk, or much thicker, when poured in between the brick course and the lead lining, will soon harden into a stone-like formation. The grout will, of course, adhere to the lead and to the cement with which the bricks are laid and to the bricks themselves, and in this way only is the grout used to fit the bricks against the lead. When this Meurer patent was applied for the Russell patent had been issued 1½ months and the application for the reissue had been pending 6 months.

Assuming, as we must, in view of the decision of the Circuit Court of Appeals, that Russell was patentable because of his continuous course of cement lining, Meurer, in view of the prior art, would have been rejected, had he included in his claim the continuous lining of grout, cement, or allowed, perhaps, as an improvement, inasmuch as he combined with the shell (old), the lead lining (old), the brick lining (old), the cement lining, which was old, also, when he (Meurer) applied. Meurer has his lead lining fitted as a continuous sheet by fusing the edges of the several sheets of lead together. Mitscherlich covered the interior surface of the shell with a thin layer of sheet lead, which, says the patent,

"is applied at ordinary temperature to the iron walls by a cement composed of common tar and pitch. This cement is heated and the layer of lead placed thereon by rubbing it smoothly and carefully down."

It is useless to speculate on what the Patent Office would have done in the event stated. The defendants admit:

"All these cases are defended by the Non-Antem Sulphite Digester Company, a New York corporation, and all the structures proceeded against are practically identical, and the digester linings therein have been put in by said Non-Antem Sulphite Digester Company under license under letters patent to Eugene Meurer, No. 514,374, dated February 6, 1894 (Defendant's Exhibit No. 4, printed D. R., pp. 65, 66). The single claim of this Meurer patent reads as follows: 'The combination with the outer shell of a pulp digester or similar vessel of a lead lining fitted as a continuous sheet against the inner face of the shell and an inner lining of acid-proof blocks fitted against the lead lining.' It is an improvement on lead-lined digesters which have sheet lead linings, and also on those of the Mitscherlich lead-lined construction. It is *not* an improvement on the Russell patent lining, which contains no lead."

The defendants do use the continuous lining of cement, two of them divided by a lining of brick laid in mortar. The Circuit Court of Appeals has said that this cement lining was new, disclosed patentable invention, and that Russell was the first inventor and has a valid patent therefor. Omit these two continuous courses of cement one inch in thickness, and defendants would not infringe. In using them, or either of them, defendants do infringe. I see no escape from this conclusion. I have gone over all the decisions and all of the prior art presented. In the Pierredon French patent of 1883, No. 154,589, in a digester we have the metal shell with a lining of square blocks of stone or brick—

"set *into* a mortar of Portland cement which fills the joints up to about half their height; the rest of the joint is filled afterwards by melted lead in such a manner that there is in contact with the acid liquor only acid-resisting materials."

It did not occur to Pierredon to use a continuous Portland cement lining. It does appear that it was well known in 1883 that Portland cement was acid proof, and it seems strange that no one prior to Russell used a double lining of acid-proof brick with another of Portland cement interposed, or a continuous lining of cement alone, or a lining of cement supplemented by a layer of brick next the cement; but, so far as appears, it was not done, and it seems from the decision of the Circuit Court of Appeals in the De Grasse Case, supra, that the Russell patent is not limited to a continuous Portland cement lining placed next to the metal shell; that is, the words of the claims, "applied to the interior of the said shell," are not a limitation on the claims such as to permit the use by others of the Russell cement lining when not "applied *to* the shell," but placed on its interior and separated therefrom by a wall of brick laid in cement. In the De Grasse Paper Company Case the Circuit Court of Appeals quoted and *approved* the holding in the First Circuit that these claims should be construed as including all cementitious mixtures which ordinary skilled practical chemists might be expected to find as answering the requirements of the described conditions, or such as would naturally develop in the growth of the art *without invention*. In our opinion the patent is valid, and protection should be commensurate with the invention stated in the claims and the discovery and process described in the specification; and in our view the patent covers homogeneous structural linings composed of adhesive acid-resisting materials in the nature of cement which possesses the required qualities described in the specification.

In the De Grasse Paper Co. Case the Circuit Court of Appeals (157 Fed. 664, 87 C. C. A. 260) describes the structure of the defendant in that case held to infringe. True, there the course of brick was a few inches from the shell, and the grout was poured into the space between the shell and the wall of brick. But can it be material that the continuous lining of cement is removed from the interior wall of the shell by the interposed wall or lining of brick, when we consider that the shell is protected from the action of the acid in the cooking pulp just as effectually and just as surely, whether the continuous cementitious lining be placed next the shell or removed therefrom by an interposed course of brick laid in cement mortar? It is the continuous cement lining which prevents the acid from reaching the shell, and I do not see that a change in its location by interposing a course of brick, or a course of lead, or both, avoids infringement. The continuous lining or coat of cement in the broad sense is "applied to" the interior of the shell. I think a person's overcoat is applied to his body, even if his other clothing is interposed. It is immaterial that the Meurer structure is patented, so long as it includes as one of the elements of its lining the Russell invention or lining which was prior to Meurer. Meurer had no right to use it if it is a patentable and a patented invention, even in combination. The defendants urge that their structures have a lead lining, as well as the cement lining. But how is this important? If they use the prior art structure and add thereto the Russell lining, they infringe. If they use some other structure, and

add or include the Russell lining they infringe. And it matters not how meritorious the structure of the Meurer patent. His structure made in accordance with his patent infringes, if it includes the Russell cementitious continuous lining. In the De Grasse Paper Company Case the Circuit Court of Appeals said:

"The fact that the interior of this lining [referring to the defendant's lining in that case] is occupied by bricks set edgewise to reinforce the structure or cheapen its cost we regard as immaterial. The defendant certainly has the patented lining; what else it has is not important."

It is urged that the first claim of the Russell patent—that is, the lining made according to the first claim—is destitute of utility. If a continuous cement lining is acid proof, it will protect the metal shell of the digester so long as it remains unbroken; that is, free from cracks. There can be little doubt that the friction of cooking pulp will and does wear this cement lining when used without the brick support. It must be that there is more or less vibration to the digester when in use, and that this, with the intense heat and pressure when in use, coupled with the fact that the expansion and contraction of the shell and that of the lining are not of the same degree, are not uniform, may cause, and do cause, at times, cracks in the cement lining. The evidence shows that a lead lining of itself will not remain in place; that on account of heat, vibration, nonuniformity of expansion, etc., it will spring or bend away from the steel shell, buckle more or less, and crack. The lead linings require support, and so it may be of the cement linings. If these supporting walls are made acid proof, so much the better.

These suits were commenced but a short time prior to the expiration of the Russell patent, which shortly thereafter expired. No injunctive relief can be granted, but this fact does not warrant a dismissal. No motion has been made to transfer the causes to the law side, and they were brought to a final hearing. I find nothing in the records that will justify this court in holding the Russell patent invalid, or in holding that it must be so narrowly construed as to make the use of a continuous cement lining, supplemented by brick walls or supports laid in cement, one of which walls is next the shell, a noninfringing structure.

The complainant is entitled to a decree for an accounting in each case with one-fifth costs in each.

AMERICAN SULPHITE PULP CO. v. HINCKLEY FIBRE CO.

(District Court, N. D. New York. October 8, 1914.)

1. PATENTS (§ 283*)—SUIT IN EQUITY FOR INFRINGEMENT—INJUNCTION—EXPIRATION OF PATENT.

An injunction will not be granted against the use of a machine or structure which infringed a patent during its life after the patent has expired, even though it was made and put in use by the owner prior to such expiration.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. § 283.*]

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

2. PATENTS (§ 178*)—EQUIVALENTS—LATER INVENTIONS.
A patent does not cover equivalents not known at the time and which were the result of later invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. § 178.*]

3. PATENTS (§ 328*)—INFRINGEMENT—PULP DIGESTER.
The Russell reissue patent, No. 11,282 (original No. 445,235), for a pulp-digester having an acid-resisting lining of cement or material in the nature of cement, *held* not infringed by a digester lined with the composition of the Panzl patent, No. 644,367, which is not a cement, and was unknown to Russell, or to any one, until its invention subsequent to his patent.

In Equity. Suit by the American Sulphite Pulp Company against the Hinckley Fibre Company. On final hearing. Decree for defendant.

Suit in equity for an injunction to restrain defendant from using certain structures (pulp-digesters) alleged to infringe United States letters patent No. 11,282, dated November 15, 1892, and granted to George F. Russell, assignor to the complainant, and for an accounting. The patent expired shortly prior to the commencement of this action, but the structures alleged to infringe were erected prior to the expiration of the patent.

Frank T. Benner and Alex. P. Browne, both of Boston, Mass., for complainant.

Henry Schreiter, of New York City, for defendant.

RAY, District Judge. In the case of American Sulphite Pulp Company v. St. Regis Paper Company (and four other cases) 217 Fed. 51, this court herewith hands down its opinion, following the Circuit Court of Appeals in this (the Second) circuit, holding the Russell patent valid and infringed and awarding an accounting. Reference is made to that opinion for a description of the patent and structure covered thereby.

This case presents the additional features: (1) That an injunction is demanded against the use of the infringing device alleged to infringe, notwithstanding the expiration of the patent prior to final hearing; and (2) the cementitious material used to form the cement lining of the digesters is itself patented by United States letters patent to one Panzl, No. 644,367, issued February 27, 1900, and under which defendant is licensed. This patent is for a "composition of material for lining vessels used for storing or boiling corrosive liquids," and is antedated by the Russell patent some eight years.

[1] I do not think an injunction should issue against the use of a machine or structure which infringed a patent during its life after the patent has expired, even if made and put in use prior to the expiration of the patent. By issuing a patent the United States secures to the patentee and his sole licensee the exclusive right to make, use, and vend the patented thing during the life of the patent and to exclude others from making, using, or selling the same. The right to an injunction to restrain others from making, using, and vending is equitable in its nature and may or may not be availed of. It is usually accompanied by

an accounting and an award of damages and profits as compensation for the infringement. The court does not and cannot take possession of or destroy the infringing article. The patentee or licensee may content himself with a suit at law to recover money damages. When the patent expires, the discovery or invention becomes common property; that is, all persons have the right to make, use, and sell articles made in accordance therewith. The discovery or invention is then given to the public. An infringing article belongs to the maker, or the one for whom it was made, and its use or sale after the patent has expired is not prohibited by any statute. After the patent has expired, the use of the thing, or its sale, offends against no law, or the rights of any person. The sole right or monopoly of the patentee in the invention, and of his licensee, has then ceased to exist, except to recover damages and profits for past infringement, and he has no ownership or interest in the article which during the life of the patent infringed, or in its use. Its use after the patent expires infringes no right of any person. Its use damages no person. He can recover damages or profits up to the time of the expiration of the patent, and no longer. If an injunction is granted during the life of the patent, and is obeyed, no damages or profits accrue after the issue of such injunction, and the recovery of damages, etc., is measured in time by the period between the commencement of the infringement and the issue of the injunction.

The law imposes no penalty for the infringement, aside from a recovery of damages and profits. The law does not condemn the infringing article or deprive the infringer of his property therein. It simply says he shall not use or sell it during the life of the patent. He may not use it while the patent is in force, but may when the sole rights of the patentee under the patent cease to exist. If it should appear that an infringer had on hand a quantity of infringing articles made prior to the expiration of the patent, and which he might sell thereafter, and that the owner of the patent could not recover adequate damages in a suit at law, possibly equity would restrain their sale on the ground of want of adequate remedy at law. But if he could have full and complete or adequate remedy at law, why and by what authority could he in effect substantially destroy the property right of the owner in said articles—compel him to reduce them to mere junk. I think the well-considered authorities are against the contention of the complainant. In Westinghouse v. Carpenter (C. C.) 43 Fed. 894, on a motion, during the pendency of an action for infringement, to dissolve the injunction granted pendente lite, Mr. Justice Miller of the Supreme Court of the United States, said:

"We are of the opinion that the motion ought to be granted. The attorney for the plaintiff practically concedes, from the decisions of the courts on that subject, that the motion to dissolve the injunction should be granted on account of the expiration of the patent, which expired a few days ago with the expiration of a prior English patent. He, however, insists that the injunction should be continued as to the use and sale of those articles which were manufactured and sold while the patent was alive, the manufacture of which was an infringement of this patent; that he should have the benefit of having forbidden them while the patent was in existence; and that the injunction should be continued as to the selling or using of those manufactures, notwithstanding the expiration of the patent. We are of the opinion that

with the expiration of his patent the plaintiff's right to forbid anybody to make, sell, or use the articles to which this invention refers expires. His monopoly is continued for 17 years by law, or whatever period the law allows his patent to run. That monopoly is against the making, selling, or using of such articles. He has the benefit of that monopoly, and has had that benefit with regard to those articles in which he now asks to be further protected. He may recover the damages he has sustained, in this suit, which is still pending in this court. He may recover for the damages which were inflicted before the injunction was brought. And he still asks that the court shall enjoin the sale and use of those articles for which he expects to get damages. Speaking for myself, and also for Judge Love, I do not believe that is the true doctrine on this subject."

See Miller v. Schwarner (C. C.) 130 Fed. 561, 562, 563. Amongst other things the court there says:

"The conclusion reached is that under section 4921 (U. S. Comp. St. 1901, p. 3395) equity will entertain suits for infringement of patents only when the bill shows that a part of the complainant's remedy is an injunction, and, if the patent has expired, the injunction will not be granted, and the case should not be retained in equity for an accounting and damages only."

Section 4921, R. S. U. S., says:

"Sec. 4921. The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable. * * *"

The use by the owner thereof of a digester lined with a structure which infringes a valid patent after such patent has expired is not the violation of any right secured by patent. If an infringer during the life of the patent makes a quantity of articles for sale generally as an article of merchandise, in an action in equity brought during the life of the patent the infringing maker may be enjoined from using or selling same. He is liable in damages if he makes, sells, or uses. But when the patent expires such injunction will usually be vacated, even during the pendency of the action. Use and sale thereafter of such article is not "the violation of any right secured by patent." An injunction continued thereafter must be based on some equitable ground other than the mere infringement of the patent. If the infringer, in anticipation of the expiration of the patent, is making large quantities of the infringing article, or a large number of the infringing structures, the remedy of the owner of the patent is to enjoin such making, and he may recover damages, if any, for such making and for the wrong thereafter consummated by selling same, in my judgment. If it could be shown that a threatened sale thereafter of such infringing articles (made before the expiration of the patent) could not be adequately compensated for in damages, there may be a right to an injunction to restrain such sale even after the expiration of the patent.

But such is not this case. Here the owner of the patent on an accounting will recover all the damages and for all the loss of profits he is entitled to and up to the expiration of the patent, but he cannot enjoin the owner and user of the digester from using it now after the patent has expired and compel him to tear out and replace his lining or lose his digester. In certain reported cases a combination patent had been infringed, and the combination broken up, dismantled, and re-

stored after the patent expired. This restoration was not an infringement. Johnson v. Brooklyn & C. R. Co. (C. C.) 37 Fed. 147, 2 L. R. A. 489. It was there held by Lacombe, C. J.:

"An injunction against the infringement of a patent for an invention consisting of a combination of known appliances is not violated by using the combination after the expiration of the patent."

There was a time when our patent laws gave as a remedy for the violation of our patent laws by infringement an action at law upon the case for damages and also forfeited the infringing article. Act April 10, 1790, c. 7, 1 Stat. 109. This was changed by the Act Feb. 21, 1793, c. 11, 1 Stat. 318. This was changed by Act April 17, 1800, c. 25, 2 Stat. 37. In Act July 8, 1870, c. 230, 16 Stat. 198, our patent laws were revised and consolidated. By Act Feb. 15, 1819, c. 19, 3 Stat. 481, jurisdiction in equity was conferred. Since 1793 there has been no power to confiscate or forfeit the infringing article. Damages may be trebled, however. See Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975. There is no existing power in the courts to forfeit or destroy the infringing article (I do not refer to our copyright laws), either directly or indirectly, during the life of the patent, and clearly it cannot in effect be destroyed or rendered useless to the owner thereafter by enjoining its use thereafter. In W. W. Sly Mfg. Co. v. Central Iron Works, 201 Fed. 683, 120 C. C. A. 264 (C. C. A., 7th Circuit), the court said:

"Equity jurisdiction in patent cases depends on the right to an injunction at the time suit is commenced. If it appears, therefore, that no facts then existed supporting the right to an injunction, and that the patent sued on will expire before any final decree can be made, the remedy at law is entirely adequate, and the equity suit, since it can avail nothing, must be dismissed, because there is no equity jurisdiction."

[2, 3] The next proposition is that there is no infringement by defendant in making and using in a digester a continuous, homogeneous, cementitious digester lining made of a cementitious mixture discovered or invented and patented after the issue of the patent to Russell. In relation to this Russell patent, the Circuit Court of Appeals, First Circuit, in 80 Fed. 395, 25 C. C. A. 500, said:

"Some of these compositions stood the test better, made better linings, and did the work more successfully, than others; and as to such as he used, such as he described, and such as those skilled in the art could understand, he is entitled to protection. At this time he had advanced the art in the sulphite process line, not in a slight degree, but in a high degree. He was an inventor, not in a narrow sense, but in a broad sense, and as such was entitled to a patent covering his homogeneous structural lining, his adaptation of the forces in matter which he had discovered, and the cementitious compositions in the nature of cement with which he had successfully experimented, and which he had adapted to the required conditions and use, as well as those which he described with sufficient clearness to be understood by persons skilled in the art, and such as would naturally develop, in the growth of the art, *without invention.* We look at this as an invention of an improved structure, with a devised and described process for creating it and putting it in operation in connection with a new and pressing emergency, and not for any particular ingredient or composition. It is true, the ingredients must possess certain described characteristics; but after all the ingredients are only a part of the invention involved in the construction of the inner part of the shell, and, in order to answer the prescribed purpose, they must possess cer-

tain described plastic, adhesive, cohesive, and acid-resisting characteristics. * * * Thus, it would seem to be clear that the inventor intended to cover *acid-resisting cementitious mixtures*, which could be applied in plastic condition, which would adhere to the outer shell, become a part of it, and so compactly form and harden under the pressure and process of application which he described as to prevent the acid from reaching the iron; and while describing commercial cement as a convenient material, and while he expressed a preference for Portland cement made plastic with water, as to other cementitious mixtures he left the acid-resisting and adhesive qualities to be ascertained by the practical chemist, or other 'person skilled in the art or science to which it' appertained. * * * And we think, upon principle and authority, that Russell, having discovered that cement material generally possesses the qualities required for his conception of a *homogeneous* digester lining, should not be limited to such materials in the class of cementitious mixtures as he had chemically and commercially isolated as individuals, but that his claims and description should be construed as including all cementitious mixtures which ordinary skilled practical chemists might be expected to find as answering the requirements of the described conditions, or such as would naturally develop in the growth of the art without invention. In our opinion, the patent is valid, and protection should be commensurate with the invention stated in the claims and the discovery and process described in the specification; and *in our view the patent covers homogeneous structural linings composed of adhesive, acid-resisting materials in the nature of cement, which possess* the required qualities described in the specification."

The Circuit Court of Appeals in this circuit, in the De Grasse Paper Co. Case, 157 Fed. at page 663, 87 C. C. A. at page 263, quote and approve that clause of the opinion in the Howland Falls Pulp Co. Case, above quoted from, which contains this statement:

"Should be construed as including all cementitious mixtures which ordinary skilled, practical chemists might be expected to find as answering the requirements of the described conditions, or such as would naturally develop in the growth of the art *without invention*."

In view of this holding by the Circuit Court of Appeals in both the First and the Second Circuits, it seems to me that this patented cement or cementitious composition is not within the conception or invention of Russell. If the patented cementitious composition used by defendant is not within the claims of the patent, how can defendant's continuous and homogeneous cement lining made thereof be within the claims, or how can such a lining made of such materials be an infringement? The idea or conception of a continuous and homogeneous lining of lead and also one of acid-proof brick laid in cement, or cement mortar, was old when Russell came into the field. The Circuit Court of Appeals in the First Circuit expressly held that the patent does not cover or include a digester with a lining made of a material or mixture *other than cement or of the nature of cement,* and hence that any one is at liberty to line a digester with a continuous homogeneous lining of other material. The court said:

"The inventor, in his second claim, which is substantially the same as the first, refers to his 'continuous lining or coat, *B*, of cement, substantially as described.' Now, what is the effect of this? Doubtless it is to limit his claim to a pulp digester with a lining of cement. It does not cover structures with linings of other material, *but limits itself to a cement-lined structure* with an outer shell, described in the specification as a metal shell, and a lining described in the specification as of *cement mixtures*. In other words, he *limits his patent to a cement-lined structure, and, by express and necessary*

reference to his specification and diagram, describes the material, the process, and the operative means for constructing the improved pulp digester as a whole; and, while his reference to the specification may not enlarge or extend the invention claimed, it may and must be examined in order to understand the manner of making and constructing the shell and compounding the cement materials necessary to reduce his conception to use."

The patented cementitious material of which defendant's lining is made is a *new* and useful composition, a *new* and useful discovery, and discloses invention. The cementitious composition of defendant's digester lining is not one "which ordinary skilled practical chemists might be expected to find as answering the requirements of the described conditions." If it is, then it is not a patentable composition. Nor is it "such [a cementitious mixture] as would naturally develop in the growth of the art *without invention.*" Defendant's mixture has been developed in the growth of the art, but it was the result or product of invention. Hence the patent therefor.

The Panzl composition was made the subject of judicial inquiry and determination in Panzl v. Battle Island Paper Co., 138 Fed. 48, 52, 70 C. C. A. 474, 478, where this Russell patent was also considered. The Circuit Court of Appeals, per Townsend, C. J., said:

"The appellant lays much stress on the opinion of the Court of Appeals for the First Circuit in sustaining reissue patent No. 11,282, granted to George F. Russell in 1892, for a pulp-digester. American Sulphite Pulp Co. v. Howland Falls Pulp Co., 80 Fed. 395, 25 C. C. A. 500. But this patent merely covers a cement lining, applied, when soft, to a pulp-digester, and which, when it hardened, mechanically protected the shell of the digester by its cohesive, adhesive, and acid-resisting powers from the corroding influence of the solution. There is no suggestion either in the patent or in the opinion of the court that this patent is for any acid-proof chemical combination, and the claims merely cover 'a continuous lining or coat of cement.' This patent, therefore, has no bearing upon the issues herein."

This excludes the Panzl lining as not being within the claims of the Russell patent. It is entirely different from anything mentioned, referred to, or described by Russell. The claim of the Panzl patent (claim 3) held valid reads as follows:

"A composition of matter for acid proof lining of boilers, tanks and similar vessels, composed of 26 per cent. of hydraulic cement, 12 per cent. chamotte, 21 per cent. of quartz, and of a suitable quantity of diluted silicate of soda."

In a broad sense this composition of matter, used in defendant's digesters, is more or less cementitious, as it contains 26 per cent. of hydraulic cement; but in the opinion of this court this is not sufficient as used in the defendant's structures to bring them within the claim of the Russell patent, which had, when this action was commenced, a layer of composition material about one inch in thickness composed, it is conceded in complainant's brief, of that described in the Panzl patent and above set forth. Then came a course of common red brick 2¼ inches thick laid up edgewise, then another layer of the above-named Panzl composition about one inch thick, and next thereto a course of acid-proof digester tile laid up in the same composition. I do not think this a continuous lining or coat *of cement*, substantially as described in the claims of the Russell patent. This Panzl composition was not described in the patent at all, substantially or otherwise.

The patent gave no information as to such a composition or lining, and no one could have made a lining composed thereof as it was unknown. All this appears from the extracts from the decisions of the Circuit Court of Appeals in both the First and Second Circuits hereinbefore set forth. Panzl v. Battle Island Paper Co., supra, is reported below in 132 Fed. 607. The Panzl composition was used for lining a pulp digester, and the Russell lining was urged as an anticipation; but this contention, we have seen, was held untenable both at circuit and in the Circuit Court of Appeals. In Gill v. Wells, 89 U. S. (22 Wall.) 1, 22 L. Ed. 699, it is held:

"Whether one device is or is not an equivalent for another is usually a question of fact, and often becomes a difficult issue to decide. * * * Questions of the kind usually arise in comparing the machine of the defendant in a suit for infringement with that of the plaintiff, and the rule is that if the defendant omits entirely one of the ingredients of the plaintiff's combination, without substituting any other, he does not infringe, and if he substitutes another in the place of the one omitted, which *is new* or which performs a substantially different function, or even if it is old, but was not known at the date of the plaintiff's patent as a proper substitute for the omitted ingredient, he does not infringe. * * * Alterations * * * in a combination, which are merely formal, do not constitute a defense to the charge of infringement, as the inventor of a new and useful combination of old ingredients is as much entitled to claim equivalents as any other class of inventors; but they cannot suppress subsequent improvements which are substantially different from their inventions, whether the new improvement consists in a new combination of the same ingredients, or of some newly discovered ingredient, or even of some old ingredient performing some new function not known at the date of the letters patent as a proper substitute for the ingredient withdrawn."

In Imhaeuser v. Buerk, 101 U. S. 647, 25 L. Ed. 945, it is held:

"A party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer, if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use."

In Wicke v. Ostrum, 103 U. S. 461, 26 L. Ed. 409, it is held:

An inventor is entitled "to the benefit of all the mechanical equivalents of his several elements, known at the time of his invention, if used in the same combination."

In Rowell v. Lindsey, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906, it is held:

"A combination may be infringed when some of the elements are employed, and for the others mechanical equivalents are used which were known to be such at the time when the patent was granted."

In Magic v. Economy, 97 Fed. 87, 38 C. C. A. 56, it was held: "A patent covers only known equivalents." See, also, Brown v. Stilwell, 57 Fed. 731, 741, 6 C. C. A. 528.

In Dryfoos v. Wiese, 124 U. S. 32, 8 Sup. Ct. 354, 31 L. Ed. 362, it is held:

"An inventor is not entitled, when his invention covers a particular machine for performing a given function, to claim equivalency in every machine which performs the same function."

The fact that both the Russell lining and the Panzl lining perform the same function does not establish equivalency. If these cases are good law, then defendant here does not infringe, as it has left out the continuous cement lining of Russell, and substituted, if its structures have a cementitious lining, *not an improved cement* but *a new composition,* and one which protects the lining in a better way—a composition *entirely unknown* to any one when the Russell patent was applied for and granted, and not an equivalent for the Russell lining or cement, which complainant is entitled to claim or assert is an equivalent.

Following the decisions in this and the First circuits, this court holds that, while the Russell patent is valid for what it covers and claims, the defendant does not infringe.

There is nothing in Herman v. Youngstown, etc., 191 Fed. 579, 112 C. C. A. 185, or in Murray v. Detroit Wire Spring Co., 206 Fed. 465, 124 C. C. A. 371, in conflict with or contrary to these views. In view of the cement lining of the Russell patent and what his patent covers or claims, and the lining of defendant's digesters made of *a new* and patented composition not known to Russell or covered by his patent, or its claims, not an improved cement, the defendants do not use the Russell cement lining, or an equivalent therefor, and hence do not infringe. If defendants were using an *improved* cement lining (like or similar to Russell's), an improvement on Russell, and the Panzl patent were for such improvement, then there would be a use of Russell's cement, or of Russell's cement lining, with an improvement, and in such case the Panzl patent would be no protection against infringement. The Panzl patented composition of which defendant's lining is made being wholly a *new discovery, a new mixture or composition,* not known to Russell, or to any one, at the time his patent was granted, and not an improvement, there is no substitution of an equivalent, and all the other elements being old, and such as the defendants had and have the right to use in combination, they did not infringe, as they did not use the Russell combination changed in form by the substitution of an equivalent for the cement lining. When a person has a valid patent for a combination composed of entirely old elements, but combined in a new way to produce a new and a useful result, or an improved result, or a patent for a new combination of old elements and one new element, he infringes who substitutes for one of such elements something which is an equivalent, operating in substantially the same way and producing substantially the same result; but he does not infringe such combination who substitutes for one of such elements a new and an unknown element—that is, one not known when the patent was granted, but discovered, composed, and compounded or constructed and patented thereafter—and the fact that it is patented is evidence that the composition is new. In this case, the proof shows, and the court finds, and it has been judicially determined in prior cases, that the Panzl composition is *entirely new,* not an improved composition. It has been held that Russell's composition did not and does not anticipate Panzl for the reason stated, not for the reason that Panzl is an improvement on Russell. It is not

contended that he who substitutes for one of the elements in a patented combination an equivalent known to be such at the time of the granting of the patent, but subsequently improved and a patent granted for the improvement, does not infringe. Here, as repeatedly stated, the Panzl patented composition is not an improvement, but an entirely new and a useful composition, and, Judge Townsend said, a chemical composition.

There will be a decree dismissing the bill, with costs.

ASBESTOS SHINGLE, SLATE & SHEATHING CO. et al. v. ROCK FIBRE MFG. CO.

(District Court, N. D. Illinois, E. D. September 23, 1914.)

No. 227.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF MAKING ARTIFICIAL STONE PLATES.

The Hatschek reissue patent, No. 12,594 (original No. 769,078), for a process of producing artificial stone plates or slabs by mixing asbestos fibers and hydraulic cement in a large bulk of water until the cement is reduced to a colloidal condition, and a pulp is formed which can be worked in a cardboard machine, then pressing the same and allowing the material to set or harden, and also for the product of such process, construed, and *held* valid and to cover a broad and meritorious invention. Also *held* infringed.

2. PATENTS (§ 165*)—CONSTRUCTION.

The claims of a patent should, if possible, always be given a scope that is commensurate with the real invention; the purpose of the patent law being to protect the inventor in his actual contribution to the useful arts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

In Equity. Suit by the Asbestos Shingle, Slate & Sheathing Company and Ludwig Hatschek against the Rock Fibre Manufacturing Company. On final hearing. Decree for complainants.

Edwards, Sager & Wooster, of New York City, and Heidman & Street, of Chicago, Ill., for plaintiffs.

Lothrop & Johnson, of St. Paul, Minn., for defendant.

BAKER, Circuit Judge (orally). [1] The bill is the usual one for the infringement of a patent. Complainant sues as the owner of the Hatschek patent, reissue No. 12,594, dated January 15, 1907, for the manufacture of imitation stone plates or slabs. The seven claims of the patent and the parts of the specifications which sufficiently disclose the invention read as follows:

"This invention relates to the production of artificial stone plates from hydraulic cement, e. g., Portland cement, Roman cement, hydraulic lime, or like cements which set with and under water. These stone plates have a great resisting power against atmospheric influences, and especially against water and change of temperature, and also against frost and mechanical blows.

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

"The invention is carried into effect by mixing intimately fibrous material—such as asbestos, for example—in the presence of a great bulk of water with hydraulic cement, and by working up this watery mixture to plates of the desired thickness in the manner of the process of making cardboard. The cardboard-like plates obtained are then pressed under high pressure, whereby they may, if desired, be caused to receive any predetermined shape or appearance. After some time the product obtained becomes as hard as stone by the setting of the cement. The mixing of the materials to be employed and the working up of the mixture are preferably carried out in the usual machines for making cardboard or paper, whereby the quantity of water may be even larger than in making paper or cardboard.

"The process is based, as I have found, on the fact that in working a hydraulic cement with a large bulk of water and with the addition of fibrous material—e. g., asbestos—the setting or hardening power of the cement is not destroyed, and the hydraulic cement added slowly to the well-divided asbestos is intimately associated with the latter, so that no separation takes place, even if the weight of the cement amounts to four to nine times the weight of the asbestos. The water is and remains clear even after a long time. The hydraulic cement of the mixture seems to swell up, taking the appearance of a more or less colloidal, starch, or paste-like mass. These facts explain, perhaps, that such a mixture can undergo the working on the cardboard-machine without setting or hardening and without separation of the cement during this process, and that in consequence of the layer-like structure of the plates obtained they can be subjected to a very high pressure without causing any particles of the mass to be pressed out laterally. Only clear water escapes, and the plates retain their original dimensions apart from the thickness reduced by the pressure.

"In carrying out the process I disintegrate the desired quantity of fibrous material—e. g., asbestos—in the presence of water in such a way that the single fibers of the material are separated from each other. Then the hydraulic binding medium—e. g., hydraulic cement—is added and well intermingled and worked with large quantities of water, whereupon the mixture is immediately worked up in the usual way of making cardboard by means of cardboard-machines. In such a way it is possible to produce an article which contains 80 to 90 per cent. of cement with 20 to 10 per cent. of fibrous material.

"The carrying out of the process may be explained in a more detailed manner by the following example with the use of a well-known cardboard-machine: Into a mixing and disintegrating machine of about three to five cubic meters capacity 50 kilograms of asbestos are introduced. The asbestos, which is preferably previously disintegrated in an edge-mill, is subjected to the treatment in the said mixing-machine until it is sufficiently broken up; that is, until the fibers are as much as possible separated. Then the required proportion of the hydraulic cement—e. g., about two hundred and fifty kilograms—is gradually added, the entire bulk being mixed thoroughly. The mixture thus prepared is then caused to flow immediately into a vessel with a stirring device, the capacity of which vessel is preferably five to six times greater than that of the mixing-machine. The mixture is diluted with five to six times the quantity of water, the mixture being continuously agitated or stirred. From this vessel the thin paste is immediately conveyed to the cardboard-making machine in order to obtain a cardboard-like product. In the cardboard-making machine the thin paste containing the asbestos and hydraulic cement is thus conveyed to or upon an endless rotating porous fabric, through which the water of the thin paste or pulp flows off, leaving on the upper side the hydraulic cement intermixed with asbestos as a thin layer, which layer is conducted to a rotating roller, on which this layer is taken off from the said endless fabric and rolled up thereon. Thus a sheet is formed composed of several superimposed layers, the number of which layers corresponds to the number of rotations of said roller. As soon as the product thus obtained on the roller has reached the desired thickness the same is cut to the desired size and pressed to the desired shape, whereupon it is caused to set in suitable rooms."

"1. The process of rendering hydraulic cement colloidal, which consists in

working the same with a large bulk of water, that is to say, with sufficient water to allow the particles of cement to be kept in motion and thus segregated, whereby the setting or hardening power of the cement is not destroyed, and, in the presence of other material, as well-divided asbestos, it is intimately associated with the latter, so that even if the weight of the cement be greater than that of the material with which it is mixed, no separation takes place, substantially as set forth.

"2. The herein-described process of producing artificial-stone plates, consisting of first mixing fibrous material and hydraulic cement in the presence of a great bulk of water, then forming therefrom a series of thin layers of the mixed cement and fibrous material superposed on each other until the required thickness is secured, then pressing the same and allowing the material to set or harden.

"3. The herein-described process of producing artificial-stone plates, consisting of first mixing asbestos fibers and hydraulic cement in the presence of a great bulk of water, then forming therefrom a series of thin layers of the mixed cement and asbestos superposed on each other until the required thickness is secured, then pressing the same and allowing the material to set or harden, substantially as set forth.

"4. The herein-described process of producing artificial-stone plates, consisting in mixing fibrous material and hydraulic cement in a bulk of water sufficient to render the cement colloidal, then forming therefrom a series of thin layers of the mixed cement and fibrous material superposed on each other until the required thickness is secured, then pressing the same and allowing the material to set or harden.

"5. The herein-described process of producing artificial plates, consisting of first mixing fibrous material and hydraulic cement in the presence of a great bulk of water, to render the cement colloidal, then forming therefrom a series of thin layers of the mixed cement and fibrous material superposed on each other until the required thickness is secured, then pressing the same and allowing the material to set or harden.

"6. An artificial-stone product consisting of a major proportion of hydraulic cement and a minor proportion of fibrous material, the product being in layers and elastic, non-brittle and penetrable to nails, that is, capable of being nailed similar to paper building-board or wood, incombustible and water and frost resistant, of hardness, strength and durability, and having a certain quality of toughness which enables it to resist strains and shocks which would shatter ordinary brittle material, such as slate, and the product being finally, easily cut and sawed into shape and capable of being presented thin enough to serve as a substitute for wooden shingle and slate tile, etc., substantially as described.

"7. A product of the invention hereinbefore set forth, being a composition containing hydraulic cement which has been rendered colloidal."

The defenses are that claims 1 and 6 are invalid, and claims 2, 3, 4, 5, and 7 are not infringed.

I do not deem it necessary to refer particularly to the prior patents that have been introduced in evidence. They have been pretty thoroughly reviewed by Judge Hand in the case of this complainant (Asbestos Shingle & Sheathing Co. v. H. W. Johns-Manville Co. [C. C.] 184 Fed. 620; Id. [C. C.] 189 Fed. 608); and in the instant case no stronger presentation of the prior paper art has been made. The testimony which has been given orally leads me to find that prior to Hatschek's time no similar pulp-like product had ever been produced which is capable of being turned by paper-making processes into imitation stone plates or slabs. From this evidence I find that chemists had known more or less familiarly that cement might be converted into a colloidal or partially colloidal condition. So far as this fact had been established, it stood only as a laboratory fact. Hatschek was the first who ever brought it into the realm of the useful arts. And therefore

Hatschek is entitled to be ranked as a true inventor, just as in the Tesla Polyphase Motor Case (C. C.) 97 Fed. 588, the patent was sustained because Tesla was the first to bring into the useful arts the laboratory-known electrical principle of splitting and retarding phases. As to the ordinary processes in which grouting was used, or in which a thin mixture of cement might be thrown by a plasterer on a stucco house, I find as a fact that the cement particles had not advanced toward a colloidal condition to that degree which made it possible for any one to use it as pulp in the paper-making process. The testimony in this case establishes that through the Hatschek process practically a true colloidal condition is reached, because Dr. Sadtler in his experiments found that the cement after undergoing the Hatschek process would absorb dyes with as much readiness practically as would gelatine, thus tending to establish, by actual demonstration, that a true colloidal condition had been attained. There is no evidence in this record that otherwise than by the Hatschek process had cement particles ever been brought into a condition where they would absorb dyes as does gelatine.

Claim 1 of this patent I deem to be the most important. It covers the process of producing what may be called a pulp, which then is in a condition to be utilized by paper-making processes. The process covered by claim 1 is not merely for the general old process of mixing up cement with water, either with or without natural stone material, but it is for the process of working the cement in a large bulk of water, meaning thereby a larger quantity of water than had been used in prior practices in which cement had been employed, and working it in this large bulk of water in the presence of finely divided asbestos, divided so finely that each fiber is in the water separate from the other fibers, and carrying on a sufficiently prolonged agitation of the cement and the asbestos fibers in this large bulk of water until the particles of the cement have changed from their initial crystalline physical character to an amorphous condition in which the particles partake of a colloidal nature. This particular Hatschek process of rendering cement colloidal is aided by the presence of the asbestos fibers, these fibers assisting in separating and keeping separate the particles of cement, and helping to produce the final condition of having all the particles colloidal by taking up each particle of the cement as it is brought to a thoroughly colloidal condition.

While in the prior art undoubtedly a start was made toward what is known in this record as a colloidal condition, I regard Hatschek's process as not merely carrying forward a prior art. He accomplished something more than a change in degree. He brought about an absolutely new result. In this respect the present case seems to me quite similar to the Asperin Case decided by the Court of Appeals of this Circuit, in Kuehmsted v. Farbenfabriken of Elberfield Co., 179 Fed. 701, 103 C. C. A. 243. In that case, in one sense all the chemist Hoffman did was to make progress in the degree of purifying a product which was already known, but the purification was carried to the point where a deleterious substance was converted into a highly valuable medicinal product. So here the partial change toward colloidal condition that may occur in grouting and other prior uses of cement had never pro-

gressed to the point, and no one had thought that it might be carried to the point, where the hydraulic cement could be used as the binding material in holding fiber, so that the new mass could be worked like pulp upon paper-making machines.

Claim 7 covers the composition of the invention described in process claim 1, and is infringed by any product in which hydraulic cement has been brought into the colloidal state described in the patent, namely, a colloidal state brought about by working the cement with a large bulk of water, and in the presence of and association with asbestos or equivalent fibrous material.

Claim 6, in my judgment, is not to be stricken down as a mere duplication of claim 7. It certainly is not a duplication of claim 7 in words, and in substance it strikes me as being a narrower product claim than claim 7. Claim 7, as I have already indicated, covers in my judgment any product in which the pulp mixture of the Hatschek invention is used in any kind of paper-making process in producing artificial stone plates of slabs. Claim 6, however, is only for the product which results from the use of this pulp-like material upon the usual cardboard machine. This is indicated by the recital in claim 6 that the product is in layers, and this expression I attribute, by reason of the specification, to the operation of the cardboard machine.

There is virtually no contention that process claim 1 and product claims 6 and 7, as above construed, are not infringed.

This leaves claims 2, 3, 4, and 5. For purposes of this case these claims may be considered as essentially the same. No particular attack upon their validity has been made, the reliance of the defendant being upon the assertion of noninfringement. Each one of these claims defines a process consisting of first producing the pulp mixture, then forming from the pulp mixture a series of thin layers superimposed upon each other, and "then pressing the same and allowing the material to set or harden." In describing the process the inventor in the fourth above quoted paragraph of the specification requires that after the pulp mixture is prepared it shall be "worked up in the usual way of making cardboard by means of cardboard machines." At this point in the specification the inventor made no reference to any subsequent and independent pressure; no pressure beyond that exerted by the cardboard machine itself. In the second paragraph the inventor describes the same process for producing the pulp mixture and then working it up into plates according to the process for making cardboard, and then proceeds: "The cardboard-like plates obtained are then pressed under high pressure, whereby they may, if desired, be caused to receive any predetermined shape or appearance." From this expression it might be contended that the inventor had in mind that in every instance and for all purposes additional and independent pressure should be applied. And in the last above quoted paragraph the inventor, after describing the formation of the sheet, says:

"As soon as the product thus obtained on the roller has reached the desired thickness the same is cut to the desired size and pressed to the desired shape, whereupon it is caused to set in suitable rooms."

From this last expression it might be urged that, in his specifications at least, the inventor contemplated no additional and independent pressure unless it was desired to give the product some particular shape by means of pressure, such as corrugation and the like.

Taking the whole of the specification in connection with the unquestioned description of the actual method of manufacture pursued under the direction of the inventor himself, I have no difficulty in arriving at the conclusion that the inventor intended that there should be additional and independent pressure if that was necessary to produce a given form; that independent and additional pressure should be applied if it was desired that the product should have very unusual resisting strength, due to a higher degree of compactness than would be obtained through the pressure of the cardboard machine, and that he intended that in every instance there should be the degree of pressure that was suitable to the purpose to which the product was to be applied. In interior work the product does not need to have so great a consistency, so high a specific gravity, so dense a texture; and the requisite degree of pressure is supplied by the cardboard machine itself.

In the cardboard machine used by the defendant there are only the means of pressure that are present in all of the cardboard machines of the prior art. Machines used by the complainant and the defendant are substantially alike. But the pressure in the machine as it had been developed and as it stood for paper-making purposes was a pressure, according to the testimony produced orally before me, which had the end in view of expressing from the paper pulp the water as far as possible, in order that the paper or the cardboard might be handled more quickly commercially; in order that in many classes of cardboard and millboard there might be saving in freight. The pressure means that were put on paper-making machines were not put there to carry out the purposes for which Hatschek had pressure in mind.

[2] Pressure in Hatschek's process stands for the compacting of the materials in such a way that the effect of the pressure persists beyond the release of the pressure means. The Hatschek material, unlike the paper pulp, does not spring back at all on account of resiliency, for it has none. Pressure upon the Hatschek pulp leaves its permanent results, and compacts the product so it is held in the given density while the cement sets and hardens. While this is sufficiently plain to me from the evidence as to what has actually been accomplished, it remains true that the patentee may not hold an alleged infringer except in accordance with the terms of his claims. And it sometimes unfortunately happens that an invention, very clearly and accurately disclosed and described in the specification, is lost to a greater or less degree by reason of the ineptitude of the inventor's solicitor in framing the claims. But always claims should be given, if possible, a scope that is commensurate with the real invention. The object of the patent law is to protect the inventor, not in some paper ideal, but in his actual contribution to the useful arts. And here the contribution is of the highest order. This is not an improvement in an art, it is the foundation of a new art. No process of this kind, no manufacture like the complain-

ant's, was known prior to Hatschek's time, and it is now known only by reason of Hatschek's genius and his disclosure to the world of the result of his labors. And so while I realize that a strictly literal reading of claims 2, 3, 4, and 5 might lead to an enlargement of this defendant from the charge of infringement, yet I believe that, when the nature of this invention is borne in mind, when it is further remembered that although a process claim is a description of the step by step means by which a particular result is achieved, yet it is possible for two steps to be taken concurrently instead of their always being required to go successively, the pressure specified in claims 2, 3, 4, and 5 should be held to include not only that pressure which is given to the Hatschek pulp independently and subsequently to its treatment upon the accumulator roll, but that, inasmuch as for many practical purposes no pressure is needed beyond the pressure that is exerted by the rolls of the machine, the pressure mentioned in these claims 2, 3, 4, and 5 likewise covers the pressure that is exerted by the pressure means of the cardboard machine. This is true in spite of the fact that no new pressure means are added to those present in the old paper-making art, because the old means of pressure were not used to bring about the necessary new kind of pressure, the pressure having a result upon this Hatschek pulp which the pressure of the cardboard-making machines never wrought upon the paper pulp.

Therefore I think that the complainant has not departed from claims 2, 3, 4, and 5 by proportioning the pressure to the desired density of the product, and that the defendant by abstaining from the extra pressure which is most desirable for some forms of the product has not escaped infringement of a single one of the claims of the patent. The defendant has appropriated the new and wonderful discovery that this stone thing, this hydraulic cement, could be used as paper pulp, and has appropriated the benefits that come from using the Hatschek pulp. And it would be a case of sticking in the bark, of adhering to the letter at the expense of the spirit of our patent laws, to permit the defendant to appropriate the fruits of an invention that is broad and meritorious and that lies at the foundation of an absolutely new industry.

A decree for the complainant will be entered in accordance with the prayer of the bill.

CONNER v. STUMPP & WALTERS CO.

(District Court, S. D. New York. June 20, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—POULTRY FEEDER AND EXERCISER.

The Whitten patent, No. 513,747, and the Conner patent, No. 886,580, each for a poultry feeder and exerciser, and capable of conjoint use in the same machine, both disclose invention and are valid; also *held* infringed.

In Equity. Suit by William M. Conner against the Stumpp & Walters Company. On final hearing. Decree for complainant.

---

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

Seymour, Seymour & Megrath, of New York City (John S. Seymour, of New York City, of counsel), for complainant.

E. W. Marshall, of New York City, for defendant.

MAYER, District Judge. The complainant is the owner, by assignment dated January 4, 1908, and recorded January 11, 1910, of the Whitten patent, No. 513,747, granted January 30, 1894, and of the Conner patent, dated May 5, 1908, for an improvement on the Whitten invention, both inventions being used jointly by complainant in the same machine. The inventions under consideration relate to poultry feeders and exercisers. This art has grown important and practical, and in its development is but another illustration of the improvement constantly making in many directions. It is recognized that poultry, when housed, do not get the necessary exercise if their feed is obtained without effort, and that feed, if carelessly scattered, constitutes quite an item of waste in an industry where the figuring is close. For many years inventors have devoted their thought to devising useful and economical machines for feeding live stock;[1] but so far as this record discloses, one Xevers (letters patent No. 701,121, May 27, 1902), was the first to think of constructing a combined feeder and exerciser for poultry. The ideal result sought to be attained in this art was a machine so constructed as to assure economy in the use of poultry feed, automatic operation of the machine by the action of the poultry, and protection against rain, mice, and birds.

I have not discovered anything in the record which shows that the Xevers was ever a commercial article and an examination of the letters patent will show that in the Xevers the feed is not protected from rain, mice, and birds, and that there are different means for feeding from those employed in the Whitten and in the Conner. The Barnes patent (No. 838,161) is substantially on the same principle as the Xevers and has substantially the same defects.

The Whitten patent, with the exception of a fugitive instance, seems not to have been put into practical use, although it contains some highly valuable ideas. I am satisfied that Conner was working independently on the problem when he learned of the Whitten patent, and purchased it solely for the reason stated by him, namely, to protect what he regarded as an invention on his part. The so-called Conner machine seems to possess the characteristics claimed for it. Its operation is simple. The grain is placed in the hopper and when the chicken perches on or strikes its body against the prong or roost, the grain comes through in an amount limited by the movement of the chicken. The grain is protected from the elements and from animals. The chicken must earn its feed and thus get exercise, and waste is prevented because

[1] Note.—See patent to Pope, No. 65,004, May 21, 1867, for a hog feeder; patent to Daniels, No. 110,015, December 13, 1870, for a horse feeder; patent to Stamberger, No. 137,390, April 1, 1873, for a machine for salting cattle; patent to Winterscheid, No. 177,778, May 23, 1876, on a machine for salting cattle; patent to Babcock, No. 369,155, August 30, 1887, for a machine for salting cattle; patent to Magoon, No. 484,442, October 18, 1892, on machine for horse feeding; patent to Frese, No. 656,453, August 21, 1900, for a salt feeder.

the machine does not require human regulation, but operates automatically and practically to the extent desired by the poultry. The machine may be made in different sizes to meet the varying ages of the chickens, and is capable of easy shipment. So far as the record discloses, and as the experiments in the court room demonstrated, the machine seems to be without a mechanical defect, and was undoubtedly the first practical device which met the various requirements of this art above referred to.

Conner displayed his machine at the New York Poultry Show, during the Christmas holidays of 1908–1909, and sold some at that time. He has not done a large business in these machines since then, but there is nothing to show that his limited business has been due to any defect in his machine.

The defendant is a business house in the city of New York which has been selling the alleged infringing device of the Norwich Automatic Feeder Company, of Norwich, Conn.

Testimony was adduced by the defendant to show ability to sell the alleged infringing device as against the Conner but, as the defendant's witness declined to state its business arrangements, it may be that the defendant had a more favorable contract with the Norwich Company than with complainant, and it may also be that the "bait bar" of the Norwich machine seems more attractive and useful to the purchasing public than the roost or prongs of the Conner. The Norwich may also appear to be a more finished piece of workmanship than the Conner. All of these considerations, however, may be disregarded in determining the validity of the Whitten and Conner patents and the question as to whether the Norwich infringes.

The claims of the Whitten patent sued on are Nos. 1 and 2 as follows:

"1. In a poultry feeder, the combination of (1) a supply hopper, (2) a rotary upright or standard having roosts thereon, (3) a deflector on the upper portion of said upright or standard, and (4) a feed disk upon said upright and within the hopper, substantially as described.

"2. In a poultry feeder, the combination of (1) a rotary upright or standard, (2) a hopper, and (3) a feed disk conneeted to the upper end of said upright or standard and coacting with the hopper, said upright or standard having impelling means thereon, substantially as described."

The defects of Whitten are that the roosts cannot be raised or lowered from the ground to accommodate the requirements of condition and size of fowl, and the adjustment of the disk is such that feed would be wasted however the disk is adjusted from the bottom of the hopper. The Whitten also has an adjustable feed for the poultry keeper from day to day, which it is fair to assume would waste feed and such an adjusting device would be a defect.

The question as to the Conner patent is whether it was anticipated by Whitten or shows invention over Whitten. The claims sued on are Nos. 1, 7, and 16 as follows:

"1. A feeder and exerciser for poultry comprising (1) a feed hopper, (2) a feed disk, and (3) a rod for rotating the disk, having means whereby the rod may be rotated by the poultry thereon and said rod being vertically adjustable in the disk."

"7. A feeder and exerciser for poultry comprising (1) a feed hopper having a central opening and a series of openings surrounding the central opening, (2) a feed disk having a sleeve depending into the central opening and radial ribs on its under side; and (3) a rod for rotating the feed disk, operable by the poultry."

"16. A feeder and exerciser for poultry comprising (1) a feed hopper having an annular series of openings, (2) a feed disk arranged on the bottom of the hopper and having radial ribs on its under side for feeding material through said openings, and (3) means operated by the poultry for rotating the disk."

Conner provides a series of feed holes, while Whitten has but one feed hole divided into parts, and the disk of Conner has been so constructed with relation to the holes, and the means for agitating the disk, that these elements, with the others in the combination, have brought about automatic operation without human regulation, the only duty of the chicken keeper being to fill the hopper from time to time as necessity requires. Even though what Conner did may seem slight from a mechanical standpoint, nevertheless, he accomplished a new result and produced, so far as this record discloses, for the first time, a practical chicken feeder and exerciser, simple in operation, which accomplished all of the purposes sought to be attained in a machine of this kind in this art.

It remains only to consider whether the Norwich has infringed. As I gather the contention of defendant, the basic difference claimed to distinguish these machines is that the Norwich operates by gravity and is the descendant of old devices referred to supra, while gravity does not play any part in the Conner machine, but the result is there attained by the construction and operation of the feed disk. The defendant insists that it employs an "agitator," and that complainant employs a "feed disk," and that these are different instrumentalities.

The Norwich machine may be described in the phraseology of the claim of the Enos patent, No. 952,793, March 22, 1910 (owned by the Norwich Company, and the application for which was filed March 20, 1909, after Conner's exhibit at the New York Poultry Show) as follows:

"A poultry feeder comprising a hopper having a relatively small opening at its base, a cap having circularly arranged openings for closing said opening, a cut-off slide for said circularly arranged openings, a perforated disk mounted in said cap and spaced from its bottom, a rotatable element depending from said disk and rigidly attached thereto, a bait on said element, and pins depending from said disk and arranged in concentric series with said circularly arranged openings."

Whitten—Norwich. It is urged that the Norwich lacks the last three elements of claim 1 of the Whitten combination. It seems to me, however: (a) That the depending rod of Norwich is the equivalent of the rotary upright or standard of Whitten; (b) that the deflector in the Norwich is the equivalent of Whitten's; and that (c) the "agitating" disk in Norwich is the equivalent of the feed disk of Whitten.

Claim 2 of Whitten speaks of the coaction of the feed disk with the hopper, and defendant contends that such coaction is lacking in defendant's device. In this, I think, defendant is in error, but, in any event,

the relation between the "agitator" and the hopper is such that too fine a distinction should not be drawn to negative equivalency.

Conner—Norwich. Both feed by gravity aided by intermittent movement of the feed mechanism. Gravity may play a more important part in the Norwich than in the Conner, but degree is unimportant. The Norwich has a hopper, holes in the bottom, a disk over the holes carried on an upright rod adjustable in the disk, with means on the lower end to give the push or jerk of the poultry on the ground below. The Conner has radial ribs on the under side of the disk, while the Norwich has pins depending from the disk—ribs and pins performing in their respective relations the same function and accomplishing the same result. The Norwich has a shut-off which may close or partly close the holes in the bottom of the hopper or leave them open, but except as interfered with in the Norwich by a valve, the operation of both machines is substantially the same.

I agree with complainant that his structural adjustment of the disk to the holes in the bottom of the hopper, so that it will feed all kinds and sizes of grain without readjustment, and will not feed when the machine is at rest, and will feed by natural motions of the chickens on the ground below without waste, and without mechanical defect in construction or in operation, by mechanical means not found in any other patent except Whitten, is still a marked improvement on Whitten. I conclude, therefore, that the Whitten and Conner patents are valid, and that the claims here in issue are infringed.

The Whitten patent having expired, complainant may have a decree for an injunction as to the Conner, with the usual accounting for infringement of both Whitten and Conner, with costs.

Settle decree on five days' notice.

LUTEN v. SHARP et al.

(District Court, D. Kansas, Second Division. April 7, 1914.)

No. 1356.

PATENTS (§ 328*)—INFRINGEMENT—CONCRETE BRIDGE.

The Luten patent, No. 853,203, for a concrete bridge, consisting of a floor with walls at each side and reinforcing members embodied transversely of the floor and extending upward into the walls, construed, and *held* not infringed.

In Equity. Suit by Daniel B. Luten against Walter Sharp and others. On final hearing. Decree for defendants.

See, also, 200 Fed. 151.

Russel T. McFall, of Indianapolis, Ind., and Joseph G. Cary, of Wichita, Kan., for complainant.

S. A. Smith and Joseph T. Lafferty, both of Winfield, Kan., for defendants.

POLLOCK, District Judge. This suit was brought by complainant, charging defendants with infringement of his rights under letters pat-

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

ent by him owned, numbered 830,483, 852,970, 853,183, 853,203, 853,-204, 979,776, 989,272, 999,663, and 933,771, in the building of a county bridge across a stream called Grouse creek at a place known as Darst ford, in Cowley county, this state, and for an accounting of profits made. The bill of complaint, after setting forth said patents and certain adjudications thereon, charges infringement in the most general language, as follows:

"And your orator further shows to your honors, on information and belief, that the defendants herein, well knowing the premises and the rights and privileges secured unto your orator, and continuing to injure your orator and deprive him of the profits, benefits, and advantages which might and would otherwise accrue to him from the said letters patent Nos. 830,483, 852,970, 853,183, 853,203, 853,204, 979,776, 989,272, 999,663, and 933,771, and from the use of the inventions set forth therein, since the issuance thereof and the acquirement of the title thereto by your orator, within six years last past, and before the commencement of this suit, have, without license and authority, against the will of your orator, and in violation of your orator's rights, and in infringements of the aforesaid letters patent Nos. 830,483, 852,970, 853,183, 853,203, 853,204, 979,776, 989,272, 999,663, and 933,771, at Cowley county, in the district of Kansas, knowingly and willfully constructed and sold, or caused to be constructed, used, and sold, a bridge or structure comprising one 40-foot and one 20-foot span over Grouse creek, at what is known as Darst ford, in section 13, township 33, range 6, in said Cowley county, by the practice of and in accordance with and containing the improvements and inventions described and claimed in said letters patent Nos. 830,483, 852,970, 853,183, 853,-203, 853,204, 979,776, 989,272, 999,663, and 933,771, or material or essential parts thereof, all as recited in the claims thereof, but to what extent the defendants have made use of said inventions or improvements described and claimed in said letters patent Nos. 830,483, 852,970, 853,183, 853,203, 853,204, 979,776, 989,272, 999,663, and 933,771, your orator does not know, and prays a discovery thereof."

To this bill defendants first demurred on the specific ground the averments of the bill as to infringement were insufficient. This demurrer was overruled. Defendants then answered, admitting the building of the structure complained of, denying infringement of any rights granted to complainant by virtue of his letters patent as set forth in the complaint, but, on the contrary, asserting said bridge was constructed in accordance with rights granted to defendant Sharp by letters patent No. 885,386.

On issue so joined proofs were taken in open court and the case submitted for final decision and decree. It is thus seen defendants raise no issue with complainant as to the validity or ownership of the nine different letters patent set forth and relied upon in the bill of complaint. On the contrary, complainant raises no issue as to the validity or ownership of defendant Sharp's letters patent. In this condition of the pleadings the court would be left to grope in the dark among the many claims of the letters patent involved to determine the question of infringement charged against defendant, were it not that in the statement of the respective claims of the parties at the trial the solicitor for complainant waived any contention as to the infringement of many of complainant's patents entirely, and limited the inquiry in the following manner. After reading claim No. 1 of defendant's patent, it was stated:

"Now that to my mind suggests that the chief controversy here will be between Mr. Sharp's patent and our patent No. 853,203. Now, I just want to state in a word my theory of the law, and that is this: Mr. Luten's application antedates Mr. Sharp's application. Mr. Luten's patent antedates Mr. Sharp's patent. Mr. Luten's claim is for this reinforcement across the roadway and up into the parapets, binding the whole structure together, including the side walls. Now, we are not making an attack on Mr. Sharp's patent or its validity, or its novelty and its validity. * * * The fact is that his patent is a combination patent as the claims read, and one of the elements, to my mind an important element, is the one claim of our patent No. 853,203; that is, the reinforcement transverse of the roadway. Now, as we understand the law, the Supreme Court has decided it several times, if we have a patent on this device of reinforcing across the roadway and up into the parapet, and Mr. Sharp subsequently procures a patent for a combination which includes, as it reads in part, 'suitably supported abutments, parapets, and intermediate beams connecting the same, and a floor between the said abutments and the said parapets and upon the said beams, and a wire network imbedded in the said floor and extending upwardly through the said parapets,' his combination patent may be entirely valid, but he cannot use the elements which he has taken from us without infringing, any more than we can take his entire combination, using our own device, without infringing his. It is just the old question of the interlacing or interlapping."

Assuming, therefore, the entire controversy between the parties to be that stated by solicitor for complainant, as above, and further conceding the settled law to be as therein stated, concerning which there can be no serious controversy, as will be found from a consideration of the authorities (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; Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713; Ries v. Barth Mfg. Co., 136 Fed. 850, 69 C. C. A. 528; Columbia Wire Co. v. Kokomo Steel & Wire Co., 143 Fed. 116, 74 C. C. A. 310), and many other cases which might be cited, and further conceding, as do the parties, the validity of all letters patent involved in this controversy, the single question presented for decision is this: Was the bridge in controversy constructed in accordance with the claims of the Sharp patent? If so, as the application for the Luten letters patent No. 853,203, and the patent itself, antedates the application for the Sharp patent, and the patent itself, does the method actually employed in the construction of the bridge by defendants, although found to fall within the claims of the Sharp patent, infringe upon the prior rights granted to complainant under his patent?

This involves a consideration of: (1) The actual method employed in the construction of the bridge; (2) whether such method falls within the protection afforded by the claims of the Sharp patent; (3) if so, does such method of construction infringe upon rights secured to complainant by the claims of his prior patent No. 853,203, as above contended?

From a reading and consideration of the proofs, the actual method employed in the construction of the bridge in question is found to have been as follows:

The structure is composed of two spans, one of 20 and the other 40 feet in length. The weight of the structure and superimposed burden is borne by girders, with one end resting on the bank abutments, the other on a center pier, placed about 4 feet apart. These girders are

tied with transverse rods, and the space between them filled with concrete set in forms giving the underside the shape of an arch, with a mesh of hog wire imbedded in the concrete floor of the bridge near its surface and extending up into the concrete walls on the sides of the bridge. The concrete floor of the bridge is thereafter covered with earth by others than defendants.

The claims of the Sharp patent read as follows:

"1. A bridge structure comprising in combination a plurality of coalesced elements composed of concrete or analogous material, and including suitably supported abutments, parapets, and intermediate beams connecting the same, and a floor between the said abutments and the said parapets and upon the said beams, and a wire network imbedded in the said floor and extending upwardly through the said parapets.

"2. A bridge structure comprising, in combination, a plurality of coherent elements composed of concrete or analogous material and including suitably supported abutments, beams connecting the same, and a floor between the said abutments, upon the said beams, and rods imbedded in the said beams and projecting through the said abutments into the said floor."

A comparison of the method employed in the construction of the bridge with the claims of the Sharp patent, more especially claim No. 1, makes it entirely clear the method actually employed in the construction falls well within the claims of the patent. Does this method of construction, thus employed, although within the claims of the Sharp patent, infringe upon prior rights granted to complainant under his patent No. 853,203, more especially claims numbered 8 and 9, principally relied upon by complainant?

Claims numbered 8 and 9 read as follows:

"A concrete bridge consisting of a floor with walls at each side and reinforcing members imbedded transversely of the floor and extending upward into the walls.

"A bridge of concrete or similar material with reinforcing members imbedded transverse to the roadway, in combination with a wall or spandrel with upright reinforcing members imbedded."

In this consideration, it may be observed, the claims, specifications, and drawings of the Luten patent, No. 853,203, render it entirely clear the object sought to be accomplished by the invention and improvement therein claimed does not relate to bridges thrown across the larger streams or bodies of water, requiring either many spans or spans of any great length. On the contrary, the method of construction therein contemplated is a single-arch reinforced body thrown across the smaller water courses from one bank to the other, such as culverts. In neither the specifications nor claims of said patent is the word "pier" or "span" mentioned. The reinforcing materials therein employed are placed transversely to the roadway, a method of construction entirely dissimilar in principle in the most part to that employed in the structure in question, and is such a method of construction as would be impossible to employ in spanning a space of 60 feet, as does the structure in question.

In real truth, as gathered from the entire record, the principal ground of contention resolves itself into the use by defendants of the surface-imbedded mesh of hog wire which extends upward into the side walls or parapets of the structure; it being the contention of complainant

this is such a method of reinforcing the structure transversely to the roadway as to infringe upon right covered by the claims of his patent.

It may be observed the imbedded mesh of hog wire employed in the structure does operate to reinforce the concrete floor of the bridge transversely, to the same extent, however, and no more, than it does longitudinally, and this mesh of wire does extend up into the side walls of the bridge, and does undoubtedly serve to bind said walls to the bridge structure. However, it is quite clear the office performed by the surface-imbedded hog wire in the structure in question is not the same office as that performed by the transverse reinforcing rods or materials in the Luten patent. The object of the transverse reinforcing materials employed under the claims of the Luten patent is to render the structure of sufficient strength to support its own weight and the added load of crossing travel, whereas, under the method employed in the construction of the bridge in question, the girders resting on the abutments and pier must and do sustain the entire weight of the structure and the superimposed burden of travel, for if such element as the girders, not present in the combination of the Luten patent, should be removed from the structure in question, the bridge would collapse of its own weight. The purpose of the imbedded hog wire in the structure in question is merely to assist in binding the materials together. It is not the mechanical equivalent of the transverse reinforcement employed in the Luten patent. In the structure in question, the walls or parapets at the sides of the bridge, and the carrying of the imbedded hog wire up into the same, is not for the purpose of strengthening the burden-carrying capacity of the bridge, for the walls in the bridge in question are merely employed for the protection of the traveling public, the structure is of equal strength with the side walls or parapets, and the carrying of the imbedded hog wire up into the same omitted in construction.

In addition to this thought, let there be added the prima facie showing made by the action of the department in issuing the subsequent Sharp patent, containing the claims it does, in the face of the former grants to complainant. From which it follows, conceding the validity of all the patents involved in this controversy, and the many claims thereof, the charge of infringement in this case is not made out by the proofs.

The bill is therefore dismissed. It is so ordered.

ST. LOUIS, I. M. & S. RY. CO. et al. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION, Intervener).

(District Court, E. D. Illinois. September 10, 1914.)

No. 959.

1. COMMERCE (§ 97*)—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.
Courts of the United States can review orders of the Interstate Commerce Commission only on questions of law. They cannot consider questions of policy or expediency, or substitute their findings of fact for those of the Commission; but they may consider the question whether there

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

is any evidence on which those findings can legally be based, which is one of law.

[Ed. Note.—For other cases see Commerce Cent. Dig. § 147; Dec. Dig § 97.*]

2. COMMERCE (§ 88*)—ORDERS OF INTERSTATE COMMERCE COMMISSION.

An order of the Interstate Commerce Commission, directed against a number of railroad companies, based on a finding of discrimination, must be supported by evidence which is sufficient to warrant a finding separately against each company named therein.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. § 88.*]

3. COMMERCE (§ 87*)—INTERSTATE COMMERCE—DISCRIMINATION IN RATES.

A charge of discrimination cannot be made by a locality against a railroad company which does not serve that locality, either directly by its own line or by a joint arrangement with other companies for a through route and a joint rate.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 139; Dec. Dig. § 87.*]

4. COMMERCE (§ 85*)—INTERSTATE COMMERCE COMMISSION—ORDERS RELATING TO RATES.

In a proceeding before the Interstate Commerce Commission against separate railroad companies charged with discriminating against a locality, the Commission has no legal jurisdiction to compel two connecting roads, only one of which reaches such locality, to make a through route and a joint rate; nor, where such two companies have not made a through route or joint rate, but each charges its own separate rate to and from the point of connection, neither of which rates is found to be unreasonable, is there any legal basis in the evidence for an order of the Commission making a reduction in the sum of the two rates.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. § 85.*]

5. COMMERCE (§ 88*)—INTERSTATE COMMERCE COMMISSION—ORDERS RELATING TO RATES.

In establishing through routes with joint rates in proper proceedings looking to that end, the Interstate Commerce Commission cannot deprive a carrier of the benefit of a full haul over its own line, unless there is a finding, based on adequate evidence, that the haul over the entire distance would make the through route unreasonably long.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141; Dec. Dig. § 88.*]

In Equity. Petition for injunction by the St. Louis, Iron Mountain & Southern Railway Company and the St. Louis Southwestern Railway Company against the United States, in which the Interstate Commerce Commission became intervener. Granted.

H. G. Herbel, of St. Louis, Mo., for complainant St. Louis, I. M. & S. Ry. Co.

S. H. West and E. A. Haid, both of St. Louis, Mo., for complainant St. Louis Southwestern Ry. Co.

Joseph W. Folk and Charles W. Needham, both of Washington, D. C., for intervener.

Blackburn Esterline, of Washington, D. C., Sp. Asst. Atty. Gen., and Charles A. Karch, U. S. Atty., of Danville, Ill.

Before BAKER, Circuit Judge, and HUMPHREY and WRIGHT, District Judges.

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

BAKER, Circuit Judge (orally). If the complainants must obey the Commission's order, it will be necessary for them to prepare tariffs by September 20th, and it is therefore necessary that this application for a temporary injunction promptly be determined. The importance and novelty of the questions involved might well justify a carefully prepared opinion; but having been given a very complete exposition of the case through the able and elaborate arguments of counsel, and having come to the conclusion that an injunction should issue, we proceed, in view of the limited time, at once to enter a decree and to indicate briefly the grounds of our decision.

[1] Beginning with the Abilene Case, and down through the Pitcairn, Robinson, Mitchell Coal & Coke, International Coal, and many other cases, the general principle has been thoroughly settled that the courts of the United States cannot act in these interstate commerce cases as they can in ordinary appeals in equity, where the court may examine the evidence and substitute its finding of facts for that of the original tribunal. Questions of policy and expediency cannot be considered. In short, nothing can be reviewed except questions of law. But in interstate commerce cases, as in all other cases, it is always a question of law whether there is evidence on which the finding can legally be based.

[2] The order attacked by these complainants was entered in a proceeding before the Commission wherein merchants of Metropolis, Ill., were petitioners and a score of railroads were respondents. The petitioners asserted that the railroad rates from Southern and Southwestern lumber territory to Metropolis were wrongful in two respects: First, that the rates in themselves were excessive; and, second, that the rates exhibited an undue preference in favor of Cairo, Ill., and undue discrimination against Metropolis. The Commission found that the first charge was without basis in fact, and placed its order wholly upon the ground of discrimination. All of the respondent railroads, except these two complainants, have apparently acquiesced in the order; and we are of the opinion that the evidence before the Commission was sufficient on which legally to base a finding that discrimination against Metropolis was exercised by some of the railroads which were respondents in the proceeding before the Commission. It is now argued by the defendants in this case that, because there was evidence before the Commission to justify a finding of discrimination by some, the order must stand as against all the railroads which were parties to the hearing. In our opinion this is erroneous. In a civil case against a number of defendants, or in a criminal indictment against numerous defendants, a judgment cannot be permitted to stand against a certain defendant, if there is no evidence against him, merely because there may be evidence which would support the judgment against other defendants. And so we believe that, as a matter of law, an order of the Interstate Commerce Commission must be supported by evidence which is sufficient to warrant a finding separately against each railroad named in the order.

[3] Against neither of the complainants in this cause was there evidence before the Commission which could legally support a charge

of discrimination on its part. The railroad of neither complainant touches Metropolis. Each has a 16-cent rate over its own rails from points of origin in Southwestern lumber territory to Cairo. This Cairo rate, the record shows, was an abnormally low rate, forced upon these complainants by competition of other trunk lines. Neither of the complainants joins with any other railroad in making a through route and a through rate to Metropolis. When lumber reaches Cairo over the line of either of the complainants, the shipper pays 16 cents per hundredweight, which is a rate that the Commission has not found excessive for that service. If the lumber is to go beyond complainants' lines at Cairo and is destined to Metropolis, it must be carried on the independent line of the Illinois Central, and the shipper must pay therefor 6 cents per hundredweight, which the Commission has not found to be an excessive charge for that service. How can it be said on this basis of fact that either of the complainants is discriminating against Metropolis? How can any one discriminate against another whom he does not serve and with whom he does not come in contact? We believe that, as a matter of law, the charge of discrimination cannot be brought by a locality against any railroad that does not serve that locality, either directly by its own route or by a joint arrangement with other railroads for a through route and a joint rate.

Other railroads which were parties to the hearing before the Commission were serving Cairo and Metropolis through Memphis as an intermediate gateway, and through such gateway the distance on those other railroads to Metropolis was substantially the same as to Cairo. Therefore there was no legal basis on which those railroads could maintain that the discrimination practiced by them was not undue.

[4] The order as applied to these complainants makes the rate to Metropolis 17 cents, a reduction of 5 cents from the sum of the two independent rates of 16 cents from the Southwestern territory to Cairo and 6 cents from Cairo to Metropolis. In the proceeding before the Interstate Commerce Commission these complainants and the Illinois Central Railroad were parties respondent, but each to answer only to a charge of discrimination on its own part. In such a proceeding how could the Commission have jurisdiction to do indirectly what it could only do directly in a proceeding of another character—a proceeding not then pending before the Commission? The Commerce Act gives the Commission jurisdiction to entertain a hearing against two or more railroads as joint respondents for the purpose of compelling them jointly to establish a through route and jointly to establish over such through route through rates. In a proceeding of that character the Commission would have legal jurisdiction, if there was a legal basis in the evidence to support the finding, to compel the joint railroad respondents to establish a through route with through rates and to compel them to submit to an apportionment of the through rates. But in this proceeding, which in our opinion involves only a question of discrimination against each railroad separately, the Commission had no legal jurisdiction to undertake to compel these complainants to establish a through route with a through rate, jointly with the Illinois Central. Which road, complainants or the Illinois Central, is to bear

the reduction of 5 cents from the sum of two fair and reasonable independent rates? No party should be left subject to penalties for failing to obey an order which affords him no protection if he does obey. The complainants have no power, under the order now in question, to compel the Illinois Central to bear any part of the reduction; the finding in effect being that the Illinois Central charge of 6 cents from Cairo to Metropolis is reasonable. There is, therefore, no lawful basis for the order, which in effect compels the complainants to reduce their already disproportionately low rate of 16 cents down to 11 cents.

[5] The only way that the complainants could avoid giving such an effect to the order would be for them to divert their traffic from their own rails to Memphis, and thus surrender a substantial part, probably one-half, of the average haul on their own rails. Even in establishing through routes with through rates, in proper proceedings looking to that end, the Commission cannot deprive a carrier of the benefit of a full haul over its own line, unless there is a finding, based, of course, upon adequate evidence, that the haul over the entire distance would make the through route unreasonably long. As a matter of law we therefore hold that, on the record before the Commission, there was no authority to undertake to compel the complainants to divert the traffic from their own lines and turn it over to other lines through the Memphis gateway.

We are further of the opinion that the Commission erred in matter of law in failing to give effect to the manifest fact that the Cairo rate in and of itself was abnormally low, due to competition of other trunk lines and to competition of other points of origin of the lumber traffic. We say "other points of origin" because, in our judgment, territory extending from Georgia to Texas cannot justly be viewed as one and the same point of origin of traffic to Cairo and Metropolis.

For these reasons we are of the opinion that an interlocutory decree in favor of the complainants should be entered; and, counsel for the respective parties having agreed that no further evidence could be produced at the final hearing, the cause is now submitted for final decree, and the injunction will therefore be made permanent.

FILL v. CUNARD S. S. CO., Limited.

(District Court, S. D. New York.)

1. SHIPPING (§ 84*)—LIABILITY OF VESSELS—INJURY TO STEVEDORE.

It is the duty of a steamship company to provide reasonable safeguards and protection against injury to those on a coal barge alongside engaged in filling the ship's bins pursuant to orders of her captain, and the company is liable to such a person, who was injured by a sudden jet of steam and hot water allowed to escape from the vessel's exhaust without warning.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

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

2. SHIPPING (§ 86*)—LIABILITY OF VESSEL—SUIT FOR INJURY TO STEVEDORE.
In such case the person injured had a right to rely on the performance of their duty by those in charge of the vessel, and is not required to prove the reason for discharging the steam and water at the time; but the doctrine of res ipsa loquitur applies, and the burden of proof rests on the vessel.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353–360; Dec. Dig. § 86.*]

3. ADMIRALTY (§ 34*)—LACHES—SUIT FOR PERSONAL INJURY.
A suit against a steamship company for a personal injury *held* not barred by laches, where a prior action at law was dismissed for want of jurisdiction, and other causes beyond libelant's control also contributed to the delay.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 316–321; Dec. Dig. § 34.*]

In Admiralty. Suit by William Fill against the Cunard Steamship Company, Limited. Decree for libelant.

William H. L. Lee, of New York City (Alexander Cameron, of New York City, of counsel), for libelant.

Lord, Day & Lord, of New York City (Howard Mansfield, of New York City, of counsel), for respondent.

HAZEL, District Judge. Libel in personam against the Cunard Steamship Company, Limited, to recover for personal injuries sustained by the libelant at about 8 o'clock in the forenoon of November 8, 1908, while he was engaged in coiling rope on the barge Hersimus preparatory to making her fast alongside the steamer Slavonia, which was moored to her dock at Pier No. 52, North River, for the purpose of supplying her with coal, when suddenly, without notice to him, the steamer ejected steam and hot water from the exhaust or outlet at her side, scalding him and inflicting serious injuries and suffering.

[1] In loading large steamers after they are moored in their berths, it is customary to place alongside them coal barges provided with hoisting appliances from which the coal is hoisted or conveyed to the bins of the steamer. The order for shifting and placing the coal barge Hersimus alongside the Slavonia was given by the harbor master of the claimant upon receiving orders from Captain Roberts of the respondent company. In these circumstances the respondent must be deemed to have had notice of the proximity of the barge in question and of libelant's efforts to fasten her alongside the steamer. While thus engaged the libelant had the right to assume that the steamer would not eject steam or hot water to his injury.

[2] I think there can be no question but that the rule of res ipsa loquitur has application to the facts under discussion; indeed, the law is well settled that the owners of vessels owe a personal duty to stevedores who are engaged in loading or unloading to provide reasonable safeguards and protection against injuries, and also to warn them of any latent dangers caused by the vessel or those in charge of her navigation. The Chicago (D. C.) 156 Fed. 374; The Rheola (C. C.) 19 Fed. 926. It was accordingly the duty of the claimant to exercise or-

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

dinary care to save the libelant harmless from injury while he was engaged in making fast alongside in his preparation for loading coal aboard the steamer. Libelant was not required to prove affirmatively the immediate reason for the ejection of the steam or hot water; nor was he, as contended, required to look out for the discharge of steam or hot water from the steamer's outlets, but, on the contrary, the burden rested upon the respondent, irrespective of any custom, either to protect the steam and hot water outlets of the steamer while she was moored to her dock or to have a lookout to give warning of her intentions.

[3] The defense principally urged is that the libelant has barred himself by his laches from recovery in this proceeding, but I think it is sufficiently shown that the asserted delay was not of an inexcusable character. There is no fixed limitation of time for bringing an action in admiralty, and while it may be conceded that staleness of a right of action will not be ignored by the court in a proper case, and that the policy of the court is to adapt itself by analogy to the common-law period of limitation for bringing an action, yet in the present case I am satisfied by the evidence that the circumstances—namely, the earlier action at common law brought by libelant to recover damages for the injuries sustained, the subsequent dismissal of the complaint because of lack of jurisdiction arising from the absence of evidence to show diversity of citizenship, the delay in his efforts to induce a settlement of the claim, and the customary delay before hearing in this court—require me to hold that there have been no such laches on the part of libelant as to defeat recovery.

The proofs do not warrant holding that the libelant was negligent. He could have escaped the injury if there had been reason to anticipate it, but there was no one to warn him of his danger while he was engaged alongside the steamer preparing to unload the coal. He sustained painful injuries of a lasting character, although the defendant denies that libelant's present condition is wholly attributable to the scalding. The libelant was confined to his bed for four months and was unable to leave his home for upwards of a year. The scalding extended over the lower portion of his body, and it is shown that his leg became infected, resulting in erysipelas and paralysis, and continued incapacity to work. He is still unable to work, and it is doubtful if he will ever be able to engage in work with which he is familiar. He has difficulty in walking and in raising his arms, and his speech is impaired. Two reputable physicians have testified for libelant that the erysipelas and paralysis were the direct result of the scalding and burns, and, although this is disputed, I am nevertheless inclined to the opinion that it is fairly shown by preponderating evidence that his unfortunate condition is due to the injuries received in the manner hereinbefore stated, owing to the negligence and want of foresight of the respondent.

Taking into consideration the amount of money expended by libelant for medicine and medical attendance, the loss of wages at $45 per month since the receipt of the injuries, the permanence of his

injuries, his pain and sufferings, and the fact that he has reached the age of 63, I think that the sum of $5,871 would not be excessive, and a decree for that amount may be entered, with costs.

THE TRANSIT.

(District Court, E. D. Pennsylvania. August 20, 1914.)

No. 86.

1. MARITIME LIENS (§ 64*)—ENFORCEMENT—PLEADING—SUFFICIENCY OF ANSWER.

In a suit in admiralty to establish a maritime lien for repairs, an answer, denying the correctness of libelant's account, is insufficient, unless it specifies which of the charges are incorrect.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 102; Dec. Dig. § 64.*]

2. MARITIME LIENS (§ 64*)—REPAIRS AND SUPPLIES—CONSTRUCTION OF STATUTE.

Under Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), which gives a maritime lien for repairs made to a vessel on order of the owner, and expressly provides that it shall not be necessary to aver or prove that credit was given to the vessel, but further provides in section 4 that the right to a lien may be waived in order to plead a good waiver, it is not sufficient to allege that credit was not given to the vessel, but the answer must also allege that the debt was contracted solely on the personal credit of the owner.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 102; Dec. Dig. § 64.*]

In Admiralty. Suit by Henry F. Stockwell, receiver of John H. Dialogue and Son, against the steamtug Transit. On exceptions to answer for insufficiency. Sustained in part.

See, also, 210 Fed. 575.

This proceeding is on a libel in rem filed by the receiver in bankruptcy of John H. Dialogue & Son against the tug Transit. An answer was filed, to the sufficiency of which exceptions were taken, and an amended answer was put in. To this a number of exceptions have been interposed charging insufficiency.

A statement of all the facts required to present the points now requiring attention is as follows: John H. Dialogue & Son, who were shipbuilders, were requested by the owner of the Transit to make certain repairs to her. The contract which grew out of this will be referred to later. Some repairs had been made to the tug when Dialogue & Son went into bankruptcy. The work on the tug was continued by the receiver, but there was later a cessation of all work before the repairs were completed. The owner of the tug gave security and obtained possession of his property. The receiver was then authorized to libel the tug for the repair bill due the bankrupt. In consequence the present libel was filed. The only averment with which we are concerned is the simple statement on which the claim of the libelant proceeds, to the effect that certain repair work, consisting of labor and materials, were supplied to and on the credit of the tug, amounting in the aggregate to the sum of $2,085.06, at the request of the owner. An itemized statement of the repairs so made is attached, and a credit for $1,000 paid on account is allowed, and payment of the $1,085.06 balance demanded.

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

It should be noted here that the claim is by this part of the pleadings planked upon a simple quantum meruit for work and labor done and materials for the same provided.

The answer is in part a denial of the debt sued for, but is in substance a counterclaim which is set up by way of cross-libel. The full answer is restated in the amended answer so that the first answer may be ignored. A contract of repair is set up, consisting of an agreement to do specific things, and, in addition, "such other repairs necessary to put the said tug in proper seaworthy condition." No agreement on price is averred. The answer continues with a denial that Dialogue & Son did the work agreed by them to be done. It avers a dismantling of the tug and the careless scattering of the dismantled parts and cessation of work after very little had been done, and a final refusal to complete the contract. This is followed with the averment that the owner was obliged to have the removed parts replaced in the tug and the work completed elsewhere. There is also a blanket averment that the $2,085.06 is excessive, both in respect to the work done and the materials furnished and in the prices charged, but there is no specific averment of what work or material included in the bill was not done or furnished, nor are the proper prices set forth. There is, however, a general statement that an aggregate proper charge "would not exceed $1200." This is further followed with a denial of the $1,085.06 claimed being due, and a counterclaim is made for damages exceeding this amount. This claim for damages is based upon the statement that the repairs contracted to be made should have been made at a total cost of $2,500, and that the respondent had completed the contract at a cost to him of $2,000. Because of this, and that respondent had paid $1,000, a loss or damage of $500 is claimed. The cross-claim is further increased by the fact that the repairs contracted for should have been completed within 14 days, whereas because of delays interposed by the shipyard the tug was detained 16 days beyond the proper time. As the charter hire rate of the tug is $80 per day, a further loss and damage of $1,280 fell upon her owner. Further, small claims of $18 for coal and $29 for wharfage are made, which, deducting $90 admitted to be due libelant, makes the net counterclaim of respondent $1,737. There is also a denial that the repairs were made on the credit of the tug, and an averment that they were made solely on the personal credit of the owner.

Willard M. Harris, of Philadelphia, Pa., and Wilson & Carr, of Camden, N. J., for libelant.

J. Frank Staley and Lewis, Adler & Laws, all of Philadelphia, Pa., for respondent.

DICKINSON, District Judge (after stating the facts as above). This case comes before us now on exceptions to the amended answer. The general question presented is one of pleading, and we are in consequence now concerned only with the juridical history of the case. The facts necessary to be incorporated in this, however, in order that the conclusions reached may be vindicated, or even understood, are so many that a statement of them would extend this opinion to undue length. We, therefore, content ourselves with a very brief reference to the more salient facts, and file separately a more detailed statement. This may compel a repetition of some statements of fact, but none the less contributes to brevity.

[1] The libel is in effect simply an averment of a quantum meruit indebtedness for repair work done and materials supplied to this tug on the order of the master, with the added claim of a maritime lien under the act of Congress. If there is any defense to this claim other than an almost purely technical one, the respondent apparently does

not know in what it consists. The prejudgment of the final decree to be entered is because of this favorable to the libelant. The respondent has already been accorded two opportunities to present the defense. The present right of the libelant is to have a decree, if one can now be made. The answer presents a threefold aspect. It consists in part of a general denial of the correctness of the bill of the libelant and of the right to a lien, and in part of a set-off or counterclaim presented in the form of a cross-libel. The first feature is introduced for the purpose of putting the libelant to his proofs. If the first question arose on a rule for judgment for want of a sufficient affidavit of defense, under the practice in the courts of Pennsylvania, the weight of authority would be with the libelant. Even there, however, there may be circumstances under which a general denial, coupled with an explanation of the absence of specific averments, may be sufficient to prevent judgment and put the plaintiff to his proofs. The question, moreover, does not technically so arise because the conformity provision of the Revised Statutes does not extend to proceedings in admiralty. The question must be determined, therefore, by our own admiralty rules. The Pennsylvania decisions are not even persuasive because not altogether in point. The affidavit of defense law under the Pennsylvania statutes has a special purpose. At common law, averments in the narr., which were traversed by the defendant, must be supported by proofs. It was recognized that there were many cases to which there was no real defense. To administer speedy justice and to relieve the trial lists from congestion, the courts were empowered to enter judgment for the plaintiff unless a sworn defense was interposed. Such a defense must, of course, be a real defense, and as it was ruled there was no constitutional right of defendants in the way, the inevitable outcome was the present Pennsylvania practice. It is evident that a fair administration of this law would remit plaintiffs in all defended cases to a common-law trial. A strong tendency has, however, been manifested by the Pennsylvania courts to compel defendants to plead a full and complete defense by setting forth the facts which constituted it. Answers in admiralty practice are more in the nature of pleas than of affidavits of defense, and a nearer analogy is to be found in the principles of pleadings and the rules governing bills of particulars. The answer is insufficient, in that it does not state what of the work sued for was not done, or which of the charges made is excessive in price.

[2] The second question suggested is one of lien. This is a proceeding in rem. A maritime lien is given by Act Cong. June 23, 1910, 36 Stat. 604, where repairs are made to a vessel on the order of the owner. The act expressly provides that "it shall not be necessary to allege or prove that credit was given to the vessel." There is another provision in the fourth section of the act, to the effect that the repairer may waive his right of lien. The act was evidently passed to change the rule referred to in the case of The Iris, 100 Fed. 104, 40 C. C. A. 301, as laid down in previous cases. Since the act of 1910 the claim of a right of lien, it would seem, could only be met by the

averment of a waiver. A mere denial of the extension of credit to the vessel is surely not sufficient. Such denial, coupled with an averment that the debt had been contracted solely on the personal credit of the owner, would also seem to fall short of a defense, except for the ruling in Ely v. Murray, 200 Fed. 368, 118 C. C. A. 520. It is there ruled that the act does not "bar proof that whatever was furnished was furnished on the mere credit of the owner, and in no sense on the credit of the vessel." To give effect to this ruling we must hold a double averment of no credit to the vessel and sole credit to the owner personally to be a defense to the claim of lien. This necessarily sends the case to trial on this issue.

As to the third question suggested, the counterclaim is clearly invalid. The defense of a contract to do the whole work of repairing for the round sum of $2,500 fails because no such contract is averred. The demurrage claim cannot be allowed because no time limit is even mentioned, much less a contract to complete within any certain time.

With respect to the disposition to be made of those parts of the answer found to be insufficient, the case is not ripe for a decree under rules 23, 27, 28, and 29. The decree of pro confesso there provided for is not based upon the insufficiency of the answer, but upon the default of the respondent in complying with the order of the court following a finding of insufficiency of the answer. Rule 30, however, does apply in the alternative because, so far as the exceptions are allowed, the answer may be treated as if never filed and a decree pro confesso entered. Inasmuch as there must be a trial, the conclusions which the court has reached are stated, and the libelant may put the case in shape for trial, or may submit a decree dealing with the answer so far as found to be insufficient.

The conclusions are summarized as follows:

1. The answer, so far as it is a denial of the debt averred by libelant to be due, is insufficient in the respect that it should set forth what of the work claimed to have been done and what part of the materials claimed to have been furnished were not done and supplied, and should further set forth which of the charges are unreasonable and excessive in price and what the proper charge is.

2. The answer, so far as it avers the repairs to have been made solely on the personal credit of the owner and not on the credit of the vessel, is found to be sufficient.

3. The answer is found to be sufficient in respect to the averments of counterclaims of $18 for coal and $29 for towage.

4. The answer and cross-libel are found to be insufficient so far as respects the counterclaims for breach of contract.

5. The respondent is within the allegata and probata rule, and if the case is tried on the issues raised by the answer as filed, the evidence will be confined to a rebuttal of libelant's proofs of work done and materials furnished and the proper price to be charged therefor, and to proofs that the repairs were made wholly on the personal credit of the owner and in no sense on the credit of the vessel, and the cross-libel accompanying the answer will be dismissed as setting forth no cause of action.

6. Costs are to abide final decree.

BUFFALO SPECIALTY CO. v. VANCLEEF et al.

(District Court, N. D. Illinois, E. D. September 16, 1914.)

No. 219.

COURTS (§ 354*)—PROCEDURE—SET-OFF OR COUNTERCLAIM—EFFECT OF DISMISSAL OF BILL.

The provision of new equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) that the answer may "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" is to be given a liberal construction, and includes, as it in terms states, "any" set-off or counterclaim which might be the subject of an independent suit in equity; and the same, when pleaded, being in effect a "cross-suit," is not affected by a decree dismissing the bill on the merits. Whether such a decree is a final one, reviewable by appeal before adjudication upon the set-off or counterclaim, quære.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. § 354.*]

In Equity. Suit by the Buffalo Specialty Company against Noah Vancleef and others. On motions by defendant for injunction and a reference. Denied.

Offield, Towle, Graves & Offield, of Chicago, Ill., for plaintiff.

Banning & Banning, of Chicago, Ill., for defendants.

SANBORN, District Judge. This is an application by defendants for an injunction, based on defendants' counterclaim and affidavits, restraining plaintiff from making false representations concerning the order or decree of August 7, 1914, dismissing the bill for want of equity, with costs, and from interfering with defendants' business of making and selling "Neverleak Tire Fluid." They also ask a reference to a master to ascertain the profits and damages they claim to be entitled to, as prayed in their counterclaim.

The bill, which was dismissed, alleged infringement of a trade-mark and unfair competition. Defendants denied plaintiff's allegations, and pleaded a counterclaim under equity rule 30, alleging wrongful acts of plaintiff in reference to the use by defendants of the trade-mark or name claimed by plaintiff, and praying for an injunction against such acts, and an accounting of damages. Defendants alleged that plaintiff was threatening their customers with suits and various forms of prosecution in case they should continue to market their own goods.

Defendants moved to dismiss the bill because it appeared on the record that complainant had by its conduct made its right to use the word "neverleak" coextensive in time with its patent on the fluid called neverleak, and by the expiration of the patent had lost its protection. The motion was granted, and a decree of dismissal followed, without making any disposition of the counterclaim. An appeal from this decree to the Circuit Court of Appeals was at once taken, and is now pending undetermined; the clerk's return to the appellate court having been duly made. Defendants then, before any hearing on the counterclaim,

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

moved for a permanent injunction and reference, just as though they had obtained an interlocutory decree on hearing, showing by affidavit that plaintiff had begun several suits against customers of defendants, had written threatening letters to defendants' dealers, and had misrepresented the nature of the decree of dismissal. These acts were injurious to defendants, causing loss of custom and other damage. While the motion was for a permanent injunction and reference, on the hearing they asked for a temporary injunction only, and did not press the motion for reference.

Answering the motion, plaintiff denied any unfair competition (submitting many affidavits), and contended that the district court has no jurisdiction of the motion because the case and the whole case has been removed to the Court of Appeals. Counsel for defendants contend that the case involves two separate suits, one on bill and answer for trade-mark infringement and unfair competition, and the other on counterclaim and reply for unfair competition, and that only the first suit has been finally disposed of, leaving the second one still pending just as though the first had never been commenced. It is contended in reply to this position that the counterclaim authorized by rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) is like a cross-bill in equity under the former practice, which was so connected with the bill that a dismissal would necessarily carry the cross-suit with it. It was also suggested on the argument that a counterclaim under the rule is so connected with the main suit that the decree already entered was not a final one, for the purpose of an appeal, because it made no disposition of the counterclaim.

Many questions are being raised in the district courts as to the proper construction of rule 30, and there has been conflict of opinion which will probably continue. As I look at the matter, the rule is quite clear and easy to interpret. It is quite similar to section 3 of order 19 of the English orders (Statutory Rules and Orders of 1912, p. 1781; Annual Practice of 1908, p. 234). The two rules follow:

English rule:

A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the registrar or the judge may, on the application of the plaintiff before trial, if in opinion of the registrar or judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

Equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi):

The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence, and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state; such statement operating as a denial. Averments other than of value or amount of damages, if not denied, shall be deemed confessed, except as against an infant, lunatic, or other person non compos and not under guardianship, but the answer may be amended, by leave of the court or judge,

upon reasonable notice, so as to put any averment in issue, when justice requires it. The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense. 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.

It will be seen that rule 30 requires defendant to set up any counterclaim which arises out of the transaction forming the subject-matter of the bill, but allows without requiring him to set up any equitable counterclaim or set-off which might be the subject of an independent suit by defendant against plaintiff. The language is perfectly clear: If defendant has an independent cause of action in equity against plaintiff, he may counterclaim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court, in adopting the rule, omitted the last clause of the English rule which restricts counterclaims to those which can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counterclaim which may be the subject of an independent suit included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action, wholly unconnected with the claim of the plaintiff, may be counterclaimed. Birmingham Estates Co. v. Smith, 13 Ch. D. 506, 509. Nor is a counterclaim to be excluded because plaintiff is a foreigner who could not be sued in England. By invoking the jurisdiction, he consents to be sued there by counteraction, unless plaintiff be a sovereign, not suable without its consent. Griendtovan v. Hamlyn & Co., 8 L. T. R. 231; Strousberg v. Costa Rica Republic, 29 W. R. 125, Ch. App.; Imperial Japanese Govt. v. P. & O. Co., (1895) A. C. 644, P. C. Nor is the amount recoverable by counterclaim limited by the jurisdiction of the court (Amon v. Babbett, 22 Q. B. D. 543, Ch. App.), unless objection is made by giving written notice, as required by the Judiciary Act of 1873. By adopting the English rule, its construction in England is adopted, at least to the extent of excluding construction at variance with plain and explicit language. Under such circumstances, the clear meaning of the words should not be rejected on account of supposed inconvenience in applying the rule.

It is said in argument that it could not have been the intention of the rule to compel a nonresident plaintiff to submit to cross-suits in districts foreign to his residence, and thus run counter to express statutes, like section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), or the Act of March 3, 1897, c. 395, 29 Stat. 695 (U. S. Comp. St. 1901, p. 588), relating to place of suit. Section 51 provides that civil suits, other than those of diverse citizenship, shall only be brought in the district where defendant inhabits, the others only in the district of the residence of either party. The act of 1897 applies only to patent cases, and provides that the court shall have jurisdiction only in the district where defendant inhabits, or where he has committed infringement and has an established place of business. But these acts do not relate to the general jurisdiction of

the district court, only to the power of the particular court to proceed. They give defendant a privilege which he may waive. If the counterclaim defendant (original plaintiff) raises the question of jurisdiction at the outset, and succeeds, defendant may have a speedy decision of this question by the Supreme Court. Whatever the decision may be affects the scope of rule 30, not its construction.

It is true that the weight of authority in the construction of the new rule limits its scope to counterclaims which might formerly have been made the subject of a cross-bill. Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C.) 204 Fed. 103; Williams, etc., Co. v. Kinsey Mfg. Co. (D. C.) 205 Fed. 375; Adamson v. Shaler (D. C.) 208 Fed. 566; Klauder v. Weldon, etc., Co. v. Giles (D. C.) 212 Fed. 452; Sydney v. Mugford, etc., Co. (D. C.) 214 Fed. 841. To the contrary are Marconi Wireless Tel. Co. v. National Elec. Signaling Co. (D. C.) 206 Fed. 295; Salt's Textile Mfg. Co. v. Tingue Mfg. Co. (D. C.) 208 Fed. 156; Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 208 Fed. 419; and Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377. The cases supporting a limited application of the rule proceed upon the theory that it was not intended to change the substantive law providing what could be treated as a set-off or counterclaim prior to the rule (Judge Thomas, 214 Fed. 841), and that the words "shall have the same effect as a cross-suit" mean to limit the counterclaim to what might have been brought in by cross-bill. These words are adopted from the English rule, except that "cross-suit" is there "cross-action." Why not give them the settled construction of the English courts? As Judge Chatfield says in the Marconi Case:

"Here we have a deliberate use of new terms covering any 'independent suit in equity' to have the result of a 'cross-suit,' and yet to be pleaded 'without cross-bill.'"

The contrary view is strongly argued by Judge Dodge in the Terry Case, Judge Geiger in the Adamson Case, and Judge Thomas in the Sydney Case. But the new equity rules were conceived in a most liberal spirit, and I think the one in question should be given its manifest meaning, so as to allow all mutual claims in equity to be set off or opposed, as is done under the English practice. I have examined many English decisions under order 19, and am convinced that the rule has there worked justly. It has been given a broad and liberal construction, but has not been extended (as its terms prohibit) to cases so incongruous as to be incapable of trial with the original suit. Bartholomew v. Rawlings, W. N. 56; Huggons v. Tweed, 10 Ch. D. 359, Ch. App.; Compton v. Preston, 21 Ch. D. 138. Such an exception may also properly be applied under rule 30, since the rule relates only to equitable causes of action. If it would be inequitable to subject the plaintiff to the defense of an incongruous cross-action, surely the court would decline jurisdiction. I am convinced, therefore, that the dismissal of the bill had no effect on the counterclaim for unfair competition. The Electric Boat Company Case contains an able discussion of the construction of the words of the rule.

The effect of the appeal from the decree of dismissal is a different question. I am inclined to think that such decree was not final, and

therefore not appealable. The concluding clause of rule 30, "so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims," seems to contemplate a single decree disposing of both causes of action. Any other construction would permit two final judgments. In Bowker v. United States, 186 U. S. 135, 22 Sup. Ct. 802, 46 L. Ed. 1090, an admiralty decree disposing of a counterclaim, but not passing on libelant's cause of action, was held not final for the purpose of appeal.

The appeal, however, has been taken, and it is for the appellate court to decide whether it shall be dismissed. And it is unnecessary to decide the question because the affidavits submitted on both sides show that no injunction should be issued. Both parties have exaggerated the effect of the decree in their advertising matter, probably through misconception, and neither has any standing to claim any temporary relief against the other. Of course the motion for reference in advance of adjudication on the counterclaim is premature.

The motions are denied.

PACIFIC LIVE STOCK CO. v. LEWIS et al.

(District Court, D. Oregon. September 28, 1914.)

No. 6463.

1. COURTS (§ 508*)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.

When a suit commenced in a state court has been legally removed to a federal court, that court may, when necessary to protect its own jurisdiction or render effective its decree, enjoin further proceedings in the state court; but when it has refused to assume jurisdiction, on the ground that the cause was not removable, a bill in equity for an injunction is not a proper method to review its judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

2. COURTS (§ 508*)—RESTRAINING ACTION BY STATE BOARD—PENDENCY OF SUIT IN FEDERAL COURT.

A proceeding before the state water board of Oregon to determine the respective rights of all claimants and users of water from a stream under the state law does not interfere with a private suit in a federal court between two of such users to enjoin interference by one with the use of water by the other, and affords no ground for the issuance of an injunction to restrain action by the state tribunal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

3. CONSTITUTIONAL LAW (§§ 249, 318*)—WATERS AND WATER COURSES (§ 4*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW—PROCEEDINGS BEFORE ADMINISTRATIVE BOARD.

The Oregon water law (Laws 1909, p. 319), which provides for the hearing of contested claims to water before the state water board, on notice, and with the right to be heard and to produce testimony, and for a judicial review, with right of appeal, before the determination of the board

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

becomes final, does not deprive a claimant of his property without due process of law, or deny him the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 710, 949; Dec. Dig. §§ 249, 318;* Waters and Water Courses, Cent. Dig. § 1; Dec. Dig. § 4.*]

In Equity. Suit by the Pacific Live Stock Company against John H. Lewis, James F. Chinnock, and George T. Cochran, constituting the State Water Board of the State of Oregon, C. B. McConnell, Emory Cole, Leonard Cole, the Harney Valley Improvement Company, the Silvies River Irrigation Company, the William Hanley Company, R. R. Sitz, Fred Otley, and M. B. Hayes. On motion for preliminary injunction. Denied.

John Rand, of Baker, Or., and Edward F. Treadwell, of San Francisco, Cal., for complainant.

Emmons & Webster, of Portland, Or., J. W. Biggs, of Burns, Or., Wood, Montague & Hunt, of Portland, Or., A. M. Crawford, of Salem, Or., George T. Cochran, of La Grande, Or., and C. B. McConnell, of Burns, Or., for defendants.

Oliver P. Morton, of Portland, Or., amicus curiæ.

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

BEAN, District Judge. This is an application for a preliminary injunction in a suit brought by the complainant, a California corporation, against the Oregon state water board and others, to enjoin and restrain further proceedings before the water board in the matter of determining the relative rights of more than 200 users of the waters of Silvies river in this state.

The proceedings were regularly initiated before and by the water board in November, 1911, under the legislative act of 1909 (Laws of Oregon, page 319) providing for the control, disposition, and use, and the determination of existing rights to the use, of the waters within the state. Notices were regularly served upon the various claimants, including the complainant, as required by law, and within the time fixed therein the complainant filed with the water board a petition and bond for removal of the proceedings to this court on the ground of diversity of citizenship; but the court declined to assume jurisdiction, and the matter was remanded to the state tribunal. In re Silvies River (D. C.) 199 Fed. 495. The complainant thereafter filed its claim to the use of the waters of the stream with the water board, paying the fees therefor required by law, and thereafter the board gave notice to the various claimants that it would at a certain time proceed to the taking of testimony in support of such claims and the contests arising thereon.

The complainant thereupon commenced this suit to enjoin the proceedings on the grounds: (1) That the matter had been duly and regularly removed to it by this court, and therefore the state tribunal had no right to proceed further in the matter. (2) That prior to the in-

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

stitution of the proceedings before the state board complainant had commenced suits in this court against the Harney Valley Improvement Company and the Silvies River Irrigation Company and the William Hanley Company, alleging that such corporations threatened to take and divert from the lands of the complainant a large amount of money to which it was entitled, and praying for an injunction, that issues were joined in such suits, and that they are now pending and undetermined in this court. And (3) that the act of the Legislature of Oregon creating the water board and prescribing its powers and duties is violative of the federal Constitution in so far as it undertakes to vest in the board the power to hear evidence and determine the rights of the claimants to the water, because it deprives them of their property without due process of law and denies them adequate judicial protection.

[1] Whenever a suit commenced in a state court has been legally removed to the federal court, the latter may, when necessary to protect its own jurisdiction or render effective its decrees, enjoin further proceedings in the state court. Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; French v. Hay, 22 Wall. 250, 22 L. Ed. 857; Wagner v. Drake (D. C.) 31 Fed. 849; Abeel v. Culberson (C. C.) 56 Fed. 329. But in this matter the court has refused to assume jurisdiction on the ground that it was not removable, and a bill in equity is not the proper method to review its judgment.

[2] Nor is there any doubt of the authority of a court of the United States to grant an injunction to stay proceedings in a state court to protect its own prior jurisdiction (Cen. Trust Co. v. Western N. C. R. Co. [C. C.] 112 Fed. 471); but no such necessity exists here. The matters involved in the two proceedings are essentially different. That before the state board is to ascertain, determine, and fix the relative rights of all the claimants, including the complainant, to the use of water from a common source, while the purpose of the suits pending in this court is to enjoin threatened interference by certain parties with the complainant's use of the water, and, in our judgment, is not a bar to the proceedings before the state tribunal; nor does it prevent the state authorities from ascertaining and determining the relative rights of the claimants as provided in the state law, whether their conclusions, if they come to issue here, may or may not be binding on this court. Insurance Co. v. Brune's Assignee, 96 U. S. 588, 24 L. Ed. 737; Sperry & Hutchinson v. Tacoma (C. C.) 190 Fed. 682. In one of the cases referred to the matter involved is now before the water board in pursuance thereof by direction of the Court of Appeals. Pacific L. Co. v. Silvies R. Ir. Co., 200 Fed. 487, 118 C. C. A. 513.

[3] The provisions of the Oregon water law are stated somewhat in detail in the opinion of the court on the motion to remand and need not be repeated here. It is sufficient for present purposes to add that section 17 thereof provides that at the time of the submission of proof of appropriation, or at the time of taking testimony for the determination of rights to water, the division superintendent shall collect from each claimant or owner a fee of $1 for recording the water

right certificate, when issued, in the office of the county clerk, and an additional fee of 15 cents for each acre of irrigated land up to and including 100 acres, and 5 cents per acre for each acre in excess of 100 acres up to and including 1,000 acres, and 1 cent for each acre in excess of 1,000. And section 21 requires, in case of a contest, a deposit of $5 from each party for each day the superintendent shall be engaged in taking testimony, to be refunded to the party in case the contest is decided in his favor. All other deposits and the fees provided by section 17 are to be paid into the state treasury.

The state statute provides for notice to the various claimants of every step in the proceedings before the water board, and gives them an opportunity to be heard, to produce testimony in support of their claims and such contest as they may initiate. It also requires the determination of the board and the original testimony taken by it to be filed with the state court for its consideration, and gives the parties 30 days thereafter in which to file exceptions to the determination of the board, provides that they may be heard by counsel upon the consideration of such exceptions, that the court may, if necessary, remand the case to the board for further evidence, and after a final hearing the court shall enter a decree affirming or modifying the orders of the board, from which decree an appeal may be taken to the Supreme Court in like manner and effect as in other cases in equity. It thus furnishes interested parties not only adequate opportunity to be heard before the water board, but provides for a judicial review by the courts before the determination becomes final, and therefore is not a denial of due process of law or the equal protection of the laws. O. R. R. & N. Co. v. Fairchild, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863.

Laws governing the regulation and distribution of water and providing for the determination of the rights of the respective claimants thereto, similar in many respects to the Oregon statute, are in force in several of the arid states, and as far as we are advised the universal holding of the courts where the question has been judicially determined is that the water board or officer charged with the duty of executing such laws is an administrative body or officer clothed with certain quasi judicial powers necessary to enable it or him to discharge such administrative duties, and the proceedings before the board or officer are not judicial, and do not deprive the claimant of his property or water right without due process of law, since provision is made for resort to the courts by a dissatisfied claimant. The question is ably and satisfactorily discussed in Farm In. v. Carpenter, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647, McCook Ingales Co. v. Cross, 70 Neb. 115, 102 N. W. 249, and Ormsby v. Kearney, 142 Pac. 803, recently decided by the Supreme Court of Nevada, and it would be mere reiteration to attempt to add anything to what has already been said on the subject in the opinion on the motion to remand.

It is claimed that, since the statute provides that any party who fails to appear after notice and submit to the water board proof of his claim

shall be barred from subsequently asserting any rights thereafter acquired, the provision requiring him to pay a fee for so doing is in effect depriving him of his property without due process of law. It is not necessary for us to determine that question in this case. The bill of complaint shows that the complainant has paid the required fee and filed its claim before the board, and therefore is not being deprived of any right it may have to the waters of the stream. The other probable expenses referred to in the bill, such as attorney's fees and cost of procuring evidence on behalf of the complainant, are not required by the statute to be paid or incurred, but are within the control of the complainant, and as such may be incident to any proceedings in which it deems its interests are involved. Moreover, if the provision requiring a payment of fees by a claimant as a condition to asserting his rights to the use of the water is void, it is so clearly separable from the other provisions of the statute as not to render the whole act invalid. Berea College v. Ky., 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81. It is analogous to a penalty provided for violation of a law, which does not render the entire law void, where it is not unreasonable to believe that the lawmaking power would have adopted the statute without the penalty. Reagan v. Farmers' L. & T., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Flint v. Stone, Tracey Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312.

It follows that the injunction should be denied; and it is so ordered.

JOHNSON v. WILSON.

(District Court, N. D. Georgia. September 17, 1914.)

No. 7.

BANKRUPTCY (§ 175*)—CONVEYANCE BY BANKRUPT TO WIFE—VALIDITY.

Evidence considered, and *held* to sustain the findings of a special master that at the time of the making of a deed to land by a bankrupt to his wife, nearly three years before his bankruptcy, he was solvent, and that the deed was not made to defraud creditors, but in good faith, in consideration of money advanced to him by his wife in former years, on the understanding that he should deed her land for the same, and was valid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

In Equity. Suit by W. H. Johnson, trustee in bankruptcy of W. D. Wilson, against Amanda J. Wilson. On exceptions to report of special master. Overruled, and report confirmed.

H. H. Perry, of Gainesville, Ga., for creditors.

W. M. Johnson, J. G. Collins, and H. H. Perry, all of Gainesville, Ga., for trustee.

H. H. Dean and A. C. Wheeler, both of Gainesville, Ga., for defendant.

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

NEWMAN, District Judge. This is a suit by the trustee in bankruptcy of W. D. Wilson to recover of Mrs. Amanda J. Wilson, the wife of the bankrupt, certain real estate in Hall county, Ga. The case was referred to W. B. Sloan, Esq., as special master, and his report, which will show the issues in the case and the finding of the special master on these issues, and his final conclusions in the matter, is as follows:

"On the 11th day of October, 1912, by agreement of all parties, the case was heard by me at Gainesville, Ga., and E. H. Cooley, the official stenographer of the Northwestern circuit, under order of the special master, reported the evidence in the case, which report of evidence as submitted by him, together with the documentary evidence therein designated and specified, is certified by me, and is hereby made a part of this report.

"On the 13th day of July, 1911, W. D. Wilson filed a voluntary petition in bankruptcy, and on that date was adjudged a bankrupt, according to law, and on the 15th day of August, 1911, W. H. Johnson, Esq., was elected trustee of the estate of W. D. Wilson, bankrupt, and qualified as trustee in said case, and took charge of the assets of said estate of said W. D. Wilson, bankrupt.

"On the 9th day of December, 1911, W. H. Johnson, trustee as aforesaid, filed his equitable complaint in this court against Amanda J. Wilson, alleging: (a) That W. D. Wilson was, at the date of his adjudication as a bankrupt, the owner and was in possession of parts of lots of land Nos. 36 and 37 in the eighth land district of Hall county, Ga., containing 175 acres, and known as the James W. Gould place. (b) That Amanda J. Wilson was claiming to own said land under a deed which purported to have been executed October 21, 1908, and recorded November 12, 1910. (c) That at the time said deed was executed W. D. Wilson was insolvent, and that said deed was made with intent to defraud creditors, was a voluntary conveyance, was not bona fide, nor for a valuable consideration, and that Amanda J. Wilson knew, or ought to have known, that the said W. D. Wilson was insolvent, that the making of said deed was in contemplation of the bankruptcy proceedings, and was a fraud upon the bankruptcy laws of the United States and upon the creditors of W. D. Wilson. (d) Said W. H. Johnson, trustee as aforesaid, prayed that said deed be canceled and set aside, and that the property described in said deed be decreed to be the property of the bankrupt in the hands of the trustee to be administered.

"On the 13th day of January, 1912, Amanda J. Wilson filed her answer to said equitable petition, as follows: (a) Defendant denied that W. D. Wilson was the owner of said land, or was in possession of said land, at the time he was adjudicated a bankrupt, but averred that she was the owner of said land in fee simple at that date and was in possession. (b) That she purchased said property from said W. D. Wilson on the 21st day of October, 1908, obtained a deed to same, and went into possession of said property by herself and tenants, and that she has been in the actual and adverse possession of the same since that date. (c) Defendant denied that said W. D. Wilson was insolvent at the time he executed the deed, denied that said deed was made with intent to defraud creditors, and denied that she has any reason to believe that W. D. Wilson was insolvent at the time the deed was made, or that the deed was made to defraud creditors. (d) Defendant denied that the deed was a voluntary conveyance, and denied that it was not for a valuable consideration, and denied that it was made in contemplation of bankruptcy proceedings, or was a fraud against the bankruptcy laws or a fraud against creditors of W. D. Wilson. (e) Defendant set up that the deed was executed in payment of a bona fide and valid debt that W. D. Wilson owed to the said Amanda J. Wilson for money advanced by her to the said W. D. Wilson, to amount of $1,600, besides interest. (f) That said W. D. Wilson had invested said money in lands under an agreement and promise to convey to defendant lands in payment of said money advanced, and that this deed was executed in pursuance of said agreement and was a bona fide transaction.

"Upon the issues raised by the pleadings in the case, the evidence justifies the following conclusions: (a) That W. D. Wilson was not the owner, and was not in possession, of the land described in the petition at the time he was adjudged a bankrupt. (b) That the deed from W. D. Wilson to Amanda J. Wilson, dated the 21st day of October, 1908, and recorded November 12, 1910, conveyed the title to the property therein described to the said Amanda J. Wilson. (c) That at the time said deed was executed W. D. Wilson was solvent, and owned sufficient property other than that described in the deed to have paid all his indebtedness, including his security debts. It was not without some difficulty that this conclusion was reached, owing to the conflict in the testimony and the various contentions. But when we consider the constant accumulation of interest, and the payment of loan commissions, some of which are rather excessive, I am forced to the conclusion that W. D. Wilson was solvent at the time the deed was executed, and that there was no evidence of any fraudulent intent, or that the deed was to hinder, delay, or defraud creditors. (d) That the deed was not a voluntary conveyance. (e) That the deed was made for a valuable consideration, and in payment of a valid debt due from the husband to the wife. The evidence does not disclose the exact amount of the indebtedness that was due from Wilson to his wife, but did show that considerable money had been turned over to Wilson by his wife, and that he had promised to convey land to her in payment of the money, and a preponderance of the evidence authorizes the conclusion that the deed in controversy was executed in compliance with said agreement between the said W. D. Wilson and his wife, Amanda J. Wilson, and was a valid deed.

"(f) Wherefore my conclusion, as special master, is that the deed in controversy was a valid deed, and conveyed the title to the property therein described to Amanda J. Wilson, and that the property described in the deed is not subject to be administered as the property of the bankrupt.

"As to the questions of law: Objections to the testimony of Palmour, found on pages 25, 26, 27, and 28 of the stenographer's report, were sustained by me, and the testimony ruled out, upon the grounds that it was a conversation between W. D. Wilson and a third person after Wilson had put his wife in possession of the land, and was not had in her presence. Objection was made to the testimony of R. Burnett, found on pages 18 and 19 of the stenographer's report, which objections were sustained by me, and the testimony ruled out, on the ground that it was a conversation between W. D. Wilson and a third person after he had gone out of possession of the land, and was not in the presence of his wife, and could not be introduced against her to affect her rights under a deed taken prior to that time. This view seems to be borne out by the holdings of the State Supreme Court. Bowden v. Achor, 95 Ga. 244, 22 S. E. 254; Marion v. Hoyt, 72 Ga. 117; James v. Kerby, 29 Ga. 684. This evidence of Palmour and Burnett was also inadmissible because these conversations appeared to have been conversations relative to another and different transaction, and were made long after the deed from W. D. Wilson to his wife had been executed and recorded. And it also appeared that these conversations related to a deed made to R. C. Green as security for a debt, and was a deed to other and different property. In any event, if the evidence thus ruled out should be considered, and given full weight, force, and credit, it would not authorize a different conclusion or afford any reason for canceling or setting aside the deed in question.

"I have carefully examined many authorities furnished me by the able and distinguished counsel for plaintiff, but fail to find anything that demands a different conclusion to the one rendered."

I have gone over the evidence in this case, and it seems to me sufficient to support the findings of the special master. If the testimony of Mr. and Mrs. Wilson is to be believed, there is no question about the correctness of the report of the master, and I see nothing whatever to cause the master or the court to disbelieve them, or either of them. Their characters are not attacked in any way in the record, and certain circumstances connected with the case can only be claimed

to impugn their testimony at the most. The difficulty in the case was, of course, that the debt by Wilson to his wife had been of such long standing as to make it a rather remarkable claim of indebtedness; still there seems to be no question at all that she inherited the money, as she claimed, or that she received the other $500, as she claimed, and turned it over to her husband, with the understanding that he was to make her a deed to some land for a "home place," as it is expressed.

The deed was made two years before Wilson went into bankruptcy, and, so far as this record shows, before he probably had any intention whatever of going into bankruptcy. The master found that Wilson was solvent in 1908, when he made the deed to his wife, and the evidence is sufficient, at least, in my opinion, to justify this finding. The testimony of all of the witnesses in the case was heard by the master, and he saw them and had an opportunity to judge them, and to judge and weigh their testimony, better than the court can from the record. I find no evidence whatever in the record to show that any creditor of W. D. Wilson was deceived into giving him credit by the nonrecord of the deed to Mrs. Wilson, so it is unnecessary to inquire how far this, if so, would affect Mrs. Wilson's rights.

There are some exceptions to the admissibility of testimony, but it is unnecessary to consider these, because the master finds that he would have reached the same result if he had admitted and considered the testimony which he excluded. The exceptions mainly make the two questions referred to above, as to Wilson's solvency at the time of the making of the deed to his wife, and as to the good faith and bona fide character of the transaction, and whether it was for a valuable consideration. The deed from Wilson to his wife could not have been made with intent to hinder, delay, or defraud creditors, if it was made in good faith, for the purpose of settling with her for the money Wilson received from her. The existence of a debt for a very long time might very well be recognized by a debtor, even by husband to wife, or particularly by husband to wife.

To state it again, the truth about the case is that, if it was, as Wilson and his wife stated, made in good faith, to pay her for the money she had advanced to him long ago, the transaction should be sustained. The master believed them about it, and I find no reason for differing with his finding.

The exceptions will all be overruled, and the report of the special master confirmed.

In re EDWARDS.

(District Court, N. D. Georgia. July 18, 1914.)

BANKRUPTCY (§ 166*)—VOIDABLE PREFERENCE—BELIEF OF CREDITOR.

A wholesale house, having received notice from a mercantile agency of the filing of a number of mortgages against the property of a customer, sent an agent, who at once, and without examining the records, or making any inquiries, except of the customer, took a mortgage on the latter's stock of goods to secure a pre-existing indebtedness. The debtor was in-

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

solvent, and became a bankrupt a few days afterward, and the mortgage, if enforced, would have effected a preference. *Held*, that the creditor had reasonable cause to believe that such preference would result, and that the mortgage was voidable under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. § 166.*]

In Bankruptcy. In the matter of J. L. Edwards, bankrupt. On review of order of referee disallowing claim of the Dannenberg Company as a secured claim. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, Ga., for claimant.

M. J. Yoemans and Jas. G. Parks, both of Dawson, Ga., and I. J. Hofmayer, of Albany, Ga., for trustee.

NEWMAN, District Judge. The finding of the referee in this case is as follows:

"I, W. W. Wright, one of the referees of said court in bankruptcy, do hereby certify that in the course of the above proceedings before me the following questions arose pertinent to said proceedings

"Question. Whether or not the claim of Dannenberg Company against J. L. Edwards, bankrupt, should be allowed as a secured claim over the objection of A. J. Hill, trustee for said bankrupt, on the following grounds, to wit:

"(1) Because, the mortgage securing the said claim was given for the purpose of hindering, delaying or defrauding creditors. Section 67 (e) of the Bankruptcy Act.

"(2) Because, said mortgage was a voidable preference under section 60 (a) and (b) of the Bankruptcy Act.

"After notice to all parties at interest, a hearing was had on said matter before me at Dawson, Ga., on March 12, 1914, and on March 23, 1914, I entered an order disallowing said claim as a preferred lien, on the ground that the same was a voidable preference under section 60 (a) and (b) of the Bankruptcy Act.

"At said hearing Dannenberg Company introduced in evidence the following documentary evidence: A note signed by J. L. Edwards for $1,082.24 principal, dated October 7, 1913, and due one day after date. Also a certain mortgage, dated October 7, 1913, given by J. L. Edwards to the Dannenberg Company to secure said note and future credits and advances which might be extended by the said Dannenberg Company during one year after this date, not to exceed $2,500, upon the following property: All of that certain stock of dry goods, notions, clothing, shoes, hats, caps, groceries, cigars and tobacco, tinware and hardware and all fixtures and all other goods of every kind and description now contained in the one-story brick storehouse situated on Main street in the city of Dawson, said county, which mortgage was duly recorded in the clerk's office of the superior court of Tarrell county on October 9, 1913. Also the answer of the trustee to the application of J. A. Shields to sell certain lands belonging to the bankrupt in order to fix the amount of his claim.

"The trustee introduced the following documentary evidence: Mortgage to the Bank of Dawson, given by J. L. Edwards on his stock of goods and fixtures for $3,200, dated January 3, 1913, recorded October 3, 1913. Also mortgage to the Bank of Dawson, given by J. L. Edwards on his stock of goods and fixtures and the crop, for $9,082, dated October 3, 1913, and recorded October 3, 1913. Also mortgage to the Swift Fertilizer Works, given by J. L. Edwards on the entire crop of cotton, corn, and other crops, dated May 23, 1913, and recorded October 2, 1913, for $———; also mortgage to Lowery Bros., given by J. L. Edwards on the entire crop of cotton and corn, dated August 1, 1913, and recorded the same month, for $126.90. Also mortgage to

Gardner & McDowell, given by J. L. Edwards, covering 24 head of mules, dated January 3, 1912, and recorded January 12, 1913, for $5,113.20, with interest from October 1, 1912. Also claim of Brown Guano Company, for $1,067.04, evidenced by a note dated January 22, 1913, due October 1, 1913. Also that part of the original petition in bankruptcy, showing the entry of filing on October 11, 1913, and the certificate of reference from the clerk on October 28, 1913. Also the order of adjudication. Also the schedule in bankruptcy, showing the indebtedness owing to the secured and unsecured creditors, as well as all the assets of the bankrupt. Also the intervention of L. J. Boswell for a rescission of the real estate. Also the appointment of trustee. Also the appraisement of the stock of goods of the bankrupt. Also one report of sale of said stock and the order of consummation of the referee.

"Findings of Fact.

"The application of J. A. Shields and the intervention of L. J. Boswell are set out in the petition for review, and reference thereto is prayed. The other documentary evidence is attached to this certificate.

"I find that on the 11th day of October, 1913, an involuntary petition in bankruptcy was filed against J. L. Edwards, which was, on the 28th day of October, 1913, referred to me as referee, which order of reference recited that Edwards had filed an answer to the petition of creditors, admitting insolvency. Whereupon he was, upon the 18th day of November, 1913, adjudged bankrupt.

"That on or about the 6th day of October, 1913, notice was brought to the Dannenberg Company, a creditor of the bankrupt, through a mercantile agency, that on the 2d and 3d several mortgages, aggregating about $15,000, had been filed for record, and that immediately upon receipt of this knowledge the credit man of the Dannenberg Company came to Dawson to make an investigation, and that on October 7, 1913, the said Edwards being at that time insolvent, he executed and delivered to the Dannenberg Company his note and mortgage on the stock of goods, fixtures, etc., for the sum of $1,082.24, due one day after date, to secure a pre-existing, past-due indebtedness, which, upon request, had already been extended at least once. The agent of the Dannenberg Company made no investigation of the affairs of J. L. Edwards, other than questioning him, and did not investigate the court records.

"I further find that the effect of the execution of said mortgage was to give the Dannenberg Company a greater per cent. of its debt than would be received by other creditors of its class, and that the agent of the Dannenberg Company was put upon notice of sufficient facts to give him reasonable cause to believe that a preference was intended.

"Findings of Law.

"In order to set aside a mortgage as a voidable preference under section 60 (a) and (b) of the Bankruptcy Act, it is necessary for a trustee to show that the bankrupt, (1) while insolvent, (2) within four months of the bankruptcy, (3) made the transfer in question, (4) that the creditor receiving the transfer will be thereby enabled to obtain a greater per cent. of his debt than other creditors of the same class, and (5) that the creditor receiving the transfer had reasonable cause to believe that it was thereby intended to give a preference. Kimmerle v. Farr, 26 Am. Bankr. Rep. 818, 189 Fed. 295, 111 C. C. A. 27.

"The evidence satisfies me that at the time the mortgage was given Edwards was insolvent. The stock of goods, according to the appraisment, inventoried $10,146, and was appraised at 75 per cent. of inventory value, or $7,609.50, and when sold by the trustee brought $7,400. The evidence showed that this stock of goods was covered by mortgages far in excess of its value. The evidence also showed that the bankrupt had traded his Terrell county land to one Boswell for Fulton county property, and that owing to the undisclosed liens on both properties the trade has been rescinded, and it therefore follows that the bankrupt's assets in land should be figured on the basis of the value of the Terrell county property; and the evidence showed, further, that the Terrell county land, which Edwards received back in the Boswell rescission, is covered by liens to such an extent that the unsecured cred-

itors will receive nothing therefrom. There were also mortgags on the bankrupt's entire crop. No evidence was introduced showing that the unsecured creditors would derive anything, except from the proceeds of the bankrupt's stock of goods. I have therefore concluded that Edwards was insolvent on October 7, 1913. It is undisputed that the mortgage was made within four months of the bankruptcy, and that, if not set aside, its effect will be to give the Dannenberg Company a greater percentage of its debt than other creditors of the same class.

"The remaining element to be considered, therefore, is whether the Dannenberg Company, through its agent, had reasonable cause to believe that a preference was intended by the execution of the mortgage. The evidence shows that, immediately upon receiving knowledge that mortgages were being recorded against Edwards, the Dannenberg Company sent their credit man to make an investigation, but that, in spite of the knowledge that mortgages aggregating more than the value of the stock of goods belonging to the bankrupt had been filed for record, this agent made no investigation of the court records as to the other assets or liabilities, if any, of the bankrupt, and made no further investigation except to question the bankrupt himself.

"In the case of Ogden v. Reddish (D. C.) 29 Am. Bankr. Rep. 531, 200 Fed. 977, the court held that the person receiving transfer has reasonable cause to believe that it will effect a preference if the degree of knowledge is such as to engender fear that such is the case, so strong that the preferred creditor refrains from availing himself of the means at hand for ascertaining the truth, in order to keep himself in the dark in regard thereto, and to be in a position to claim that he did not have reasonable cause to believe that the transfer to him would work a preference.

"In Rogers v. American Hobert Co., 31 Am. Bankr. Rep. 576, 103 Fed. 689, the court held that since the amendment of 1910 to section 60 (b) of the act, it was not necessary to show the intention of the bankrupt to prefer a creditor, but he must still show that the creditor had reasonable cause to believe that the debtor was insolvent, and that the transfer would result in diminishing the bankrupt's assets applicable to the payment of creditors of the same class.

"In Tilt v. Citizens' Trust Co. (D. C.) 27 Am. Bankr. Rep. 320, 191 Fed. 441, it was held that notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all of the facts which a reasonably diligent inquiry would disclose.

"See, also, Stearn v. Paper et al (D. C.) 25 Am. Bankr. Rep. 451, 183 Fed. 228, holding that facts which would put an intelligent business man upon inquiry constituted reasonable cause to believe, if intent to prefer would be discovered by following up the inquiry, and also that fear or suspicion of a preference constituted reasonable cause to believe, if they would incite an intelligent business man to an inquiry, which would disclose a preferential intent.

"In the Stearn Case, supra, the court, on page 458, enters into a very interesting discussion of what is necessary to constitute a reasonable cause to believe, comparing the line of authorities holding that fear and suspicion do not constitute reasonable cause to believe, and the authorities holding that actual knowledge or actual belief of an intent to prefer are not required, and says that the doctrine of fear or suspicion of a preference is not sufficient to invalidate the transfer must receive a restricted application under the present bankruptcy law. The agent of the Dannenberg Company could have found out, not only the facts appearing on the record, but also that Edwards was at that time being pressed by his various creditors. And these facts, taken in connection with the recording of the large amount of mortgages, which showed on their faces that they had been withheld from record for a considerable time, and the other circumstances, in my opinion brought the Dannenberg Company within the meaning of authority cited, supra, on the doctrine of inquiry.

"Upon the foregoing facts and authorities I entered the order which is hereto attached, disallowing the claim of the Dannenberg Company as a secured claim. And the said question is certified to the judge for his opinion thereon.

"I return herewith the documentary evidence hereinbefore mentioned, the claim of the Dannenberg Company, the transcript of the evidence adduced upon said hearing, and the order which is the subject of this review."

This matter is before the court for review, and the question is, as shown by the discussion and findings of the referee, whether the mortgage was a voidable preference under the Bankruptcy Act of 1898.

Counsel for the Dannenberg Company state that under the evidence and the findings of the referee, as a matter of fact, they must agree that Edwards was insolvent at the time he made the Dannenberg mortgage. This being true, and the mortgage having undoubtedly been made for a pre-existing debt and within four months of the filing of the petition in bankruptcy, the simple question is whether the mortgagee had "reasonable cause to believe that the enforcement of such * * * transfer would effect a preference."

It would be a reflection on the intelligence of Mr. Walker, who represented the Dannenberg Company in this matter, and who took the mortgage for them, to say that he did not know that the effect of this transfer would be to give a preference to the Dannenberg Company, or at least to say that he could not have anticipated it, the facts being as they are conceded to have been. There can be no question that the facts before Mr. Walker were such as to put him on inquiry, and that this inquiry would have developed what is now conceded to be true, that Edwards at the time was insolvent, and, of course, if insolvent, a mortgage would give the Dannenberg Company a greater percentage of its debt than other creditors of the same class.

Learned counsel for the Dannenberg Company says in his brief:

"Unless there was substantial evidence of reasonable ground for belief on Walker's part that the enforcement of Dannenberg's mortgage would effect a preference, the referee's finding cannot be sustained. Reasonable grounds for such belief cannot be found in the evidence in this case. The burden being on the trustee, and such evidence not having been introduced by him, he cannot, because he disbelieves the witnesses, assume as proven the things which they refused to testify to as facts."

I understand the finding of the referee to be based on the facts conceded by Walker and by Edwards, the bankrupt, to be true. Walker states that he had received what is called a "red slip" from a commercial agency, which puts them on inquiry as to the condition of the person as to whom the "red slip" is issued. When Walker received this slip, he was not very far from Dawson, and went there immediately and obtained the mortgage. He concedes that after he obtained the mortgage and before he filed it for record he had information that Edwards would be put into bankruptcy, and says he did not intend, before he received this information, to have it recorded.

Tested either at the time of the giving of the mortgage or at the time it was recorded, I think it perfectly clear that Walker, acting for the Dannenberg Company, had reasonable cause to believe that the enforcement of the mortgage would effect a preference in favor of his firm.

The action of the referee must be approved and confirmed.

HARRISON et al. v. CITY OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. September 26, 1914.)

No. 1175.

CONSTITUTIONAL LAW (§ 280*)—DUE PROCESS OF LAW—ADOPTING PLAN OF STREETS—PENNSYLVANIA STATUTE.

Act Pa. Dec. 27, 1871 (P. L. 1872, p. 1390) § 3, and Act Pa. May 16, 1891 (P. L. p. 80) § 12, provide that the owner of property over which a street has been plotted by the city of Philadelphia in accordance with its adopted plan of streets cannot recover for damage to any building subsequently built within the lines of such plotted street, and the Supreme Court of the state has held such acts constitutional and valid. *Held*, that neither their enactment nor the plotting of a paper street projected over the lands of an owner constitute a taking of his property without due process of law, within the prohibition of the fourteenth constitutional amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 877–890; Dec. Dig. § 280.*]

In Equity. Suit by Theodore L. Harrison and the Philadelphia Trust, Safe Deposit & Insurance Company, executors and trustees under the will of Joseph Harrison, Jr., deceased, against the City of Philadelphia. Decree for defendant.

Roberts, Montgomery & McKeehan, of Philadelphia, Pa., for plaintiffs.

Otto Wolff, Jr., Asst. City Sol., and Michael J. Ryan, City Sol., both of Philadelphia, Pa. (Edwin O. Lewis, Asst. City Sol., of Philadelphia, Pa., of counsel), for defendant.

DICKINSON, District Judge. There is no dispute over the facts in this case, except possibly that of money damage and the amount. Formal special findings are filed herewith. Such facts as are necessary to an understanding of the question involved appear in the course of its discussion and need not be now preliminated. The general question involved may be most clearly presented thus:

1. The state of Pennsylvania, by acts of its General Assembly of December 27, 1871 (P. L. 1872, p. 1390, § 3), and May 16, 1891 (P. L. 1891, p. 75, § 12), made it the law of the state that property owners should recover no damages for buildings erected within the lines of plotted streets shown on the plan of streets of the city of Philadelphia.

2. The state also conferred by law upon said city the power, and indeed required it, to adopt a plan of city streets and to locate and ordain them to be plotted streets, which, when lawfully opened to public use and travel, should become city streets and public highways of that commonwealth.

3. The city adopted such a plan, and located and ordained a plotted or paper street as part of said plan over and on the lands of the plaintiffs, which street the city has not as yet opened to public use and travel.

4. No compensation has been paid, or secured to be paid, or offered to be paid, to the plaintiffs.

The question arising out of the facts thus stated is whether the state of Pennsylvania by so doing is depriving the plaintiffs of property without due process of law, within the prohibition of the fourteenth amendment to the Constitution of the United States.

The plaintiffs feel that they have (and they are justified in this), a money interest in the answer to this question of some moment. This pales into insignificance, however, compared to its momentous importance to the state of Pennsylvania and its municipalities, and to every state in the Union.

At the birth of the federal Union Pennsylvania was an independent sovereign state. As such it was the right of her people to adopt any Constitution they saw fit to adopt, to make laws in pursuance thereof, and to commit to her judiciary the power to interpret and declare their meaning in any controversy arising thereunder.

This case concerns only her own citizens as parties and the lands within her own borders as its subject-matter, and arises under her own Constitution and laws, the meaning of which is alone involved in its decision. If any power outside of Pennsylvania can determine such a cause between such parties, and impose its will upon her against her own, she is no longer sovereign in anything. She is not now sovereign in everything, but only because she willingly and gladly surrendered some of the attributes of sovereignty, or more properly sovereign control of some matters, for the sake of the advantage to her sister states and to herself from the federal Union in which she joined. This surrender was made by the states upon more than the assurance, it was made upon the condition, that they retain all the rights and powers of sovereign states, except those enumerated in the instrument by which that surrender was evidenced. One of the most important of sovereign rights which were sacrificed was involved in the act of confiding to the United States, through the federal judiciary, the right and power to determine what had thus been surrendered. If it is determined that the states have given up the right to declare the meaning of their own Constitutions in controversies between their own citizens and affecting their control of the soil within their own borders, their sovereignty, as already stated, is wholly gone. If this has been done, the surrender is to be found in the provisions of the Constitution of the United States. Surely he who asserts this must point to some words in that Constitution by which this surrender was made.

We are referred to the fourteenth amendment, and to the particular provision that no state shall "deprive any person of * * * property without due process of law." The historical purpose of that amendment is well known. To accomplish this the dual character of our citizenship is given constitutional recognition. Every person born or naturalized within the United States and subject to the jurisdiction thereof is declared to be, not only a citizen of the United States, but of the state in which he resides as well. If to further secure the general purposes of that amendment the states gave up the right to make or—what is the same thing in some of its aspects—to declare the meaning of their own laws, the price, immeasurably great as it is, must be paid.

Surely, however, such a tremendous concession must have been expressed, or at least appear by necessary implication. It is certainly not expressed, and we see no necessity to imply it. What is expressed is that no person shall be deprived of his property without due process of law. Any person so circumstanced, therefore, is within the protection of the words of this provision. Are these plaintiffs so circumstanced? We waive, or at least pass over, all other possible questions in order to meet this one squarely.

The plaintiffs are the owners of real estate within the limits of the city of Philadelphia. The city has in contemplation the future opening of public streets. To this end it has indicated their future location by adopting a plan. One of these streets, if opened, will pass through or over the premises of the plaintiffs. The laws of Pennsylvania provide that, when streets so laid out come to be opened, the property owner shall not be compensated for the value of any "buildings or other improvements" which he shall have erected within the lines of the plotted streets after such plotting, of which it is further provided that he shall have notice. The Constitution of Pennsylvania provides that:

"Private property shall not be taken, injured or destroyed without just compensation."

Pennsylvania is not behind any of her sister states, nor any state on earth, in the protection which she throws around private rights, personal or property. The city of Philadelphia has not taken the plaintiffs' property for street purposes, and holds out no offer of compensation until she does. The plaintiffs feel that the plotting of this street imposes a servitude upon their property and impairs their rights therein, in that its full use and therefore its value is in part destroyed. The practical hardship in cases of which this may be and doubtless is one must be admitted. There may, of course, be a property so located that the opening of streets through it will enhance the value of the remaining property beyond its former value as a whole. There are just as surely other cases in which the value is depreciated. There have been, and doubtless will be again, properties over the whole of which streets are plotted. The hardship may be present, and for the purposes of a ruling in this case must be admitted to exist here. Is there, however, any injustice in the legal sense? There is a legal justice, and there is what has been called abstract or natural justice. It is to be desired that they be synonymous. It is the purpose and the effort of every enlightened state to make them so.

These plaintiffs, it must be admitted, have been subjected to a hardship which may be said, although inaptly, to amount to an injustice. Have they, however, been deprived of their property without due process of law? The damage done them is through the impending exercise by the state of the power of eminent domain. The state of Pennsylvania has this power. No property right of the landowner is infringed by its exercise, because the law of Pennsylvania is that every property is held subject to the exercise of this power. It was thought by many, however, to be a hardship to take private property for public use without compensation. By the early Constitutions of the state

this right to compensation was secured. It then became a legal right, and its deprivation a legal wrong. Property might yet, however, be injured by public improvements, and compensation withheld without legal injustice. Many again thought this to be wrong, and the further right was secured to the property owner that his property should not be "taken, injured or destroyed" without compensation. This was not made a right of property in Pennsylvania, in the constitutional sense, until the adoption of the Constitution of 1874.

The right of the plaintiffs, if it exists at all, exists by virtue of some law of the state. They are citizens of Pennsylvania. Their property is within the borders and subject to the jurisdiction of that state. Their property rights must necessarily be determined by the laws of that state, because by no other power can laws affecting the right of property in that state be made, unless its sovereignty be denied. What, then, is the law of Pennsylvania on the subject? It is admittedly that the plaintiffs have no such right in their lands of which either the plotting of a street upon them, or the acts of assembly denying them compensation for buildings subsequently erected within the limits of the streets, can deprive them. This has been determined by the tribunals to which the power to declare what property rights in land are has been committed. It is sufficient to refer to In re Forbes Road, 70 Pa. 125, and Bush v. McKeesport, 166 Pa. 57, 30 Atl. 1023.

This settles the question. Of what avail is it that similar tribunals in some of the other states have declared the law of such states to be otherwise, and inferentially that it should be otherwise in Pennsylvania? Of what avail is it that the members of the federal judiciary should be of opinion that the courts of Pennsylvania might have ruled the question otherwise than they have? It is a known fact, because it could not well be expected to be otherwise, that there was the same difference of opinion in Pennsylvania as elsewhere as to the validity of acts of assembly, thus anticipating the exercise of the power of eminent domain and limiting the compensation to be allowed. Indeed, individual members of its Supreme Court are known to have expressed themselves as of opinion that the law might well have been declared to be otherwise than it has been declared to be. This, however, cannot change the law, or confer a property right which does not exist. Many laws in their application work hardships. The police powers of the states afford us many illustrations. Such hardships, however, do not reach the dignity of legal injustice. The evil here complained of is, moreover, not even real, or at least present. It is threatened only. It can be reached only by invoking the doctrine of quia timet.

If a case should arise in which buildings erected after a street had been plotted should be taken and compensation therefor was demanded, the right to compensation could be determined. If it were determined against the plaintiffs, could it be successfully urged that they had been deprived of their property, if the claim of property was based upon a right which did not exist? In such a case are the federal courts to be guided by what the law is, or what in their opinion it should be? This question has been already answered. It has been determined for

us both before and since the fourteenth amendment went into effect. Suydam v. Williamson, 65 U. S. (24 How.) 433, 16 L. Ed. 742; Eldredge v. Trezevant, 160 U. S. 460, 468, 16 Sup. Ct. 345, 40 L. Ed. 490.

Federal inquiry into state acts is not to determine whether the law of a state is what it might be, but whether violence has been attempted to the provisions of the Constitution of the United States. The real complaint of the plaintiffs is not that there has been a denial of a right, or that this right has not been determined in the due process of law, but that the Supreme Court of Pennsylvania erred in holding the plaintiffs to have no right to compensation. Moreover, the utmost ingenuity of counsel can devise no form of decree to meet the exigencies of an anticipated taking of property. No better illustration can be given of the futility of the attempt to have this right declared to exist and its deprivation found than the failure of counsel of the highest ability to formulate a decree which would effectuate the purpose.

To ask the question whether the courts can compel the city councils to condemn the plaintiffs' property or to open this street is to answer it. To put it in the alternative that the street must either be opened or the plan withdrawn is to decree that the city of Philadelphia cannot adopt a plan of a system of streets. The paper plotting of streets admittedly in itself hurts no one. It is the provision of the acts of assembly at which the ruling is asked to be directed.

To dismiss this bill, as has been suggested, on the ground that in the opinion of the court the acts of assembly, when a case arises, will be held to be invalid, is for the court to embark in the hazardous business of judicial insurance of future rulings. The only course left to us is simply to dismiss the bill, with costs; and this we accordingly do, and a formal decree to this effect may be submitted.

Findings of Facts.

The court finds the following findings of facts:

1. The averments in the bill of complaint, as set forth in paragraphs 1 to 20, inclusive, and also 21, are found as stated in said paragraphs, respectively.

2. There is no act of assembly of the commonwealth of Pennsylvania which provides for the payment of, or requires security for, any damage which a property owner may sustain by reason of the laying out of a paper street on or over his land, in advance of such street being declared to be open for public use and travel.

3. The premises of the plaintiffs are opposite the City Hall and municipal buildings of the city of Philadelphia, and in close proximity to the terminal station of the Pennsylvania Railroad, and are situate within what may be termed the heart of the city. Property other than that included within the lines of the plotted street referred to in the bill in the vicinity of what is known as City Hall Square have been improved by the construction of modern buildings, and the lands of the plaintiffs, by reason of their location, are well adapted for a similar kind of improvement. All lands surrounding the City Hall

Square, including the property of the plaintiffs, have improved or increased in market value since the plotting of said street.

4. The plotted avenue or parkway referred to in the bill has been since 1904, and still remains, upon the confirmed plan of the city of Philadelphia. The said parkway is as plotted a proposed avenue extending from the City Hall where plaintiffs' property adjoins City Hall Square in a northwestward direction for more than one mile connecting with Fairmount Park, the principal public park in the city, and one which is much frequented by its inhabitants. No legal steps have been as yet taken by the city to open said parkway. The improvement, of which this parkway is part, is one which will entail the outlay of a very large sum of money in its completion. The improvement is one which was projected in good faith by the city, and which, so far as the future action of the city can now be determined, is one which will be carried out and completed when and as soon as, in the judgment of the city authorities, the improvement should be completed. The market value of the plaintiffs' property with the plotted street upon it is less than its market value would be if the plotted parkway existed alongside of, or in close proximity to, the plaintiffs' lands, instead of part thereof being within the lines of the plotted avenue.

5. No finding is made of the effect on market values of the plaintiffs' property with and without the said projected parkway.

6. So far as it is a question of fact, there is no statutory obligation or duty imposed upon the city of Philadelphia to take any part of the lands of the plaintiffs for street purposes, and no such obligation is imposed, to pay the plaintiffs any compensation for the act of the city in adopting a plan of streets, including a projected street over the said lands.

7. No finding is made as to the rental or rental value of the plaintiffs' premises at the time of the adoption of said plan of streets, nor of the assessment for tax purposes at different times.

Conclusions of Law.

The court finds the following conclusions of law:

1. Neither the adoption of the acts of assembly, approved December 27, 1871, and May 16, 1891, respectively, nor of either of them, nor the adoption of said street plan, nor of the plotting of a paper street projected through the lands of the plaintiffs, constitute a taking of property without due process of law.

2. The said acts of assembly do not constitute a violation of the provisions of the Constitution of the United States, or of the fourteenth amendment thereto.

3. The plaintiffs are not entitled to the relief as prayed for in the prayers enumerated in said bill and paragraphs 1 to 6, both inclusive, or in any of them.

4. The defendant is entitled to a decree dismissing said bill.

5. The defendant is entitled to a decree for costs.

In re DAVIS.

(District Court, D. New Jersey. October 3, 1914.)

1. BANKRUPTCY (§ 100*)—JURISDICTION OF COURT—DOMICILE OF BANKRUPT—PROOF OF CHANGE.

An alleged bankrupt, who was a builder, and had for many years had his domicile and been engaged in business in the district of New Jersey, where the petition was filed, about a year before that time, being financially embarrassed and in failing health, conveyed all of his property to a trustee for the benefit of his creditors, and on the advice of a physician went to California for the benefit of his health, and was still there at the time of the filing of the petition. *Held*, that the burden of proving that he had changed his domicile from New Jersey, so as to defeat the jurisdiction of the court, rested on intervening attachment creditors, who contested the adjudication; that the fact that he had been absent for a year, and had during that time continued to reside in California, was not, under the circumstances, sufficient, in the absence of further proof of his intention not only to abandon the old domicile, but also to acquire a new one in California.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

2. DOMICILE (§ 2*)—DEFINITION—RESIDENCE DISTINGUISHED.

Domicile is of more extensive signification than residence, and includes, beyond mere physical presence at a particular locality, an intention to constitute it a permanent abiding place.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 2; Dec. Dig. § 2.* For other definitions, see Words and Phrases, First and Second Series, Domicile.]

In Bankruptcy. In the matter of Joseph Davis, bankrupt. On motion to confirm and exceptions to report of special master recommending dismissal of answer of intervening creditors. Report confirmed, and answer dismissed.

William L. Brunyate, of Newark, N. J., for petitioning creditors.
William E. Holmwood, of Newark, N. J., for intervening creditors.

HAIGHT, District Judge. This matter is before the court on a motion to confirm, and on the exceptions filed to the report of the special master, to whom was referred the issues raised by the petition for adjudication and the answer of the intervening creditors. He has recommended a dismissal of the answer. The alleged bankrupt has not contested an adjudication; in fact, the act of bankruptcy alleged is an admission in writing, signed by his attorney, and attached to the petition for adjudication, of the bankrupt's inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. An adjudication was entered upon the filing of the petition. Subsequently, and before the expiration of the time allowed by the bankruptcy act, the intervening creditors filed an answer. The order of adjudication was not vacated, but the issues raised by the petition and answer were referred to a special master, and the proceedings thereon were conducted in the same manner as though an adjudication had not been entered. If the intervening creditors prevail, the adjudication will, of course, be vacated; but, if they do not, the adjudication will stand, and their answer be dismissed. Within four months prior to the

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

filing of the petition, the answering creditors caused an attachment to be issued out of the Essex county circuit court against the property of the bankrupt. This will be vacated, if the petitioning creditors prevail; but, if they do not, the answering creditors will secure a preference. Three questions are presented:

(1) Whether the attorney who signed the consent to adjudication had, in fact, authority to do so.

(2) Whether the domicile of the bankrupt had been within the territorial jurisdiction of this court for the preceding six months, or the greater portion thereof.

(3) Whether the answering creditors have a valid and enforceable claim against the bankrupt.

As to the first question, I entertain no doubt whatever that the special master reached a proper conclusion. I need but refer to the very excellent analysis of the evidence contained in his report.

As to the second question, I think that the special master has correctly stated the legal principles which govern, and in his application of them to the facts has reached a proper conclusion. For many years prior to May, 1913, the bankrupt had his domicile and had been engaged in business in East Orange and South Orange, Essex county, N. J. He was a builder and dealt generally in real estate. In the spring of 1913, having become financially embarrassed, he conveyed all of his property (the same being located in this district) to a trustee for the benefit of his creditors. He expected that sufficient would be realized therefrom to pay all his creditors in full, and that something would be left for himself.

Being then in failing health, he was advised by his physician to "go away, drop business cares, and secure a complete rest." Accordingly, in May, 1913, he went to California, after having been assured by his physician that it would be a "good place" for him. He has remained in the latter place up to the present time. His three daughters accompanied him, although his wife appears not to have done so. Whether she has joined him since, the evidence does not disclose. The furniture which had been in his home, and which appears to have belonged to one of his daughters, was at first stored in a warehouse in East Orange; but later, by direction of the daughter, some of it was shipped to California.

The petition was filed and the order of adjudication entered on April 29, 1914. It is clear that the bankrupt's principal place of business had not been, nor had he resided, within this district, for the six months, or the greater part thereof, preceding the filing of the petition and the adjudication. The intervening creditors contend that his domicile was, likewise, not within this district during that time, and that therefore the court is without jurisdiction to entertain the petition.

[2] The present Bankruptcy Act (Act July 1, 1898, c. 541, § 2, subd. 1, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]) recognizes a distinction between one's residence and domicile. This the law has always done. Domicile is of more extensive signification than residence, and includes, beyond mere physical presence at a particular locality, an

intention to constitute it a permanent abiding place. A clear statement of the distinction is found in Brisenden v. Chamberlain (C. C.) 53 Fed. 307. It having been established that in May, 1913, and for many years prior thereto, the bankrupt's domicile had been this district, it is necessary to ascertain whether it has been changed. The principles of law which must govern in the solution of this question have thus been stated by Mr. Justice Swayne, in Mitchell v. U. S., 21 Wall. at 353, 22 L. Ed. 584:

"A domicile, once acquired, is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made, except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

These principles have been consistently followed by the Supreme Court and are universally accepted. Desmare v. United States, 93 U. S. 605, 23 L. Ed. 959; Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078. Instances of their application in the bankruptcy courts are found. In re Filer (D. C. S. D. N. Y.) 108 Fed. 209, 5 Am. Bankr. Rep. 332; In re Williams (D. C. W.) 99 Fed. 544, 3 Am. Bankr. Rep. 677; In re Berner, 3 Am. Bankr. Rep. 325; In re Clisdell, 2 Am. Bankr. Rep. 424.

[1] The burden of proving the change of domicile was, therefore, on the intervening creditors. The argument of their counsel seems to assume that it is sufficient, in order to discharge this burden, to show that the bankrupt had decided to remain permanently away from the old domicile, without showing an intention to remain permanently in the new place of residence. But this is not sufficient, because the old domicile remains until a new one is acquired, and a new one is not acquired unless there is a residence in a new locality, coupled with the intention to remain there. One cannot have two domiciles at the same time, but is always deemed to have one.

Even if the evidence could be said to demonstrate an intention on the bankrupt's part to abandon New Jersey as his domicile, it fails to prove his intention to remain permanently in California and make it his domicile. The bankrupt's intention, in this case, must be gathered from the circumstances, his declarations, and letters written by him. The evidence is quite meager. It does not show whether he is keeping house or boarding, nor whether he has paid personal taxes, or voted or attempted to vote, in California. His testimony has not been taken. It does appear, however, that he went to California originally for his health, and that before his departure he informed the attorney, to whom he had intrusted his affairs, that he would return as soon as he was in shape to do so, and that he wrote his sister in the latter part of 1913 that a doctor had ordered him to a sanitarium for a year. However, in other letters, written to friends, he speaks of his health

being improved and of attempting to do some business. In the last of these letters, written in December, 1913, referring to a rumor (about which this friend had evidently written him) of his intention to return to East Orange at Christmas, he used this significant expression, indicating, I think, an intention to return to his old home:

"I doubt if I shall see East Orange for some months yet."

In some of these letters he speaks of certain advantages of California over New Jersey, referring to the climate, cost of living, and characteristics of the people. Neither these expressions nor his attempt to do some business are inconsistent with an intention to stay in California temporarily. He appears to have been without means, and it was probably necessary for him to do something in order to support himself.

But it is further urged on behalf of the answering creditors that where one lives is prima facie his domicile, and that as they have shown that the bankrupt's place of residence, for at least six months prior to the filing of the petition, was in the state of California, they have discharged the burden of showing a change in domicile. In support of this contention Ennis v. Smith, 14 How. 400, 411 (14 L. Ed. 472), is cited. It is true that Mr. Justice Swayne, speaking for the Supreme Court in that case, said:

"Where a person lives is taken prima facie to be his domicile, until other facts establish the contrary."

But he also said (same page):

"It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicile of choice. But there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence."

The opinion points out that a removal from one's place of residence does not prima facie prove a change in his domicile, when it appears that the removal was, for some particular purpose, expected to be only of a temporary nature, and which is not inconsistent with an intention to return to the original domicile. To the same effect is De Bonneval v. De Bonneval, 1 Curt. 856.

In the case at bar it is shown that the bankrupt's removal was for a particular purpose, which is not inconsistent with an intention to return to the original domicile. It follows, therefore, that the bankrupt's residence in California does not prima facie prove his domicile there. The evidence does not demonstrate, in my judgment, that the bankrupt has acquired a new domicile in California or elsewhere, or for that matter has determined to abandon his domicile in New Jersey. It therefore follows that his domicile still continues in the state of New Jersey.

This disposition of the first and second of the above-stated questions makes it unnecessary to consider whether or not the answering creditors have a valid and enforceable claim against the bankrupt. No opinion is expressed on this phase of the matter.

The special master's report will be confirmed, and the answer of the intervening creditors dismissed, with costs.

THE PROTECTOR.

THE MATTIE L. JOHNSON.

(District Court, E. D. North Carolina. October 5, 1914.)

No. 132.

COLLISION (§ 95*) — TOWS MEETING AT NIGHT — FAILURE TO CARRY PROPER LIGHTS.

A collision at night on the Cape Fear river, between a tow going up, consisting of two lighters alongside of a motor tug, and a barge in tow on a 300-foot line passing down, *held* due solely to the fault of the upbound tow in failing to carry the lights required by the regulations, or to give any passing signal; it being shown that neither lighter carried any light, and that the only light which could be seen from the approaching tug was a single white light, which led its pilot to suppose it was a vessel at anchor, when at the time of collision it was on a crossing course.

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

In Admiralty. Suit for collision by D. McEarchern and others, owners of the motor boat Topaz and lighters in tow, against the steam tug Protector and the barge Mattie L. Johnson and their owner. Decree for respondents.

John D. Bellamy & Son, of Wilmington, N. C., for libelants.
Robert Ruark, of Wilmington, N. C., for claimants.

CONNOR, District Judge. From the evidence, in regard to which there is but little contradiction, it appears that on the night of January 15, 1914, the gasoline tugboat Topaz, length 39 feet 6 inches, beam 11 feet, depth 6 feet, draft 36 inches, when loaded 40 inches, pilot house elevated above deck 6 feet, left the fish factory, on the Cape Fear river, below Wilmington, N. C., having in tow two lighters, Nos. 4 and 5, of 75 feet length, 20 feet beam, 5 feet depth, "decked over, bulkheads across, and used for transferring stuff about the river," and started up the river to Wilmington. The lighters were lashed to the tug, on each side, lashed together, "formed, practically, a 'V' shape, with which, in the closed end of the 'V' the motor boat put her bow between them." Four hundred and fifty barrels of fish oil were loaded upon the lighters, standing upon end. The Topaz carried a green light on the starboard side, red light on the port, a white light in the middle, and two mast lights on the stern. The white light was in the middle, between the green and the red lights, on top of the pilot house." There was no light at the bows of, or elsewhere on, the lighters. The tug was in charge of L. L. Bryant. He had no license to act as captain of motor boat, or any other kind of craft; never had any license; no license was required for the motor boat. The Topaz, with the lighters in tow, as described, left the factory at about 7:30 p. m., going up the river. The night was dark—starlight. At about 8 o'clock, when she had proceeded up the river about 1½ miles, on the eastern side of the channel, with a flood tide—the channel being about 250 or 300 feet wide—Mr. Bryant saw the Protector with the Mattie L. Johnson in tow, approach-

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

ing about 1½ miles away. The channel runs "northeast and southwest slightly—a little north." The depth of the river in the channel was about 28 feet.

On the same day, at about 6:30 p. m., the Protector, a seagoing steam tug, having in tow the barge Mattie L. Johnson, left Wilmington, N. C., going down the river. The barge is about 190 feet long, 36 feet 6 inches wide, 18 feet high, "pilot house on her aft 7 feet, and the pilot house 7 feet more, draft, when loaded, 14 feet, at this time about 6 feet 4 inches. "She was light." The barge carried a red light on the port, green on the starboard, and "two white lights up on the flagpole aft, about 2½ feet apart." The Protector carried two masthead lights, and red lights and green lights. "She was electrically lighted all over." L. J. Pepper, regularly licensed as a first-class pilot, and "master for steam vessels," was in command of the Protector, as pilot, actively engaged in and directing her navigation. William D. Schwartz, having a government license as master and pilot, was, on this occasion, acting mate on the Protector. Capt. Brown was her master. C. W. Johnson was master and part owner of the barge Mattie L. Johnson. He was in command, on January 15, 1914, at the wheel, going down the river.

Mr. Bryant says:

"On first seeing the Protector, I got to the east of the channel to allow him to pass to the westward, and stayed there. When I first saw her coming, until she was half or three-quarters of a mile from me, and I saw she was headed straight toward me, heading on the river toward me, trying to take up the range, I still got further to the eastward to get out of her way, and she headed right straight for me, and crossed and ran me down. She went across my bow."

The barge struck the lighter, No. 5, on the port side about amidships—the left side going up the river. The lighter No. 5 and the motor boat Topaz were sunk, and lighter No. 4 was injured. "The Topaz sunk right where she was." She was found the next morning about 300 feet from the center of the channel; water there about 16 feet deep. When the barge struck the lighter, the motor boat was "headed" northeast—"headed more to the eastward to get clear of the boat." Bryant gave no signal. When he saw the Protector approaching, she was in plain view.

"I was clear of her at that time—did not think a signal necessary. I was out of the channel—could have given signal at any time until the lighter was struck; lights were burning."

Several witnesses on the motor boat, at the time of the collision, were examined, all of whom gave substantially the same account of the collision, etc.

Mr. Pepper, the pilot in charge of the Protector, says:

"Just about the time the collision took place, dark night, starlight, we were going down the river with the ranges on, right in the channel, course south-southwest; saw one bright, white light; saw nothing at all, except one bright light; saw this light all the time; was about one mile and a half from where we collided, when first saw light; it was an anchor light. Told Capt. Schwartz that it was some small boat anchored there, and it was a good point to steer by; did not know then it was under way. When about 50 yards away, saw the shadow of the tow; there was only one light. The motor boat was headed about east; was about two points on our side and heading right for

us. As soon as I saw there was something in motion, I immediately stopped the tug. I saw it was his intention to go across the barge's bow, and I let my hawser down, so he could go right across it. The wind blew about west, ordinary breeze; tide about to the eastward. Saw but one light on the Topaz. There was nothing after I discovered that the Topaz, with her tow, was moving, that I could do to prevent the collision; too short a time to do anything other than what I did."

To the question:

"If the Topaz and her tow had been showing red and green lights, and a white light on her stern, or near her stern, and two lights on her beam, to indicate a tow in motion, could and would you have entirely avoided this accident?"

—he answered:

"Of course, I would have gone to the other side of her. The rules of the road are to keep to the right of her, but she appeared to be weighed on an anchor."

All of the witnesses concur in saying that there is ample room in the channel for the boats and their tow to have passed without danger of collision. The barge had 300 feet towline—was moving about 8 miles an hour. As affecting the value to be given Mr. Pepper's testimony, it is shown, on cross-examination and his personal appearance, that he wore glasses. He is 64 years of age; had pilot's license 41 years, and master's license 31 years. He denied that there was any other weakness in his capacity to see than was incident to his age; was examined, as required by the regulations, 2 years ago.

Capt. Craig, a licensed bar and river pilot for 37 years, and master of steam vessels 12 years, testified to Mr. Pepper's good character and that he had a good record as a pilot. He said that he was familiar with the river at the point where the collision occurred. When asked by the court what course the Topaz should have taken, he said:

"She could have gone most any way, except the way she did. He had almost all the room in the channel. * * * He could have taken either side and gone up in perfect safety. The Protector should have been running with the ranges, and in the center of the channel; that would have been proper navigation. Capt. Pepper's testimony indicates that the Topaz was going directly across the channel, the way the barge struck her. Taking the testimony of all the witnesses, it would indicate that the Topaz was going across the channel eastwardly."

Capt. Williams, the harbor master at the port of Wilmington for 20 years, holding a license as master of steam vessels for 45 years, says that he has known Capt. Pepper "pretty much all of my life," and his general character is good—his reputation as a pilot is good. He further says:

"I have passed, all of my life, vessels of different draft, without any accident, at that point and at different points on the river."

Capt. Johnson, the master and part owner of the barge Mattie L. Johnson, was at the wheel when approaching the place of the collision. He says:

"I did not see any red light or green light on the Topaz, or the lighters. I saw a white light· just one."

He says that the place at which he was standing in the pilot house was about 32 feet above the water; could have seen the red and green lights all right, if they had been up above the lighters. The bow of the barge struck the lighter.

Capt. Schwartz, in his deposition, corroborated Mr. Pepper in regard to the light as seen on the Topaz, and the course pursued by the Protector. He was in the pilot house at the wheel.

On rebuttal, Mr. Bryant was asked whether he knew of the rule which required a tug, when towing two or more boats abreast, that colored lights should be carried at the outer side of the bow of the outside boat, and answered that he did not—that he had no lights on the bow of the lighters. He says that the white light was "as far forward, and as near the stem of the boat, as was practicable to place it." If he had put the white light down on the deck below, it could not have thrown a light on either side; that, in order to comply with the law, it was necessary to put the white light on the pilot house; that he showed a white light aft, on the starboard side a green light, and on the port side a red light; that these would throw an unbroken light over the arc of the horizon 10 points on the compass. He further said that with a tow he would have put another white light on the mast, not less than 3 feet apart; "two lights indicate that you have a tow, whether at the stern or alongside. The channel of 250 or 300 feet in width, 25 feet deep, gave ample room for the two boats, with their tows, to have passed in safety."

The government chart of the river shows that, for a much greater width, there was water from 9 to 17 feet deep at the point of the collision. By the rules prescribed by the Department of Commerce for lights for barges in tow of steam vessels navigating the harbors, rivers, and inland waters, it is required that:

"Barges towing astern of steam vessels, when towing singly or tandem, shall carry a green light on the starboard side and a red light on the port side and a white light on the stern," etc. "When two or more boats are abreast, the colored lights shall be carried at the outer side of the bow of the outside boats."

In The Lyndhurst (D. C.) 92 Fed. 681, Judge Brown (S. D. N. Y.), referring to the failure to observe this rule, says:

"The requirement of the inspector's rule * * * imposes a duty also on the tow to carry lights as specified, and this includes the duty of attention to the lights required to be exhibited so as to keep them in proper condition. In towing upon a hawser it is not reasonable to hold that the tug alone should attend to and keep up such lights."

In The Eugene Moran (D. C.) 143 Fed. 187, Holt, District Judge (N. D. N. Y.), says:

"I think that both the Moran and the scows were in fault for not having up lights on the scows. * * * The authorities establish that, under those circumstances, it was the duty of the master of the tug and the men on the scows to see to it that the lights required by law to be on the tow were in place and lighted."

In North American Dredging Co. v. Culter, 162 Fed. 457, 89 C. C. A. 343 (C. C. A. 9th Cir.), Gilbert, Circuit Judge, said:

"It seems to be the theory of the regulations adopted by Congress for the prevention of collisions in harbors, rivers, and inland waters of the United States * * * that, when a vessel is towed by a tug, the tow shall carry certain lights, and that an overtaking vessel is not required to look to the lights on the tug for information that it has a tow, although the tug is required to indicate that fact to meeting vessels by carrying in front of the foremast two bright white lights in a vertical line, one above the other not less than three feet apart." Article 3, Rules, etc.

It is manifest, from the evidence in this case, that neither of these rules were obeyed by the Topaz or the lighters, which she had in tow. The Protector and her tow, the barge Mattie L. Johnson, both carried these lights required by the rules. Under these conditions the rule of liability is announced by the Supreme Court in The City of New York, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84:

"When fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel."

The uncontradicted testimony of those in charge of the Protector and the Mattie L. Johnson tends strongly to show that if the tow—the lighters—lashed to the Topaz had carried the lights, or the Topaz had carried the two white lights, as required by the rules, the collision would have been avoided. It is evident that Capt. Pepper was led to believe by the single white light carried by the Topaz that she was at anchor, and in the absence of the two lights on the motor boat, or any lights on the lighters, there was nothing to indicate that the tug was in motion, or the presence of the lighters, until, by the shadow of the tow, 50 yards off, when he immediately stopped the tug, and, seeing that it was the intention of the master of the Topaz to go across the bow of the barge Mattie L. Johnson, let his hawser down so that she could cross in safety. It is manifest from the testimony of Capt. Craig, an entirely disinterested witness, intelligent, and a skilled pilot, having long experience in navigation on the river, that Mr. Bryant, for some reason, did not understand the situation, or failed to exercise a correct judgment. He admits that he did not give any signal when he saw the Protector approaching, because he thought he had the right of way.

Viewed from either aspect, I am brought to the conclusion that the collision was due to the failure of the master of the Topaz to obey the rules in regard to lights prescribed for the prevention of collisions, and erroneous navigation under the circumstances, and that no liability attaches to the conduct of the Protector or the Mattie L. Johnson.

A decree may be drawn dismissing the libel, with cost to be taxed by the clerk.

BYNUM v. SCOTT et al.

(District Court, E. D. North Carolina. October 5, 1914.)

No. 23.

BANKRUPTCY (§ 250*)—CORPORATIONS—UNEXPLAINED SHORTAGE OF ASSETS—LIABILITY OF MANAGING OFFICERS.

Directors of a bankrupt mercantile corporation conducting a store in a small town, who were also its managing officers, having charge of all of its business and property, *held* liable to its trustee for a large shortage in its stock of goods, wholly unexplained by the books which it was their duty to keep; but another director who had no part in the actual conduct of the store and no reason to suppose it was not properly managed, *held* not liable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 235, 350; Dec. Dig. § 250.*]

In Equity. Suit by Fred W. Bynum, trustee in bankruptcy of the Bennett Supply Company, against J. H. Scott, J. W. Purvis, and Eli Scott. Decree for complainant against defendants Scott, and in favor of defendant Purvis.

L. M. Swink, of Winston-Salem, N. C., and H. A. London & Son, of Pittsboro, N. C., for plaintiff.

R. H. Hayes, of Pittsboro, N. C., for defendants.

CONNOR, District Judge. The evidence shows that the Bennett Supply Company was chartered and organized on November 10, 1910, for the purpose of conducting a general mercantile or supply store, at Bennett, N. C. It continued in business until November 30, 1913, when upon its petition, alleging insolvency, the judge of the superior court appointed plaintiff receiver of its property. A short time thereafter, upon the petition of its creditors, the corporation was adjudged bankrupt. Plaintiff was duly elected and qualified as trustee, and in that capacity retained possession of its assets. Immediately upon his appointment as receiver, plaintiff, with the active aid and assistance of defendant J. W. Scott, took an inventory of the goods, merchandise, furniture, fixtures, and other property of said corporation. From such inventory it appeared that the goods and merchandise, upon the basis of the cost price marked thereon, amounted to $6,764.20; furniture and fixtures, $314.44; storehouse and lot cost $992.78. Its indebtedness is over $11,000. In the bankruptcy proceeding an order was made appointing Jos. B. Cheshire, Jr., Esq., special master, with direction to make an examination of defendants and such other persons as he should think proper touching the condition of the affairs of said Bennett Supply Company and its assets. His report was introduced on the hearing of this cause. It is very full, clear, and enlightening. He finds that:

"The Bennett Supply Company is a corporation, with its principal place of business at Bennett, Chatham county, N. C., incorporated November 10, 1910, with J. H. Scott, subscribing for 20 shares, of the par value of $100 each; Eli Scott, for 10 shares, par value $100 each; J. A. Purvis, 10 shares, par

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

value $100 each; and I. H. Dunlap, for 5 shares, of the par value of $100 each. From the formation of said corporation, until it went into the hands of Fred W. Bynum, receiver, on November 30, 1913, J. A. Purvis was president thereof, Eli Scott was vice president thereof, and J. H. Scott was secretary thereof. Its board of directors was composed of J. H. Scott, Eli Scott, and J. A. Purvis. J. H. Scott and Eli Scott were its managers and had control of it; they being, most of the time, the only agents of the company.

"J. H. Scott supervised and kept the books of the company and took off trial balances each month (with a few exceptions, when two or three months would be consolidated, or trial balances for one month omitted), up to February, 1913, when he took no more trial balances and stopped writing up his ledger. The invoices of merchandise, purchased during the year 1913, were missing when the books were audited, and they have not been produced. During the year 1912, the year prior to the receivership year, the company's books show a profit of $1,638.28.

"During 1913 J. H. Scott would send checks of the Bennett Supply Company to the Chatham Bank at Silver City, N. C., have the bank place part of the checks to the credit of the Bennett Supply Company, and return the balance of the checks, in cash, to the company. No cash account was kept of these amounts of money sent the Bennett Supply Company in cash from the Chatham Bank. The officers and managers of the Bennett Supply Company kept no account of actual cash handled in the store, unless such cash was sent to the bank for deposit, when it would appear on the cash book. The actual cash was kept in the safe, and no record made of it, except when put on deposit slip and sent to bank. The managers would leave the store for short intervals of a few minutes, frequently leaving customers sitting around; but they never had cause to suspect any of them of taking anything. About September 1, 1913, and just prior thereto, J. A. Purvis, Eli Scott, and J. H. Scott bought up all of the capital stock of the Bennett Supply Company, not already held by them, except two shares owned by R. L. Bradley."

The special master, upon the testimony of Leslie Abott, an expert accountant who had made an examination of the books, etc., of the company, and other evidence before him, found that, by an inventory taken December 31, 1912, the company had on hand stock of merchandise costing $4,359.32. From the inventories found on file, it purchased goods for cash amounting to $8,393.32, on credit $7,383.76, aggregating, with the stock on hand January 1, 1912, $20,136.37. From January 1, 1913, until November 30, 1913, it sold goods amounting to $8,025.71. The expense of conducting the business at $70 per month was $770, thus accounting for $8,795.71, to which should be added the stock on hand, $6,764.20, leaving a deficit of $4,576.46. In this calculation no profits are charged on the goods sold for cash. There is evidence that goods were sold for a profit of 25 per cent. This, however, is a mere estimate made on this account. This is not included in the above figures. The master finds the facts in regard to the Bennett Milling Company, a corporation, the stock of which was owned by defendants.

It is charged in the bill herein that the assets of the Bennett Supply Company were diverted from that corporation and invested in the property of the Milling Company. Whatever suggestion is made to this effect, based upon the successful operation of one corporation and the insolvency of the other, both belonging to, and managed by, the same persons, seems to be met by the evidence taken on the hearing herein. The record evidence shows the sources from which the money invested in the Milling Company was derived. It is under mortgage for considerable amounts for money borrowed for the purchase money

of the plant. The checks introduced, drawn on the accounts of both corporations, negative the charge that the money of the Supply Company went into the assets or operating expenses of the Milling Company.

Some other explanation must be sought for the admitted deficit in the assets of the Bennett Supply Company. Either the goods and merchandise purchased by the company, and for which it is largely indebted, were sold for cash, of which no record was made and no accounting had, or the goods were taken from the store by some one. There is no evidence that any of the goods were stolen, nor is there any evidence tracing them into the possession of any other person. The only explanation suggested by J. H. Scott, while being examined on the hearing, is that there were more goods in the store than the inventory shows, and that, in taking it, a mistake was made. This is a mere surmise on his part. It is disposed of by the fact that, for a large portion of the time during the taking of the inventory, he was in charge of and assisted in the work, and during the entire time he was present and assisting. Each article, with the cost, is entered on the inventory, and the additions carefully made and verified. The goods have been sold by the trustee, using the inventory as the basis of the sale. Defendant Eli Scott was not introduced as a witness and has never been examined.

The question, therefore, is: Upon whom shall the loss, occasioned by the shortage in the assets, fall? The defendant J. H. Scott is shown to have enjoyed a good character prior to the developments made in this case. He is a man of temperate, economical habits. He gives no indication, either in his appearance or manner, of being extravagant or dissipated. The defendant Eli Scott, for some time prior to the failure, was president, together with J. H. Scott, and actively assisted in the management of the business. The property of the corporation was in their actual possession at all times. As managing officers of the corporation, intrusted with the possession and sale of the corporate property, they owed the duty to the stockholders and creditors to use at least ordinary care to protect it from waste, dissipation, or embezzlement. This duty, the evidence shows, they have failed to discharge. It is settled that, as directors, the defendants owed the duty to the corporation—

"to exercise as much diligence and care as the proper performance of the duties of their office requires. What constitutes a proper performance of the duties of a director is a question of fact, which must be determined in each case in view of all the circumstances. The character of the company, the condition of its business, the usual methods of managing such companies, and all other relevant facts, must be taken into consideration." Morawetz, Priv. Corp. 552.

It has frequently been said that they are required to use ordinary care, or that degree of care and prudence which is generally exercised by business men in the management of their own affairs. With respect to the duty of the directors of a mercantile corporation, such as the Bennett Supply Company, it would seem that, if they exercised due care in the selection and employment of agents and managers, and thereafter exercised due care in overlooking and supervising such

agents or employés, they are not liable for mistake of judgment, or the wrongdoing of such agents. The persons employed are the agents of the corporation, and not of the directors. It is not expected, or required, of the directors of a small mercantile corporation, that they give their entire time and attention to the conduct of the business. They receive no compensation for their services. When, however, a director is also president and secretary of the corporation, and assumes the actual and sole active management of the business of the corporation, takes its property into his possession, sells, and receives and disburses the proceeds, keeps its books, and buys property in the course of business, a very much higher degree of care is required, or, to state the duty more accurately, ordinary care calls for much more active supervision and oversight of the business and property of the corporation. Such officers receive pay for their services.

This is the attitude of defendants, J. H. Scott and Eli Scott, to the bankrupt corporation. They may be likened to bailees for hire, and liable for a failure to exercise due care in taking care of and accounting for the property placed in their possession. There can be no doubt of the liability of defendants J. H. Scott and Eli Scott for the value of the property of the corporation, the goods purchased by them for the corporation, and for which its money was expended, or liability incurred. Neither the corporation, nor its representatives, is called upon to show what became of the goods which are shown to have gone into the business, been purchased by defendants. The burden of proof is on the defendants J. H. Scott and Eli Scott, upon the uncontradicted evidence, to do so. The defendant Eli Scott has never undertaken even to suggest, and the defendant J. H. Scott does not more than make a surmise as to, the cause of the deficit of more than $5,000. This deficit came about between January 1, 1913, and November 30, 1913. It is significant that after February, 1913, defendant "took no more trial balances and stopped writing up his ledger." The books show that, during the year 1912, the business yielded a profit of $1,638.28, and during the year 1913 a loss of more than $5,000, without any explanation.

The liability of defendant J. A. Purvis is not so clear. There is no evidence connecting him with the management of the business, or of facts calculated to put him upon inquiry, leading to knowledge or suspicion that the business was not being properly conducted. There is nothing in the evidence fixing him with negligence in the selection of his codirectors, as president and secretary, or placing them in control of the property. He owned only 10 shares of the stock, for which it is admitted he paid in full. It would seem that the duty of a director in a corporation conducting a small country store is discharged, so far as the selection of agents is concerned, when he exercises, with the lights before him, ordinary care in their selection. It is well known that an annual inventory and accounting in business of that character is usual. In the absence of any reason suggesting the necessity for doing more, he discharges his duty by following the usual and customary method pursued in business concerns of a similar character. It does not appear that the corporation was sued or

pressed for overdue debts. The inventory and books of January 1, 1913, showed that the business was in healthy condition and making a fair profit. It is true that the company borrowed $1,500 early in the fall of 1913 and executed a mortgage upon its entire property. This money appears to have been properly applied. There was nothing in this act which was calculated to arouse suspicion. It was not unusual, at that season, for a country mercantile business to borrow money. It seems that Mr. Purvis is a farmer, and would not, by simply going in the store, have discovered that any goods were missing; nor is there any evidence that he knew the quantity of goods purchased by the company during the year. There is nothing in the evidence suggesting when the goods were removed or taken from the store. Mr. Morawetz states the measure of liability imposed upon directors:

"The amount of attention and care, which the proper performance of their duties requires, evidently depends upon the character of the business in which the company is engaged." 2 Corp. 551.

Earl, J., in Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546, says:

"It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied."

There is a lamentable absence of appreciation, or probably knowledge, on the part of persons who become directors in the numerous business corporations, industrial and mercantile, which are being created and operated. I am unable to find, by the application of the principles laid down by the courts, such negligence on the part of Mr. Purvis in the discharge of his duty as director as fixes upon him a personal liability for the conduct of his codirectors and active managers of the business. They were his brothers-in-law and neighbors. They had the confidence and respect of others, and whatever may be the true explanation of their conduct of the business of the corporation, there is no evidence here which would indicate that they were not regarded as honorable, reliable men when the corporation was organized, or that there was anything in their conduct to cause suspicion until the crash came. While it seems that the business of the Bennett Milling Company has had a fairly successful career, an examination of the bank accounts and production of the checks drawn by J. H. Scott, its secretary and treasurer, fails to disclose any mingling of the funds of the two companies, or application of the funds of the Supply Company to the debts or expenses of the Milling Company. The evidence, regarding the source from which the means employed in procuring the plant and machinery of the Supply Company is not contradicted; on the contrary, it appears to be corroborated by the record evidence.

It is conceded by the plaintiff that a more thorough examination of the books and stockbook than was first made disclosed that full payment was made for all of the stock subscribed and issued. The right of action, vested in the corporation to sue defendants for their breach of duty, passed to the plaintiff as trustee. The assets, including such causes of action of an insolvent corporation, constitute a trust fund

for the benefit of creditors, whose rights are worked out through the corporation. In re Swofford Bros. Dry Goods Co. (D. C.) 180 Fed. 549; Morawetz, Corp. 795.

The plaintiff trustee is entitled to a decree against defendants J. H. Scott and Eli Scott personally for the sum of $4,576.46. This is the amount of shortage found by the special master, and eliminates any element of profits on sales. It gives to defendants the benefit of every possible doubtful question, and adopts figures in regard to which there is no controversy. The bill will be dismissed as to defendant J. A. Purvis. The costs will be taxed against defendants.

MALING et al. v. MALING et al.

(District Court, D. Oregon. October 5, 1914.)

No. 6345.

1. COURTS (§ 505*)—JURISDICTION OF FEDERAL COURTS—SUITS BY LEGATEE OR DISTRIBUTEE.

A federal court may entertain jurisdiction of a suit by a distributee, who is a citizen of another state, to establish his right to a share in the estate of a deceased person, although the estate is still pending for settlement in probate, and may enforce its adjudication against the administrator or his sureties personally, or in any other way which does not disturb the possession of the property by the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. § 505.*]

2. WILLS (§ 435*)—CONSTRUCTION—GENERAL RULES—INTENTION OF TESTATOR.

It is a cardinal principle in the construction of wills that the actual personal intention of the testator, and not merely the presumptive intention, to be inferred from the use of set phrases or familiar forms of words, must be ascertained, and in case of ambiguity the situation of the testator and the circumstances surrounding him at the time the will was executed may be considered, although parol or extrinsic evidence is not admissible to add to, vary, or contradict its terms.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 946; Dec. Dig. § 435.*]

3. WILLS (§ 728*)—CONSTRUCTION—SHARES OF DEVISEES—RENTS AND INCOME.

In the absence of clear directions to the contrary in the will, the beneficiaries have the same interest in the income, rents, and profits of the property given to them as they have in the property itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1759–1780; Dec. Dig. § 728.*]

4. WILLS (§ 728*)—CONSTRUCTION—SHARES OF BENEFICIARIES—RENTS AND PROFITS.

A testator by his will devised one-half of his property to his wife and one-half to a nephew and nieces, who were to have their shares as soon as available without undue expense or delay. The executors were authorized to sell any of the property whenever they thought it advantageous to the estate. By a codicil it was directed that the dividing of the property should not take place until the death of the wife, whose share should go to her heirs as she might direct by will. *Held* that, while the

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

division of the principal of the estate was so postponed, the rents and profits were to be divided, as they accrued, between the widow and the nephew and nieces.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1759–1780; Dec. Dig. § 728.*]

In Equity. Suit by Frederick Maling, Mary Maling, and Annie Maling against Mrs. Annie Maling, individually and as executrix of the last will of Charles Cooper Maling, deceased. Decree for complainants.

On March 20, 1897, Charles C. Maling made his will, whereby, by the first clause, he bequeathed and devised to his wife, Annie Maling, an undivided half interest in all personal property and real estate of which he should die possessed, and the residue of all personal property and real estate he bequeathed and devised to his nephew, Frederick Maling, and nieces, Mary Maling and Annie Maling, share and share alike, they to have the same, or proceeds of the same, as soon as available, without undue expense or delay. By the second clause he directed and authorized his executrix or executors, as the case might be, to sell at any time any or all of his estate when in their judgment such sale would be advantageous to the final settlement thereof, without any order of any court, and at either public or private sale. By the third clause the testator nominated his wife, Annie Maling, his sole executrix, without bonds, but further provided that, should she fail for any cause to discharge the trust, he nominated her brother, John Dee, and Marion R. Elliott to act in her stead. Subsequently, on July 31, 1902, Maling made and published a codicil to his will, in language following:

"I hereby ratify and confirm said will and testament in every respect, save so far as any part of it is consistent with this codicil.

"The second paragraph of my aforesaid last will and testament is hereby amended in so far as the division of my property during the life of my wife, Annie Maling, and I direct that the dividing of said property shall not take place until the death of my wife, Annie Maling; then the share and interest of my said wife, Annie Maling, in my property shall be given to her heirs as she shall by will direct.

"That my wife's brother, John Dee, having died, I nominate and appoint George Dee to have full power to act in his stead and place as executor of my said last will and testament and this codicil.

"And I further direct that if Lena Hurley remains in our service during the life of myself and wife and until the decease of the last survivor of us two she is to have the sum of two thousand dollars."

Maling having died September 15, 1902, his wife, Annie Maling, was appointed by the probate court of Crook county executrix of his last will and testament; both the will and codicil having been duly admitted to probate. On March 2, 1903, the executrix petitioned the court that the estate be closed, whereupon the court ordered and decreed that said estate and the further probate of the will "be and the same is hereby discontinued and closed, in so far as the necessity of making any inventory and appraisement, or any other and all reports and accounts as required by law, until such time as any person or heir interested in said estate shall petition or demand the same."

Since that date no further action has been taken by the executrix in the probate court. The nephew and nieces of Maling now bring this suit against Mrs. Annie Maling, in her individual capacity and as executrix, for an accounting, claiming that they are entitled to one-half of the rents, issues, and profits arising from the estate since the date of testator's decease.

Carey & Kerr and Charles A. Hart, all of Portland, Or., for plaintiffs.

W. A. Bell, of The Dalles, Or., and W. Y. Masters, of Portland, Or., for defendants.

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

WOLVERTON, District Judge (after stating the facts as above). [1] Whether the order and decree of the probate court, made March 2, 1903, were legally effective to close and settle the estate, it is unnecessary to determine, for it is clear that a federal court has jurisdiction of the subject-matter of the controversy, even if it be true that the estate has not been fully closed in probate. The federal court may entertain jurisdiction of a suit by a distributee, he being a citizen of another state, to establish his right to a share in the estate of a deceased person, although the estate is still pending for settlement in probate, and may enforce its adjudication against the administrator personally, or his sureties, or against any other party subject to liability, or in any other way which does not disturb the possession of the property by the state court. Payne v. Hook, 7 Wall. 425, 19 L. Ed. 260; Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532; Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80.

The question whether plaintiffs are entitled to the rents and profits at the present time depends upon a proper construction of the will and codicil. These instruments must be construed together, as they constitute in legal effect but one paper.

The first clause of the will is perfectly clear. It is a bequest of an undivided one-half of the testator's property to his wife and the remaining undivided one-half to his nephew and nieces, the latter to have their share or the proceeds thereof as soon as available, without undue expense or delay. The title to the property under this clause would have passed to the legatees and devisees immediately upon the decease of the testator.

The second clause simply authorized the executrix to sell any part of the estate when deemed advantageous to final settlement, without the necessity of obtaining an order of court, and was the delegation of a power without affecting the passing of the title to the property of the testator. The codicil by its language purports to amend the second paragraph of the will, and that in so far as it concerns the division of the property during the life of Annie Maling, the widow of deceased. "I direct," so reads the codicil, "that the dividing of said property shall not take place until the death of my wife, Annie Maling; then the share and interest of my said wife, Annie Maling, in my property shall be given to her heirs as she shall by will direct."

By the first clause of the will the testator evidently designed that the nephew and nieces should come into their part of the estate in due course of a speedy settlement of the estate in probate, for he nominated executors to carry out the provisions of the will, and one effect of the codicil was to postpone the time when they should come into their estate until the date of the death of Mrs. Maling. It did not change the effect of the first clause of the will in passing the title to the estate at the death of the testator to the legatees and devisees in the proportions specified.

In this view of the testator's purpose, what was to become of the rents, issues, and profits in the meantime? There is no provision of the will entitling Mrs. Maling to the whole thereof. Nor is there any

specific provision that she or the nephew and nieces shall have any part of the same prior to a division of the property at the death of Mrs. Maling. I cannot conceive that it was the purpose of the testator to deprive his widow of a subsistence out of his estate during the time he directed that the property should remain undivided, and the only means of subsistence she could have was from the rents and profits of her share of the estate. Nor is there any expression, either in the will or codicil, on the part of the testator, that the rents, issues, and profits shall be impounded to await the decease of the widow, and then be divided with the estate. With these premises, we have the alternatives whether the testator impounded the estate only which existed at the date of his decease, to abide the death of his widow, or the estate, including the rents, issues, and profits which should accumulate after his death, the whole to be then divided.

[2] It is a cardinal principle of construction of wills and codicils that the intention of the testator must be ascertained, if possible, and given effect—that is, his actual, personal, individual intention, and not a mere presumptive intention, inferred from the use of set phrases or familiar forms of words; and for this purpose the will should be construed liberally. It is also true that the intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed. 40 Cyc. 1386-1389; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; Burke v. Lee, 76 Va. 386.

[3] But parol or extrinsic evidence is not admissible to add to, vary, or contradict the terms of the will. 40 Cyc. 1427. And, again:

"In the absence of a clear direction to the contrary, in the will, the beneficiaries have the same interest in the income, rents, and profits of the property given to them as they have in the property itself." 40 Cyc. 1487.

[4] The evidence shows that the testator and his wife had no children, and that the accumulation of the property was the fruit of the joint efforts of both during their lifetime, and, according to the testimony of Mrs. Maling, they considered themselves equal partners in the accumulations. What are we to infer from this? If partners, on the death of one the partnership would be dissolved, and each would be entitled to one-half of the estate. Now, the provision of the codicil has postponed the division until the decease of the widow; the nephew and nieces taking the position of the testator. The profits of a copartnership are usually divided between the partners, and may we not reasonably assume, and is it not a necessary implication of the will and codicil, that it was the intention of the testator that the profits should continue to be divided as previously, as they accumulated? I am impressed that such was the real purpose and intention of the testator, he deeming that the estate kept intact as a whole would produce a larger income than if divided, and therefore that his widow, as well as the nephew and nieces, would receive a greater benefit therefrom during the life of the former. I cannot agree, therefore, with the contention of counsel for Mrs. Maling that the testator in-

tended "to give his wife the full use of this property during her lifetime."

The fact that the widow happens to be the executrix or trustee can make no difference in the construction of the will. The construction would be the same if either of the other persons nominated as executors had been appointed. In such case it would have been his duty to divide the income between the widow and the other legatees in proportion as the estate was devised to them. In ascertaining the rents, issues, and profits, the executrix should be credited with the debts of the estate, if she has paid them, and the costs of administration, and with reasonable compensation for her services in managing and conducting the property as trustee.

The decree will be for plaintiffs in accordance with this opinion, the costs to be paid out of the income of the estate.

In re BREFO.

(District Court, E. D. Kentucky, at London. May 11, 1914.)

1. ALIENS (§ 68*)—NATURALIZATION PROCEEDINGS—DECLARATION OF INTENTION—REQUISITE FORM.

Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 528), is expressly designed to provide "a uniform rule for the naturalization of aliens throughout the United States," and its administration is committed to the Bureau of Naturalization thereby created, which is required to furnish to the clerks of courts having the requisite jurisdiction of naturalization proceedings, on their requisition, all blank forms and record books required. Such clerks are required to keep the records in a specified manner, and to charge certain fees and report and account to the United States for one-half of the same. *Held*, that it is the evident intention of the act that every step toward naturalization shall be under government supervision and control, that a court which has not obtained the requisite forms and records cannot exercise jurisdiction in naturalization matters, and that a declaration of intention filed in such a court, and not upon the prescribed form, is a legal nullity, and cannot be made the basis of a petition for naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

2. ALIENS (§ 68*)—NATURALIZATION—RULES AND REGULATIONS OF DEPARTMENT.

Rules and regulations made by the Secretary of Labor under authority of Naturalization Act June 29, 1906, c. 3592, § 28, 34 Stat. 606 (U. S. Comp. St. Supp. 1911, p. 543), if not contrary to its terms, have the same weight as the law itself.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

In the matter of the naturalization of Arnold Brefo. Petition denied without prejudice.

Edwin Morrow, U. S. Atty., of Madisonville, Ky., for the United States.

COCHRAN, District Judge. [1] This is a petition for naturalization filed in this court on December 29, 1913, by Arnold Brefo, a resi-

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

dent of Hyden, Leslie county, Ky., and therefore within the jurisdictional limits of this court. The petition of Mr. Brefo is predicated upon a declaration of intention filed in the circuit court for Leslie county, Ky., on February 17, 1910.

In form the petition meets the requirements of the law, with the exception of the fact that the declaration of intention was not filed on a form furnished by the United States government for that purpose. Naturalization forms had never been supplied to the clerk of the Leslie circuit court by the government since the passage of the Act of Congress of June 29, 1906 (34 Stat. 596), which was in full force and effect on February 17, 1910, at which time the declaration of intention of this alien was filed. The declaration of intention filed in good faith by Mr. Brefo was, therefore, not filed on a government form. It is the contention of the government that the declaration of intention so filed in the Leslie circuit court, and not on a government form, is not a valid declaration of intention, and cannot be used as a basis for this petition for naturalization, and that, therefore, this petition should be dismissed.

The Act of Congress of June 29, 1906, enacted under constitutional authority, is entitled "An act * * * to provide for a uniform rule for the naturalization of aliens throughout the United States." Under this act it is provided that the "Bureau of * * * Naturalization shall have charge of all matters concerning the naturalization of aliens." The enacting of a law for the "uniform naturalization of aliens" and the vesting of the authority for the administration of that law in a certain body forces the conclusion that Congress meant that all steps by aliens toward their naturalization should be taken under direct governmental supervision and control.

In furtherance of this idea the act provides in section 3 that "all courts of record * * * having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited," shall have power to naturalize aliens. In the same section the act further provides that "the courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of * * * Naturalization with such blank forms as may be required in the naturalization of aliens. * * *" Thus, after defining which courts shall have the power to naturalize aliens, Congress specified, as the first requisite to the exercise of such jurisdiction, that such courts should, through their clerks, obtain the proper forms from the Bureau of Naturalization. The Leslie circuit court comes within the definition of courts authorized by Congress to naturalize aliens.

Further, under section 13 of the act it is made compulsory upon every clerk "exercising jurisdiction in naturalization cases" to charge a certain stipulated fee, half of which shall be accounted for to the United States. Here, clearly, the keynote of uniformity is shown. Again, under section 14, appears:

"That declarations of intention and petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made a part of the records of the court."

[2] In section 28 of the act it is provided:

"That the Secretary of * * * Labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act."

Acting under such authority the Secretary of Labor has made rules and regulations which, if not contrary to the law authorizing them, are entitled to the same weight as the law itself. Fok Yung Yo v. United States, 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; Caha v. United States, 152 U. S. 212, 14 Sup. Ct. 513, 38 L. Ed. 415. Under the authority of the act of Congress, the Secretary of Labor specifies the method of making requisition for supplies and how declarations of intention will be furnished to clerks of courts for issuance to aliens. Section 10 of such regulations reads:

"Clerks of courts will be furnished with requisition blanks on which are listed, by number and title, all blank forms, including record and order books, to be used in the naturalization of aliens, and these forms must be obtained exclusively from the Bureau of Naturalization, Department of Labor, none other being official."

There seems to be no room to doubt the intent of Congress. A uniform rule for the naturalization of aliens is enacted into law; certain courts are specified where aliens may proceed to be naturalized; all such courts are clothed with authority if they desire to use it; jurisdiction exists if only they choose to exercise it; certain forms for this uniform system of naturalization are agreed upon, and one of the administrative branches of the government is named as the distributing center for such forms; fees are to be accounted for to the government, and records are to be filed at Washington. It is clear that the intent was that every step toward naturalization should be under governmental supervision and control, and therefore on government forms. Under section 3 it becomes obligatory upon the part of the government to furnish naturalization supplies to clerks of courts when requisition is made therefor by clerks of courts having requisite jurisdiction as defined by the act.

To be a valid paper, a declaration of intention must be filed on the form furnished for that purpose by the government. If filed on a form other than that furnished by the government, it is a legal nullity. Otherwise there is an end to uniformity, and government control and supervision cannot exist. If filed on some form other than that furnished by the government, why is it necessary for a declaration to be filed on any form at all? It becomes apparent that to permit this would destroy this most wise provision of the naturalization law. Not only are declarations of intention and petitions for naturalization to be filed on government forms furnished by the federal body, but the law in section 3 even specifies more elaborately that the certificates of naturalization are to be on safety paper furnished by the government.

In addition to the specific wording of the statute, the whole act, when read together, shows that Congress placed in the hands of the Bureau of Naturalization the administration of the law. Congress realized that without a central directing agency there could be no uniformity.

As previously stated, the exercise of naturalization jurisdiction was

to have its birth in the receipt of naturalization supplies from the government, thereby giving to the court the tools with which to work. It appears that the Leslie circuit court never chose to exercise this jurisdiction legally; no requisition for supplies was ever made to the government, and the fact that the declaration of Arnold Brefo was not made on the form regularly used by the government indicates that the Leslie circuit court did not have such government forms. Not having such forms, the court never had taken the steps demanded by Congress to the proper exercise of the authority conferred upon it. Not having the means to exercise jurisdiction, the court could not issue a valid declaration of intention to Brefo. A declaration so issued is a legal nullity, and as such cannot be used as a basis for a petition for naturalization. The petition is therefore invalid for the dual reason that the declaration comes from a court without its compliance with formalities necessary to the exercise of jurisdiction in naturalization matters and that it is not on the government form.

I am convinced that, were I to admit this alien, the law would be disregarded and the applicant be done a palpable injustice. He has paid for the opportunity to have his case judicially determined, and, if certificate of naturalization be granted to him, he would have the right to rest secure in the enjoyment of an unimpeachable citizenship status, not subject to possible successful attack at some future date, when he relies most upon it. That I cannot give, on his application defective in a material respect, and believe it to be to his interest, aside from the question of law involved, that he proceed de novo.

Quoting from the opinion of the Circuit Court of Appeals for the Third Circuit, handed down in March, 1913, in the case of United States v. Kolodner, 204 Fed. 240, 124 C. C. A. 1:

"This conclusion may be, and doubtless is, a hardship imposed upon the applicant in this case. We may not, however, in order to avoid the hardship of a particular case, relax the strict requirements imposed by the lawmaking power upon those who seek to obtain the privilege of citizenship in the United States, or impair in any degree, by judicial interpretation, the safeguards sought to be thrown around the citizenship of the country."

It may be that this alien was informed by the clerk of the court and others that this declaration of intention was in legal form and was valid. But, as stated in Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066, quoting with approval from United States v. Spohrer (C. C.) 175 Fed. 440:

"An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist."

For the reasons stated, the petition of the said Arnold Brefo is denied, without prejudice to the right of this alien to file a new petition when the jurisdictional requirements of the law have been met.

THE POCOHUNTAS.

THE MAIA.

(District Court, S. D. New York. October 9, 1914.)

1. COLLISION (§ 72*)—TOW AND ANCHORED VESSEL—MUTUAL FAULTS.
One of a tow of 24 barges coming down North River in the evening on a slack tide at a speed of about three miles an hour came into collision with the steamship Maia, anchored near the western side of the channel, which was 1,500 feet wide. The master of the towing tug, which also had a small tug as a helper, undertook to pass on the west side of the steamship. There was room to have passed to the eastward in the channel, and also to have passed on the west side, if the tow had been properly handled by the use of the helper. The Maia had been anchored near or beyond the edge of the anchorage grounds, and so that by the action of the tide she swung into the fairway for some 300 feet. *Held*, that the tug was primarily in fault, because she could have passed with tow by exercising due care; that the Maia was improperly anchored, and for that reason was not exonerated as an anchored vessel, but was chargeable with fault which contributed to the collision.
[Ed. Note.—For other cases, see Collision, Cent. Dig. § 102; Dec. Dig. § 72.*]

2. COLLISION (§ 69*)—ANCHORAGE IN NAVIGABLE CHANNEL.
The duty is imposed on vessels coming to anchor in navigable channels to see that they do not under any circumstances, accidents excepted, prevent or obstruct the passage of other vessels.
[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. § 69.*]

In Admiralty. Suit for collision by John H. Flannery, owner of the barge Economy, against the steam tug Pocohuntas, with the German steamship Maia, impleaded. Decree for libelant against both respondents.

James J. Macklin, of New York City, for libelant.
Amos Van Etten, of Kingston, N. Y., for respondent The Pocohuntas.
Chauncey Clark and Burlington, Montgomery & Beecher, all of New York City, for respondent The Maia.

SHEPPARD, District Judge. This is a collision case, brought here by the libelant, John H. Flannery, owner of the barge Economy, against the steam tug Pocohuntas, for damages sustained to the former while in tow of the Pocohuntas and brought in collision with the German steamship Maia, at the time temporarily at anchor near the Jersey shore of the North River. The cause of the collision is charged by the libelant to the negligence and bad seamanship of the master of the steam tug Pocohuntas. The steamship Maia is brought into the case under the Fifty-Ninth admiralty rule (129 Sup. Ct. xlvi) on the petition of the owner of the Pocohuntas, alleging that the Maia was responsible for the collision, due to her improper and misleading position off the anchorage ground.

[1] The collision the proofs show to have occurred about 8 o'clock in the evening of May 18, 1914. The Maia had been left at anchor by

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

Harbor Pilot Fernald about two hours previous, head down to the "westward of the white spar buoy off Edgewater, and to the westward of the drilling machines in the river." The weather was fair, the tide slack, and the night calm and starlit. The Pocohuntas was descending the river with a tow of twenty-four barges (four light and twenty loaded), assisted with the tow by a smaller steam tug, the Virginia. The tugs, with their tow, had just cleared the digging machines in the river when the lights of the Maia were "dimly sighted" from "600 to 700 yards" straight ahead.

According to the testimony for the steam tug Pocohuntas, her master could not make out at first what sort of craft the lights were on. Owing to the great number of lights set out in this part of the river it was difficult to locate the object they were on until the outlines of the ship's bulk were made out, and it was not until then that the master of the Pocohuntas discovered that the object, if anchored, was off the anchorage ground and "near the middle of the fairway." Lights in the distance down the fairway were taken to be boats ascending the river with tows; but, as the testimony disclosed, when discovered by the crew of the Pocohuntas, were from three-quarters to a mile away, but, as seen, the intervening time before the ascending tows reached the scene of the collision afforded adequate opportunity for the tug Pocohuntas to have kept to the fairway and to have cleared the Maia on the east side.

The master of the Pocohuntas, as explained, to avoid confusion and danger with the ascending tows determined upon a course to the starboard of the Maia and accordingly put his helm to the port, sheering abruptly in a direction toward the Jersey shore. The Pocohuntas, with the two first tiers of her tow, cleared the port bow of the Maia, which was at this time pointing northwestwardly toward the Jersey shore. It was then that the master of the Pocohuntas realized that a collision was imminent. When the Pocohuntas righted her course down the river, the middle of her tow was caused to swing in and collide with the port bow of the Maia, with the resulting damage to the barge Economy.

The direction taken and the course pursued by the Pocohuntas after discovering the position of the steamer, and, it is contended, her failure to dispatch the helping tug Virginia back to right about the tow, when a hazardous situation was obvious, was the fault or omission proximately responsible for the collision. The weight of the evidence clearly supports this theory.

Libelant's testimony tended to show that at the point of the collision the river was from three-quarters to a mile wide, with a fairway of about 1,500 feet. The tow was approximately 2,000 feet long, including hawser, and, accepting the estimates of the respondent's witnesses, the Maia was discovered from 600 to 700 yards straight ahead. At this time, according to the testimony, the tide was slack and the tow had no momentum, other than that produced by the speed of the tugs, which, as conceded, was not more than 3 miles an hour. Therefore it appears that at the distance the indefinable object (the Maia) was discovered, if there were any room for doubt as to the best course in such circumstances, the master of the Pocohuntas had sufficient time to have ascertained the nature of the object and to have given such warning to the

Maia, which was then under steam, as would have devolved upon the steamer the duty of righting about and dropping out of the way.

The evidence shows that there was sufficient fairway to permit the tugs and tow to pass the steamer Maia to the New York side. Whatever may have been the judgment of those in charge of the Pocohuntas, the fact is established by a clear preponderance of the evidence that the Maia was anchored toward the Jersey side; the testimony putting it at about one-third the width of the river out. The conclusion is irresistible that the passage to the west or Jersey side of the Maia might have been safely accomplished, had the master of the Pocohuntas exercised the usual precaution in such exigencies of sending the helping tug back to push the threatened portion of the tow clear.

Confronted with this situation and having present the choice of two courses to escape the danger of collision, the master of the Pocohuntas elected to take obviously the most dangerous. The law imposes, in such circumstances, the duty of exercising the greatest diligence to avoid danger to other craft as well as to safeguard the tow in charge. Manifestly the best course to have taken was to the left of the Maia and to have remained in the fairway. The anchored vessel could, no doubt, have been cleared without incurring any risk of collision. The apprehended danger from the distant lights, and the assumption that they were ascending boats and tows, in the light of subsequent events, can scarcely excuse a cautious navigator of some 20 years' experience from his failure to adopt such a course as only reasonable prudence would suggest. It is abundantly shown that the fairway offered sufficient room for the safe passage of the tows.

Obviously the most dangerous course lay to the starboard of the Maia, and when the master of the Pocohuntas elected to take it, there devolved upon him the duty of signaling such purpose to the anchored craft and to have sent the helping tug to control the swing of the tow. From the moment that the master of the Pocohuntas discovered the unexpected object in the fairway, it became his imperative duty to secure the safety of his tow by every means at hand and not to run any avoidable risk. It seems that the fault of the Maia in improperly anchoring would not exonerate the Pocohuntas, if the latter had any practical way of avoiding the danger of collision which would be apparent to an experienced navigator. The degree of diligence required in such situation is well stated in the following cases: The Delaware (D. C., N. Y.) 12 Fed. 573; The Gertrude, 118 Fed. 130, 55 C. C. A. 80; The Admiral Schley, 131 Fed. 433, 65 C. C. A. 417; The Bee, 138 Fed. 303, 70 C. C. A. 593; The Gladys, 144 Fed. 653, 75 C. C. A. 455; The Plymouth, 186 Fed. 108, 108 C. C. A. 217; The Helen (D. C., N. J.) 204 Fed. 653.

In view of the evidence, the court is constrained to hold in this branch of the case that the negligence of the towing tug was the proximate, although not the sole, cause of the collision.

We turn, now, to the anchorage of the Maia as a contributing cause. The testimony in this branch of the case is most conflicting; some of the witnesses placing the steamer wholly on the anchorage ground, while others place her well in the fairway. The fact, however, is uncontradicted that the Maia was anchored in 21 feet of water, with the

tide 2½ feet to fall and the ship drawing 18 feet. Hence it is seen that there was only about 6 inches clearway under the keel from bow to stern, and the ship having a swing radius of about 375 feet toward the fairway.

The master of the Maia went aboard about 7 o'clock in the evening, when he was informed by a passing fisherman that the Maia lay in shoal water. It is also shown that the master evidenced some anxiety regarding the position of the steamer, for he immediately took soundings, which showed 21 feet all around. It is not probable that an experienced navigator would take a chance with so close a margin between the draft of the vessel and the depth of the water. While the master of the Maia and the crew denied that her position had been changed, the testimony of the crews of both towing tugs placed her near the middle of the fairway. The testimony of Monk, a disinterested witness, and one familiar with the surroundings, who was at the time lying with his tug at the stakeboat about 600 feet from the Jersey shore, between it and the Maia, and who went immediately to the scene of the collision, placed the Maia well out in the fairway and off the anchorage ground.

Considering most favorably the testimony of the crew of the Maia, her position was admittedly close to the prescribed boundary, and it is not at all improbable that with the swing of the vessel, the distance of her length and chain—375 feet—she could have drifted well over on the fairway. To have left the steamer anchored in this manner when the tide was slack, and aware that she would right about with the tide, and in so doing would probably encroach on the fairway and assume the awkward position in which she was found by the Pocohuntas, is conduct not to be entirely condoned. When we consider the enormous and continuous traffic on this river where the collision occurred, it is plain that this was not the exercise of such care and caution as the conditions and circumstances required.

Aside from any consideration of the requirements of the navigation laws and regulations, the position of the Maia was well calculated to confuse, mislead, and impede navigation, and no doubt influenced the errors committed by the Pocohuntas. It was obvious that the effect of the tide would be to shift the vessel, and her position when discovered by the Pocohuntas was one to be reasonably anticipated. It was shown that the Maia, when sighted, was heading northwestwardly, with an encroachment on the fairway of about 300 feet, and it is the inevitable conclusion that the careless and improper anchoring of the Maia was a contributing cause to the collision, and she is not therefore entitled to the privileges of a vessel so anchored through necessity. The Margaret J. Sanford (D. C.) 203 Fed. 331.

[2] The duty imposed on vessels coming to anchor in navigable channels is to see that they do not under any circumstances (accidents excepted) prevent or obstruct the passage of other vessels or craft. Assuming that the Maia had the right to anchor where she did, with the reasonable effect of the tide to be anticipated, her stern as well should have been anchored, or other appropriate measures adopted as would have prevented unnecessary encroachment on the fairway. Section

15 of the Navigation Act (Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543]) above alluded to provides:

"That it shall be unlawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels."

Vide The Delaware, supra; The Georgia (D. C., R. I.) 208 Fed. 636; The John H. Starin, 122 Fed. 236, 58 C. C. A. 600; The Bourgogne (D. C., N. Y.) 76 Fed. 868; The Ogemaw (D. C., Wis.) 32 Fed. 919–925.

Upon the evidence the court is constrained to hold that the towing steam tug Pocohuntas was primarily at fault for the collision, but that the improper anchorage of the Maia contributed, and the damages sustained will be apportioned equally, so that the Pocohuntas and the Maia shall stand liable to the owner of the Economy, each for one-half the damages, and an accounting will be had to ascertain the extent thereof, whereupon a decree will be entered against each vessel.

Let decrees be prepared accordingly.

WHITAKER et al. v. COUDON et al.

(District Court, D. Maryland. October 13, 1914.)

No. 60.

1. REMOVAL OF CAUSES (§ 29*)—RIGHT TO REMOVE—RESIDENT DEFENDANTS.
   Where a suit, by citizens of New York, South Carolina, Delaware, and West Virginia, was instituted in the state courts of Maryland against residents of Maryland, West Virginia, and Washington, there being residents of Maryland among the defendants, who had no right of removal on the ground of diverse citizenship, the suit was not removable.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 69, 72, 74; Dec. Dig. § 29.*]

2. REMOVAL OF CAUSES (§ 48*)—RIGHT TO REMOVE—CITIZENSHIP.
   Where a resident of the state in which the action was brought is made a defendant, he cannot remove the cause to the federal court because of diversity of citizenship, regardless of the fact that the suit may involve a separable controversy between plaintiffs and another defendant.
   [Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. § 48.*]

In Equity. Bill by Martha E. Whitaker and others against Joseph Coudon and others. On motion to remand. Granted.

John S. Strahorn, of Annapolis, Md., and H. A. Brann, Jr., of New York City, for plaintiffs.

George R. E. Gilchrist and John A. Howard, both of Wheeling, W. Va., for defendants.

ROSE, District Judge. This suit was instituted in the circuit court for Cecil county in this state. On petition of defendants it was removed to this court. The plaintiffs ask that it be remanded. No fed-

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

eral question is involved. The jurisdiction of this forum is invoked on the ground of diverse citizenship.

[1] The plaintiffs, as the bill arranges them, are citizens of New York, South Carolina, Delaware, and West Virginia; the defendants of Maryland, West Virginia, and Washington. This district is not that of the residence of either all the plaintiffs or all the defendants. Upon the assumption that the alignment of the parties in the bill is in accordance with their substantial interests as seen by themselves, this court could not entertain the suit as against the objection of any one of them. The defendants contend, however, that the case made is one within the provisions of section 57 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [U. S. Comp. St. Supp. 1911, p. 152]), to which the statutory restrictions upon venue are not applicable. Plaintiffs dispute this contention. It will be unnecessary to pass upon it. There are Marylanders among the defendants. They have no right to remove on the ground of diverse citizenship a case against them from the courts of their state to one of the nation. There are citizens of West Virginia on each side of the record. If they should properly be where the bill puts them, the controversy to which they are parties is not one between citizens of different states. Defendants answer that, when the court arranges the parties according to their real rights and interests, it will appear that none of the objections to the jurisdiction stated are applicable.

What is the case made by the bill? Almost a quarter of a century ago one George P. Whitaker, a wealthy resident of Cecil county, died leaving a will which was there admitted to probate. He left the bulk of his estate to be equally divided among his five children and their descendants per stirpes. At his death he owned all the stock of the George P. Whitaker Company, a Maryland corporation, and one-fifth of that of the Whitaker Iron Company, which had received its charter from West Virginia. Four of his children held among them the other four-fifths. He named three executors, one of whom shortly resigned. The other two continued the administration of the estate. One of them, Nelson E. Whitaker by name, was a son of the testator; the other, the defendant Joseph Coudon. The former died some five years ago, leaving Coudon the sole surviving executor trustee. It so happened that the testator charged certain annuities for the support of his widow upon the estate. She is still living, and a complete division of the property has never been made.

The bill is very long, but the nature of the issues raised by it can be briefly stated. It charges that the two executor trustees made up their minds to filch from the descendants of a deceased child of the testator a large part of the latter's share of his estate. For that purpose they brought about the sale by the George P. Whitaker Company to the Whitaker Iron Company of the very valuable property of the former for a small fraction of its real worth. Those whom they were seeking to defraud were beneficially entitled to one-fifth of the stock of the George P. Whitaker Company and to only one twenty-fifth of that of the Whitaker Iron Company. Those in whose interests the executors trustees are alleged to have been acting were the substantial

owners of twenty-four twenty-fifths of the Whitaker Iron Company and of only four-fifths of the George P. Whitaker Company. The plaintiffs in great detail tell how this scheme was carried through. Among the means employed was the procurement by fraud and concealment of various orders and decrees from the circuit court of Cecil county sitting as a court of equity. In the conception and execution of this fraudulent scheme it is charged that Nelson E. Whitaker was the master mind and the controlling will, but that the defendant Joseph Coudon knowingly and willingly contributed his active assistance to it and personally has largely profited by it. He is made a defendant as an individual as well as in his representative capacity. The bill prays that the conveyance of the property to the Whitaker Iron Company shall be set aside.

[2] The state court was asked to order the removal upon the ground that there was a separable controversy to which the real plaintiffs were citizens of New York, South Carolina, and Delaware, while the defendants were the surviving executor trustee, a citizen of Maryland, and various citizens and corporations of West Virginia. The plaintiffs deny that their bill discloses any separable controversy. Even if there were, and the parties to it were as the defendants claim them to be in their petition for removal, the case would in my judgment be irremovable. One of the defendants in the alleged separable controversy is a Maryland citizen. The majority of the Circuit Court of Appeals for the Eighth Circuit in Thurber v. Miller, 67 Fed. 371, 14 C. C. A. 432, held that such circumstance was fatal to the right to remove.

As I understand Wrightsville Hardware Co. v. Hardware & Woodenware Mfg. Co. (C. C.) 180 Fed. 586, Judge Lacombe assumed that proposition to be unquestionable. It is true that the words "being nonresidents of that state" are found in the second sentence of section 28 of the Judicial Code, providing for removals on the ground of diversity of citizenship when no separable controversy is necessarily involved, and that the fourth sentence, authorizing removal on the ground of prejudice or local influence, limits the right to a defendant "being such citizen of another state," and that no such restriction is expressed in the third sentence, which has relation to separable controversies.

District Judge Shiras in Stanbrough v. Cook, 38 Fed. 369, 3 L. R. A. 400, decided that where there is a separable controversy the right of removal may be exercised by a defendant who is a citizen of the state in whose courts the suit was brought, and Mr. Hughes, in the last edition of his excellent work on Federal Procedure, at page 337, says that in his judgment, when the controversy is a separable one, the defendant, whether resident or not, has the right to remove.

It is perfectly clear that a resident of a state in whose courts he is sued, if made a sole defendant, cannot remove. I cannot conceive that Congress could have intended to allow him to do so merely because it so happened that some one else, who could not remove or who did not want to, was made a codefendant with him.

At the argument of the motion to remand, the defendants sought to sustain their right to remove on another ground, which not only

was not mentioned in the removal petition, but was more or less directly in conflict with some of the allegations there made. At the bar of this court the theory was developed that in contemplation of law the executor trustee was not a defendant at all, but was in fact the plaintiff, and the only indispensable one, because the legal title to the undistributed portion of the testator's estate was still in him, and that the Whitaker Iron Company was the only defendant whose presence before the court was imperative; it being said that the other defendants had profited, if at all, by the alleged frauds only through the enhanced value of their stock in that company. Upon that assumption the controversy was one in which a citizen of Maryland sought relief from a West Virginia corporation, and the latter had a clear right to remove. It is one of the humors of the case that this contention was made on behalf of what was said to be the real defendant by the same counsel who also appeared for the individual whom they say the law must hold to be the sole plaintiff. The fact that the executor trustee and the Whitaker Iron Company are fighting each other would appear to be quite a recent discovery both to them and to their legal representatives.

The contention, in substance, is that the executor trustee is charging himself with fraud and asking on that ground that conveyances he has made to the Whitaker Iron Company be set aside. To state such a contention is to answer it. No citation of authority is required. More plausible theories have frequently been held unsound. East Tennessee R. R. v. Grayson, 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382; Railroad Co. v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949; MacGinniss v. Boston, etc., Mining Co., 119 Fed. 96, 55 C. C. A. 648.

As the case stands, it will not be worth while to inquire whether plaintiffs are right in asserting that, even if there were diverse citizenship, the case would not be removable because it is in its nature ancillary or supplemental to a proceeding long pending in the state court and over which the latter had acquired exclusive jurisdiction.

The motion to remand must be granted, at the cost of those defendants who united in the petition to remove.

In re SCHRAPEL.

(District Court, W. D. Washington, N. D. October 8, 1914.)

No. 2447.

ALIENS (§ 65*)—NATURALIZATION—SERVICE IN NAVY OR OTHER MARINE SERVICE.

Act June 30, 1914, providing for the naturalization of aliens who have served or may serve in the Navy, Marine Corps, Revenue Cutter Service, or naval auxiliary service, and receive an honorable discharge or a discharge with recommendation for re-enlistment, that they may be admitted to citizenship without previous declaration of intention or proof of shore residence, and that their discharge shall be accepted as proof of good moral character, was enacted for the benefit of aliens in the branches of government service enumerated, who, not being citizens, were

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

not entitled to increased pay on re-enlistment, and applies only to those who are in the service when application is made, or are still eligible for re-enlistment with the benefits enjoyed by citizens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 129; Dec. Dig. § 65.*]

In the matter of the petition of Paul William Schrape for naturalization. On objection to petition. Objection sustained, and petition dismissed.

John Speed Smith, Chief Examiner.

NETERER, District Judge. August 14, 1914, petition for naturalization was filed under the act of Congress approved June 30, 1914. The petition was brought before the court September 12, 1914, and on the hearing it was shown that the petitioner came to the United States, as a seaman in 1909, deserted his ship at the port of New York, came to Seattle in an American schooner, enlisted in the revenue cutter service of the United States May 4, 1910, and completed four years in that service and was discharged therefrom on May 4, 1914, with recommendation for re-enlistment, and has not re-enlisted and does not intend to do so. The Chief Examiner objected to the petitioner's admission to citizenship under the provisions of the act of June 30, 1914.

The question for decision is: May the petitioner at once, without the usual notice, be admitted to citizenship upon his discharge, without submitting further evidence of moral character and shore residence? The act under which this petition was filed reads as follows:

"Any alien of the age of twenty-one years and upward who may, under existing law, become a citizen of the United States, who has served or may hereafter serve for one enlistment of not less than four years in the United States Navy or Marine Corps, and who has received therefrom an honorable discharge or an ordinary discharge with recommendation for re-enlistment, or who has completed four years in the Revenue Cutter Service and received therefrom an honorable discharge or an ordinary discharge with recommendation for re-enlistment, or who has completed four years of honorable service in the naval auxiliary service, shall be admitted to become a citizen of the United States upon his petition without any previous declaration of his intention to become such, and without proof of residence on shore, and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof from naval or revenue cutter sources, of such service: Provided, that an honorable discharge from the Navy, Marine Corps, Revenue Cutter Service, or the naval auxiliary service, or an ordinary discharge with recommendation for re-enlistment, shall be accepted as proof of good moral character: Provided, further, that any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions."

To correctly understand this act and the motive prompting its enactment, other provisions of the naturalization laws should be considered. Act July 26, 1894, c. 165, 28 Stat. page 124 (U. S. Comp. St. 1901, p. 1332), provides:

"* * * Any alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or

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

may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States Navy or Marine Corps. * * *"

The term of enlistment in the Marine Corps at the time of the passage of this act was five years, but the Naval Appropriation Act of March 3, 1901 (31 Stat. 1132, c. 852 [U. S. Comp. St. 1901, p. 1095]), provides:

"That hereafter the enlistments into the Marine Corps shall be for a period of not less than four years."

Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 528), established the Bureau of Immigration and Naturalization, and provided a uniform rule for the naturalization of aliens throughout the United States, but did not disturb the exemptions in favor of the special classes. The act of June, 1914, adds the Revenue Cutter Service and the naval auxiliary service, and the excepted classes already provided, and changes the term of enlistment in the Navy from five consecutive years to a term of not less than four years, and also supplements the requirement of an honorable discharge by extending it to include those receiving an ordinary discharge with *recommendation for re-enlistment.* No change is made in the act requiring proof of service and good moral character, but it does define what proof of good moral character may consist of, and that is:

"An honorable discharge from the Navy, Marine Corps, Revenue Cutter Service, or an ordinary discharge with recommendation for re-enlistment, shall be accepted as proof of good moral character, and that proof of residence upon the shore shall not be required"

—and further provides that the petitioner furnishing the prescribed proof may be immediately naturalized. It is contended by the Chief Examiner that the Congress intended to limit the provisions of this act to those in the service and to those who may re-enlist after a discharge within the period of four months.

The act of June 30, 1914, is not amendatory of a former act, and having no repealing clause, and repeals by implication not being favored, and nothing appearing upon the face of the act showing such intent, it must be held supplementary to the other acts, and the legislative statement in this act must be taken with the other statements to determine the congressional intent solemnly expressed. This act, standing alone, is free from ambiguity; but, when taken with the other acts, confusion arises as to the intent of the Congress with relation to the benefits to be conferred or evils to be remedied. The fundamental and general rule in construing statutes is to ascertain and give effect to the intention of the lawmaking body. 36 Cyc. 1106; Lewis' Sutherland Statutory Construction, vol. 2, page 701; U. S. v. Goldberg, 168 U. S. 95–102, 18 Sup. Ct. 3, 42 L. Ed. 394. The intent and purpose of the act may be determined by reference to the discussion of the subject by the lawmakers. Congressional Record, Second Session, vol. 51, pages 7956–7968. Mr. Stafford, at page 7965, said:

"There is at present on the statute book a law that gives a seaman in the Navy and the Marine Corps the privilege of taking out citizenship papers after they have served five years. This provision reduces that to four years. But it has been pointed out by the officers of the Navy Department that the seamen have difficulty in proving their moral character by two witnesses as is prescribed under the general law admitting aliens to citizenship, and so this bill provides for striking out the words 'after good moral character' as now provided by law."

On page 7966, Mr. Roberts, speaking on the bill, stated:

"The *real reason* for this change of law is to take care of certain cases now in the navy of aliens who, up to a certain period, *were being allowed increased pay* that came to them from re-enlistment. The naval authorities had treated their service in the navy as having made them citizens; but the Comptroller rendered a decision that seamen were not entitled to this increase of pay unless they were American citizens. Now the law stated that these men who were not citizens and who had been in the Navy and had been re-enlisted could not become citizens, because they could not get the year's residence ashore required in most jurisdictions, and because they could not furnish a certificate of good conduct. * * * Hence we propose to change the law as suggested by the Navy Department, *and take care of those men who, to all intents and purposes are citizens, and who have been getting the advantage of the increased pay on re-enlistment until the Comptroller decided it was unlawful*, and to make it so that these men will become citizens and give them the same advantage that a natural-born citizen has in re-enlistment the second or third or fourth time."

The expressed purpose of the lawmakers in support of this measure clearly establishes the intent to include only persons who were then in the service of the government defined by this act, or who could re-enlist and obtain the benefits enjoyed by enlisted citizens, and it was not the intention to include persons who were not in the government service, or whose time for re-enlistment, and to secure such benefits, had expired. All laws should receive a reasonable and sensible construction; general terms should be so limited as to have operation with and give vitality to other legislative acts not repealed or amended, with a view of administering justice, remedying the evils sought to be corrected, and not lead to absurd consequences. U. S. v. Kirby, 7 Wall. 482, 19 L. Ed. 278. The purpose of Congress in enacting the law of 1914 with reference to alien seamen, in my opinion, intended to extend the right to immediate naturalization and make a certificate of honorable discharge or discharge with recommendation for re-enlistment conclusive as to good moral character upon the court only in cases where aliens are in the government service specially provided for in this act, or are eligible for re-enlistment within the purview of the act.

Any other conclusion would permit aliens whose service with the government ended many years ago to be immediately naturalized, without notice, or proof of good moral character, or proof that they are not within the classes of persons excluded by other acts of Congress, such as anarchists, polygamists, etc., which beliefs and practices may have developed subsequent to discharge. The franchise of citizenship is the greatest honor that can be conferred upon an alien by this government. It gives him an equal voice at the ballot, and extends to him equal opportunities with the native-born citizen. Citizenship makes us constituent members of the United States government, attached to the principles of its Constitution, with due reverence for the Stars and

Stripes, the emblem of liberty and equality, and binds us everywhere to obey its laws, because it protects us everywhere. The right and duty are inseparable. They begin and end together. The Congress did not intend to jeopardize this right, this sacred privilege, by extending it to persons whose conduct has not been under special observation, such as the service provided in the act of 1914 affords, without competent proof of qualifications, and opportunity of investigating the conduct of the petitioner, as provided by the acts of 1894 and 1901, which require the publication of the petition and a hearing on a stated day, not less than 90 days after the filing of the petition. The Department of Labor having construed the act in harmony with this conclusion adds weight to the conclusions here expressed.

The objection will be sustained, and the petition dismissed.

ROYAL BREWING CO. v. MISSOURI, K. & T. RY. CO.

(District Court, D. Kansas, Third Division. March 12, 1914.)

No. 36-N.

1. INJUNCTION (§ 144*)—RESTRAINING ORDER—VERIFIED PETITION.
   Where a petition for a restraining order is verified, and there is no counter showing by defendant, the facts recited in the petition, which are well pleaded, must control the application.
   [Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 316, 317, 321; Dec. Dig. § 144.*]

2. COMMERCE (§ 89*)—REFUSAL TO TRANSPORT LIQUOR—RIGHT TO SUE—APPLICATION TO INTERSTATE COMMERCE COMMISSION.
   Where defendant railroad company refused to transport liquor into Oklahoma from Missouri, complainant was not bound to apply to the Interstate Commerce Commission for relief before suing in equity for an injunction.
   [Ed. Note.—For other cases, see Commerce, Dec. Dig. § 89.*]

3. CARRIERS (§ 45*) — REFUSAL TO TRANSPORT LIQUOR — INJUNCTION — ADEQUATE REMEDY AT LAW.
   Where defendant railroad company posted a general order refusing to receive shipments of liquor designed for or to be carried and delivered to points in O. county, Okl., and pursuant to such order refused to carry liquor into that county for complainant, a wholesale liquor dealer in Missouri, and complainant in a suit for an injunction alleged that defendant's refusal would work irreparable damage to complainant's business, which could not be estimated in damages, equity jurisdiction was not defeated on the theory that complainant had an adequate remedy at law.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120, 123–128; Dec. Dig. § 45.*]

4. INDIANS (§ 35*)—"INDIAN COUNTRY"—INTRODUCTION OF LIQUORS.
   What is "Indian country," within Act Jan. 30, 1897, c. 109, 29 Stat. 506, prohibiting the introduction of liquors among Indians, depends on whether the Indian title under which the land was formerly held has or has not been completely extinguished by subsequent grants.
   [Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. § 35.*
   For other definitions, see Words and Phrases, First and Second Series, Indian Country.]

---

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

5. CARRIERS (§ 45*)—TRANSPORTATION OF LIQUORS—DUTY TO TRANSPORT—INTERSTATE COMMERCE.

Where complainant, a wholesale liquor dealer in Missouri, had a legal right to sell liquor to a white male citizen of O. county, Okl., for his personal use, it had an equal right to compel defendant, a public carrier, to transport the liquor, and was entitled to restrain defendant from enforcing as to it a rule refusing to receive liquor for transportation into such county.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120, 123–128; Dec. Dig. § 45.*]

In Equity. Suit by the Royal Brewing Company against the Missouri, Kansas & Texas Railway Company. On application for a temporary restraining order. Granted.

I.J. Ringolsky and Harry L. Jacobs, both of Kansas City, Mo., for plaintiff.

Hadley, Cooper & Neel, of Kansas City, Mo., and W. W. Brown and James W. Reid, both of Parsons, Kan., for defendant.

POLLOCK, District Judge. The petition in this case, duly verified, is presented by plaintiff, and a restraining order against defendant is prayed. The matter has been submitted on briefs. No counter showing is made by defendant against the averments in the petition, duly verified. Therefore the same must control on this hearing. The facts alleged in the petition, briefly stated, are as follows:

Plaintiff is a corporate citizen of the state of Missouri; defendant, of this state. Plaintiff is engaged in a wholesale liquor business, a lawful business in the state of Missouri. In the conduct of its said business, plaintiff receives orders for intoxicating liquors by mail, and, where lawful and proper, accepts and fills the same, by making shipment of the goods ordered. In the transaction of such business it received an order, accompanied by cash payment, for a cask of beer from one Fred Peters, a male white person, over 21 years of age, a citizen of the state of Oklahoma. The beer so ordered and purchased from plaintiff by said Fred Peters was directed to be forwarded over defendant's line of railway from the city of Kansas City, in which plaintiff is doing business, to a town in Oklahoma called Nelagoney, at which town the line of defendant's railway intersects with that of the Midland Valley Railway, and from such point of intersection to the town of Avant, Osage county, Okl., where the consignee, Peters, lives. In pursuance of such order plaintiff accepted and tendered to defendant the cask of beer so ordered, properly packed, marked, labeled, and branded for shipment, as is by the laws of the United States required. Payment for such transportation in advance was tendered by plaintiff to defendant on July 3, 1913. Theretofore defendant had issued and posted an order providing it would not receive for shipment any intoxicating liquors whatever to be carried for delivery to any point in Osage county, Okl., including the town of Avant. Solely on this ground the agents and representatives of the defendant company refused to accept or carry the shipment tendered by plaintiff to be carried and delivered to the consignee, Fred Peters, at Avant, Osage county, Okl.

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

It is further averred by plaintiff in the petition that said Fred Peters ordered said cask of beer for his own personal use, and not for barter, sale, or disposition to any other person, or for use in any other manner; that said town of Avant is not located in what is or formerly was Indian country; that at the time said order was made and said shipment tendered defendant railway, and long before that date, the Indian title to the townsite, of Avant, Osage county, Okl., on which the consignee, Fred Peters, lived, to which plaintiff desired the intoxicating liquors offered for carriage carried and delivered, had been fully and completely extinguished; that this controversy involves an amount conferring jurisdiction on this court; that the failure and refusal of defendant to receive shipments of intoxicating liquors to all points in Osage county, Okl., similarly situated as the town of Avant, results in such injury and damage to plaintiff in the conduct of its business as cannot be estimated in damages, and is working and will work irreparable damage to plaintiff and injury to its legitimate business. Wherefore an injunction against defendant, restraining it from further refusing to accept and carry the particular shipment in question, and similar shipments, is prayed in the protection of the legitimate business of plaintiff.

[1] As has been stated, the petition is duly verified, and, as no counter showing by defendant is made, the facts recited in the petition, well pleaded, must control on this application.

[2] Defendant insists, by way of argument, application should have been made by plaintiff to the Interstate Commerce Commission, and not to this court. This position, however, is not well taken. Under the facts averred in the petition, there is no question presented for the consideration or action by that body. Louis. & Nash. R. R. Co. v. Cook Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; Danciger v. Wells-Fargo Co. (C. C.) 154 Fed. 379.

[3] Again, defendant insists no ground for resort to a court of equity is shown to exist by the petition in this case and the plaintiff has an adequate remedy at law. The bill pleads in apt terms the general order posted by defendant under which it refuses to receive any shipments of intoxicating liquor designed for or to be carried and delivered by defendant to points in Osage county, Okl., is, and will work irreparable damage to the business of plaintiff, and that the same cannot be estimated in damages. From all of which, uncontradicted, I am of the opinion a court of equity has jurisdiction. Louis. & Nash. R. R. Co. v. Cook Brewing Co., supra.

[4] Did defendant have the right to make and enforce such general order. It is a common carrier for hire, and must carry all goods tendered for carriage properly packed, marked, and branded, in accordance with the requirements of the law, unless it may excuse itself on some ground of positive law. In this regard it is thought by defendant it could lawfully refuse the shipment in question under the order made by it for delivery at the point to which the same was consigned. What is now Osage county, Okl., formed no part of the Indian country, and was not included within the provisions of section 8 of the Act of March 1, 1895 (28 Stat. 697, c. 145), commonly known and called the "Intro-

ducing Act," held by the court in Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248, to remain in force.

The only other ground, on which it is conceived the refusal of defendant to carry the shipment in question or any like shipment for delivery in Osage county, Okl., is found in the act relating to the introduction of liquors among the Indians; that is, the act of January 30, 1897 (29 Stat. 506). However, under this act the determination of what is and what is not Indian country, as that term is employed in the act, depends upon the fact as to whether the Indian title under which the land was formerly held has or has not been completely extinguished by subsequent grants. This is settled by a long line of decisions. Bates v. Clark, 95 U. S. 204, 24 L. Ed. 471; Ex parte Crow Dog, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; Dick v. United States, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520; Clairmont v. United States, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201; Evans v. Victor, 204 Fed. 361, 122 C. C. A. 531; United States v. Myers, 206 Fed. 387, 124 C. C. A. 269; Schaap v. United States, 210 Fed. 853, 127 C. C. A. 415 (Circuit Court of Appeals, 8th Circuit, recently decided).

[5] As it is conceded by defendant the beer in question consigned to Fred Peters, a full-blooded white male citizen of Oklahoma, over 21 years of age, was to be by him employed for his own use, no question of the protection the government affords its wards, the Indians, can arise; and as the shipment tendered defendant by plaintiff for carriage was properly marked, branded, and packed, as by law required, to entitle it to carriage, no objection was or can be urged on this ground. As is shown by the undisputed evidence and averments in the petition, long before this controversy arose the Indian title had been extinguished as to that tract of land on which the town of Avant, Osage county, Okl., where the intoxicating liquors were to be delivered, is situate.

It follows, in so far as shown on this hearing, plaintiff had the legal right to sell the beer in question to Fred Peters for his own personal use (Vance v. W. A. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100), and had the further right to have the same transported by defendant on its line of railway for the purpose of delivery to the purchaser at the town of Avant, Osage county, Okl., notwithstanding the general order by it made refusing such shipments.

It follows the restraining order applied for must issue, on the giving by plaintiff of a bond conditioned as by law provided in the penal sum of $2,000.

It is so ordered.

THE PEJEPSCOT.

(District Court, D. Maine. October 6, 1914.)

No. 144.

1. TOWAGE (§ 11*)—DUTY OF CARE—INJURY TO TOW.
   While a towing tug is not an insurer, her master is bound to the exercise of reasonable care and skill, commensurate with the difficulty of the undertaking, and failure therein is a fault which creates liability on the part of the tug for any resulting injury.
   [Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

2. TOWAGE (§ 11*)—INJURY TO TOW—LIABILITY OF TUG.
   Injury to a steamship while being berthed by a tug, by striking her anchor, which protruded slightly from the hawse hole, but was in plain view, against the wharf, *held* due solely to the fault of the tug, whose captain in charge of the movements failed to exercise due care.
   [Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

In Admiralty. Suit by Furness, Withy & Co., Limited, as owner of the steamship Daltonhall, against the steam tug Pejepscot and the Central Towboat Company. Decree for libelant.

William H. Gulliver, of Portland, Me., for libelant.

Benjamin Thompson, of Portland, Me., for claimant and respondent.

HALE, District Judge. This libel of the owners of the steamship Daltonhall seeks to recover for injuries sustained by the steamship on February 19, 1910, while being docked by the steam tug Pejepscot at berth No. 3 of the Maine Central Railroad Company, in Portland Harbor. The steamship is 337 feet long, 45 feet beam. She arrived in Portland Harbor on February 19, 1910, with a cargo of 4,440 tons of China clay to be discharged at berth No. 3 of the Maine Central Railroad Company. She was drawing about 22 feet, and was in command of Captain Charles Anderson. The Maine Central Railroad Company's berth in question is located above two bridges. The channel at the berth is about 50 feet wide, and about 300 feet long. In order to reach the berth, it is necessary to pass through the draws of the Portland bridge, and of the first Boston & Maine railroad bridge. After passing the draw of the railroad bridge, in order for a ship to enter the dredged channel alongside of the berth, she must be winded from a west course to an east northeast course. The tug is 102 feet long, 24 feet beam, 12 feet draft, of the burden of 79 tons, built expressly for towing. At the time of the injury the tug was under charter to the respondent, the Central Wharf Towboat Company, and was in command of Captain Swett, her regular master. As the work was of a character that Captain Swett was not familiar with, Captain Charles W. L. McDuffie, master of the steam tug Cumberland, was sent with Captain Swett to take charge of the docking of the Daltonhall. Captain McDuffie is a man of large experience, and had docked many vessels at this wharf. The libel alleges that he attempted to bring the Daltonhall alongside of the wharf, and,

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

in doing so, failed to use due care; that he negligently and carelessly caused the bow of the steamship to strike the wharf, so that the anchor on the port side of the steamship came in contact with the cap log of the wharf, and was forced back into the hawse pipe with such violence that the shank of the anchor was forced against the upper side of the hawse pipe, and caused it to crack and break; that such breaking and resulting damage were caused wholly by poor seamanship, lack of judgment, and due care on the part of the tug.

The defense is that the circumstances show no negligence on the part of the respondent; that the steam tug was of sufficient power and well adapted to the towage service, in charge of a master of large experience, of a pilot of exceptional qualifications, who had full charge of her docking, and had docked her many times before at the same place, and at the time in question exercised a high degree of care in the management of the tow; that the vessel encountered nothing but ordinary risks attending navigation of this kind; it is not clearly shown where the touching of the crown of the anchor occurred; no one thought at the time there was any injury; there was no lack of due care; there was no striking of the cap log with any force, any want of proper seamanship, or lack of judgment on the part of the tug; the injury, if any, was due to the negligence of the chief officer of the steamship in allowing the port anchor to protrude from the hawse pipe, in consequence of the chain having fouled the shank; of the failure to report the condition to Captain McDuffie of the tug while the ship was proceeding up the harbor, and as she was approaching the wharf; and, further, the ship's motion ahead at the time of the injury was by the use of her own bow line, in charge of her own chief officer; and the chief cause of the injury was the fact that the protruding of the anchor from the hawse pipe brought it into an unsafe and unseaworthy position for making a port landing. It is urged also that, before being towed to her berth, the Daltonhall should have had her anchor carefully stowed.

The towage service was performed on a cold morning in winter. In getting up the anchor of the Daltonhall, it appears there was a turn in the chain over the windlass, and the stock of the anchor was not brought snug up into the hawse pipe, but protruded a foot or two. It was, however, where it could have been seen by any one; whether or not it was actually seen by Captain McDuffie, is not made entirely clear. It appears he was on the bridge, however, during a portion of the time, at least, when the crew were getting up the anchor. In making the turn and bringing the steamer up to the wharf, the testimony convinces me that the ship was headed on to the wharf at an angle of from 35 to 45 degrees. From the whole record, I can have no doubt that, while proceeding at such angle, the crown of the port anchor struck the cap log of the wharf with such violence as either to force the shank of the anchor up into the hawse pipe and break it, or to make such a leverage against the inboard end of the pipe as to result in breaking it. The "cracking against the wharf" was heard in the forecastle. There is other testimony clearly showing that the injury occurred at this time. The fact that the wharf had been touched was reported to Captain Mc-

Duffie, who appeared surprised, but expressed his belief that no harm had been done. He testifies that there was no necessity for touching the wharf, and that he did not intend to touch it. I cannot agree with the contention of the claimant that the time of the injury is not clearly shown. From the whole record, I think the injury must have happened as I have briefly pointed out. The testimony of the captain and first officer, and others in behalf of the ship, is convincing on this point; and I cannot disregard the testimony of Burns, the stevedore, although he became confused during his examination. His story is clear that, as he saw the vessel approaching, he feared her weight would break into the wharf, and he moved back some feet from his first position; that the anchor did touch the cap sill; and that some shock to the vessel resulted.

[1, 2] The law of the case is not in dispute. The tug is not an insurer; she is liable for only ordinary care under all the circumstances of the case. Her master is bound, however, to exercise reasonable care and skill in the performance of his duty; and failure therein is a fault creating liability for resulting injury to the tow. He must use the ordinary prudence and judgment called for by the circumstances of the case. If the duty undertaken by him is difficult, he must use commensurate care and skill. The Margaret, 94 U. S. 494, 496, 24 L. Ed. 146; The L. P. Dayton, 120 U. S. 337, 351, 7 Sup. Ct. 568, 30 L. Ed. 669. Negligence is a question depending upon the circumstances of each case, and can rarely be absolutely defined as a matter of law. The case at bar presents some unusual features. From a careful study of the testimony, I am of the opinion that the master of the tug did not use the care which he should have used in the difficult service undertaken. He was a man of large experience; he had shown ability in the towage service, and for that reason was intrusted with this duty, for which his corporation was paid a commensurate sum. In a former case I had occasion to commend Captain McDuffie for his qualities as a seaman, and for his frankness and clearness of statement. I am the more reluctant to attribute fault to him in this case; but it often happens that the most skillful man is not always free from error. I cannot escape the conclusion that Captain McDuffie did not exercise the care he should have exercised under all the circumstances of the case, and that the injury came from such want of due care.

While it is prudent for a vessel to have her anchors carefully stowed, I cannot find that under all the circumstances in this case it was a fault for the Daltonhall, while she was in port, to have the anchor in the position in which it was at the time of the injury, protruding only slightly from the hawse pipe, and in plain view. I am of the opinion that the tug must be held solely at fault.

A decree in pursuance of this opinion may be presented.

Fritz H. Jordan is appointed assessor.

MASTORAS v. CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Washington, N. D. September 2, 1914.)

No. 2761.

DAMAGES (§ 120*)—BREACH OF CONTRACT—ELEMENTS OF DAMAGE—INJURY TO REPUTATION OR BUSINESS.

In an action for defendant's breach of contract employing plaintiff to procure for it foreign laborers from among his own countrymen, plaintiff was entitled to recover all damages proximately resulting from his discharge, consisting of expenditures necessarily made by him and loss of compensation; but he could not recover for alleged injury to his reputation and business as an employment agent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 291–305; Dec. Dig. § 120.*]

At Law. Action by Jerry M. Mastoras against the Chicago, Milwaukee & St. Paul Railway Company. On motion to strike certain parts of the amended complaint. Granted.

H. A. P. Myers and Walter L. Johnstone, both of Seattle, Wash., for plaintiff.

George W. Korte, of Seattle, Wash., for defendant.

NETERER, District Judge. The plaintiff, in his amended complaint, after alleging jurisdictional facts, states in substance that he is a native of Greece, and has been a resident of the United States for a period of ten years, and enjoys extensive acquaintance with "hundreds of citizens from his native country," and for several years has been in the employment business, procuring employment for laborers from his own countrymen, that he has been able to control large numbers of laborers of foreign birth, that for two or three years prior to the month of February, 1914, he had been employed by the defendant company as their labor agent; and then alleges, in paragraph 5 of the first cause of action, that he was employed to go to Chicago to procure several hundred men, that he secured the men as per instructions, and that, after securing the men and assembling them in Chicago, the defendant repudiated its agreement and refused to take the men so assembled, and—

"that, by reason of defendant's refusal to take the men, said plaintiff was compelled to flee from the city of Chicago for fear of receiving great bodily injury at the hands of the large number of men whom plaintiff had so employed, greatly humiliating plaintiff, and working great and irreparable damage to his reputation, standing, and employment business among his fellow countrymen as an employer of laborers."

And he further alleges, in paragraph 6, that he was compelled to and did expend the sum of $300 in the expenses incurred in making the trip to Chicago—

"and defendant, by reason of defendant's unlawful and wrongful repudiation of said agreement with plaintiff, has injured plaintiff's reputation and influence with plaintiff's countrymen and acquaintances in and around Chicago, and has injured plaintiff's business standing, all to plaintiff's damage in the sum of $5,000."

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

And in his second cause of action plaintiff alleges facts with relation to employment and repudiation on the part of the defendant, and then states, in paragraph 5:

"That by reason of defendant's wrongful repudiation and breach of said agreement, plaintiff's reputation, standing, and employment business in this community have been greatly and irreparably injured to plaintiff's damage in the sum of $5,000."

And in paragraph 6:

"That, had the defendant fulfilled its said agreement with this plaintiff to give plaintiff all its employment work in and around Seattle and Tacoma, plaintiff would have made a net profit during the year of 1914 of the sum of five thousand dollars ($5,000)."

Plaintiff further states that he has been damaged in the sum of $500 on account of money advanced in the expenses, rentals, license fee, and incidental outlay in procuring his employment office in the city of Tacoma, and prays judgment in the sum of $15,800.

To this complaint the defendant has filed a motion to strike the part quoted from paragraphs 5 and 6 of the first cause of action and paragraph 5 and a part of paragraph 6 of the second cause of action.

The question to be determined is whether damages for loss of business reputation are recoverable in an action upon breach of contract of employment. Plaintiff has cited and relies upon Skagit Railway & Lumber Co. v. Cole, 2 Wash. 57, 25 Pac. 1077, and Graham v. McCoy, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235. The first case was an action to recover damages by reason of failure to comply with the conditions of a contract to cut timber, this failure being occasioned on the part of the defendants by failure to furnish supplies necessary in carrying out the cutting contract, and the court held that the damages recoverable were proximately traceable to the failure on the part of the defendant to comply with the conditions of the contract and were such as reasonably could have been anticipated by the parties. In Graham v. McCoy the same principles and practically the same issue was involved and disposed of by the court.

Do the allegations sought to be stricken state facts within the rule that damages for breach of contract are only such damages as may be reasonably supposed to have been contemplated as a probable result from such breach? The damage for a breach of contract is such a sum as will compensate the party aggrieved for all damages proximately caused, and no damages which are not clearly ascertainable in both nature and origin can be recovered where an employé is discharged from his employment in violation of his contract. The rule, I think, is fairly stated by Moore on Carriers, volume 5, page 1701 (2d Ed.), in which he says:

"In an action for breach of contract the damages recoverable are only such as the parties may be reasonably supposed to have contemplated as a probable result from such breach."

The damages sought to be recovered by the plaintiff by the allegations attempted to be stricken are not damages arising ex contractu. The defendant, by canceling the contract, was exercising a legal right, and is responsible to the plaintiff only for damages which were suf-

fered and which could reasonably have been contemplated by the parties as the outgrowth of the contract. There is no allegation in the complaint that the defendant was guilty of any tortious behavior towards the plaintiff in word or act and that plaintiff suffered damages by reason of such conduct. Dugue v. Levy, 114 La. 21, 37 South. 995. The Supreme Court of California, in Westwater v. Rector, etc., of Grace Church, 140 Cal. 339, 73 Pac. 1055, where a singer's contract, providing that it might be terminated upon six months' notice, was terminated without notice, and she brought an action to recover for injuries to her reputation, to her health and to her feelings, said:

"Injury to the plaintiff's health, feelings, or reputation would not be proximately caused by her wrongful discharge, nor would it be likely to result in the ordinary course of things."

The same court in Friend & Terry L. Co. v. Miller, 67 Cal. 464, 8 Pac. 40, quotes Field on Damages, § 10, as follows:

"To trace remote effects of causes would often be a difficult, if not an impossible, task. It would require an infinite mind. Each cause produces results that in turn, alone or by combination with other causes, produce other effects, and so ad infinitum. It is a subject too abstruse and complicated for the human mind."

And it further quotes section 254, in which he gives the following illustration of the doctrine:

"The defendant had contracted to deliver a threshing machine to a farmer within three weeks, knowing it was needed to thresh wheat in the field, but did not deliver it at the time agreed, and after reasonable efforts to secure the crop the plaintiff's wheat was injured by the necessary delay in saving it, and in consequence of a rain, and he sustained a further damage from the fall in the market price, which occurred before it could be kiln-dried and got ready for sale. He was held entitled to recover the loss by the injury to the wheat, but not to the change in the market, as the former loss might well have been in the contemplation of the parties, but not the latter."

The plaintiff in this case may recover all damages proximately resulting from his discharge, which he sustained, which would be the expenditures necessarily made by him, and loss of compensation, but not for injury to his reputation or business.

The motion to strike should be granted.

CAREY v. WIMPEE.

(District Court, N. D. Georgia, N. W. D. July 18, 1914.)

No. 13.

HUSBAND AND WIFE (§ 129*)—SEPARATE PROPERTY OF WIFE—ESTOPPEL TO CLAIM.

Property owned by a wife was exchanged in part payment for a farm, the remainder of the price being unpaid. A bond for a deed was executed in the name of the husband, who afterward, while they were living together on the farm, transferred it to his wife, and later became a bankrupt. *Held*, that the wife was not estopped to claim the land, as against the bankrupt's creditors, because the bond for a deed was for a time in

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

his name, or because of any representations made by him with respect to the ownership of the property, where she neither said nor did anything to induce a belief that he owned it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 283, 468–470; Dec. Dig. § 129.*]

In Equity. Suit by C. Irving Carey, trustee in bankruptcy of G. W. Wimpee, against Mrs. S. Frances Wimpee. Decree for defendant.

Lipscomb & Willingham and Nathan Harris, all of Rome, Ga., for plaintiff.

Max Meyerhardt, Sharp & Sharp, and J. M. Hunt, all of Rome, Ga., for defendant.

NEWMAN, District Judge. This suit is brought by Carey, trustee in bankruptcy, against Mrs. Wimpee and others, to cancel the transfer of a bond for title by Mrs. Wimpee's husband to her. The issues in the case are: First, whether Mrs. Wimpee owned an equity in certain real estate in East Rome, which was used in part payment for the farm, the property in question here; and, second, if she did, whether, after having allowed a bond for title to be taken in the name of her husband, G. W. Wimpee, she acted in such way as to cause certain creditors of Wimpee to believe that the farm land belonged to him. The trustee says that she allowed the bond for title which was taken for the farm land to be taken in his name, and allowed him to represent to creditors that it was his, and thereby to give him credit on the strength of his ownership of the property.

All this is denied by the defendant, Mrs. Wimpee, who says that the property in East Rome belonged to her, and was taken, at $2,500, on the trade for the farm, for which it was agreed $8,500 was to be paid. She says, also, that she did nothing to induce any creditors to give credit to Wimpee on the strength of his ownership of the property, that she never told anybody that he owned it, or did anything to cause them to believe that he owned it.

There is considerable evidence in the case, taken before a master to whom the case was referred, but who never made a report thereon. I have read this evidence over carefully, and I think there can be no doubt of the question of fact that the property in East Rome belonged to Mrs. Wimpee. Her evidence, and that of her husband, and of other witnesses in this case, shows that, I think, very clearly. While the husband may have added some little amounts to the purchase money of this property, the great bulk of it was evidently, by the evidence here, made by Mrs. Wimpee by selling milk, taking boarders, and in other ways. I do not think that that can be seriously questioned. So, taking this an an established fact, it appears that her property to the extent of $2,500 went into the purchase of the farm.

The husband and wife took possession of this farm and lived on it until the time the testimony in this case was taken. There is some slight controversy in the evidence as to who was in possession, but the fact is that they lived there together. It also seems to be true from the evidence that Mrs. Wimpee rented the most of the farm land

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

to her husband, and he tried to make something on the land in 1911, but made almost a complete failure of the crops.

On November 8, 1911, the bond for title to this land was transferred by G. W. Wimpee to Mrs. G. W. Wimpee, and it is claimed by Mrs. Wimpee that this was simply a correction of the bond for title from Brown, which should have been made to her, instead of to G. W. Wimpee, at the time it was executed, and the transfer to her by Wimpee was made in view of the fact that her money had paid all that had been paid on the property, and this was the first opportunity they had had to make the bond speak the truth in giving her her rights in the premises.

The case is a troublesome one, because there are several sides to it. I may state now, however, one thing, and that is that I do not believe the claim of Mrs. C. E. Barfield can be determined or passed upon in this case. It seems to me to be a separate matter, and not to enter into the controversy between the trustee in bankruptcy and Mrs. Wimpee, which is really the controversy before the court.

The main question really is whether or not the placing of the bond for title in the name of G. W. Wimpee, the husband, and what occurred afterwards, as disclosed by the evidence, was sufficient to charge the equity in the property with the debts due by Wimpee and scheduled by him in his schedule in bankruptcy. This question seems to me to be controlled absolutely by a case decided by this court some years ago. Garner v. Findley (D. C.) 110 Fed. 123. The headnote in that case will show what was there decided, and it is as follows:

"A wife furnished one half the money from her separate estate for the purchase of a farm, under an agreement between her and her husband, who furnished the other half, that they should be equal owners. The legal title remained in a third person as security for unpaid purchase money, but a bond for a deed had been executed to a prior purchaser, which was assigned to the husband, who promised, on his wife's objecting when she learned such fact, that the deed should be made to both. While the title stood in such condition the husband became a bankrupt. Held, that the wife was not estopped to claim and recover her interest in the land as against the general creditors of her husband by the condition of the title or by any representations by him as to his sole ownership, made without her consent or knowledge, whether the question be determined by the decisions of the Supreme Court of Georgia or of the Supreme Court of the United States."

I think the discussion of the question involved in that case is sufficient by reference to it, without going over it again at this time. It was held in that case that the record showed no act whatever on the part of Mrs. Garner to induce persons to give credit to her husband as the sole owner of the land, and if she was estopped at all it was because of her allowing the title to remain in her husband. The decision of the Supreme Court of Georgia in Bell v. Stewart, 98 Ga. 669, 27 S. E. 153, was cited in support of the contention for Mrs. Garner in that matter, and also Garner v. Bank, 151 U. S. 420, 14 Sup. Ct. 390, 37 L. Ed. 218, to the same effect.

The cases are very much alike in their facts, and, unless some reason is apparent for changing the court's view of the matter, the case of Bell v. Stewart should control here. I do not see that there is anything incorrect as to the finding upon the law in that case, and

see no reason why it is not as applicable now as it was then. In my opinion the equities of this matter are strongly with Mrs. Wimpee, and she is consequently entitled to a decree.

But this may be added, that so far as the creditors who sold property to Wimpee on his representations that he was the owner of the farm are concerned, assuming the same to have been untrue, and known to him to be untrue, as appears to be claimed here, they will be fully protected by paragraph 2 of section 17 of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), which provides that a discharge in bankruptcy shall not release the bankrupt from liabilities for obtaining property by false pretenses or false representations. If he bought goods from the various merchants who are referred to here by making false representations within the meaning of the law, his discharge in bankruptcy will not hurt such creditors, and they will have the same rights against him as they had before.

ASHLAND ELECTRIC POWER & LIGHT CO. v. CITY OF ASHLAND et al.

(District Court, D. Oregon. October 5, 1914.)

No. 6137.

1. CONSTITUTIONAL LAW (§ 278*)—COURTS (§ 282*)—DUE PROCESS OF LAW—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

An attempt by a city to summarily oust an electric company, which has acquired, by irrevocable grant or contract, the right to maintain its poles and wires in the streets, is an attempt to deprive it of its property without due process of law, in violation of Const. U. S. Amend. 14, and a federal court has jurisdiction of a suit to enjoin such action.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 763, 765, 767–770, 772–777, 779–806, 808–810, 816–824, 907–924, 942; Dec. Dig. § 278;* Courts, Cent. Dig. §§ 820–824; Dec. Dig. § 282.*]

2. ELECTRICITY (§ 4*)—ELECTRIC COMPANIES—FRANCHISE—DURATION.

Under the doctrine of the federal courts, a grant by ordinance to an electric company of the right to occupy the streets of a city with its poles and wires for the conduct of its business is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 1; Dec. Dig. § 4.*]

3. MUNICIPAL CORPORATIONS (§ 76*)—CONTRACTS—LEGISLATIVE RATIFICATION.

A state Legislature may ratify any act of a municipality which it might have originally authorized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 181, 687; Dec. Dig. § 76.*]

In Equity. Suit by the Ashland Electric Power & Light Company against the City of Ashland and O. H. Johnson, Mayor, C. H. Gillette, Recorder, and C. L. Cunningham, T. L. Ashcraft, L. L. Werth, W. H. Goudy, A. M. Beaver, and E. C. Sherman, Councilmen, of said city. On motion to dismiss bill. Motion denied.

---

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

On January 29, 1889, the common council of the city of Ashland by ordinance granted the Ashland Electric Power & Light Company, under the name of the Ashland Electric Light & Power Company, "the right of way, but not exclusive, over, upon, and across the streets, alleys, and public grounds of the city of Ashland, * * * for the purpose of establishing, maintaining, and operating throughout the city a system of electric light, and for the purpose of transmitting power within the limits of the city and adjacent country, in accordance with the object and purposes expressed in the articles of incorporation of said company." Section 2 of the ordinance provides for locating the poles and stringing the wires under the supervision of the mayor and council.

At the time of the adoption of this ordinance the city council was authorized and empowered by subsection 5, § 31, of the charter of the city of Ashland, "to provide for lighting the streets and furnishing the city with gas or other light, and for the erection or construction of such works as may be necessary or convenient therefor," the franchise for such purpose to be "used and exercised under such rules, regulations and restrictions as the council shall from time to time prescribe." And by subsection 27 the council was further authorized and empowered "to regulate the use of streets and sidewalks for the use of signs, signposts, awnings, awning posts, telegraph and telephone posts, and all other purposes." City Charter 1885.

By an act of the legislative assembly, approved February 19, 1903, conferring the right of eminent domain upon telephone, telegraph, and electric lines in Oregon, and amending section 4750 of the Annotated Codes and Statutes of Oregon, it was provided, among other things, that "any agreement or grant heretofore made by a county court, or by any municipal corporation, of the right to build or maintain any lines of poles and wires for the purposes aforesaid in any county or in any incorporated city or town, within which such line of poles and wires is already located is hereby confirmed, and such line of poles and wires may be maintained and operated so long as they are kept in repair and do not interfere with the convenient use of the highway for travel." Sess. Laws 1903, p. 112.

The Ashland Electric Power & Light Company, an Oregon corporation, accepted the grant, and in pursuance thereof, at heavy cost and expense, erected and established in the city of Ashland, and throughout the streets thereof, an electric light system, and has since operated the same. On July 25, 1911, the city council adopted an ordinance repealing in toto Ordinance No. 62, and requiring the light company to remove its system from the streets and highways of the city, and has since adopted resolutions with the purpose of requiring the removal of said system, and prohibiting the light company from exercising its said franchise in any way.

In resistance of the acts of the city, the light company has instituted a suit to restrain the city from interfering with its rights and privileges acquired under Ordinance No. 62, alleging that the city is seeking to deprive plaintiff of its property without due process of law. The sufficiency of the bill of complaint is tested by a motion to dismiss under the new equity rules.

Wm. D. Fenton, of Portland, Or., and A. C. Hough, of Grants Pass, Or., for plaintiff.

W. J. Moore, of Ashland, Or., and A. E. Reames, of Medford, Or., for defendants.

WOLVERTON, District Judge (after stating the facts as above). [1] If the plaintiff has acquired the right and privilege of constructing and maintaining an electric lighting system within the city by irrevocable grant or contract, any attempt on the part of the city to summarily oust the plaintiff would be tantamount to depriving it of its property without due process of law, contrary to section 1, art. 14, of the federal Constitution, and hence a federal question would be in-

volved. Boise Water Co. v. Boise City, 230 U. S. 84, 33 Sup. Ct. 997, 57 L. Ed. 1400.

[2] The chief controversy is whether it was competent for the city council of the city of Ashland to confer a perpetual right or authority upon the plaintiff to construct and maintain an electric lighting system within the city. It has been definitely settled by authority of the Supreme Court that a—

"grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the city making the grant." Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 65, 33 Sup. Ct. 988, 990 (57 L. Ed. 1389); Boise Water Co. v. Boise City, 230 U. S. 84, 33 Sup. Ct. 997, 57 L. Ed. 1400; Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592; Louisville v. Cumberland Telephone Co., 224 U. S. 649, 32 Sup. Ct. 741, 56 L. Ed. 1151.

The grant is one to exercise the right generally, without any limitation as to the time of its running. There is no limitation set upon such a grant by general law, so far as I have been advised; nor is there to be found in the corporate powers of the city existing at the time of the grant any such restriction. So it would seem, in view of these authorities, that the grant was one in perpetuity.

It is insisted that to enable a municipality in Oregon to confer such a privilege its authority must be deduced from the Constitution or statutes of the state, and specially conferred, and that the state Supreme Court has so held. The essential difference between that doctrine and the doctrine of the federal Supreme Court is that by the former it is deemed that explicit legislative authority is essential to the conferring of a perpetual license, while by the latter a general authorization to grant a right or privilege of the kind is considered to carry with it the power to confer a perpetual license, such license partaking of the nature of a contract with the city, and a grant by the city without limitation as to time must be deemed perpetual in its operation. See Owensboro v. Cumberland Telephone Co., supra.

[3] The case cited which is thought to be controlling is City of Joseph v. Joseph Waterworks Co., 57 Or. 586, 111 Pac. 864, 112 Pac. 1083. But the question was not involved in that case, and hence could not have been decided, so as to render it an authoritative precedent. The right and privilege granted by the Joseph ordinance was for a term of 15 years. This was so ascertained by the court. So there could have been no perpetual grant for the court to pass upon respecting its validity. But were that case to be deemed authoritative of the doctrine announced, the legislative confirmation in the present case by the act amendatory of section 4750, Bellinger and Cotton's Ann. Codes, is ample to ratify the power and authority exercised in conferring a perpetual franchise upon the plaintiff corporation. The Legislature was competent to ratify any act which it might have originally authorized. 26 Am. & Eng. Enc. of Law (2d Ed.) 698.

The motion to dismiss will be denied.

THE PLANTER.

(District Court, W. D. Washington, N. D. September 4, 1914.)

No. 3344.

SALVAGE (§ 34*)—NATURE OF SERVICE—TOWING INTO PORT WATER-LOGGED LUMBER VESSEL.

A barkentine loaded with lumber, bound southward for San Francisco, when 160 miles southwest of Cape Flattery, encountered a storm which caused her to leak, and she began to fill. Unable to make headway, the captain turned back for Puget Sound. Five days after the storm commenced, and after jettisoning 100,000 feet of lumber, he arrived 7 miles off the Straits, where he beat about for another day unable to enter, because of the wind. On the second day, in response to his signal, libelant's tug came and towed the vessel into Port Townsend. She was then full of water. *Held*, that the vessel was in danger, and the service rendered by the tug was one of "salvage," although not of high order, and that she was entitled to an award of $800, exclusive of her crew; the value of the saved vessel, with cargo, being $23,000.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 80–83; Dec. Dig. § 34.*

For other definitions, see Words and Phrases, First and Second Series, Salvage.]

In Admiralty. Suit by the Admiralty Tugboat Company, owner of the tug Wyadda, against the barkentine Planter, John Kentfield, claimant, in which Charles H. Finkel, Frank Fendall, Fritzjof Kittleson and John Knutzen became interveners. Decree for libelants and interveners.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for libelant.

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

Tucker & Hyland, of Seattle, Wash., for interveners.

NETERER, District Judge. On October 6, 1906, libel was filed by the Admiralty Tugboat Company, a corporation, owner of the steam tug Wyadda for a salvage claim, and monition and attachment were issued, and the American barkentine Planter taken into custody by the United States marshal. In November following intervening libels were filed by members of the crew of the tug Wyadda, asking for salvage service rendered by them to the Planter. Answer was filed, denying a salvage liability, and the cause was referred to the United States commissioner to take the testimony, and the issue is now presented upon the evidence reported.

From the testimony reported, it appears that on September 27, 1906, the Planter, with a full cargo of lumber—approximately 600,000 feet, including a deck load of approximately 300,000 feet, sailed from Port Gamble for San Francisco. On October 1st, when she was about 100 miles to the westward from the entrance to the Columbia river, she encountered a heavy southeast storm, which continued throughout the day, and about 2 o'clock on the morning of the 2d shifted to the southwest. A heavy gale continued to blow until about 10 o'clock on the

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

evening of the 2d. During the shifting of the wind a heavy cross-sea was encountered, and at about 9 o'clock a. m. on the 2d the vessel sprang a leak and began to fill with water. About 5 o'clock p. m. there was about 3½ feet of water in the hold, notwithstanding the pumps were continuously operating. The captain, unable to make any headway toward San Francisco, wore ship and headed for Puget Sound. This was about 160 miles to the southwest of Cape Flattery and 100 miles to the westward of the entrance to the Columbia river. The vessel then proceeded on her course, and about 10 o'clock a. m., October 3d, she had about 8 feet of water in her hold and listed to starboard. One hundred thousand feet of lumber was jettisoned to bring her back to an even keel. The vessel reached Cape Flattery on the morning of October 5th. When the vessel arrived off Cape Flattery a southeast wind was blowing out of the Straits, and the vessel beat back and forth across the water off of Cape Flattery, out from the entrance into the Straits, and about 7 miles from shore, until the morning of the 6th, when the tug Wyadda hove in sight, towing the schooner Talbot out to sea. For the purpose of attracting the tug, the captain hoisted two cork fenders to the masthead, and the tug Wyadda, after having taken the Talbot out to sea, returned to the Planter, when the following conversation took place, as reported by the captain of the Planter:

"He asked me if I wanted a tow, and I told him, 'Yes; at the usual rates.' He said he was not allowed to tow me in the condition I was in and make a bargain. I told him there was nothing to keep me out there but the head wind. If I had a fair wind, I would not want him. Then he said that his orders were to make no bargain in a case like that. Then he said that his owners would do the right thing with me; that they would not rob me. I told him again there was nothing but the head wind to keep me out there. He refused to tow me and make any bargain, so I told him to take the hawser."

At this time the Planter was completely filled with water. The waves broke over her bulwark. The crew had taken their bedding from below on top of the lumber upon the upper deck. Some of it had been hung in the rigging to dry. The crew cooked their meals in a coal oil can on top of the deck load. She was on an even keel, her sails were in good condition; she answered to her helm, and she had 75 tons of ballast in her hold.

The United States Weather Bureau report shows that the wind at Tatoosh Island from 12 o'clock midnight to 9 o'clock a. m., October 6th, was from the east and had a velocity of from 7 to 20 miles an hour; from 9 to 10 a. m., the wind was southwest, with a velocity of 4 miles an hour; from 10 to 11 a. m., south, with a velocity of 16 miles an hour; from 11 a. m. to 3 p. m., southwest, with a velocity of 15 to 7 miles an hour; and from 3 p. m. to midnight, south, with a velocity of 10 to 7 miles an hour. A southwest wind prevailing outside of Flattery would blow a disabled vessel onto the Vancouver shore. While the vessel was not disabled in the sense that any of her paraphernalia or appliances were out of commission, her water-clogged condition enveloped her with an element of danger.

The crew of the Planter consisted of six men forward, captain, mate, second mate, and cook. The vessel was provisioned for three weeks or a month. The value of the tug was $35,000. The value of the

Planter, including the cargo, was $23,400. The usual time required to tow a loaded vessel from the point where the Planter was taken to Port Townsend, her destination, is 14 hours; the time required to tow the Planter was 20 hours.

It is strongly urged by claimants, at the bar, that the only service rendered was a towage service; that the vessel was not in a position of danger, or where danger could be reasonably apprehended. I am of the opinion, however, that from all of the evidence presented, taking into consideration the various phases as disclosed by the testimony, and approaching the issue from every viewpoint, that there was a sufficient element of danger, actual and apparent, which, under the circumstances, should make the service a salvage service, rather than a towage service. The vessel was unquestionably assisted in getting safely away from apparent peril. It is, however, a salvage service of a low order. There was no element of danger in the services rendered, either to the crew or to the tug. Neither was exposed to any risks. The tug was not required to deviate from its usual course. It did take, however, 6 or 8 hours more to perform the service than would have been required to return without the tow.

I think an award of $800 as salvage to the Tugboat Company, and $40 to each of the two members of the crew pressing their claim, to be ample. The Robert S. Besnard (D. C.) 144 Fed. 992; The Brina P. Pendleton (D. C.) 200 Fed. 848; The New Camelia, 105 Fed. 607, 44 C. C. A. 642; The Grace Dollar (D. C.) 103 Fed. 665; The Beaconsfield (D. C.) 67 Fed. 144. Interest to be computed from the date of decree.

In re BRITISH AMERICAN CEDAR CO.

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

No. 50.

1. CARRIERS (§ 197*)—CARRIERS OF GOODS—LIEN FOR FREIGHT CHARGES.
   A railroad company has a lien on goods carried for the freight charges, and may enforce the same by a proceeding in rem in a proper court.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

2. CARRIERS (§ 197*)—LIEN FOR FREIGHT—WRONGFUL REMOVAL OF GOODS BY CONSIGNEE.
   The action of a railroad company in spotting a car containing goods on a spur track leading to the consignee's plant, for the purpose of being unloaded, did not deprive it of possession of the car, and the unloading of the car without its consent and against its expressed stipulation did not constitute a delivery of the goods as against its claim for a lien for freight.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

3. CARRIERS (§ 197*)—LIEN FOR FREIGHT—DELIVERY OF GOODS.
   The finding of a referee that there was not an unconditional delivery of goods by a railroad company to a bankrupt, such as would deprive the carrier of its lien for freight, *held* supported by the evidence.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891-900; Dec. Dig. § 197.*]

---

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

In the matter of the British American Cedar Company, bankrupt. On review of order of referee allowing the Great Northern Railway Company a lien on certain machinery for freight. Affirmed.

Griswold & Hudson, of Bellingham, Wash., for trustee.
Romaine & Abrams, of Bellingham, Wash., for Capital Mach. Co.
F. V. Brown, F. G. Dorety, and R. J. Hagman, all of Seattle, Wash., for Great Northern Ry. Co.

NETERER, District Judge. In December, 1913, the bankrupt purchased a car load of machinery which was consigned to it over the Great Northern Railway, and arrived in Bellingham April 2, 1914. The car was "spotted" on the spur track leading into the manufacturing plant of the bankrupt by the Great Northern Railway Company, through the Bellingham & Northern Railway Company. The car was unloaded by the bankrupt before the freight charges due for transportation had been paid. It is contended by the petitioner, the Great Northern Railway Company, that the car was unloaded without delivery to the bankrupt, and against the positive agreement and stipulation when the car was placed there, and that the car was not to be unloaded until the freight charges were paid. The trustee objects to the claim of the Great Northern Railway Company for redelivery of the machinery or the payment of the charges as a preferred lien, upon the ground that the machinery was delivered and any lien for transportation charges which would inure to the railway company was thereby waived. The matter was tried before the referee, testimony submitted by the respective parties, and the referee found that the car had not been delivered to the bankrupt, and that it was unloaded without the consent of the railway company and against its positive stipulation and agreement. Petition for review has been presented, and the matter is for hearing upon the issue thus raised.

[1] That the railway company has a right to retain the goods until the freight charges have been paid, and therefore a lien upon the goods for the amount, and may enforce its lien by a proceeding in rem in a proper court, cannot be questioned. Bulkley v. Naumkeag Steam Cotton Co., 24 How. 386, 16 L. Ed. 599; Sears v. Wills, 1 Black, 108, 17 L. Ed. 35.

[2] The action of the railway company in "spotting" the car upon the spur track leading to bankrupt's plant for the purpose of allowing it to unload the car did not deprive the railway company of the possession of the car, and the unloading of the car without the consent of the railway company and against its expressed stipulation would still permit the railway company to repossess itself of the car, or the machinery if unloaded, for the purpose of enforcing its lien. Darlington et al. v. Mo. Pac. Ry. Co., 99 Mo. App. 1, 72 S. W. 122.

The lien of the carrier is not affected where delivery is secured by fraud (5 American & English Enc. of Law, page 412), nor is the lien lost where the property is taken from the carrier's possession without his consent (25 Cyc. 675). The lien of the carrier is lost by unconditional delivery or voluntary surrender of the goods, but there may be a conditional delivery, reserving the lien (4 Elliott on Railroads [2d

Ed.] § 1572), or if the delivery is procured upon the promise of the consignee to pay the freight as soon as the delivery is made, which he fails to do, the carrier does not lose his lien or his right of possession of the goods (2 Hutchinson on Carriers [3d Ed.] § 871, at page 967); and, unless the stipulation is that delivery shall precede the payment, and the surrounding circumstances clearly show that the claim of lien has been abandoned, the carrier will not be deprived of the security which is afforded to him (2 Hutchinson on Carriers [3d Ed.] page 970), and where they are taken possession of by the consignee against the carrier's consent, there is no delivery as against the claim for lien (Hahl et al. v. Laux, 42 Tex. Civ. App. 182, 93 S. W. 1080; Martland v. Bekins Van & Storage Co., 19 Cal. App. 283, 125 Pac. 759).

[3] A careful reading of all of the evidence which was submitted to the referee convinces me that the referee did not err in his conclusions that it was the intention of the agents of the Great Northern Railway Company to have the machinery remain on the car until the freight charges were paid, and that the promises made by the manager of the bankrupt lulled the agent of the carrier into a feeling of security, and through this deception the bankrupt wrongfully unloaded the machinery, and that the railway company at no time waived its right of lien or surrendered the possession unconditionally to the bankrupt. The witnesses, except one, appeared before the referee. He had an opportunity of observing their demeanor while testifying, and is in a much better position to weigh the evidence than a person who merely reads the record. Connor et al. v. U. S., 214 Fed. 522, 131 C. C. A. 68; Southern Pine Co. v. S. T. Co., 141 Fed. 805, 73 C. C. A. 60; In re Covington (D. C.) 110 Fed. 143; In re Stout (D. C.) 109 Fed. 794.

The report of the referee will be affirmed.

ARCHBALD v. UNITED STATES.

(District Court, M. D. Pennsylvania. October Term, 1914.)

No. 629.

1. COURTS (§ 425*)—FEDERAL COURTS—JURISDICTION OF DISTRICT COURT—CLAIMS AGAINST UNITED STATES—"FEES, SALARY, OR COMPENSATION."

Jud. Code (Act March 3, 1911, c. 231) § 200, 36 Stat. 1146 (U. S. Comp. St. Supp. 1911, p. 214), creating the Commerce Court, provides that "each of the judges, during the period of his service in the Commerce Court, shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as Circuit Judge an expense allowance at the rate of $1,500 per annum." *Held*, that such expense allowance is not "fees, salary, or compensation" for official services, within the meaning of section 24, par. 20, of such Code, which excepts from suits against the United States, of which the District Courts are thereby given jurisdiction, "cases brought to recover fees, salary, or compensation for official services of officers of the United States."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1130; Dec. Dig. § 425.*]

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

2. UNITED STATES (§ 39*)—ACTIONS AGAINST—CONDITIONS PRECEDENT—SUIT TO RECOVER "FEES."

A suit by a judge to recover such expense allowance is not within the meaning of Jud. Code (Act March 3, 1911, c. 231) § 145, par. 2, 36 Stat. 1137 (U. S. Comp. St. Supp. 1911, p. 199), which provides that no suit against the United States by an officer to recover "fees" shall be allowed "until an account for said fees shall have been rendered and finally acted upon as required by law," etc.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 5, 24–28; Dec. Dig. § 39.*

For other definitions, see Words and Phrases, First and Second Series, Fees.]

At Law. Action by R. W. Archbald against the United States. On demurrer to petition. Overruled.

R. W. Archbald, Jr., of Philadelphia, Pa., for plaintiff.

Rogers L. Burnett, of Scranton, Pa., for the United States.

WITMER, District Judge. The plaintiff has filed his petition to recover from the defendant a balance of $587.84, "expense allowance" alleged to be due him when his services were ended, January 13, 1913, as an additional United States Circuit Judge for the Third Circuit, designated and serving until then as an Associate Judge of the Commerce Court. To the petition the defendant interposes a demurrer, alleging that, first, the court is without jurisdiction to entertain the suit; and, second, the petition does not allege presentation to and refusal of the claim by the proper accounting officer as required by law.

[1] The jurisdiction of the court is derived from section 24, paragraph 20, of the Judicial Code (Act March 3, 1911, 36 Stat. 1093), which provides that:

"The District Courts shall have jurisdiction, * * * concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars, founded upon * * * any law of Congress * * * in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable: * * * Provided, however, that nothing in this paragraph shall be construed as giving to * * * the District Courts * * * jurisdiction * * * of cases brought to recover fees, salary, or compensation for official services of officers of the United States."

This is a re-enactment of section 2 of Act March 3, 1887, c. 359, 24 Stat. 505, amended by Act June 27, 1898, c. 503, § 2, 30 Stat. 494 (U. S. Comp. St. 1901, p. 753), with some changes not material here.

The point made by the first ground of demurrer is that this is a suit to recover fees, salary, or compensation for official services as an officer of the United States, jurisdiction of which by the District Courts is excluded by the first proviso of this section of the Judicial Code. It will be remembered, however, that the Commerce Court Act says that the sum sued for is an "expense allowance" in addition to salary "on account of the regular sessions of the court being held in the city of Washington."

The Commerce Court Act (Act June 18, 1910, c. 309, 36 Stat. 539 [U. S. Comp. St. Supp. 1911, p. 214]) says:

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

"Each of the judges during the period of his service in the Commerce Court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as Circuit Judge an expense allowance at the rate of one thousand five hundred dollars per annum."

This allowance is not in any sense a compensation for services, but a reimbursement for moneys expended or to be expended by reason of the judges being compelled to live in Washington, D. C., stated in a lump sum for convenience. In the case of United States v. Swift, 139 Fed. 225, 71 C. C. A. 351, it is held, that a suit by a United States marshal for disbursements in procuring bailiffs is cognizable by the Circuit (now District) Court, as this is not "fees, salary, or compensation," within the meaning of the statute of June 27, 1898 (30 Stat. 494) then in force, the language of which is the same as that now under discussion—"fees, salary, or compensation for official services of officers of the United States." So, also, it was held in Benedict v. United States, 176 U. S. 357, 20 Sup. Ct. 458, 44 L. Ed. 503, that the sum of $300 per term, received by the judge of the Eastern district of New York for holding criminal court in the Southern district was not "salary" within the meaning of the act providing for the payment of "salary" after retirement.

[2] The second ground of demurrer, suggesting that the claim of the petitioner should have been first presented to the accounting officer of the treasury, is based on section 145, paragraph 2, of the Judicial Code, re-enacting section 1, Act March 3, 1887 (24 Stat. 505), amended by Act June 27, 1898 (30 Stat. 494), wherein it is provided:

"No suit against the government of the United States, brought by any officer of the United States to recover *fees* for services alleged to have been performed for the United States, shall be allowed under this act unless an account for said fees shall have been rendered and finally acted upon * * * unless the proper accounting officer of the treasury fails to finally act thereon within six months after the account is received in said office."

Having already decided that the "expense allowance" could not be regarded as compensation for services rendered, it is yet more apparent that this is not a suit to recover fees for services alleged to have been performed.

The demurrer will be overruled, and the defendant allowed to answer within 20 days from this date.

In re CROCKER et ux.

(District Court, N. D. Iowa, W. D. October 17, 1914.)

No. 1088.

1. APPEAL AND ERROR (§ 1019*)—REVIEW OF FINDINGS OF REFEREE.

A finding of fact by a referee on conflicting testimony will not be disturbed by the court, unless an obvious error has intervened or some serious mistake has been made in considering the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.*]

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

2. BANKRUPTCY (§ 400*)—HOMESTEAD EXEMPTION—TEMPORARY REMOVAL FROM HOMESTEAD.

A finding by a referee that bankrupts, husband and wife, in moving from their farm in Minnesota to Iowa, left the farm temporarily and did not lose their right to claim and hold the same as a homestead under Gen. St. Minn. 1913, § 6963, which provides that a debtor may remove from his homestead without affecting his right to the exemption if he do not thereby abandon the same as his place of abode, *held* sustained by the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. § 400.*]

In the matter of Lovell R. Crocker and Sarah C. Crocker, his wife, bankrupts. On petition of the trustee of bankrupts' estates for review of an order of the referee allowing and setting apart to them a homestead. Affirmed.

J. B. Lindsay, of Sheldon, Iowa, for trustee.
C. A. Babcock, of Sheldon, Iowa, for bankrupts.

REED, District Judge. From the certificate of the referee it appears that on November 26, 1913, the trustee of the estates of the above-named bankrupts, who are husband and wife, set apart certain property as exempt to them; that the bankrupts filed exceptions before the referee to the report of the trustee in the matter of such exemptions, and claimed, in addition to the property set apart to them by the trustee, about 40 acres of land, with the buildings thereon, in the state of Minnesota, where they resided and occupied such homestead immediately before coming to this state, where they were engaged in business at the time they were adjudged bankrupts (in September, 1913). Upon the hearing of such exceptions and claim of the bankrupts to a homestead, the referee heard the testimony of the respective parties, made a finding of facts, and set apart to the bankrupts, in addition to the property set apart to them by the trustee, said 40 acres of land in Blue Earth county, Minn. (particularly described in the order of the referee), as a homestead of said bankrupts under section 6957 of the general statutes of Minnesota of 1913 (section 3452, Rev. Laws 1905), which section reads in this way:

"Sec. 6957. The house owned and occupied by a debtor as his dwelling place, together with the land upon which it is situated to the amount hereinafter limited and defined [not exceeding 80 acres, section 6958], shall constitute the homestead of such debtor and his family, and shall be exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing, except such as are incurred for work or materials furnished in the construction, repair, or improvement of such homestead, or for services performed by laborers or servants."

The facts found by the referee from the testimony so taken by him are as follows:

"I find as a matter of fact that bankrupts in the month of August, 1911, temporarily removed from their homestead near Mankato, to Sheldon, Iowa, for business purposes; that said bankrupts intended to remain in Sheldon until such time as they might make enough money in the business of general merchandising to pay off the mortgage on their homestead and improve the same by building thereon. I find as a matter of law that said bankrupts oc-

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

cupied the said homestead within the meaning of actual occupancy of section 6963 of the Minnesota statutes of 1913 (section 3458, Rev. Laws 1905)."

The section of the Minnesota statutes referred to is as follows:

"Sec. 6963. The owner may sell and convey the homestead without subjecting it, or the proceeds of such sale for the period of one year after sale, to any judgment or debt from which it was exempt in his hands. And he may remove therefrom without affecting such exemption, if he do not thereby abandon the same as his place of abode. But if he shall cease to occupy such homestead for more than six consecutive months he shall be deemed to have abandoned the same unless, within such period, he shall file with the register of deeds of the county in which it is situated a notice, executed, witnessed, and acknowledged as in the case of a deed, describing the premises and claiming the same as his homestead. But in no case shall the exemption continue more than five years after such filing, unless during some part of said term the premises shall have been occupied as the actual dwelling place of the debtor or his family."

From this order of the referee the trustee petitions for review upon the ground that the facts found by the referee are not sustained by the evidence taken by him, and that he erred in matter of law in setting apart to the bankrupts such property as their homestead. If the facts found by the referee are sufficiently supported by the evidence, it is not contended that there was error in setting apart to the bankrupts the homestead claimed by them.

[1] The rule in this jurisdiction is that a finding of fact upon conflicting testimony by a referee or master in chancery will not be disturbed by the court unless an obvious error has intervened, or some serious mistake has been made in considering the evidence. De Laval Separator Co. v. Iowa Dairy Separator Co., 194 Fed. 423, 425, 114 C. C. A. 385; Brandt v. United States, 198 Fed. 449, 453, 117 C. C. A. 208; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372.

[2] In this case the referee heard the testimony and has found as a fact that the bankrupts did not abandon their homestead when they went to Sheldon from near Mankato, Minn., within the meaning of section 6963 of the General Statutes of Minnesota. A careful consideration of the testimony convinces that this finding is not so without support therein as to warrant the court in disturbing it. In fact the finding and conclusion of the referee has much support in Jaenicke v. Fountain City Drill Co., 106 Minn. 442, 119 N. W. 60, construing this section upon similar facts.

The order of the referee should be and is approved, and the clerk will so certify to the referee. It is ordered accordingly.

UNITED STATES v. NESS.

(District Court, N. D. Iowa, C. D. October 17, 1914.)

ALIENS (§ 70*)—NATURALIZATION—CERTIFICATE OF PHYSICAL EXAMINATION—OMISSION—RES JUDICATA—"ILLEGALITY."

Where the chief naturalization examiner of the Department of Commerce and Labor appeared and opposed defendant's naturalization at the hearing, on the ground that the required certificate of defendant's physi-

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

cal examination had not been procured and the head tax required on entering the United States had not been paid, but the state court overruled the objection, and admitted defendant to citizenship, the omission of the certificate was not an "illegality" within Naturalization Act 1906 (Act June 29, 1906, c. 3592, 34 Stat. 601 [U. S. Comp. St. 1913, § 4374]) § 15, providing for the annullment of judgments of naturalization when procured by fraud or other illegality; and hence the judgment of the state court was res judicata and not subject to attack in a suit to cancel the certificate in a federal court of co-ordinate jurisdiction.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 146, 151, 154–160; Dec. Dig. § 70.*

For other definitions, see Words and Phrases, First and Second Series, Illegality.]

Suit by the United States against Iver Engebretsen Ness, to set aside a certificate of naturalization. Dismissed.

F. A. O'Connor, U. S. Atty., of New Hampton, Iowa, and M. R. Bevington, Chief Naturalization Examiner, of St. Louis Mo., for the United States.

Kenyon, Kelleher & O'Connor, of Ft. Dodge, Iowa, for defendant.

REED, District Judge. This is a suit in equity by the government under section 15 of the Naturalization Act of Congress approved June 29, 1906 (34 St. c. 3592, p. 597) to cancel and set aside a certificate of naturalization issued to the defendant by the district court of Iowa in and for Palo Alto county on May 21, 1912, upon the alleged grounds that it was procured from said court by the fraud of the defendant and illegally, because the petition for naturalization at the time it was presented in the state court, nor at any time prior to the hearing thereon, was not supported by a certificate of the Department of Commerce and Labor of the United States, as required by said Naturalization Act, that the defendant did not submit to a physical examination and pay the required head tax on entering the United States, and that the certificate issued to defendant is void. The defendant in answer to the bill alleges, in substance, that the Department of Commerce and Labor directed its chief naturalization examiner to appear in the state court at the time fixed for the hearing of the petition and object on its behalf to the granting of the petition (which he did) upon the grounds alleged in the bill for setting aside and canceling the certificate, which objection it is alleged was overruled by the state court, and upon hearing the evidence admitted the defendant to citizenship and granted to him a certificate thereof in due form; that such judgment or decree of the state is res adjudicata, and cannot be called in question in this proceeding.

The failure to submit to a physical examination and pay the required head tax is not urged in argument in behalf of the government, and is not therefore considered.

The facts are agreed upon, were fully discussed at the bar, and many authorities have been cited by counsel in support of their respective contentions. It would serve no useful purpose to review them, and it must suffice to say that upon a careful consideration of the facts and authorities submitted the conclusion is that the failure to attach the certificate of the Department of Commerce and Labor of the arrival of

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

the defendant in the United States to the petition for naturalization, even if essential to prove on the hearing of the petition, was not jurisdictional; that the state court had undoubted jurisdiction to hear the petition as presented to it; that no fraud upon the part of the defendant in procuring the same was shown; that the failure to file the certificate with the petition was not an "illegality" within the meaning of section 15 of the Naturalization Act of 1906; that the judgment of the state court is res adjudicata and cannot be rightly set aside in this proceeding. Whether or not the judgment of the state court admitting the defendant to citizenship is or is not reviewable upon appeal or writ of error by some other court is quite immaterial. Congress has conferred upon certain state courts undoubted jurisdiction to hear the applications of aliens to become citizens, and grant or deny such applications as the facts may warrant. If their judgments are not reviewable under the state practice, Congress has not provided for a review of them by some appellate court. If citizenship is granted, and the judgment is not tainted with any fraud or misconduct of the party in whose favor they are entered, such judgments are final and conclusive against attack in other courts of co-ordinate jurisdiction. See Spratt v. Spratt, 4 Pet. 393, 408, 7 L. Ed. 897; Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 48, et seq., 18 Sup. Ct. 18, 42 L. Ed. 355; Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 691, 15 Sup. Ct. 733, 39 L. Ed. 859; approved in Johannessen v. United States, 225 U. S. 227, 237, 238, 32 Sup. Ct. 613, 56 L. Ed. 1066; United States v. Lenore (D. C.) 207 Fed. 865, and cases there cited; Regulations of the Department of Commerce and Labor of November 11, 1911, bottom of page 21.

Section 15 of the Naturalization Act of 1906 only authorizes the annullment of judgments of naturalization when procured by fraud, or other *illegality* as distinguished from errors of procedure, which would vitiate the judgments of all courts; and for this purpose only jurisdiction is conferred upon the federal courts by this section.

The bill should therefore be dismissed; and it is accordingly so ordered.

HAYDEN et al. v. PERFECTION COOLER CO.

(District Court, D. Maine. September 12, 1914.)

No. 716.

1. CORPORATIONS (§ 320*)—STOCKHOLDERS' ACTION TO RESTRAIN DIVERSION OF FUNDS—BILL—NECESSARY PARTIES—FAILURE TO JOIN—EFFECT.

Where complainant stockholders of defendant corporation sought to restrain it from diverting corporate assets for other than charter purposes, and charged that certain licenses under United States letters patent had been issued by defendant to certain licensees, and fraudulently gave them the privilege of making goods in the United States and shipping them to Canada without paying royalty, and that such licenses should be rescinded and canceled, and the relief prayed was that such licenses

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

be canceled, the licensees were necessary parties to the suit, and a failure to join them was ground for dismissal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426–1431, 1433–1439; Dec. Dig. § 320.*]

2. DISMISSAL AND NONSUIT (§ 75*)—GROUNDS—WANT OF PROPER PARTIES.

A dismissal for want of proper parties does not touch the merits, and must be without prejudice.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 169; Dec. Dig. § 75.*]

In Equity. Suit by John Hayden and another against the Perfection Cooler Company. On motion to dismiss the bill. Granted.

James A. Tirrell, of Boston, Mass., for complainants.

Winfield C. Towne and Herbert Parker, both of Boston, Mass., for respondent.

HALE, District Judge. This case is before the court upon the defendant's motion to dismiss the bill for want of parties, and for other causes. The complainants, citizens of Massachusetts, are shareholders in the defendant company, a Maine corporation. They seek to enjoin the defendant from diverting its corporate assets for other than its charter purposes. The bill charges many acts of this character, and sets out in detail that other persons, not named as parties to the bill, are related in certain ways to the matters charged in the bill. It is unnecessary to enter upon a discussion of all the allegations in the bill, and the objections raised by the defendant. It is sufficient to refer in detail to only one of the matters charged in the bill. In the twentieth paragraph, the bill alleges that certain licenses under United States letters patent have been issued by the defendant company to Cordley & Hayes, of New York City, which licenses fraudulently gave to Cordley & Hayes the privilege of making goods in the United States and shipping them to Canada without paying any royalty thereon. Paragraph 34 of the bill alleges that the Cordley & Hayes license should be rescinded and canceled. In the fourth paragraph of the prayers of the bill, the complainants pray that the Cordley & Hayes license contracts, and other contracts and assignments mentioned in paragraph 34 of the bill, may be rescinded and canceled, and that all money received thereunder, and damages arising by reason thereof, be determined, and that there be an appropriate decree of the court thereon.

[1] It is clear that the bill substantially charges fraud against Cordley & Hayes, as well as against the defendant company. Cordley & Hayes are not made parties.

The familiar rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of the suit in equity, are to be parties to it; and the established practice of courts of equity is to dismiss the complainant's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter, who are not made parties to the suit. In Minnesota v. Northern Securities Co., 184 U. S. 199, 246, 22

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

Sup. Ct. 308, 46 L. Ed. 499, the Supreme Court held that this rule in equity is founded upon clear reasons, and may be enforced by the court, even on its own volition, although the question is not raised by the pleadings, or even suggested by counsel. This rule has been followed by this court in Hyams v. Old Dominion Co. (D. C.) 204 Fed. 681, affirmed by the Circuit Court of Appeals for this circuit in 209 Fed. 808, 128 C. C. A. 532. An examination of the portion of the bill to which I have referred makes it clear that according to the well-known practice in equity, and under the rule of the Supreme Court, Cordley & Hayes are materially interested parties. The decree prayed for by the complainants cannot be made without directly affecting the material rights in equity of Cordley & Hayes. No adequate decree can be made unless Cordley & Hayes are made parties to it. It is evident, then, that the bill must be dismissed for want of parties.

[2] The bill contains many other charges against the defendant company for dissipation of its funds, and other wrongful acts done in connection with persons who are named, and with unnamed persons. It is unnecessary to discuss in detail these further allegations, inasmuch as the bill must be dismissed for the cause which I have stated. As the dismissal is for the want of proper parties, and does not touch the merits, it must be without prejudice. Hyams v. Old Dominion Co., 209 Fed. 808, 811, 128 C. C. A. 532.

The defendant recovers costs.

In re WIENER.

(District Court, E. D. New York. October 6, 1914.)

BANKRUPTCY (§ 378*)—COMPOSITION—FAILURE—DEPOSIT—FUNDS OF THIRD PERSON—EXPENSES—DEDUCTION.

Since a deposit to perform a composition must be made by the bankrupt, and if a third person advances the money to the bankrupt to make the deposit, such advancement is without any possible reservation or claim, except through the bankrupt, the deposit in case the composition fails is liable for the expenses incident to, and substantially occasioned by, the stay which the bankrupt obtained by reason of the composition proceedings, but not for expenses incurred by delay due to the opposition of creditors to the composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 601; Dec. Dig. § 378.*]

In Bankruptcy. In the matter of bankruptcy proceedings of David Wiener. On application to withdraw funds of a third person deposited to perform a proposed composition. Granted conditionally.

See, also, 215 Fed. 278.

CHATFIELD, District Judge. The court has previously ruled that a deposit, made for the purpose of carrying out an offer *by the bankrupt* of a composition with his creditors, is liable for the damages or

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

expense to the estate occasioned by the offer of composition, and which would not have been incurred by the estate if the offer had not occasioned substantially a stay of all proceedings.

The attention of the court has been called to the case of In re Harris (D. C.) 117 Fed. 575, in which the court holds that the payment of costs and the settlement of the debts by an offer of composition is a matter of agreement between the bankrupt and his creditors. Hence, if the composition fails, the ordinary administration of the assets must go on, including a payment of the costs of the bankruptcy proceeding. But this court is unable to conclude therefrom that expenses incident to and substantially occasioned by the stay which the bankrupt can obtain under the terms of the statute, if he makes oath that in his opinion a composition will be favorably acted upon by his creditors, should be borne by the creditors, to the extent at least that the bankrupt may have been negligent, or may have been seeking to benefit himself at his creditors' expense, or even attempted to defraud the creditors and the court. It is evident that if all the property of a bankrupt be surrendered as of the date of adjudication, and thereafter he make an offer of composition, the property or money deposited for the purposes of the composition must be after-acquired property, or be received from a third party, unless a part of the estate be used with the approval of the court.

The bankrupt in this case and the third party who loaned him the money for the purpose of a composition raise the objection that to apply the property of this third party to pay the expenses of certain acts occasioned by the bankrupt would be unconstitutional, in that it would be the taking of the property of that third party without due process of law. Inasmuch as the *deposit* has to be made by the *bankrupt,* and as the person advancing to him the money advances it without any possible reservation of claim, except as he claims through the bankrupt, there is no force to the contention, and the only ground of debate is a consideration of what amount should be determined as damages incident to acts for which the bankrupt should be held responsible.

This question was referred to a special commissioner, who has reported that the sum of $742.37, claimed by the receiver for custodian's fees, rent, board of horses, etc., during the period from the original date of sale to the final date of sale, should be reduced by such of those expenses as were incurred within 12 days immediately preceding the actual sale. These 12 days are supposed to be those in which a new sale could be properly arranged for.

The receiver objects to any deduction, on the ground that an equivalent period of 12 days was allowed by him at the beginning of the period and after he had closed down the store. No revenue was coming in, and a sale or composition were the only possible results. But it is not possible to include these 12 days' expenses, inasmuch as the bankrupt seems to have made the offer in good faith, and the cost of a second period of advertising would not be an unreasonable charge against the estate. Further than this, it is apparent from the record that the bankrupt was prevented, for the greater part of the period during which the sale was adjourned, from completing his composition, by the opposition of one creditor, whose objections have had the effect

of causing the estate to receive upon a sale barely one-half of the amount offered in the form of a composition.

Under these circumstances, the only part of the expense for which the bankrupt would seem to be liable would be that occasioned by his failure to bring on the specifications of objections for hearing. If he failed to do this from lack of funds, then the third party, whose money was at stake, might better have incurred the risk of seeing the matter through, than to have applied to the court for leave to be paid back the amount of the deposit, for he should have known that some expense would be attendant upon the latter course. No suggestion is made that the bankrupt abandoned the composition because the specifications of the objecting creditor might produce better terms for the creditors, and the court must assume that the bankrupt finally abandoned the composition because of the delay, or because he would be better off without the composition.

Prior to favorable report on the offer of composition, the receiver should have demanded security from the bankrupt if a stay were asked, and after the composition was dropped an order for sale should have been entered at once. If the matter be viewed from this standpoint, the expense from the day when the composition was approved, viz., the 30th day of March, 1914, to the date when a sale could have been ordered after April 27, 1914, should be taken as the actual period for which the bankrupt is responsible for the expenses. This is substantially one month, and the expenses therefor amount to $247.45.

This amount will be paid to the trustee by the clerk of the court, and the balance of the funds deposited for the purpose of the composition returned to the bankrupt.

UNITED LACE & BRAID MFG. CO. v. BARTHELS MFG. CO.

(District Court, E. D. New York. September 24, 1914.)

1. COURTS (§ 350*)—FEDERAL COURTS—DEPOSITIONS—SHOWING UNDER EQUITY RULES.

   An application *held* supported by a showing sufficiently in compliance with Equity Rule 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv) to entitle complainant to take depositions.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

2. COURTS (§ 350*)—FEDERAL COURTS—DEPOSITIONS—EQUITY PROCEDURE.

   That a cause is not on the trial calendar is not sufficient for refusing to permit a party to take depositions, where it has been kept off by stipulation to await the disposition of preliminary motions, and not through the default of either party.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

In Equity. Suit by the United Lace & Braid Manufacturing Company against the Barthels Manufacturing Company. On motion by complainant to take depositions. Granted.

See, also, 213 Fed. 535.

---

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

Littlefield & Littlefield, of New York City (Eugene A. Kingman, of New York City, of counsel), for plaintiff.

Wingate & Cullen, of New York City (Arthur von Briesen, of New York City, of counsel), for defendant.

CHATFIELD, District Judge. [1] The application denied by memorandum of June 23, 1914, has been renewed upon additional papers, which are intended to comply with Equity Rule 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv). While these papers do not set forth in detail entirely satisfactory reasons, showing inability to produce upon the trial the witnesses named, or others who would testify in the same way upon the same matters, nor just what evidence each witness will give with respect to the issues in the case, and while therefore the rule is not yet fully met, in the way that the usual application to examine a particular witness would be required to be presented, nevertheless it would appear that the motion should be granted to the extent of allowing the plaintiff to obtain the depositions, in the form of direct examination, and to give opportunity at the same hearing for cross-examination of any of the witnesses named, in Providence and Boston, whose actual presence at the trial shall not be of any benefit at the hearing of the case. In such a matter as the present, there would seem to be no necessity for requiring strict compliance with the rule, nor in preventing the preparation of depositions for submission upon the trial, when all questions and objections as to the materiality and relevancy of the testimony, and as to the competency of using a deposition instead of requiring the actual presence of the witnesses to give oral testimony, can be raised. All such rights will be preserved to the defendant, who may attend the taking of the depositions without prejudice thereto.

[2] The further objection that the case is not on the calendar is insufficient, in view of the fact that substantially, by stipulation, the court has withheld restoration of the case to the calendar until the preliminary motions are out of the way, and until one party or the other applies for such restoration within the 12-month period under which the case can be restored to the calendar for trial.

If the case had been stricken from the trial calendar, upon an actual default of the party now applying for relief, and if that default had occurred through any neglect other than inadvertence, then an order relieving the default and restoring the case to some definite status would be required. Neither party should raise such a question with respect to the present application, and the case should be restored (by one side or the other) to the calendar for prompt trial, but in the meantime the depositions desired may well be prepared.

MOORE et al. v. DONAHOO et al.

(Circuit Court of Appeals, Ninth Circuit. September 14, 1914. On Petition for Rehearing, November 17, 1914.)

No. 2353.

1. RECEIVERS (§ 158*) — PRIORITY OF LIENS AND MORTGAGES — DEBTS FOR OPERATING EXPENSES.

In the distribution of the assets of an insolvent railroad company, preference will not be given to debts for necessary operating expenses incurred before the receivership, over prior mortgages, from the corpus of the property, unless it is necessary to enable the receiver to continue operation of the road.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301–306; Dec. Dig. § 156.*]

2. RECEIVERS (§ 158*)—PRIORITY OF LIENS AND MORTGAGES—DEBTS FOR OPERATING EXPENSES.

The right of persons furnishing labor or supplies necessary to the operation of a railroad to preference over a prior mortgage debt in case of insolvency, where such equity exists, is not dependent on the institution of the proceedings by the mortgagee, or the fact that the receiver was appointed at its instance, and that it thereby invoked the equitable powers of the court; but such right is one which the court may be called upon to affirmatively enforce.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301–306; Dec. Dig. § 158.*]

3. RECEIVERS (§ 158*)—PREFERENCE OF DEBTS FOR OPERATING EXPENSES—DIVERSION OF INCOME.

Where there has been a diversion of income by a railroad company for the benefit of a mortgagee within the preferential period before a receivership, which should have been applied to the payment of current operating expenses, persons who furnished necessary labor or supplies during that time are entitled to have such income restored from the corpus of the property and applied to their claims, without reference to whether such claims became due before or after the diversion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301–306; Dec. Dig. § 158.*]

On Petition for Rehearing.

4. RAILROADS (§ 194*) — SALE IN FORECLOSURE PROCEEDINGS — LIABILITY OF PURCHASER FOR INTEREST.

Where the property of an insolvent railroad company was sold under an order of court, subject to the payment by the purchaser, in addition to the sum bid, of such claims for operating and maintenance expenses incurred by the company prior to the receivership as the court should ultimately find entitled to priority over the mortgage debt, not exceeding a stated amount, the purchaser is liable for interest on the claims so awarded priority from the date of his purchase; the amount being in effect a part of the purchase price.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 643–655; Dec. Dig. § 194.*]

Appeal from the District Court of the United States for the Northern District of California; William C. Van Fleet, Judge.

Suit in equity by the Baldwin Locomotive Works against the Ocean Shore Railway Company and others. From a decree awarding preference to claims of F. L. Donahoo and others, Charles C. Moore, F. W.

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

Bradley, Maurice Schweitser, R. D. Robbins, and Walter S. Martin, interveners, appeal. Modified.

Edward J. McCutchen, Gavin McNab, and A. Crawford Greene, all of San Francisco, Cal. (McCutchen, Olney & Willard, of San Francisco, Cal., of counsel), for appellants.

Goodfellow, Eells & Orrick, of San Francisco, Cal., for certain claimants.

Sullivan & Sullivan, Theo. J. Roche, and Goodfellow, Eells & Orrick, all of San Francisco, Cal., for certain labor claimants.

Charles S. Cushing and Wm. S. McKnight, both of San Francisco, Cal., for Remington Typewriter Co.

Frank M. Hultman, of San Francisco, Cal., for August Johnson.

Maurice R. Carey, of San Francisco, Cal., for R. P. Standley et al.

Daniel H. Knox, of San Francisco, Cal., for Knox and another.

A. F. Morrison, Peter F. Dunne, and W. I. Brobeck, all of San Francisco, Cal., for Mercantile Trust Co., of San Francisco.

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

DIETRICH, District Judge. The appellants represent the interests of the mortgagee, and the respondents are the unsecured creditors, of an insolvent railroad company. The general question involved is when and to what extent the claims of those who in the ordinary course of business furnish labor and supplies for the maintenance and operation of a railroad will, in the distribution of its assets by a court of equity, be preferred to bonds secured by a pre-existing mortgage.

The facts are presented in the form of an agreed statement, accompanied by the decree of the lower court, as provided by general equity rule 77 (198 Fed. xli, 115 C. C. A. xli). It is thereby shown that the Ocean Shore Railway Company was the owner of two short lines of railroad near the city of San Francisco, Cal., and on November 1, 1905, it executed a trust deed to the Mercantile Trust Company of San Francisco to secure the payment of an issue of bonds aggregating $5,000,000, the deed covering all of its property, including future acquisitions and income. Substantially all of the bonds were sold and became the valid obligations of the mortgagor. No interest having been paid on account of the installments falling due upon November 1, 1909, and May 1, 1910, the trustee, acting in pursuance of the authority conferred upon it by the provisions of the mortgage or trust deed, declared the entire principal due, and upon June 7, 1910, caused notice to be published of its intention to sell the property for the purpose of paying the indebtedness. The sale was originally set for September 1, 1910, but was postponed to October 1, 1910, and, under circumstances to be explained, was finally consummated on January 17, 1911.

In the meantime, on December 6, 1909, the Baldwin Locomotive Works, an unsecured creditor, filed a bill against the railway company as the sole defendant, in the United States District Court for the Northern District of California, in behalf of itself and of other creditors. It was shown by the bill that the defendant was indebted upon

unsecured claims aggregating approximately $2,000,000, that it was insolvent, and that there was danger of its property becoming dissipated or impaired in value by the prosecution of numerous suits and the levy of attachments and executions. There was a prayer for the appointment of a receiver and for an order directing him to pay the claims of plaintiff and others out of the net operating revenues of the property. Upon the same day the railway company appeared, and by answer admitted the allegations of the bill and joined in the prayer for a receiver. One F. S. Stratton was thereupon appointed receiver, who at once took possession of the property and continued to operate it until February 1, 1911. On May 21, 1910, by supplemental bill, the Mercantile Trust Company was made a party defendant, together with numerous creditors who had intervened.

On July 22, 1910, upon the representation of the receiver that he could not operate the property without loss, the court entered an order, directed against all parties to the suit, including the trustee, requiring them to show cause why a sale should not be made by the receiver. In response thereto, the trust company, appearing "specially," asked that the order to show cause be discharged, and also filed a cross-bill setting forth its interest and praying that it be permitted to proceed with the sale without interference from the receiver. Hearings were had, and the court, having assumed jurisdiction to supervise and control the sale, entered an order authorizing the trust company to sell the property, under certain prescribed conditions, one of which was that out of the proceeds a specified sum should be turned over to the receiver for the payment of the expenses of the receivership and for other purposes, and another that the sale and transfer should be made subject to the payment of certain operating and maintenance claims against the railway company incurred before the appointment of the receiver, not exceeding in the aggregate $100,000, provided the court should ultimately hold that they were entitled to priority of payment over the bonds. The claims so referred to were those which the respondents now hold, but the character and amount of which had not at that time been judicially ascertained.

The sale was made in compliance with the terms of this order, and the appellants, who became the purchasers thereat, took the title subject to the conditions prescribed. It thus appears that the sale was made under the power of the trust deed, with the permission and subject to the conditions imposed by the court. In due time the trustee made return of its proceedings, and prayed for an order confirming the sale and directing the receiver to join with it in the execution of proper instruments of conveyance. Such an order was made, and conveyances were executed accordingly. Thereupon the purchasers sought and procured permission to intervene.

The question whether or not the respondents' claims should be paid in preference to the bonds was referred to a master. The master found (and the correctness of the finding is not questioned) that the claims which accrued during the period of six months immediately preceding the appointment of the receiver—that is, from June 1, 1909, to December 6, 1909—on account of labor done and materials furnished in the ordinary course of business, for the normal maintenance and opera-

tion of the railroad, and which it was reasonable to expect would be paid out of the current operating income, aggregated $48,571.42. It is agreed that the labor and supplies for which this indebtedness was incurred were in each instance necessary to the business of the railway company as a carrier of freight and passengers, and to the public service, and were necessary for the maintenance of the railroad, and to keep it a going concern. There was no current income on hand at the time the receiver was appointed, and the operation by the receiver was at a loss. Of the operating income accruing from June 1, 1909, to December 6, 1909, there was applied to the payment of expenses of construction and other obligations having no relation to the operation or maintenance of the road the aggregate sum of $30,000. There was no evidence as to the exact time when the diversion of any specific part of this sum was made.

The master held that all of the claims were preferential in character, but, adopting the "income" theory, limited the preference to the amount of the diverted income, and hence recommended a pro rata distribution of the $30,000 to the several respondents. While confirming the master's report in other respects, the court below took the view that, inasmuch as the indebtedness due the respondents was necessarily incurred in keeping the railroad a "going concern," the question of diversion was not controlling, and entered a decree adjudging the entire amount of $48,571.42 to be a first lien upon the property, and required the purchasers to pay the same, together with interest. The appeal is from this decree.

Conceding that under certain circumstances and within certain limitations the claim of a general creditor of an insolvent railroad corporation may be preferred to a pre-existing mortgage lien, appellants contend that the decree should be reversed or modified for the following reasons:

(1) The preference of the respondents, if any they have, is limited to the amount of income diverted, namely, $30,000.

(2) No one of the respondents is entitled to priority, because the trustee did not commence an action of foreclosure or secure the appointment of the receiver, or, as is claimed, submit itself to the operation of the rule that he who seeks equity must do equity.

(3) There is no proof that any current income was diverted during the six months period after the indebtedness of any one of the respondents had become payable.

[1] 1. As already intimated, the general question involved in the first proposition is whether we shall give place to what is known as the "net income" theory, or to the "going concern" theory, as the basis for preferential allowances. Are claims, such as those of the respondents are conceded to be, for current supplies and services which are necessary to the maintenance of the property of a public service corporation, and to keep it in operation, to be paid out of the current income in preference to the bonds, upon the assumption that the lien of the mortgage attaches only to the residue of the income remaining after the payment of the operating expenses, or may they displace the vested lien of the mortgage upon the corpus of the estate, because the claimants by their labor and supplies rendered necessary assistance in continuing the oper-

ation of the property, thus enabling the debtor to discharge its obligations to the public?

In the court below, as we have seen, the latter view prevailed. The point urged by the appellants is, not that an incorrect application of the principle was made, but that the principle itself is inherently incorrect. The question has been the subject of frequent consideration in the federal courts, but the decisions are in hopeless conflict. Different rules have prevailed in the several circuits, and in some instances there has been an apparent lack of uniformity in the same circuit. Entertaining, as we do, the opinion that the point is conclusively ruled by Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, we do not deem it necessary to review or attempt to classify the numerous decisions cited in the briefs. This case was brought against the Columbus, Sandusky & Hocking Railroad Company for foreclosure of two mortgages, and a receiver was appointed. Within the six months period prior to the receivership, Gregg, in pursuance of the terms of a contract with the railroad company, furnished cross-ties for the replacing of ties decayed in the current operation of the road. A large proportion of the ties were on hand when the receiver was appointed, and used by him in maintaining the roadway. The circumstances indicated that payment would be made out of the current income. Furthermore, it was stipulated that the claim was for "necessary operating expenses in keeping and using said railroad and preserving said property in a fit and safe condition."

"The case stands," such is the language of Mr. Justice Holmes, speaking for the court, "as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether in such a case a claim for necessary supplies furnished within six months before the receiver was appointed should be charged on the corpus of the fund. There are no special circumstances affecting the claim as a whole, and if it is charged on the corpus it can only be by laying down a general rule that such claims for supplies are entitled to precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 58 [21 C. C. A. 219], and perhaps in other cases. But we are of opinion, for reasons that need no further statement (Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97 [10 Sup. Ct. 950, 34 L. Ed. 379]), that the general rule is the other way, and has been recognized as being the other way by this court."

If by this language any doubt were possible of the intention of the court to disapprove of the "going concern" theory, the dissenting opinion most clearly indicates that it was this precise question upon which there was a division.

It is pointed out by respondents that their labor and supplies "were necessary to the business" of the road, while in the Gregg Case, after referring to certain allowances sanctioned in Miltenberger v. Logansport, etc., Railway Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, the following language is used:

"The ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition."

Attention is also directed to that part of the opinion where it is observed that:

"The payment of the employés of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts."

And to the further statement that:

"We already have intimated that the payment of railroad hands might stand on stronger grounds than the payment for past supplies, etc."

But plainly all of these expressions have reference to the principle underlying an exceptional class of preferences considered in the Miltenberger Case. In brief, this principle is that a receiver may sometimes be authorized to pay past debts and charge the same against the corpus of the fund, where failure to make such payment would result in injury to, or would make it difficult to carry on the business of, the estate. If, for illustration, upon the appointment of a receiver, he finds that the pay of the enginemen of the railroad is in arrears, and that they are unwilling to render further service unless their claims are paid, the receiver may very readily conclude, especially where other skilled men are unavailable, that payment is necessary to the business of the road, and disbursements so made may be held to constitute a prior lien, upon the theory that they are required for the preservation of the value of the estate. So in the case where there is only one available source of fuel supply, and the owner declines to furnish the receiver with fuel until past bills are paid, a similar course may be taken for like reasons.

"It is easy to see," said the court in the Miltenberger Case, "that the payment of unpaid debts for operating expenses, accrued within 90 days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good will and integrity of the enterprise, and entitled them to be made a first lien."

In such cases the nature or character of the debts which the receiver is called upon to pay is comparatively unimportant; the controlling consideration is the present necessity of the receiver. If the exigency is such that he must pay past debts before he can procure indispensable future supplies, he must, in deference to his paramount duty to preserve the value of the estate, yield to the necessity, provided, of course, that the probable loss would exceed the required payments. It is to be noted that in the language above quoted from the Gregg Case a distinction is not drawn between supplies necessary for the *preservation* of the road and supplies necessary to the *business* of the road; it is difficult to see how, upon principle, such a distinction could be made. The ground of the allowance, says the court, was not merely "that the supplies were necessary," but that "the payment [therefor] was necessary."

The distinction is between the necessity of past supplies and the necessity of present payment therefor. Accordingly it was further said in the Gregg Case that:

"The payment of employés of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts."

Not that a different principle applies to labor claims, but that they are more likely to fall within the principle. In any case it is a question of business necessity, and such necessity is more likely to arise in the case of skilled labor than in the case of general supplies, which, if they cannot be procured from one source, may be gotten from another.

In the case at bar the receiver recognized this rule of necessity in the payment of a limited number of claims for rentals which are not here in controversy. But very clearly it was not made, and under the facts of the case it could not properly be made, the basis of the allowance of respondents' claims. So far as appears, the receiver never concluded that, as a matter of business policy, it was necessary to pay these claims, and no order was ever made directing or authorizing him to pay the same. There are no facts in the record from which it can be intelligently inferred that any one of the claimants continued to perform labor for or to furnish supplies to the receiver upon the condition or assumption that his claim would be paid. Indeed, there is no evidence that any one of the respondents was furnishing supplies or performing labor at the time the receiver was appointed, or thereafter furnished any supplies or performed any labor.

[2] 2. In response to the second proposition the reply may be made that, while the receiver was not appointed upon the application of the trustee, it did seek the aid of the court. True, it was formally empowered to enforce its security by notice and sale; but, without a decree adjudicating the rights of the numerous claimants, apparently no one would have purchased the property at such sale. This it practically conceded in the course of the hearings, and accordingly it filed a cross-bill, sought and procured judicial sanction for a sale, and upon its motion the sale was confirmed, and the receiver directed to join with it in executing conveyances to the property.

But, aside from these considerations, we are unable to yield to the view that claims of the character of those here involved can be preferred only in cases where the trustee institutes a foreclosure suit and applies for the appointment of a receiver. The principle of preference rests upon a more substantial basis than the power of the courts to deny an application for the appointment of a receiver in case the applicant is unwilling to submit to what the court may conceive to be equitable conditions. In the statement sometimes made that the court may, in the exercise of its discretion, deny relief to the mortgagee unless it is willing to recognize the equities of the unsecured creditor, there is clearly implied a pre-existing equity in the latter. As was pointed out in Kneeland v. American Loan & T. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, the discretion is not to be exercised arbitrarily, but with due regard to contractual rights. And surely no equity as against a mortgagee or in favor of a general creditor arises

from the mere fact that the mortgagee may be under the necessity of invoking the aid of the courts to enforce his lien. The mortgagee's lien is such as by fair implication he has contracted for, and he cannot justly be required to barter a measure of his rights for a measure of the relief which it is the duty of the courts freely to accord to any one standing in need thereof. So with the unsecured claimant: Such equity as he may have flows from the fact that, in the ordinary course of business, he has performed labor or furnished necessary supplies to the railroad company with the reasonable expectation of being paid therefor from certain funds. His power to enforce his rights should not be made contingent upon the possibility that the secured creditor may apply to a court for the appointment of a receiver or for other equitable relief, a circumstance wholly fortuitous, or at least one over which he exercises no control.

The real basis upon which the preference rests is thought to be the implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto. Reference to a few of the decisions of the Supreme Court will be sufficient to make this clear. In the leading case of Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, the court, speaking through Mr. Justice Waite, said:

"The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do."

It is further said that:

It is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgage property or the income, but because in a sense the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights."

It is also said that sometimes the court can require restoration of the diverted income from the corpus of the fund, the power so to do resting "upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors."

In Burnham v. Bowen, 111 U. S. 776, 780, 783, 4 Sup. Ct. 675, 677, 679 (28 L. Ed. 596), it was said:

"The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings."

And again:

"If current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

To the same effect is St. Louis, Alton, etc., Railroad v. Cleveland, Columbus, etc., Railroad, 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832.

In the more recent case of Southern Railway v. Carnegie Steel Co., 176 U. S. 257, 285, 20 Sup. Ct. 347, 358 (44 L. Ed. 458), Mr. Justice Harlan, speaking for the court, said that, while each case must depend upon its own special facts, it could be safely deduced as a conclusion from the former decisions of the court:

"That a railroad mortgagee, when accepting his security, impliedly agrees that the current debts of a railroad company contracted in the ordinary course of its business shall be paid out of the current receipts before he has any claim upon such income."

If, as is thus held, the current income constitutes a trust fund, and if the mortgagee in taking his security impliedly agrees that laborers and materialmen may first be paid out of this fund, before he has any claim thereto, and if one performs labor or supplies material in reliance upon this understanding, it follows as a matter of course that he has a right which a court of equity may assist him to enforce, as well as to defend, and he may, if he so desires, initiate a proceeding for that purpose.

[3] 3. Under the third head appellants contend that a railroad company is under no obligation to provide for future indebtedness by the accumulation of a surplus, and that therefore a general creditor cannot complain of diversions of income prior to the maturity of his claim. The materiality of the contention lies in the fact that the record fails to disclose the relation of the several claims in point of time to the diversions relied upon. It is to be admitted that a measure of support for the general proposition may be found in the following decisions: St. Louis, A. & F. H. R. Co. v. Cleveland R. R. Co., 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832; Central Trust Co. v. E. Tennessee R. Co., 80 Fed. 624, 26 C. C. A. 30; Kansas L. & T. Co. v. Electric Co., 108 Fed. 702; Fordyce v. Omaha, etc., R. Co., 145 Fed. (C. C.) 544, 555.

But here, as is the general rule, the courts must be understood as having spoken with reference to and in the light of the facts they had under consideration, and there is no very close analogy between some of the cases and the one at bar. In the first one cited, it may be pointed out that there was but a single intervention, and that the intervener sought to take advantage of diversions antedating the preferential period. While, as a matter of strict logic, these distinctions may

not be controlling, still it is apparent that the court had no reason to consider, and probably did not consider, the practicability or propriety of applying the rule relied upon to a case like the present one, where the diversions are all within the preferential period, and where the task of marshaling the numerous claims with reference to diversions, and calculating the distributive share to which each is entitled, would be extremely difficult, if not impossible. In the Central Trust Company Case there were but three interveners, and it is not clear that the diversion was within the preferential period. In each of the other cases there was but one intervention, and in at least one of them the diversion relied upon was prior to the six months period. It is also to be noted that the cases are not in harmony touching the date when the diversion period commences to run; two of them adopting the maturity of the creditor's claim, and the other two its creation. The appellants insist upon the former standard; that is, that there can be no diversion as to any creditor until his claim becomes due. In that view, if we suppose that employés upon monthly salaries, payable upon the 10th day of each succeeding month, render services to a corporation during a given month in expectation that they will be paid out of the current income, which they help to create, and upon the 1st day of the following month such income is applied to the payment of claims for betterments, and thereupon the mortgagee commences a suit in foreclosure and procures the appointment of a receiver, it is clear that the employés are left remediless. Again, under such a rule, what relief is available for those who supply materials or perform labor during the month immediately preceding a receivership, in a case where the current revenues for that month are applied to the satisfaction of similar claims accruing during the preceding month, which have remained unpaid because of the diversion of the current revenues for that month to the discharge of interest on bonds? And, generally speaking, it would inevitably result that claims most recently accruing, and therefore most clearly entitled to protection, would least often be in a position to demand a restoration of diverted funds. It is doubtless true in actual practice that credit is extended for current supplies and for labor upon the assumption that there has been no improvident diversion of the current income in the immediate past quite as often as upon the expectation that there will be no such diversion in the immediate future. Whatever standard may be employed in the case of an isolated claim in relation to an isolated diversion, it is thought that, at least in cases where the claims are numerous and the accounts current, the rule contended for would not only be difficult of application, but inequitable as well, and that some period must be adopted as a unit, during which all claims are to be deemed to constitute a single group and have the same footing. We agree with the court below in adopting the preferential period as such unit, and in holding that presumptively the current revenues thereof are applicable to the current debts, and that in case of a diversion restoration may be decreed for the common benefit of the entire group.

Accordingly the cause will be remanded, with directions to modify the decree by limiting its operation to the $30,000 fund, to which is to

be added interest at the rate of 7 per cent. per annum from the date the property was transferred to the appellants. Costs to appellants.

On Petition for Rehearing.

[4] The principal contention made in the petition for rehearing is that the appellants ought not to be compelled to pay interest from the date the property was transferred to them. The propriety of such a requirement appeared to us to be so obvious that discussion of the point was not thought to be necessary in our original opinion. We are not unmindful of the general rule that, where property of an insolvent debtor passes into the hands of a receiver or an assignee in insolvency, interest is not ordinarily allowed to claimants to cover the delay incident to the settlement of the estate; but this rule is not applicable here. The order of sale was made, and the appellants purchased the property, and the transfer thereof was made to them, upon the condition and upon their implied agreement that they were to pay the aggregate of respondent's claims, up to $100,000, as a part of the purchase price. It is therefore not a question of penalizing them for the delay incident to the litigation, but rather a question whether or not they are to profit thereby. When they bought the property, in effect they agreed to pay, as the purchase price therefor, not only the amount which they have already paid, but also this $30,000. They have had the use of the $30,000, and the respondents, to whom it was presently due, have been deprived thereof. It is only fair and equitable that they should pay the value of such use.

Upon other points no new considerations are advanced. Accordingly the petition will be denied.

KANSAS CITY PIPE LINE CO. et al. v. FIDELITY TITLE & TRUST CO. et al. (three cases). LANDON et al. v. KANSAS NATURAL GAS CO. et al. SAME v. McPHERSON, District Judge.

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

Nos. 4179, 4195, 4196, 4202, 143.

1. COURTS (§ 489*)—FEDERAL AND STATE COURTS—CONFLICT OF JURISDICTION—RECEIVERS.

The state of Kansas commenced a suit against the Kansas Natural Gas Company, a Delaware corporation doing business in the state, to enforce its anti-trust laws. Pending the suit receivers were appointed by the federal court in a foreclosure suit for all of the property of the company situated in Kansas, Oklahoma, and Missouri, under Judicial Code (Act March 3, 1911, c. 231) § 56, 36 Stat. 1102 (U. S. Comp. St. 1913, § 1038). As the result of the hearing receivers were also afterward appointed by the state court for the property of the company in Kansas, and on their application such property was turned over to them by the federal receivers by order of the court. The Kansas City Pipe Line Company, organized as an auxiliary of the gas company, had leased all of its property, consisting of pipe lines, to the gas company and was a large creditor for rentals. It also had a mortgage on its property, and the gas company had two mortgages securing outstanding bonds, in all aggregating $13,000,000. The pipe line company, and also its mortgagee, were

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

brought into the state suit, and a receiver for the pipe line company appointed therein. The receivers for both companies and the gas company itself applied to the federal court to have all of the property of such company, including money in the hands of the receivers, turned over to its state receivers, which was opposed only by the pipe line company and its mortgagee. The property of the gas company consisted of gas wells owned and leased in Kansas and Oklahoma and pipe lines extending therefrom through Kansas and into Missouri, and its business was the supplying of gas, for the most part through local companies, for the use of about 40 cities and towns in those two states, from which a large revenue was collected by the federal receivers, and all parties agreed that, in order to conserve the property, all that in the three states must be kept and operated together. *Held*, that the mere pendency of the suit in the state court did not deprive the federal court of jurisdiction to appoint receivers at suit of the mortgagee, but that because of the nature of the suit in the state court its receivers, when appointed, had the better right to possession of the property within the state, and that as all parties in interest, except the pipe line company and its mortgage trustee, desired it, and the necessity for a common control and management of the entire property was apparent, it was within the power of the federal court to turn over possession of all of the property and money in the hands of its receivers to the state receivers, subject to all lawful liens arising by virtue of its own receivership, retaining jurisdiction of the suit until that in the state court was disposed of.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324–1330, 1333–1341, 1372–1374; Dec. Dig. § 489.*

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

2. RECEIVERS (§ 91*)—ADOPTION OF LEASE.

Where an order appointing receivers provided that contracts and leases should not be taken as adopted without the express action of the court, the fact that they continued to use leased property did not bind them as an adoption of the lease, the court not having been asked to adopt or disaffirm it, so as to make the rental called for by the lease an operating expense of the receivership and a lien on the property and its income.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 167, 168; Dec. Dig. § 91.*]

Appeals from the District Court of the United States for the District of Kansas; Smith McPherson, Judge.

Suit in equity by the Fidelity Title & Trust Company, trustee, and John L. McKinney, against the Kansas Natural Gas Company. From certain orders made by the District Court, the Kansas City Pipe Line Company and the Fidelity Trust Company and also John M. Landon and R. S. Litchfield, as receivers, separately appeal. Petition of John M. Landon and R. S. Litchfield, as receivers, for a writ of mandamus against Hon. Smith McPherson, as assigned Judge of the District Court for the District of Kansas, First Division. Orders appealed from modified and affirmed. Petition for mandamus denied.

See, also, 209 Fed. 300, 126 C. C. A. 226.

J. W. Dana and W. C. Scarritt, both of Kansas City, Mo. (E. L. Scarritt, E. S. North, and A. M. Seddon, all of Kansas City, Mo., on the briefs), for appellants Kansas City Pipe Line Co. and Fidelity Trust Co.

John S. Dawson, Atty. Gen., of Kansas, Chester I. Long, of Wichita, Kan., and John H. Atwood, of Kansas City, Mo. (O. P. Ergenbright

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

and T. S. Salathiel, both of Independence, Kan., on the brief), for appellants Landon and Litchfield.

Charles Blood Smith, of Topeka, Kan. (Samuel Barnum, of Topeka, Kan., on the brief), for appellees Fidelity Title & Trust Co. and McKinney.

Samuel S. Mehard, Cornelius D. Scully, and Churchill B. Mehard, all of Pittsburgh, Pa., filed a brief by leave of court on behalf of the protective committee of holders of second mortgage bonds of the Kansas Natural Gas Co.

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

HOOK, Circuit Judge. These are appeals from orders of the District Court of the United States for the District of Kansas made in the adjustment of a conflict of jurisdiction between it and a state court. On January 5, 1912, the state of Kansas brought an action against the Kansas Natural Gas Company and others in the district court of Montgomery county in that state to enforce its anti-trust laws. The company is a Delaware corporation, with business headquarters in Montgomery county. The hearing of the action began September 30, 1912, but before its conclusion and on October 7th McKinney, a creditor holding second mortgage bonds, filed a creditor's bill against the company in the court below and caused receivers of its property to be appointed. October 19th the Fidelity Title & Trust Company, trustee in the first mortgage of the defendant company, was made a party plaintiff. Shortly afterwards the trustee filed an independent bill in foreclosure. For convenience these suits will be referred to as the foreclosure suit. By proceeding under section 56 of the Judicial Code jurisdiction was taken by the court below of the company's property in Missouri and Oklahoma. On February 15, 1913, the state court concluded its consideration of the action before it and rendered judgment against the company, appointing receivers of its property in Kansas, directing them in conjunction with the Attorney General to appear in the court below and urge the prior jurisdiction of the state court and the rights of the state of Kansas, making the Kansas City Pipe Line Company a party defendant and restraining it from litigating elsewhere any matter of its contract with the Kansas Natural Gas Company. February 18, 1913, the Attorney General and the state receivers appeared in the court below and applied for possession. It was held, June 5, 1913, they should prevail. 206 Fed. 772. On appeal to this court the order was affirmed. 126 C. C. A. 226, 209 Fed. 300.

The order directed the federal receivers to surrender all the property in Kansas to the state receivers and retained the matter for future directions respecting certain conflicting relations and the moneys on hand from the operation of the business. The mandate of this court was spread on the records of the court below December 30, 1913, and the physical property of the company in Kansas, both owned and leased, was accordingly turned over to the state receivers. There was also paid them the sum of $75,000. The federal receivers re-

tained subject to further directions of the court below approximately $1,000,000, including live credits which were shortly thereafter collected. Payments upon the funded debt and certain other obligations of the Kansas Natural Gas Company having been stopped, this amount in the hands of the federal receivers was materially increased by further receipts of the business. While the above proceedings were in course, other things occurred which have a bearing on the controversies here. On March 11, 1913, the Fidelity Trust Company, the mortgage trustee of the Kansas City Pipe Line Company, was made a defendant in the action in the state court, and the restraining order mentioned was extended to it. On June 21, 1913, the state court appointed a receiver of the Pipe Line Company. December 6, 1913, the insolvency of the Kansas Natural Gas Company, confessed by it in the foreclosure suit in the court below, was made an additional ground for the state receivership.

[1] The appeals now before us were taken from subsequent orders of the court below by the state receivers and by the pipe line company and its mortgage trustee, who had appeared as interveners. On January 23, 1914, the state receivers moved the court below to order its receivers to pay over to them all moneys then or thereafter in possession in virtue of the federal receivership. The Kansas Natural Gas Company, from the operation of whose property, owned and leased, the moneys came, asked that the motion be granted. The state receiver of the pipe line company also desired the moneys paid over subject to any liens and claims of that company or of himself as its receiver. As will be presently explained, the pipe line company owned extensive properties which by lease and contract had become embraced in the system operated by the Kansas Natural Gas Company. On January 24, 1914, the court below ordered its receivers to deliver to the state receivers the property of the Kansas Natural Gas Company in Missouri and Oklahoma to be returned by the latter at the end of their custody and operation of the property in Kansas, also, excepting a reservation not important here, to pay over to the state receivers all moneys then or thereafter in hand subject to all liens and claims with right to assert them in the state court. The state court thereupon directed its receivers to accept and receipt for the property and moneys upon the terms of the order of the court below. The pipe line company and its mortgage trustee appealed. Cause No. 4179.

On February 6, 1914, the court below modified the order of January 24th by limiting the amount of money to be paid over to $600,000. On March 12th the remaining federal receiver, the others having resigned, was ordered by the court below to continue collecting for all gas theretofore or thereafter sold to purchasers or consumers in St. Joseph, Kansas City, Joplin, and elsewhere in Missouri. From these sources a large part of the income from the entire business was derived. The Attorney General of the state and the state receivers renewed their earlier application for the moneys and complained of the orders of February 6th and March 12th as violative of the mandate of this court, and also because the federal receiver was allowed to collect for gas which he neither produced, bought, nor paid for,

but all of which was acquired, transported, and delivered by the state receivers. The application was denied March 23, 1914, except that the federal receiver was directed to pay the state receivers an additional $100,000; the order reciting:

"Which said money is paid for the express purpose, and for none other, to enable the state receivers of the district court of Montgomery county, Kan., to operate the entire property and to furnish a gas supply to patrons and consumers at St. Joseph, Mo., Kansas City, Mo., Joplin, Mo., and other places in the state of Missouri and subject to the right of the state court receivers to make further applications for money for said purposes."

The state receivers appealed from the order except as to the payment of the money. Cause No. 4195. The pipe line company and its mortgage trustee appealed from that part of the order directing the payment of the money. Cause No. 4196. Afterwards the pipe line company and its mortgage trustee prosecuted a further appeal from the orders of January 24th and March 23d (Cause No. 4202), and the state receivers applied for a writ of mandamus to require the judge of the court below to observe the mandate of this court (Cause No. 143, original).

A brief description of the property and business of the Kansas Natural Gas Company and the relation of the pipe line company thereto and its place in this litigation will assist the understanding of the controversies before us. The Kansas Natural Gas Company was engaged in the production, purchase, transportation by pipe lines, and marketing of natural gas. It supplied gas for lighting, heating, and manufacturing purposes in about 40 cities and towns in Kansas and Missouri. Its system of pipe lines, including those leased from other companies, extends from the Hogshooter gas field in Oklahoma, through eastern Kansas and across the Missouri river above Leavenworth, to St. Joseph, Mo., a distance of about 250 miles, with various branches therefrom, to Joplin, in southwestern Missouri, and the cities and towns in that neighborhood, to Kansas City, Mo., and Kansas City, Kan., and to Lawrence, Topeka, Leavenworth, and Atchison, Kan. Some of the gas is still obtained from wells in Kansas, but most of it from wells in Oklahoma. Much the larger part of the pipe line system is in Kansas; the lines into Missouri, particularly at Kansas City, being short in comparison. All the gas for the Missouri cities and towns goes through trunk pipe lines in Kansas. Gas for the larger cities in both Kansas and Missouri is generally sold to local companies formerly in the artificial gas business and is distributed by them to consumers.

Because of the nature of the natural gas business, the necessity of shifting the pipe lines and compressor plants to reach new sources of supply as gas wells give out, the physical interconnection of the various pipe lines owned and leased, the fact that the principal source of supply is in Oklahoma, while a large proportion of the sales is in Missouri, and most of the trunk lines are in Kansas, all agree that the system operated by the Kansas Natural Gas Company should be regarded as an integral indivisible unit. Both the court below and the state court so found in express terms. The federal receivers and the

state receivers have so represented, and the parties to the litigation by their respective counsel so state. Counsel for the pipe line company and its mortgage trustee, two of the appellants here, express the situation as follows:

"And it seems to be a conceded fact that the dismemberment of this system by segregating the parts in the different states, or by taking from it the fixed properties of the Kansas City Pipe Line Company, would wholly disable the entire system, confiscate the values of the several parts, and deprive a million people of a prime necessity of life."

Counsel for the protective committee of holders of the second mortgage bonds of the Kansas Natural Gas Company say that:

"A perpetuation of the dual receivership of the Kansas Natural Gas Company would wreck the property. * * * Interests of all parties concerned can best be served by making the management of the Kansas receivers exclusive over all the property, including money, now in the hands of the court or of the federal receivers."

Counsel for the other parties are hardly less positive.

About 35 per cent. of the pipe line system operated by the Kansas Natural Gas Company and a substantial part of the compressor plants and appliances necessary for its operation belong to the pipe line company. It owns the double line extending from Olathe, Kan., a short distance into Missouri at Kansas City, and the contracts with the local distributing companies of Kansas City, Kan., and Kansas City, Mo., are in its name. It also owns a trunk line closely paralleling one of the Kansas Natural Gas Company from Olathe to the northeastern part of Wilson county, Kan., and the double trunk line thence to Grabham in Montgomery county. The cities and towns in southern Kansas east of Montgomery county and those in southwestern Missouri are served through lines owned by the Kansas Natural Gas Company, as also are Topeka, Lawrence, Leavenworth, and Atchison, Kan., and St. Joseph, Mo. The lines of the Kansas Natural Gas Company extend but a short distance into Oklahoma. They connect there with the lines held under lease from another company, for which the state court has also appointed a receiver. To the southern end of these lines have been attached between 15 and 20 miles of pipe belonging to the pipe line company, removed there from Kansas.

The Kansas Natural Gas Company was organized in 1904. It has a capital stock of $12,000,000. June 20, 1904, it issued $4,000,000 of first mortgage bonds, and on March 1, 1906, an equal amount of second mortgage bonds. Both mortgages contain sinking fund provisions for the retirement of the bonds in annual installments in 12 years from their dates, respectively. The pipe line company, though having an independent corporate origin, was organized as an auxiliary of the Kansas Natural Gas Company. The latter owns one-half of its capital stock of $5,000,000. On August 1, 1907, the pipe line company issued $4,745,000 of mortgage bonds maturing annually in series, the last in 1918. The Fidelity Trust Company, one of the appellants, is the trustee in the mortgage. After the appointment of the federal receivers of the Kansas Natural Gas Company October 9, 1912, default was made in interest, sinking fund, and principal installments of the bonds of both companies.

On January 1, 1908, the pipe line company and the Kansas Natural Gas Company entered into a contract, termed a lease, whereby the former granted and leased to the latter, for 99 years from February 2, 1906, all its properties, franchises, and rights of every kind and description excepting its franchise to be a corporation, its corporate seal, office furniture, records, and muniments of title. Even the right to use its name in business and litigation was given. On its part the Kansas Natural Gas Company contracted to pay (1) all taxes and public charges upon the leased property, franchises, and rights, upon the bonds of the pipe line company, which it was required to pay or deduct, and upon dividends on its capital stock; (2) all interest upon the bonds issued by the pipe line company; (3) the annual requirements of the sinking fund to redeem the bonds; (4) a sum sufficient to enable the pipe line company to pay dividends of 6 per cent. on its capital stock; (5) the actual expense of maintaining the corporate organization of the pipe line company and of providing suitable offices for its officers and directors, not exceeding $500 per annum. In addition the Kansas Natural Gas Company assumed all outstanding obligations and liabilities, absolute and contingent, of the pipe line company. On January 1, 1913, the pipe line company asked leave of the court below to file an intervening petition in the foreclosure suit. With leave afterwards granted it filed a petition March 24, 1913, in which it appeared specially for the assertion of its rights under the lease, but otherwise denied the jurisdiction of the court over it. On January 24, 1914, its mortgage trustee, to whom the bond and interest sums were payable under the lease, joined it in an amended and supplemental intervening petition, claiming an adoption of the lease by the federal receivers and that by its terms there was then due $1,276,187.16. It was also averred that the first intervening petition was filed to give notice of a claim under the lease and to avoid an implication of a contract to accept compensation on the basis of quantum meruit. This amended and supplemental petition has not been determined by the court below. The amount claimed has since materially increased by the accrual of other sums under the lease. Large amounts are also due and unpaid on account of the first and second mortgage bonds of the Kansas Natural Gas Company.

The questions presented by the appeals before us are, in short: What should be done with the money, and the property in Missouri and Oklahoma, in the custody of the federal receiver? What should be done with the claims of the pipe line company? The pipe line company objects to the payment of any money or the further surrender of property to the state receivers until its demands under the lease are satisfied. Its position is that the court below had jurisdiction of all the property owned and leased by the Kansas Natural Gas Company until the part in Kansas was surrendered; that the federal receivers were rightfully in possession of and operating it; that the remaining federal receiver still has the property in Missouri and Oklahoma; that the state court has no jurisdiction outside of Kansas, and its receivers can exercise no authority beyond the borders of that state; that the property in Missouri and Oklahoma cannot be

lawfully surrendered to them; that much of the money now held by the federal receiver comes from the operation of the entire system before the property in Kansas was given up, and since then from the operation in Missouri and Oklahoma; that the lease of the property of the pipe line company was adopted by the federal receivers, and the sums due under it are an administrative or operating expense of the receivership, like the compensation of the receivers or the wages of their employés, which can be determined, allowed, and paid only under the orders of the court below; and, finally, that the pipe line company has a first and prior lien upon all the money in the hands of the federal receiver and the entire property of the Kansas Natural Gas Company, superior to all other claims and liens, including the two mortgages given by the latter, though those mortgages are first in time. On the other hand, the state receivers claim that because the action in the state court was first begun the federal receivership is void from the beginning, but if not so, then, when it lost control of the property in the primary jurisdiction in Kansas, it could not continue to hold in Missouri and Oklahoma under section 56 of the Judicial Code; also that the court below had no power to, and did not, charge the money and property with the demands of the pipe line company. The essential unity of the entire system, the imperative necessity for a single management and operation, and a single control of the income are urged.

Our conclusions may be briefly stated. The mere pendency of the action in the state court was not an obstacle to the appointment of receivers by the court below. The court below had jurisdiction of the parties before it and of the subject-matter, and, were there no other reason for its action, the trustee in the first mortgage of the Kansas Natural Gas Company had a right at once to impound the income from the mortgaged property, the state court not having yet acted. There was no conflict until it acted. The jurisdiction in Kansas was properly extended to Missouri and Oklahoma. When the state court appointed receivers, their superior right to the property in Kansas then arose, because of the nature of the action there and its prior pendency. That right was not self-executing, but in the orderly administration of justice was asserted by application in the court below. These principles were fully recognized in the opinion of the state court. The court below has the right to retain the foreclosure suit and await the progress and disposition of the action in the state court, with power to make such orders and decrees as future exigencies may require. When it surrendered the property in Kansas to the state receivers, it did not thereby lose the jurisdiction in Missouri and Oklahoma obtained under section 56 of the Judicial Code. The jurisdiction of the state court is confined to Kansas, and the authority of its receivers, as such, is no longer than the arm of the court. But their authority may be enlarged by agreement of the parties in interest, when agreeable to the court that appointed them, and not contrary to the laws of the states where the property is located, nor inconsistent with a prior jurisdiction. In such case they depend on convention rather than the force of judicial process.

The necessity for a common control and management of the entire system of the Kansas Natural Gas Company appears from every point of view. It is sought by the state receivers at the instance of the state court, and is not contrary to law. The Kansas Natural Gas Company, the owner and debtor, its first mortgage bondholders, and its second mortgage bondholders, as far as they have appeared, have urged the court to accomplish it. To divide the property and operate the several parts inharmoniously would cause great loss to the proprietary companies and the holders of their securities and would seriously impair the service to the public. Nothing can result from continuing the control of the federal receiver but confusion and loss, unless he act in an auxiliary or ancillary way to the state receivers, and that is not desirable for various reasons. The money on hand should follow the property. It would not be practicable to divide that earned after the state receivers were appointed on any than an arbitrary basis. Nothing is in the way of a complete surrender of all the property and money to the state receivers, except the possession and control by the court below over the property in Missouri and Oklahoma and the claim of the pipe line company and its mortgage trustee that the sums due under the lease are an expense of the federal receivership and a first lien upon the entire estate of the Kansas Natural Gas Company and the proceeds of its operations, which the court below and no other court can determine and pay. The court below may relinquish possession and control when justice requires it.

[2] We turn to the claim of the pipe line company and its mortgage trustee. In appointing its receivers the court below reserved to itself the power to approve or disapprove leases and contracts, and none were to be taken as adopted without its express order. No such order had been made as to the lease in question. The pipe line company has never formally asked the court below to adopt or disaffirm the lease. It relies for adoption upon administrative acts of the federal receivers, but they are not sufficient in this case. It has no lien as claimed upon the entire estate by the Kansas Natural Gas Company or the income from the receivers' operation. Its claim is under the lease. It was not affirmatively created by the court below or its receivers, and as asserted its relation to the usual, ordinary charges and costs of administration is not much closer, if at all, than that of the bondholders of the Kansas Natural Gas Company. To allow the preference claimed upon the entire property and income would displace the lien of prior mortgages to some extent. We pass the fact that the state court has appointed a receiver of the pipe line company, and enjoined it and its mortgage trustee from appearing in any other court for the determination of any matter affecting the corporate property, assets, or liabilities of the Kansas Natural Gas Company. If the case were free from complications, the court below might, under the prayer for general relief, determine the amount equitably due for the use of the leased property and order it paid before surrendering the fund. But it is not uncommon for a court to turn funds and property over to another court, subject to lawful claims to be determined by the latter. The state court has signified of record to take so

charged. That is not a recognition that any particular person has a preferential right, but a judicial acknowledgment that whatever right is found to exist will be protected. Undoubtedly the pipe line company and its bondholders have substantial equities; so have the bondholders of the Kansas Natural Gas Company. The attitude of the state court has been patient and careful. There is nothing to indicate that it would be less responsive than the courts of the United States to the obligations of contracts and the rights of those whose means have been invested in this precarious business, or more likely to allow demands for service and rates to go to the point of confiscation of private property.

The motion to dismiss in case No. 4179 is denied. The order of January 24, 1914, should be modified by making it additionally specific that the state receivers, with the express authority of the state court, accept the property and money subject to all lawful liens and claims arising under or by virtue of the receivership in the court below, or otherwise. The property in Missouri and Oklahoma and the money, less the amount of taxed costs and allowances, should be surrendered to the state receivers, upon their receipt, authorized by the state court and according to the order of January 24, 1914, as modified. As so modified, the order is affirmed. The other orders of the court below which are involved in these appeals are reversed, except so far as they direct the payment of money to the state receivers. The application for a writ of mandamus is denied, at the cost of petitioners. The matters involved in the appeals are remanded to the court below for further proceedings in conformity with this opinion.

COLUMBIA RIVER PACKERS' ASS'N v. McGOWAN et al.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2396

APPEAL AND ERROR (§ 323*)—PARTIES—SEPARATE APPEAL BY ONE OR MORE PARTIES.

In an action for an injunction the court entered a separate judgment in favor of each of the three defendants against plaintiff in the sum of $7,361 as damages from a temporary injunction, and also a separate judgment that each defendant recover from the surety on the injunction bond the sum of $4,000, one-third the amount of the bond, which amount, it was recited, was included in the sum awarded against complainant, it being specially declared that the liability of the sureties and of the complainant was coequal to the extent of $4,000 and no more. *Held*, that an appeal by complainant would not be dismissed on the ground that the surety was a necessary party to the appeal, and that a separate appeal could not be maintained by complainant, since the decree was separate with respect to all the parties to it and distributive in its awards of damages, and from such a decree each of the judgment debtors may prosecute an appeal, and a failure to join all in an appeal is not fatal to the court's jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1796, 1798–1805; Dec. Dig. § 323.*]

---

*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 Division of the Western District of Washington; George Donworth and Edward E. Cushman, Judges.

Action by the Columbia River Packers' Association against H. S. McGowan and others. From a judgment for defendants, plaintiff appeals. On motions to dismiss the appeal and for the issuance of a new citation. Motions denied.

G. C. Fulton, of Astoria, Or., for appellant.

Dorr & Hadley, of Seattle, Wash., and Welsh & Welsh, of South Bend, Wash., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. On August 11, 1908, the appellant filed in the court below its amended complaint, wherein it asked for an injunction to enjoin and restrain the appellees, and Walter Bussey and I. N. Stensland, from placing in any of the waters of the Columbia river in front of or adjacent to three certain fishing sites, on Sand Island, alleged in the bill to belong to the appellant, or from maintaining in front of its premises in such waters, any obstruction whatever, and particularly the obstructions alleged in the bill to have been maintained there by the appellees, and from any interference with the free and uninterrupted ingress to and egress from such premises. A restraining order was granted by the court below, and the appellant was required to furnish a bond in the sum of $2,000, and subsequently an additional bond in the sum of $10,000. On each of these bonds the United States Fidelity & Guaranty Company became surety, "to pay all damages and costs which may accrue to the defendants by reason of said injunction or restraining order, not exceeding" the sum named in the bond. Answers and cross-complaints were filed by the appellees McGowan, Lindstrom, and Coyle (the defendants Walter Bussey and I. N. Stensland having been dismissed from the suit without costs). After a hearing before the court the restraining order theretofore issued against the appellees was dissolved, and it was ordered that the matter be referred to a special master for the taking of testimony upon the question of the damages suffered by the appellees by reason of the granting of the restraining order. In the report of the master it was found:

"That the defendants were equally interested in the fishing locations and that they should have separate judgments, each for one-third of the total amount of recovery, and each for one-third of the total costs incurred, * * * each of such judgments to be limited to $4,000 as against the bondsmen, which taken together, will make $12,000, the face of the bond."

On September 22, 1913, a final decree was entered by the court below, wherein it was ordered, adjudged, and decreed that separate judgments should be entered herein in favor of each of the defendants for one-third of the total amount of recovery, to wit, one-third of $22,083, and for one-third of the total costs incurred by the defendants, and that said judgments should also be entered against the United States Fidelity & Guaranty Company, the surety upon the injunction bonds given by the complainant in this cause, each judgment against

the surety, however, to be limited to the sum of $4,000. Thereupon the court entered a separate judgment in favor of each of the appellees, against the Columbia River Packers' Association, in the sum of $7,361, together with the sum of $316.10, costs taxed therein, and also a separate judgment that each of the appellees recover from the United States Fidelity & Guaranty Company, surety, the sum of $4,000, which amount it was recited was included in the sum awarded against the complainant in each judgment, it being especially declared that the liability of the surety and of the complainant was coequal to the extent of $4,000 and no more. From this decree and judgment the appellant has appealed to this court.

A motion to dismiss the appeal has been interposed by the appellees on the ground of failure of the appellant to include, as a party to the appeal, the United States Fidelity & Guaranty Company, the surety on the injunction bonds. The contention is that the surety company is a necessary party to the appeal for the reasons: First, that the judgment entered in the court below was a joint judgment against the appellant and its surety to the extent of the liability of the latter; and, second, that the record discloses that no notice was served or any attempt made to sever the interest of the appellant from that of the surety, so that a separate appeal might be maintained by the latter. The appellant meets the motion to dismiss the appeal filed by the appellees with a motion for an order directing the issuance of a new citation to the surety company. The appellees resist the motion of the appellant to thus amend its citation, and in support of their contention to dismiss the appeal they invoke the rule laid down by the Supreme Court of the United States in the case of Estes v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437. In that case the writ of error was dismissed by the Supreme Court of its own motion, and the rule was there laid down that where the judgment below is a money judgment against the claimants and their sureties in a bond, naming them jointly, and the sureties do not join in the writ of error, and there is no proper summons and severance, the defect is a substantial one which that court could not amend, and by reason of which it had no jurisdiction to try the case, and it would of its own motion dismiss the case without awaiting the action of the parties. Referring to the judgment in that case the court said:

"There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties."

It was because the judgment in that case was joint and not distributive and separate against the claimants and sureties that it was held that all the parties against whom the judgment had been entered had not joined in the writ of error, and the court could not therefore try the case, and the writ of error was dismissed. That is not this case. In this case we have a separate, distributive judgment fixing the amount adjudged against the complainant in favor of each of the defendants, and also fixing the amount adjudged against the surety company on the complainant's bond, and in favor of each of the defendants. These judgments are clearly the exception mentioned by

the court, where the sureties have the right to a separate writ of error or appeal, and their failure to take such appeal does not deprive the appellate court of jurisdiction of the case with respect to the other appellants.

The case of Mason v. United States, 136 U. S. 581, 10 Sup. Ct. 1062, 34 L. Ed. 545, is also cited by the appellees in support of the motion to dismiss the appeal. In that case the action was against the postmaster at Chicago and the sureties on his official bond, the alleged breach being that he had not accounted to the United States for large sums of money received by him from the sale of postage stamps and other sources connected with the postal service. The process was against the postmaster and seven of the sureties jointly. The judgment does not appear in the record, but it is to be presumed that it followed the process and was joint against all the defendants. A writ of error was taken to the Supreme Court by certain of the sureties who had appeared in the court below, without joining the principal or certain other of the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as plaintiffs in error, or for a severance of those parties. The motion for leave to amend the writ of error was denied and the writ dismissed. The dismissal was in accordance with the rule declared in Estes v. Trabue, supra.

The case of Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572, 10 Sup. Ct. 1063, 34 L. Ed. 539, decided by the Supreme Court on January 6, 1890, less than one year after the rendition of its decision in Estes v. Trabue, supra, and four months prior to the decision in Mason v. United States, supra, is not easily distinguished from those two cases. In this intermediate case a judgment had been rendered in favor of the plaintiff and against a sole defendant at a special term of the Supreme Court of the District of Columbia. The defendant appealed to the General Term and gave sureties. The General Term confirmed the judgment of the lower court and entered a judgment against the defendant and against the sureties. The defendant then sued out a writ of error from the Supreme Court of the United States, without joining the sureties. The defendant in error moved to dismiss the writ for nonjoinder of the sureties, and the writ was accordingly dismissed by the court on November 4, 1889. On December 23, 1889, counsel for the plaintiff in error moved to rescind the judgment of dismissal and to restore the cause to the docket. In support of the motion it was urged, among other things, that it was too late to sue out another writ of error. Counsel for the defendant in error resisted the motion, contending that the objection to the writ of error was jurisdictional and could not be cured by amendment, calling the attention of the court to its order of November 4, 1889, in the same case, and also to its decision in the case of Estes v. Trabue, supra, rendered less than one year prior thereto. On January 6, 1890, the motion to rescind the judgment of dismissal, to restore the cause to the docket, and to amend the writ of error by inserting the names of the sureties, was granted, and the case returned to the docket. The court rendered no opinion in the case, but it seems proba-

ble that the court deemed the judgment a joint judgment, and the amendment appears to have been allowed under the provisions of section 1005 of the Revised Statutes (U. S. Comp. St. 1901, p. 714). The case is not an authority for enlarging the terms of the statute to bring in parties to a separate judgment in an equity case by the issuance of an amended citation after the time for appeal has expired.

The case of Copeland v. Waldron, 133 Fed. 219, 66 C. C. A. 271, in this court, cited by the appellees in support of the motion to dismiss, was an appeal from a joint decree. It was there held that where the record failed to show that one of the defendants was in any manner joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect was not one of form only which the Circuit Court of Appeals might permit the appellants to cure by amendment under section 1005 of the Revised Statutes, but was fatal to jurisdiction on appeal. The distinction between that case and the present case is obvious. In that case the decree was joint against all the defendants. In this case the decree is separate and distinct with respect to all the parties to it, and distributive in its awards of damages and costs against each. From such a decree each of the judgment debtors may prosecute an appeal, and a failure to join all in an appeal is not fatal to the jurisdiction of this court.

The rule applicable in this case is stated in 2 Cyc. 760, as follows:

"Where a decree or judgment is several both in form and in substance, and the interest represented by each of the coparties, plaintiff or defendant, is separate and distinct from that of the others, any party may appeal or sue out a writ of error separately, to protect his own interests, without joining his coparties in the appeal, and without a summons and severance."

The motion to dismiss the appeal is denied, and the motion for the issuance of a new citation is also denied.

DUNSMUIR v. SCOTT, Collector of Internal Revenue.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2386.

1. APPEAL AND ERROR (§ 671*)—TRIAL BY COURT—GENERAL FINDING—REVIEW.

Rev. St. § 649 (U. S. Comp. St. 1913, § 1587), provides that issues of fact in civil cases may be tried by the court with the written consent of the parties to waive a jury, and that the court's finding on the facts, which may be general or special shall have the effect of a verdict. Section 700 (U. S. Comp. St. 1913, § 1668) declares that when an issue of fact in a civil case is tried by the court without a jury, the court's rulings in the progress of the trial, if excepted to, and presented by bill of exceptions, may be reviewed, and when the finding is special the rule may extend to the determination of the sufficiency of the facts found to support the judgment. *Held*, that where a civil case is tried to the court and a general finding made, a review by the appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, which cannot be used to bring up the oral testimony for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

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

2. APPEAL AND ERROR (§ 842*)—SCOPE OF REVIEW—FINDINGS.

Whether at the close of the trial there is substantial evidence to sustain a finding in favor of one of the parties is a question of law which may be raised in an action tried to a jury by a request for a peremptory instruction and an exception to the refusal thereof, or, in case the trial is to the court, by a motion which presents the issue of law to the court for its determination, at or before the end of the trial, as by a motion or request for a special finding, and an exception to the denial thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316–3330; Dec. Dig. § 842.*]

3. JUDGMENT (§ 828*)—RES JUDICATA—DETERMINATION OF DISMISSAL—DISTRIBUTION OF ESTATE.

Where a court exercising probate jurisdiction, in the course of a decree of final distribution recited a finding that testator was a resident of and domiciled in British Columbia, but was temporarily residing in the city and county of San Francisco, such determination was not res judicata as to testator's domicile as against the United States in proceedings to assess a war revenue tax on a legacy bequeathed by the will.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1556–1558; Dec. Dig. § 848.*]

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

Action by James Dunsmuir against Joseph J. Scott, Collector of Internal Revenue, substituted in the place of August E. Muenter. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error brought an action against the defendant in error, the Collector of Internal Revenue, for the First collection district of the state of California, to recover the sum of $2,968.80, paid under protest to such collector as a tax under the provisions of the War Revenue Act of June 13, 1898, upon the legacy received by the plaintiff in error under the will of Alexander Dunsmuir. As alleged in the complaint, the right to recover the amount of the tax so paid was based upon two grounds: First, that Alexander Dunsmuir was domiciled in British Columbia at the time of his death, and that therefore the legacy was not subject to the tax; and, second, that the legacy had no taxable value by reason of the fact that it was burdened with the payment of an annuity of $25,000. The answer alleged that Alexander Dunsmuir was domiciled in California at the time of his death, and denied that the legacy had no taxable value. A jury trial was waived, and the cause was tried before the court. At the close of the testimony the court made a general finding for the defendant, and judgment was entered accordingly.

Andrew Thorne and Walton C. Webb, both of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and M. A. Thomas, Asst. U. S. Atty., both of San Francisco, Cal., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). The plaintiff in error contends that there is no evidence to support the finding of the District Court that Alexander Dunsmuir was domiciled in San Francisco at the time of his death, and to sustain that contention presents to this court by a bill of exceptions the testimony received in the court below.

[1] Under the provisions of Act March 3, 1865, 13 Stat. 501, Rev. St. §§ 649, 700 (U. S. Comp. St. 1913, §§ 1587, 1668), the rule is well settled that if a jury trial is waived, and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Dirst v. Morris, 14 Wall. 484, 491, 20 L. Ed. 722; Grayson v. Lynch, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230; Streeter v. Sanitary District of Chicago, 133 Fed. 124, 66 C. C. A. 190; Hill v. Walker, 167 Fed. 241, 256, 92 C. C. A. 633; W. L. Perkins & Co. v. Von Baumbach, 185 Fed. 265, 107 C. C. A. 371; New York Life Ins. Co. v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473. In Dirst v. Morris, Mr. Justice Bradley said:

"But as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

[2] The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on exception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the court, it is reviewable upon a motion which presents that issue of law to the court for its determination at or before the end of the trial. In the case at bar there was no such motion and no request for a special finding. We are limited, therefore, to a review of the rulings of the court to which exceptions were reserved during the progress of the trial.

[3] Error is assigned to the admission of evidence which was offered as tending to prove that the place of domicile of Alexander Dunsmuir was, at the time of his death, in California. It is said that it was error to admit such testimony, for the reason that the decedent's domicile had been fixed and established by the judgment of the superior court of the state of California of date June 3, 1901, a copy of which judgment was introduced in evidence by the plaintiff in error. That judgment, as it appears by the record, was not a judgment admitting to probate the last will and testament of Dunsmuir, but was a decree of settlement of the final account of the executor, and the final distribution of the estate of the decedent in the state of California. In the course of the judgment it is recited that Dunsmuir was, at the time of his death, a resident of and domiciled at Victoria, British Columbia, but was temporarily residing in the city and county of San Francisco, "as appears from the evidence, both oral and documentary, introduced upon the hearing of the petition for distribution."

Passing the question whether such a finding was appropriately within the scope of such a decree of final settlement and distribution, we turn to the question whether the finding of the probate court as to the domicile of the decedent is res judicata as to the defendant in error herein. In Thormann v. Frame, 176 U. S. 350, 20 Sup. Ct. 446, 44 L. Ed. 500, it was held that the appointment of an executor or administrator of a

deceased person by the courts of one state cannot be held to foreclose inquiry as to the domicile of the deceased in the courts of another state, the court ruling that the judgment in rem of a probate court binds only property within the control of the court which rendered it, and citing with approval the case of De Mora v. Concha, 29 Ch. Div. 268, affirmed in the House of Lords, 11 App. Cas. 541, holding that the decree of a probate court is not conclusive in rem as to domicile, and intimating that the findings on which judgments in rem are based are not in all cases conclusive against the world. In Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741, it was held that the mere finding by a probate court of the fact of domicile in a proceeding in rem did not conclusively bind all the world as to that fact. In Tilt v. Kelsey, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. Ed. 95, it was reaffirmed that an adjudication by a probate court that a testator was a resident of the state in which the court was held was not necessarily conclusive on the question of domicile, nor even evidence of it in a collateral proceeding. And although the court in that case held that the Surrogate Court of the county of New York had not the jurisdiction to decree the payment of a transfer tax alleged to be due the state of New York under a statute requiring the payment of such a tax where the decedent was a resident of that state, and so held on the ground that the decedent's will had been admitted to probate in New Jersey with an adjudication that he was a resident of that state, and proceedings thereupon had been had whereby his whole estate had there been distributed in accordance with the terms of the will, the decision was based expressly upon the ground that to permit the proceeding in the court of New York would be to deny full faith and credit to the judicial proceeding in the state of New Jersey, in violation of article 4, § 1, of the Constitution, since the effect of the judgment in the New York court would be pro tanto to set aside the judgment of the court of New Jersey. But the Supreme Court in the course of the opinion reaffirmed the doctrine of the cases above cited, and quoted with approval Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265, in which the difference in the effect of a judgment on the res before the court and of the adjudication of the facts on which the judgment is based had been pointed out, and it had been held that the decree of a probate court admitting a will to probate was not, on an issue between parties, one of whom was not a party to the probate proceeding, competent evidence of the testator's mental capacity.

In the case now before us, the judgment of the court below had no effect upon the res which was before the probate court of California, and it has not the effect to disturb in any way the decree of that court as to the distribution of the property which was before it. It affects only the question of the liability of one of the legatees to pay a war tax on the legacy which he received under the will, and we hold that the right of the government to collect that tax is not precluded by the finding of the probate court that the domicile of Alexander Dunsmuir was in British Columbia. There was no error, therefore, in the admission of evidence which tended to show that his domicile was in California.

The judgment is affirmed.

EASTERN OIL & RENDERING CO. v. THOMPSON.

(Circuit Court of Appeals, First Circuit. October 23, 1914.)

No. 1087.

APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—MISLEADING INSTRUCTIONS.

Plaintiff was employed in defendant's rendering plant to feed a suet hopper, to do which he was required to stand on a stool resting on a greasy and slanting floor. While doing so, his hand came in contact with the machine and was cut off. He testified that while standing on the stool another employé shoveled the suet so that plaintiff was struck in the chest, causing the stool to slip and plaintiff to fall, so that his hand came in contact with the machine. At the trial, defendant introduced in evidence a statement, signed by plaintiff, in which he stated that he was putting a piece of fat into the hasher, when the fat twisted in the worm and caught his hand, and that it was a pure accident. The court charged that plaintiff was bound to exercise reasonable care for his own safety, but there was no claim that he was careless so far as the particular accident was concerned, nor was the jury required to consider the question of assumed risk, but, with reference to the statement, that, if the jury should believe all that was in the paper, plaintiff could not recover, but that if he was overreached, did not understand, or was mentally dull, or his appreciation of his rights was impaired, and the statement was not a fair representation of what occurred, then he might recover, notwithstanding the statement. *Held*, that the instruction was not objectionable, as requiring the jury to believe all that was in the statement before they could render a verdict for defendant, but merely required them to believe the portion of it that had reference to how the accident occurred, and the instruction was therefore not misleading, to defendant's prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by James L. Thompson against the Eastern Oil & Rendering Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward K. Woodworth, of Concord, N. H. (Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., on the brief), for plaintiff in error.

John L. Mitchell, of Portsmouth, N. H. (John H. Bartlett and Ernest L. Guptill, both of Portsmouth, N. H., on the brief), for defendant in error.

Before PUTNAM and BINGHAM, Circuit Judges, and BROWN, District Judge.

BINGHAM, Circuit Judge. This is an action of tort brought under the employers' liability statute of New Hampshire (chapter 163 of the Laws of 1911), for injuries received by the plaintiff on the 28th of April, 1913, while in the defendant's employment.

The plaintiff alleged in his declaration, and offered evidence tending to prove, that he was engaged in operating a dangerous machine used for cutting pieces of suet, the hopper of which was attached to

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

the end of a table from which he fed the suet into the machine; that in the operation of the machine he was required to stand upon a stool 10½ inches high, 2 feet and 9 inches long, and 1 foot and 7 inches wide, which rested upon a greasy and slanting floor, to which it was not affixed; that, while standing in this manner upon the stool in the performance of his duties, another employé, who worked near him shoveling suet upon the table, negligently or accidentally shoveled the suet in such a way that the plaintiff was struck in the chest, causing the stool to slip or tip, and the plaintiff to fall, so that his left hand came in contact with the machine and was cut off by the revolving worm at the bottom of the hopper. No one testified as to how the accident occurred, except the plaintiff, and no other account was given as to how it took place, except as will appear from a statement claimed to have been given by the plaintiff a day or two after the accident.

No question was raised but that the evidence was sufficient to warrant the submission of the case to the jury. The defendant's complaint is that the court, in his charge to the jury, withdrew from their consideration the question whether the plaintiff was guilty of contributory negligence, and thereby committed error.

The portions of the charge that were excepted to read as follows:

"There are certain reciprocal obligations under a contract of service, and among them is the obligation of a man who wants work to exercise reasonable care in respect to protecting himself. I do not know that there is much in this case to consider on that phase of the case for two reasons. The first is that there is, I think, no claim made here that the plaintiff was careless himself, so far as this particular accident was concerned that caused the injury."

And:

"I do not think that there is any occasion to trouble yourselves about the question of assumption of risk, or about the question of the plaintiff's negligence, because I do not understand it to be claimed that he assumed the risk, except as his knowledge bears upon the question of contributory negligence—that is, his own negligence. I do not think the defendant is claiming that he was negligent; therefore there is nothing about the assumption of risk or his negligence for you to consider."

The defendant introduced in evidence the statement signed by the plaintiff, and the portions disclosing how the accident occurred are as follows:

"At the time I got hurt I was putting a piece of fat into the hasher with my left hand, and the fat twisted as it caught in the worm, and caught my hand. I pulled my hand as soon as it got caught, and I had it out before the machine was stopped. * * * It was merely a pure accident."

The court, in charging the jury with reference to this piece of evidence, said:

"A paper has been presented here which the witness, Mr. Quinlan, says he secured from this man [the plaintiff] the third day after the injury. I do not know exactly what to say about it, but you have a right to consider it. * * * You have a right to consider everything about it as bearing upon the question as to what you believe—as to which story you believe. Now, I think, if you should believe all that is in that paper, the plaintiff would not be entitled to recover here; but if you should believe that he was overreached, and that he did not understand, and that he was mentally dull, and that his appreciation of his rights was impaired, and that it was not a fair representation and does not fairly represent what occurred, and you believe

that what he states on the stand does fairly represent what occurred, you can see that that would be a different thing—that is, if you believe all that is in that paper, he would not be entitled to recover, because that cleans him out altogether on every branch of the case; but if you think that it does not fairly represent what he said, and you believe what he says here, then you will consider whether he is entitled to recover or not under the instructions which I have given you."

The defendant claims that the evidence contained in the statement above quoted tends to show that the plaintiff was guilty of contributory negligence, and for this reason takes the position that it was prejudiced by the charge wherein the court said that he thought no contention was made that the plaintiff was guilty of contributory negligence, and that it would not be necessary for them to consider that question.

It is apparent that the evidence as given by the plaintiff upon the witness stand and in the statement presents two distinct and divergent views as to how the accident occurred. The evidence given by him upon the witness stand, if believed, was of such a nature that the jury could find that the injury he sustained was due solely to the defendant's negligence in failing to provide a suitable place for him to work, and would not warrant a conclusion that he was guilty of contributory negligence. On the other hand, the evidence contained in the statement would not warrant a conclusion that his injury was due to the fault of the defendant, but that it was an accident or due to his own carelessness. It is also apparent that the court, in the portions of the charge here excepted to, was discussing the evidence as presented by the plaintiff upon the stand, and, had that been the only evidence of how the accident occurred, the court would have been fully justified in telling the jury they need not pass upon the question of contributory negligence.

When the court in his charge came to consider the evidence presented by the statement, which was the last thing he took up before finally submitting the case to the jury, he instructed them that if they believed all that was said in the statement as to how the accident occurred, and that what the plaintiff stated on the stand did not fairly represent how it occurred, then the plaintiff would not be entitled to recover, "because that cleans him out altogether on every branch of the case." It is true that in delivering this portion of the charge the trial judge did not state the grounds upon which his ruling was based —whether it was because the statement failed to show that the defendant was in fault, or whether it showed conclusively that the plaintiff's injury was due solely to his negligence, or was purely accidental. Whatever the reasons were which actuated him in giving this charge, it is evident that the jury were directed to give the evidence upon which the defendant relies as tending to show contributory negligence due consideration, and that the defendant's rights were in no way infringed, but were fully protected. If the jury believed the account of the accident as given in the statement, that was the end of the case; if they did not believe it to be a true statement of how the accident occurred, then the defendant was in no way prejudiced, because it could avail it nothing on the question of contributory negligence.

The defendant says that the charge required the jury to believe all that was in the statement before they could render a verdict for the defendant, and that, if they simply believed a portion of the statement, and that portion happened to be the part with reference to how the accident occurred, the jury would not be called upon to render a verdict for the defendant, and the defendant would be prejudiced, in that the jury would not then consider this portion of the evidence as bearing upon the question of the plaintiff's contributory negligence. But this is plainly an improper construction of this portion of the charge, for it manifestly did not call upon the jury to find that all that was contained in the statement was true before they could find a verdict for the defendant, but only that they should believe that all that was in the statement as to how the accident occurred was true, and, if they did, their verdict should be for the defendant.

We are therefore of the opinion that the jury were not misled to the defendant's prejudice by the portion of the charge excepted to, and that its exception should not be sustained. "A verdict is not set aside for erroneous instruction, when it is apparent, upon a reasonable construction of the whole charge, that the jury were not misled thereby." Saucier v. Spinning Mills, 72 N. H. 292, 56 Atl. 545; Theobald v. Shepard, 75 N. H. 52, 71 Atl. 26; Magniac v. Thompson, 7 Pet. 348, 390, 8 L. Ed. 709.

The judgment of the District Court is affirmed, and the defendant in error recovers his costs on appeal.

PUTNAM, Circuit Judge (concurring). The plaintiff's declaration was amended twice, once by formal amendment, and then by a paper entitled "Specification." The statute referred to in the opinion in its second section permitted the plaintiff to recover on account of the proof of an efficient negligence of a fellow servant sufficient to cause the injury. The case, as stated by the plaintiff's brief, was as follows:

"On this machine, as is shown by the photographs, was a hopper into which the suet was fed. At the bottom of the hopper was a revolving worm, which ground up the suet. The machine in question was at the left of the table onto which the suet was shoveled by the plaintiff's helper, and in the ordinary course of the work the plaintiff stood on the bench in front of the table, took up the chunks of suet as they were shoveled onto the table, and put them in the machine, which ground them to pieces. The plaintiff testified that he had been struck by his helper several different times before, that he was not watching the helper when he got hurt, that he was struck in the breast, but in spite of that fell forward, and not backward, and in such a manner that his left hand went into the hopper and down six inches onto the worm."

It is apparent that the real issue in the case was the truth of the plaintiff's statement which we have referred to. Although the position occupied by the plaintiff was dangerous in certain respects, and although he knew the danger and might be said to have assumed it, yet the efficient cause of the injury was the carelessness of the coservant in striking the plaintiff as he did, and there was in the case no real question of contributory negligence or assumption of risk.

At the close of the judge's charge there was a long discussion between the defendant's counsel and the court because the court, as the defendant said, had not instructed the jury properly on the question of

contributory negligence or the question of the assumption of risk; but there was no basis for instructions on either point, and, as the result of that discussion, no prejudice came to the defendant at the trial.

There was put into the case the statement by the plaintiff made a few days after the accident, and some question was made whether the statement should go in as an admission or as evidence, which was of no real consequence to the defendant, because the court instructed the jury that, if they believed the statement, it was the end of the plaintiff's case. It was not necessary to explain to the jury the reason therefor.

No objection was made at the time of the trial, or until the present argument, because in the long sentence covering the sum of the plaintiff's entire statement referred to the court instructed the jury that, if they believed "all" the statement, they should find a verdict against the plaintiff. Some criticism is now made on account of the use of the word "all," but none was made at the trial; and that, of course, was one of those minor criticisms which should have been specifically called to the attention of the court and objected to on the spot.

The basis of the discussion aforesaid, and of the grounds for asking a new trial at the present time, is the assertion of the defendant's position about contributory negligence or the assumption of risk; but the true issue was the negligence of a fellow servant, as we have said. The verdict was fully justified, unless the jury felt themselves bound by the statement made by the plaintiff, which we have referred to, and, of course, they were not thus bound.

WILCKENS v. WILCKENS.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4160.

(Syllabus by the Court.)

1. WITNESSES (§ 150*)—COMPETENCY—TRANSACTIONS WITH DECEDENT—"REPRESENTATIVE."

An assign of a deceased person is held by the highest judicial tribunal of Nebraska to be his representative, within the meaning of section 6882, Comp. Stat. of Nebraska 1911, which prohibits any person, having a direct legal interest in the result of any civil action or proceeding, from testifying to any transaction or conversation between him and the deceased person, when the adverse party is the representative of the latter, and this ruling is controlling in the national courts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 560, 653-657; Dec. Dig. § 150.*

For other definitions, see Words and Phrases, First and Second Series, Representative.

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

2. COURTS (§ 366*)—STATE AND FEDERAL COURTS—RULES OF DECISION.

The settled construction by the highest judicial tribunal of a state of the Constitution or statutes of that state is controlling in the national

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

courts, in the absence of any question of a violation of the national Constitution or statutes and any question of general or commercial law.

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

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

3. DEEDS (§ 211*)—WITNESSES (§ 139*)—DURESS—SUFFICIENCY OF EVIDENCE—COMPETENCY OF WITNESS—TRANSACTIONS WITH DECEDENT.

The plaintiff alleged that she was forced, by the duress of threats of her son to commit suicide, to convey her property to him, and brought suit after his death against his grantee to avoid her deeds. *Held*, she was not a competent witness to the transaction or the conversations relating to it, and that, after laying aside her testimony, her charge of duress was not sustained by substantial competent evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647; Dec. Dig. § 211;* Witnesses, Cent. Dig. §§ 582–597; Dec. Dig. § 139.*]

Appeal from the District Court of the United States for the District of Nebraska; W. H. Munger, Judge.

Bill by Miene Wilckens against Alwine S. Wilckens. From decree for defendant, plaintiff appeals. Affirmed.

W. J. Courtright, of Fremont, Neb. (S. S. Sidner, of Fremont, Neb., on the brief), for appellant.

John J. Sullivan, of Omaha, Neb., and James G. Reeder, of Columbus, Neb. (Louis Lightner, of Columbus, Neb., on the brief), for appellee.

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

SANBORN, Circuit Judge. This is an appeal by the complainant below from a decree of dismissal of her bill to avoid her deeds made on June 28, 1911, of 320 acres of land in Platte county, Neb., and two lots in Columbus in that state, to her son, Henry Wilckens, on the ground that she was forced to make them by the duress of his threats that he would commit suicide and her fear that he would do so if she did not make the conveyances. The appeal invokes a trial of the case de novo, and the record of the evidence has been examined with care, because the defendant below insists that it contains no competent evidence of the duress, in view of the fact that Henry Wilckens conveyed the property to his wife, the defendant below, on November 7, 1911, and committed suicide about March 15, 1912, before this suit was commenced.

[1] The statute of Nebraska declares that:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Comp. Stat. of Nebraska 1911, § 6882.

[2] In the absence of any question of a violation of the national Constitution or statutes and of any question of general or commer-

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

cial law, the settled construction by the highest judicial tribunal of a state of the Constitution or statutes of that state is controlling in the federal courts, and the Supreme Court of Nebraska has decided that an assign of a deceased person is his representative, within the true intent and meaning of this statute.

[3] The plaintiff was therefore incompetent to testify to any transaction or conversation she had with her son, Henry Wilckens, regarding the issues in this suit, and her testimony thereto must be disregarded. Wamsley v. Crook, 3 Neb. 344; Parrish v. McNeal, 36 Neb. 727, 55 N. W. 222; Kroh v. Heins, 48 Neb. 691, 67 N. W. 771; Smith v. Perry, 52 Neb. 738, 741, 73 N. W. 282.

When her testimony is laid aside, there remains in support of the averment of the bill that, at and for a few days before the time of executing the conveyances, she "was repeatedly and many times threatened by her said son that, unless she made said conveyances, he also would commit suicide," and that she made the conveyances by reason of these threats, the following evidence to which counsel for the plaintiff challenge attention and on which they seem to rely. A. P. Groves testified that in January or February, 1909, more than two years before the deeds assailed were made, Henry told him that he was trying to get his mother to put the property in his name; that his mother objected; and that his father-in-law told him to tell her that, if she did not put the property in his name, he would kill himself. But this evidence is immaterial, because it discloses no threat made to plaintiff, incompetent because it is hearsay and irrelevant because, if such a threat were made in 1909, it was resisted for more than two years, and it does not tend to prove duress in June, 1911.

Fred Rabeler, Sr., testified that four or five years ago Henry said to his mother, "I will kill myself and you also;" and she wept; that on the morning of June 28, 1911, she said she would sign everything in order to relieve her of his threats; and that she said that Henry had told her if she did not sign he would kill her. But this evidence was incompetent, because the threat which this witness heard was so remote in time and so disconnected with the transaction of June, 1911, the remainder of his testimony about threats was hearsay, and the plaintiff, whose statement he repeated, was herself incompetent to testify to it.

Fred Rabeler, Jr., testified that the plaintiff had told him at different times that Henry had threatened her if she did not sign papers, and that he always proceeded by threats that he would commit suicide if she did not accede to his wishes. But this testimony is also hearsay and the repetition of the statement of an incompetent witness.

Ed. Wurdeman testified that a few days before June 28, 1911, the plaintiff told him that Henry had her in court; that about the only way to get out of it was to let him have his own way; and that, if she did not, she feared that he would commit suicide as he had threatened. But so far as the testimony of this witness is of a threat, it is also hearsay, the mere repetition of the statement of an incompetent witness, and incompetent. Where a grantor of sound mind conveys her property to her son, the burden is on the party who al-

leges that the conveyance was induced by duress to prove that averment. The record of the testimony in this case has been read and searched again and again, but there is no substantial competent evidence that Henry Wilckens, at or near in time to the execution of the deeds, threatened that he would commit suicide if the plaintiff did not sign them. No competent witness testified that he heard any such threat, and the only evidence of it is the incompetent testimony of the plaintiff and the hearsay testimony of witnesses to her incompetent self-serving statements, and the court is reluctantly forced to the conclusion that the plaintiff has utterly failed to bear the burden which was upon her to prove that Henry Wilckens made threats to commit suicide at or near the time she made the deeds which overcame her mind and will and caused her against her choice to make the conveyances. There are other facts clearly proved in this case that are not inconsistent with this conclusion. Henry Wilckens' father committed suicide in 1898, and it is doubtless true that the plaintiff ever after kept that fact in mind and feared that Henry, her only son and presumptive heir, might do likewise, and that she never failed to consider and give weight to that fact and fear in exercising her will and making her choice of her action in all she did and said in her relations and transactions with him. But that did not constitute compelling duress but the rational exercise of her mind and will and its free choice of her actions, in view of the fact of the father's suicide and the danger of the son. The plaintiff owned the property in this suit, which was worth many tens of thousands of dollars, from prior to the death of the father until 1906. At the request of her son, she procured money for him at various times and became a surety for the payment of many thousands of dollars of his debts. He was married to the defendant in 1906. In that year she made deeds of the property here in controversy to her son Henry and deposited them with trustees to be delivered to him at her death, in accordance with a written contract signed by her and Henry at that time to the effect that Henry should never advise, urge, or endeavor to influence her to sell or mortgage this property during her life, and that she would not sell, dispose of, or mortgage it, unless it should be necessary to do so to provide her with money to defray her necessary living expenses. On May 23, 1910, they made a written agreement of cancellation of this contract. In May or June, 1911, the plaintiff, who lived in Columbus, wrote Henry, who was then living in California, for money to go to Europe. On receipt of the letter he telegraphed that he would come to Columbus. When the plaintiff was informed that he was coming, she sought to have a guardian of herself and her property appointed so that she would have no power to convey it, and expressed fear that she would be unable to resist any demands he would make, and she executed a trust deed of her property to Mr. Ed. Wurdeman. On Henry's arrival he brought a suit against her and Wurdeman to set aside this trust deed. Fred Rabeler, Jr., and Ed. Wurdeman were her nephews, and they were bankers. She consulted with them, and under their advice she made an agreement of compromise with Henry on June 27, 1911, to the effect that his suit should be and it was dis-

missed; that the trust deed should be annulled; that the plaintiff should convey, and she did convey to Henry Wilckens, on the condition expressed in the deed that she had and should hold a lien on the property conveyed for the payment by him and his assigns to her of $900 on the 1st day of March in each year so long as she should live, the north half of the southeast quarter of section 34 and the west half of the northwest quarter of section 35 in township 19, range one west, and lots 3 and 4 in block 1 of Stevens' addition to Columbus, all in Platte county, Neb.; that she should also convey, and she did convey, to him the northeast quarter of section 34 in the same township and range; and that she should be released, and she was released, from all liability for the payment of many thousands of dollars of debts of Henry for which she was bound as his surety. On the next day the deeds of this property, which this suit was brought to avoid, were made by the plaintiff pursuant to this compromise, and it was performed in other respects. She gave no notice of repudiation or rescission of this contract, and took no steps to rescind it until April, 1912. Meanwhile Henry conveyed the property to his wife, who had no notice that the plaintiff claimed that she had been forced by duress to convey it to him, he became insane, and she placed him in a sanitarium and defrayed his expenses until he died.

The evidence fails to prove that threats or fears of her son's suicide had greater compelling force to cause her to make the deeds and compromise of June 28, 1911, than to cause her to make the deeds and agreement of 1906, or the cancellation of that agreement, or to take other action during the years after the death of her husband, and it cannot be held that all these acts were voidable for duress. The plaintiff was fully advised of the nature and legal effect of the transaction of June 28, 1911. She was not taken alone or by surprise and driven hastily without friends or advice to make the compromise and execute the deeds. She made them after consultation with and advice from her nephews, Fred Rabeler, Jr., and Mr. Wurdeman, experienced business men who knew her and her son, their relations, and her property, and the facts proved fail to sustain the conclusion that her mind or will were overcome and forced by duress to assent to them, and the decree below must be affirmed.

The result of this conclusion is that the plaintiff is entitled to the payment of $900 on the 1st day of March, 1912, and on the 1st day of March in each year thereafter as long as she lives, and, if that is not sufficient for her care and support in comfort in any year, to a sum not exceeding $250 in addition in that year and in each year in which the $900 is so insufficient, and to interest on all deferred payments; that these claims for payments are secured by a lien superior to all other liens and claims that have arisen since June 28, 1911, upon the north half of the southeast quarter of section 34 and the west half of the northwest quarter of section 35 in township 19, range 1 west, and lots 3 and 4 in block 1 of Stevens' addition to Columbus, all in Platte county, Neb., which is and will be enforceable by a proper suit in any court having jurisdiction, notwithstanding this suit and its dismissal on the merits, but the decree below must be, and it is affirmed.

CANTON INS. OFFICE, Limited, et al. v. INDEPENDENT TRANSP. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2382.

1. INSURANCE (§ 146*)—CONSTRUCTION OF CONTRACT.
A court should give to a written contract that reasonable construction which it is to be assumed intelligent business men would give it, and such rule applies to contracts of insurance equally with other contracts.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294–298; Dec. Dig. § 146.*]

2. INSURANCE (§ 313*)—MARINE POLICIES—AVOIDANCE FOR BREACH OF WARRANTY.
Time policies of insurance on a vessel contained a provision written on the margin: "Vessel warranted employed in the general passenger and freighting business on Puget Sound within a radius of thirty miles from Seattle." Operation of the vessel was discontinued, and four months afterward, while moored in a river with no watchman on board, she filled and sank from some unknown cause. *Held*, that such warranty, given a reasonable construction, was that she would continue in the employment specified during the term of the policies, and that, when she departed from it for such length of time and was taken from the Sound, they became void.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 710; Dec. Dig. § 313.*]

3. INSURANCE (§ 146*)—CONSTRUCTION OF CONTRACT—USAGE OF THE BUSINESS.
While an insurance contract must be construed with reference to the generally established usages and customs of the business, the words used are to be understood in their ordinary and popular sense, unless they have a different meaning by some definite usage brought home to the knowledge of the parties to be affected or so general and well established that their knowledge of it may be presumed.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294–298; Dec. Dig. § 146.*]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in admiralty by the Independent Transportation Company and another against the Canton Insurance Office, Limited, and the Yank-Tske Insurance Association. Decree for libelant, and respondents appeal. Reversed.

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

Kerr & McCord, of Seattle, Wash., and Ira A. Campbell, of San Francisco, Cal., for appellees.

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

GILBERT, Circuit Judge. On July 3, 1907, the appellants issued to the Independent Transportation Company polices of insurance covering its steamer Vashon, then engaged in the summer trade between the city of Seattle and Alki Point, a summer resort on Puget Sound, about six miles from Seattle. The policies covered the vessel from July

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

3, 1907, until July 3, 1908. Each of the policies insured the owner against perils of the sea "and all other losses and misfortunes that shall come to the Vashon or damage to the said vessel insured or any part thereof, to which insurers are liable by the rules of insurance in San Francisco." In August, 1907, the Vashon discontinued her run to Alki Point, and until December was moored at the King street dock in Seattle. About December 1, 1907, she was removed from that dock and moored in the Duwamish river, a tributary of Elliott Bay. On December 15, 1907, the Vashon sank at her moorings. To the libels brought by the insured against the appellants, to recover on the policies, the appellants answered, denying liability thereon, and alleging a violation of the express warranty therein contained that during the term of the policies the vessel would be and remain employed in the general freight and passenger business on Puget Sound, within a radius of 30 miles from Seattle. The trial court construed the warranty otherwise, and ruled against the appellants, and entered a decree to enforce their liability upon the policies.

[1] A court should give to a written contract that reasonable construction which it is to be assumed intelligent business men would give it.

"Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms" which the parties have "used; and, if they are clear and unambiguous, their terms are to be" taken and "understood in their plain, ordinary, and popular sense." Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452–463, 14 Sup. Ct. 379, 38 L. Ed. 231.

"Rules established for the construction of written instruments apply to contracts of insurance equally with other contracts." Liverpool, etc., Ins. Co. v. Kearney, 180 U. S. 132–135, 21 Sup. Ct. 326, 328 (45 L. Ed. 460).

[2] We find written on the margin of the policies involved in this case the following:

"Vessel warranted employed in the general passenger and freighting business on Puget Sound, within a radius of thirty miles from Seattle. Warranted no lime under deck."

These warranties cannot reasonably be construed to be other than what their terms plainly import: First, a warranty that during the term of the policy the vessel is to be navigated in the general passenger and freighting business, and on Puget Sound within a radius of 30 miles from Seattle; second, that during that time no lime shall be carried under deck. They are expressed in no unusual form. They are similar in phraseology to other warranties in marine insurance policies, examples of which are found on the margin of policies which were introduced in evidence in this case, such as "warranted free from capture, seizure, and detention," etc. "Warranted confined to Pacific Coast trade not north of Comox nor south of Valparaiso." All such warranties are inserted for the purpose of limiting and defining the risk. Before insuring a vessel, it is important to the insurance company to know in what business the vessel is to be engaged, and upon what waters she is to be navigated. Said Lord Watson, in Birrell v. Dryer, 9 App. Cas. 345:

"To define the limits within which the vessel is to be navigated, for the purpose of a time policy, is in principle precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy."

But it is urged that the words of the warranty do not necessarily mean what they purport to say, but that another meaning may be found in them, and the rule is invoked that, where a provision of a policy of insurance is ambiguous, it is to be construed in the sense most favorable to the assured, since the instrument is prepared by the insurer, and it is contended that the warranty first above quoted may be construed to mean that the vessel, at the particular time of taking out the policy, was warranted to be engaged in the passenger and freighting business on the waters of Puget Sound within a radius of 30 miles from Seattle, or that she had prior thereto been so engaged. To this it is to be said that such a warranty would be of no value to either party to the insurance contract. It would not in any way affect the risk, and it is not conceivable that such a representation would have been embodied in the form of warranty. If it had been the intention to specify the business in which the steamer was or had been engaged, the warranty would have been that the vessel "is now carrying passengers between Seattle and Alki Point." The construction contended for by the appellee would be strained, unnatural, and unreasonable. By a like process of reasoning, most, if not all, warranties could be explained away. Thus the warranty "no lime under deck" might be said to mean that there never had been lime below the deck, and the warranty "no St. Lawrence," construed in Birrell v. Dryer, above cited, might be construed to mean that the vessel was not then navigating or had not navigated the waters of the St. Lawrence, and the warranty construed in Kirk v. Home Ins. Co., 92 App. Div. 26, 86 N. Y. Supp. 980, "warranted confined to the use and navigation of the waters of New Haven Harbor, and adjacent inland waters," could be explained to mean only that the vessel was warranted to have been theretofore confined to the use of those waters. In Birrell v. Dryer, the policy contained the words "warranted no St. Lawrence between the 1st of October and 1st of April." It was held that there was no ambiguity or uncertainty in these words sufficient to prevent the application of the ordinary rules of construction, and that, according to those rules, the whole St. Lawrence navigation, both gulf and river, was within the fair and natural meaning of those negative words. Lord Watson, discussing the contention that the words "no St. Lawrence" were ambiguous and must be applied to the river only, because underwriters are the proferentes with regard to a policy of insurance, said:

"That the underwriters may be rightly held to be the proferentes with regard to many conditions in a policy, I do not doubt; whether they ought to be so held depends, in each case, upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents; and it is in form a warranty by them that their vessel will not be navigated in certain waters, a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the proferentes; but I think the substance of the warranty must be looked to; and that in substance its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept whilst she is navigated under the policy; and that appears to me to be as much the concern of the shipowner as of the underwriters."

In Kirk v. Home Ins. Co., 92 App. Div. 26, 86 N. Y. Supp. 980, the policy contained the provision "warranted confined to the use and navigation of the waters of New Haven Harbor and adjacent inland waters." The loss occurred while the dredge so insured was in inland water adjacent to Bridgeport Harbor, 17 miles from New Haven Harbor. The court held that thereby the policy was avoided. Answering the objection that the language of the policy must be construed strictly against the insurer, the court said:

"But we must, in reason, assume that the plaintiffs made the statement as to where the dredge was to be used; and it is as probable that the phrase in question was their language as that it was the defendant's. Under such circumstances, the rule that the policy must be construed most strictly against the insurer does not apply"—citing London Assurance Corp. v. Thompson, 170 N. Y. 94, 62 N. E. 1066.

We are of the opinion that there was breach of the warranty in two particulars: First, in that the insured vessel was taken out of the permitted waters, the waters of Puget Sound; second, in that her employment of carrying freight or passengers came to an end when she was anchored for the winter in the Duwamish river. We cannot yield to the appellee's contention that the waters of a river which flow into Puget Sound are waters of Puget Sound. In Hastorf v. Greenwich Ins. Co. (D. C.) 132 Fed. 122, the policy insuring a scow contained the following provision:

"Warranted by the assured to be employed exclusively in the freighting business, and to navigate only the waters of the bay and harbor of New York, the North and East rivers, and inland waters of New Jersey."

It was held that "North river" could not be extended by construction to include tributaries of the Hudson in the state of New York, and that there could be no recovery under the policy for injury to the scow received while she was lying at a dock in Rondout creek, 2½ miles from the Hudson. Said the court:

"There can be no doubt that Rondout creek is a different body of water from the North, or Hudson, river, and that the language used does not in terms cover the locality in which this accident happened."

The appellee cites Mannheim Ins. Co. v. Charles Clarke Co. (Tex. Civ. App.) 157 S. W. 291. The policy in that case contained this provision:

"Limited to the use of the Gulf waters of the United States between Key West, Fla., and the mouth of the Rio Grande del Norte, both inclusive."

The boat sank in the Atchafalaya, about 18 miles from its mouth. The question was whether the waters at that place were gulf waters, within the meaning of the policy. The court decided that they were, but in so deciding was influenced by the further provision of the policy which insured "against the adventures and perils of the harbors, bays, sounds, seas, rivers and other waters as above named."

The Vashon was left moored in the stream, with no watchman on board, and was placed in the charge of a man who lived in a boathouse some 200 feet away. He, or one of his men, according to his affidavit, visited the vessel every day. Without any known cause, the vessel filled with water and sank at her moorings. There was no stress of weather

or collision. The testimony of one witness tended to show that the water entered through some small holes on the inside lining of the hull, the plugs in the holes having been in some way removed, but this was contradicted by others. The risk to the vessel thus moored in a stream, with no one on board, was a widely different risk from that which the insurer undertook when it insured the vessel as employed in navigation and with her crew on board. We do not say that a vessel insured as being employed in navigation may not suspend navigation for a time, or lay up at a dock, but that is a different thing from going out of commission for a period of months.

In St. Nicholas Ins. Co. v. Merchants' Ins. Co., 11 Hun (N. Y.) 108, the policy insured a barge "while running on the Hudson and East rivers." It was held that these words did not restrict the insurance to the time while the barge was in motion, but that they were intended to describe the business of the barge, and to cover the time required for lading and unlading, as well as when the barge was in actual motion. The court said:

"The term 'running,' as it was used by the defendant, must have been designed to include all that ordinarily would be comprehended by the business of a vessel in active employment. It described the condition of a vessel commercially engaged; and it was used by way of contrasting the difference between vessels laid up and out of use and those making trips upon the water."

The vessel in the case at bar was left unguarded and practically abandoned. If she had remained in commission with her crew on board, the mishap which caused her loss could not have occurred. But it is a matter of indifference whether or not the risk was enhanced by the breach of the warranty, for a warranty must be strictly performed. 2 Arnould, Mar. Ins. (7th Ed.) § 632.

It is contended that the evidence shows that, by custom and usage, the form of policy issued, referred to as the "San Francisco Hull Time Policy," covers a vessel when laid up. Several insurance brokers and adjusters were called to testify as to the meaning of the warranty in the policy, and while they all agreed that the words thereof were in common usage and had been employed in "hundreds" of policies, and that their meaning was that the vessel was to be employed in the general passenger and freighting business on Puget Sound during the entire period of the policy contract, they differed in their answers to the question whether or not such a policy would remain in force while the vessel was laid up. Five testified that the San Francisco underwriters hold the vessel insured under that form of time policy while the vessel is laid up. Two testified to the contrary. Two others testified that the right to lay up would be recognized only after application had been made to the insurance company and approved by the company, and one testified that in his opinion the insurance would continue after the vessel laid up, provided the hazard was not increased. This testimony, even if admissible, was insufficient to establish a custom.

[3] Where a written contract is on its face susceptible of a construction that is reasonable, resort cannot be had to evidence of custom or usage to explain its language. Insurance Co. v. Wright, 1 Wall. 456, 17 L. Ed. 505. While the insurance contract must be construed with reference to the generally established usages and customs

of the business, usage cannot be resorted to for the purpose of varying or contradicting the written instrument. Hearne v. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395. The insured has the right to rely on the ordinary meaning and scope of the terms used in the policy, unless a more restricted meaning is proved to have been recognized and established by general mercantile usage, or else expressly brought to his notice. Red Wing Mills v. Mercantile Mut. Ins. Co. (D. C.) 19 Fed. 115.

In Odiorne v. New England Marine Ins. Co., 101 Mass. 551, 3 Am. Rep. 401, the court said:

"The usage which was offered to be proved is also inadmissible. Seccomb v. Provincial Insurance Co., 10 Allen [Mass.] 305. It is merely a usage among underwriters in Boston to construe a clause of the policy in a particular way. The clause in question is: 'Prohibited from the river and Gulf of St. Lawrence, Northumberland Straits, or Cape Breton, and Black Sea, between October 1st and May 1st.' There is nothing in this language so technical or peculiar, or having such application to a particular trade or branch of business, or a particular method of managing business, as to require the evidence of usage to explain it."

In that case the court held that the prohibition in the policy was in effect a warranty, and that the policy was avoided when the vessel sailed from St. Johns, Newfoundland, for Cape Breton.

In Cobb v. Lime Rock Fire & Marine Ins. Co., 58 Me. 326, it was held that the words "prohibited from the River and Gulf of St. Lawrence between September 1st and May 1st" constituted a warranty that the vessel should not enter those waters within the time mentioned. The court said:

"The words used are to be understood in their ordinary and popular sense, unless, by some known usage of trade, they have a different meaning. * * * The usage must be definite and brought home to the knowledge of the parties to be affected, or so general and well established that there must be ground to presume the parties had knowledge of it, or that they were bound to be informed of it."

The decree is reversed, and the cause remanded, with instructions to dismiss the libel as to the appellants herein.

FAIRBANKS, MORSE & CO. v. NELSON.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2379.

1. CONTRACTS (§ 238*)—PAROL MODIFICATION OF WRITTEN CONTRACTS—CONSTRUCTION OF STATUTE.

Civ. Code Cal. § 1698, which provides that "a contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise," does not prevent a valid waiver by parol of a provision of a written contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1123; Dec. Dig. § 238.*]

2. CONTRACTS (§ 316*)—WAIVER OF BREACH.

A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations

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

manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382–1387, 1395, 1398–1400, 1480–1491; Dec. Dig. § 316.*]

3. EVIDENCE (§ 450*)—PAROL EVIDENCE.

In an action for the price of a tractor engine, a provision of the contract that the sale was "with the understanding that it proves adequate for your work" left such clause open to explanation by testimony as to the understanding of the parties and the purposes for which the engine was to be used.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084; Dec. Dig. § 450.*]

4. PRINCIPAL AND AGENT (§ 103*)—CONTRACT MADE BY AGENT—AUTHORITY TO WAIVE PROVISIONS.

An agent, who made the contract for the sale of an engine for his principal, must be held to have had authority to subsequently waive a provision of the written contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278–293, 353–359, 367; Dec. Dig. § 103.*]

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 Fairbanks, Morse & Co., a corporation, against J. M. Nelson. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error was the plaintiff in the court below in an action to recover upon three several promissory notes, for $1,200 each, executed by the defendant in error in payment for a 30–60 horse power tractor engine, which was sold under a written contract. The parties will be designated herein plaintiff and defendant, as in the court below. The contract provided that: "Engine is sold with the understanding that it proves adequate for your work. For the purpose of testing out engine, we agree to furnish competent man for two days, within ten days of receipt of engine at Alessandro. This man to operate and demonstrate the engine regular working hours during his stay on your place. On or before the fifth day you agree to decide whether engine complies with your requirements or not." There was evidence that the engine was purchased for the purpose of drawing a combined harvester, as well as for plowing. On April 1, 1912, it was sent to the defendant. On April 2d the demonstration began, and it continued until 4:25 p. m. on April 3d. There was evidence that during the test difficulties arose, that the ground was wet in some places and in others it was sandy, and that the wheels of the engine sank into the ground, and at times slipped, that stone and cactus were put under the wheels, and one of the gang plows was removed, and that the representative of the plaintiff stated that these difficulties could be overcome by adjusting wide extensions to the wheels, so as to give them greater bearing on the ground, and that he would hurry home to telephone for the extensions, and that he also stated to defendant that the latter should use disc plows instead of gang plows. The extensions were furnished without charge to the defendant. Thereafter several breaks in the engine occurred, interrupting its use for long periods, until May 17th, when the extensions were put on. There was evidence that the defendant continued to operate the tractor, because he was told to go ahead and do the best he could with it. The defendant procured new disc plows as suggested, but, the same being unsatisfactory, on May 28th he telephoned to the plaintiff, asking that a man be sent out to see about it. He gave a similar notice on June 4th, and again on June 7th. On June 14th, having received no answer, the defendant wrote

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

and notified the plaintiff that he was ready to help load the engine on the cars "according to contract." He wrote: "Your man assured me, if I only had disc plows, the engine would go all O. K.; but for the first six weeks I was annoyed with breaks and delays. However, I could overlook this if the engine would make the time it was claimed to do without making more than 375 revolutions a minute. You know, also, that it is from two to three tons heavier than claimed to be. To do harvesting successfully, the engine must travel two miles or more an hour, so that the harvester may handle the grain."

A jury trial was waived, and the cause was tried before the court. The court found in substance that according to the contract the engine was to prove adequate for the defendant's work; that the plaintiff had not complied with the contract; that the engine did not prove adequate for the work of the defendant as understood and agreed by the parties, and as provided in the contract, and that there was a breach of the warranty contained in the contract; that the provision in the contract whereby it was provided that the defendant should, on or before the fifth day from the beginning of the operation and demonstration of the engine, decide whether the same complied with his requirements or not, was waived by the conduct and representations of the plaintiff and its authorized agents; that within a reasonable time the defendant discovered that said engine was not adequate for his work, and notified the plaintiff of that fact, and requested that a man be sent to test properly and demonstrate the engine, and, the plaintiff having failed to comply with this demand within a reasonable time, the defendant notified the plaintiff that he was ready and willing at any time to assist the plaintiff or its employés, in accordance with the terms of the contract, to place the engine on board the cars at Alessandro, and to pay the freight on the same back to Los Angeles, as specified in the agreement; that by reason of the facts found, the contract and the notes became null and void and of no effect. Judgment was thereupon entered for the defendant.

Stutsman & Stutsman, of Los Angeles, Cal., for plaintiff in error.

William Collier and Hugh H. Craig, both of Riverside, Cal., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] It is assigned as error that the court admitted oral evidence to alter or modify the terms of the written contract, in violation of section 1698 of the Civil Code of California. The evidence so objected to was the testimony of the defendant that during the demonstration the wheels of the tractor sank into the ground to such an extent as to prevent successful operation, and that the agent of the plaintiff, to overcome the difficulty, promised to secure and furnish certain extensions to be put on the wheels to afford them a greater surface. It is said that the purpose of this testimony was to excuse compliance by the defendant with the obligation of his written contract to accept or reject the tractor on or before the fifth day. It is a sufficient answer to this assignment of error to direct attention to the fact that no objection was made to any of the testimony so introduced. But inasmuch as an exception was taken to the finding of the court below that the plaintiff by its conduct and representations waived the right to require the defendant to make his decision on or before the fifth day from the beginning of the demonstration, and that finding is assigned as error, we may properly consider the legal sufficiency of the testimony to sustain the same.

Section 1698, Civil Code of California, provides:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

It is urged that by the evidence introduced by defendant, and the finding of the court thereon, the written contract between the parties was altered by means of parol testimony. But in our opinion the evidence and finding do not show an alteration of the contract, but only a waiver by the plaintiff of one of its provisions. That this can be done by parol is established by decisions of the Supreme Court of California. In Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 Pac. 740, the action was brought to recover upon a policy of life insurance which contained the usual forfeiture clause, and the defense was that the policy had been forfeited prior to the death of the assured by his failure to make payment of a semiannual premium. But it was shown that the assured secured from the officers of the company extensions of time within which to make the payment, and that before the expiration of the last extension he was killed in a railroad accident. The court held that the extensions of time might be proven by parol testimony, and that the effect of the evidence was not to vary the terms of the policy, but to show that the company had waived one of the conditions in its favor. Said the court:

"The provision of the Code, as well as the stipulation for a forfeiture in the policy, were equally matters of benefit to the company, and it is the rule that not only provisions in a contract may be waived by the party for whose benefit they are inserted, but that he may also waive statutory and even constitutional provisions, under which he may derive a benefit."

The court quoted from Broom's Legal Maxims, 547, the following:

"It is a well-settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured."

And the court further said:

"This waiver may be established by evidence of an express waiver, or by circumstances from which said waiver may be inferred; and it may be by the managers of the company, or by a duly authorized agent."

The plaintiff attempts to distinguish the decision in that case from the case at bar upon the ground that in the Knarston Case the contract contained no obligation which required the assured to perform any specific act, whereas in the case at bar the written contract specifically required the defendant to perform an affirmative act; that is, to decide on or before the fifth day whether the engine complied with his requirements. But we find no difference in principle between the two cases. In both cases a provision of the written contract which was waived was one which was made for the benefit of the party which waived it, and it can make no difference whether that obligation was obligatory upon the other party, or whether performance was optional with him. The important fact is that the party for whose benefit the provision is made, and who has the right to exact its performance, may waive the same, and that this may be done not, by an agreement or contract between the parties, but by the act of him for whose benefit the provision has been made.

[2] In fact, the plaintiff in this case invokes the same principle of waiver; for, being under contractual obligation to make a demonstration of two days, its agent, before the completion of the second day's work, left the scene of the demonstration, and now the plaintiff justifies its agent's act in so doing by pointing to evidence which tends to show that it was assented to at the time by the defendant. The decision in the Knarston Case is in line with other decisions of the courts of California, and it is in harmony with the generally accepted rule that a written contract may be waived in part or in whole, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Hilton v. Hanson, 101 Me. 21, 62 Atl. 797; Gilson v. Boston Realty Co., 82 Conn. 383, 73 Atl. 765; Rock Island Plow Co. v. Rankin, 89 Ark. 24, 115 S. W. 943; Brady v. Cassidy, 145 N. Y. 171, 39 N. E. 814; Du Planty v. Stokes, 103 Mich. 630, 61 N. W. 1015; Peabody v. Maguire, 79 Me. 586, 12 Atl. 630.

In Luitweiler Pumping Engine Co. v. Ukiah Water & Imp. Co., 16 Cal. App. 198, 116 Pac. 707, it was held that a buyer's retention of a pump and use thereof beyond the stipulated time was not a waiver of a right to rescind, where the pump was retained and used at the instance of the seller, or in order to enable the seller to remedy the defects. The court said:

"If the return of the machine, warranted to do good work, and found upon trial to be unfit for use, is delayed at the request of the manufacturer, he thereby waives the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed."

In 30 Am. & Eng. Enc. of Law, 188, it is said:

"Stipulations in the contract of sale to the effect that a retention or use of the article sold shall constitute a waiver of any breach of warranty are valid, and are to be given effect according to their terms. But the buyer's retention and use of the article beyond the stipulated time will not operate as a waiver of the benefits of the warranty, where it was at the instance of the seller or his agent, or where it was for the purpose of giving the seller or his agent an opportunity to remedy defects."

In Sherman v. Ayers, 20 Cal. App. 733, 130 Pac. 163, the court said:

"It is contended by appellant that a clause in the contract provided that operation should constitute acceptance, and that the use by defendant for a short time of the engine was tantamount to an acceptance. It is true that such contract did provide that operation should constitute acceptance, but it certainly appears that no operation after a complete performance of the contract is shown. On the contrary, the whole of the operation, either by the employés of plaintiff's assignors, or by the defendant after they left, was in an effort to procure, if possible, information as to any existing defects, and to determine whether or not the same could be made to operate. The evidence does not disclose such an operation as, under the authorities cited, constitutes an acceptance."

The case of Jackson v. Porter Land & Water Co., 151 Cal. 32, 90 Pac. 122, cited by the plaintiff, is based upon facts which distinguish it from the case at bar. In that case the purchaser of an engine of horse power less than that for which he had contracted retained the

engine with knowledge of that fact, and used it during the entire irrigation season before raising the objection that it was not the engine contracted for. His conduct was held to be an acceptance of the engine which had been delivered to him.

The assignment that the court below erred in admitting testimony that in selling the engine the plaintiff exhibited to the defendant a circular, and in admitting the circular in evidence, cannot be considered here, for the reason that the circular is not in the record, and we are afforded no knowledge of its contents.

[3] Error is assigned to the ruling of the trial court in permitting the defendant to answer the question:

"What was the speed of that engine as it was stated to you in your negotiations?"

It is said that this was error, for the reason that all the negotiations were embodied in the written contract, and nothing was therein stipulated as to the speed of the engine. The contract did declare, however, that the engine was sold "with the understanding that it proves adequate for your work." In view of the findings of the trial court, it is impossible to see that the admission of the testimony, even if it were incompetent, could have affected the result. But, however that may be, we think the testimony was properly admitted for the purpose of explaining and justifying the action of the defendant in rescinding the contract. The undertaking of the plaintiff to sell an engine that would be adequate for defendant's work left that clause of the written contract open to explanation by testimony as to the understanding of the parties and the purposes for which the engine was to be used. This was permissible under the terms of sections 1856 and 1860 of the Code of Civil Procedure.

[4] Error is assigned to the ruling that it was admissible to prove the acts of plaintiff's agents, who visited the defendant's ranch. It is urged that such evidence should have been excluded, for the reason that there was no proof of the authority of the agents to bind the plaintiff. But the evidence indicated that the plaintiff did not disavow the acts of its agents, but ratified the same, and that it supplied without cost to the defendant the extensions to the wheels which one of the agents suggested as a remedy for the defective action of the engine. It further appears that one of those agents had acted for the plaintiff in making the sale of the engine to the defendant, and that he signed the contract for the plaintiff. In Advance Thresher Co. v. Vinckel, 84 Neb. 429, 121 N. W. 431, the court said:

"To say that its agents were vested with the mere naked power to sell and deliver, without any authority to waive or modify any term of the printed contract, would be, as is well said in Pitsinowsky v. Beardsley, Hill & Co., 37 Iowa, 9, 'to establish a snare by which to entrap the unwary, and enable principals to reap the benefits flowing from the conduct of an agent in the transaction of business intrusted to his hands, without incurring any of the responsibilities connected therewith.'"

It is assigned as error that the court found that there was a breach of the warranty by the plaintiff, and it is argued that the testimony conclusively showed that the engine was adequate for defendant's

work. There was testimony to the contrary, however, and the court below gave credence to it. The finding upon that branch of the case, therefore, is not open to review in this court.

We find no error. The judgment is affirmed.

ARMOUR & CO. v. HARCROW.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4068.

(Syllabus by the Court.)

1. NEGLIGENCE (§ 136*)—TRIAL—DIRECTION OF VERDICT—EVIDENCE.

When the evidence leaves the averment that an injury was caused by an act of negligence to speculation, without substantial evidence to sustain it, it is the duty of the court to instruct the jury to return a verdict for the defendant.

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

2. NEGLIGENCE (§§ 58, 59*) — ACTIONABLE NEGLIGENCE — PROXIMATE CAUSE — "NATURAL CONSEQUENCE"—"PROBABLE CONSEQUENCE."

An injury which is the natural and probable cause of an act of negligence is actionable, and such an act is the proximate cause of the injury.

But an injury that could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause or no cause whatever of the injury. The "natural consequence" of an act is the consequence which ordinarily follows it, the result which may reasonably be anticipated from it. A "probable consequence" is one that is more likely to follow its supposed cause than it is not to follow it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 71, 72; Dec. Dig. §§ 58, 59.*

For other definitions, see Words and Phrases, First and Second Series, Natural Consequences; Probable Consequence.]

3. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—RES IPSA LOQUITUR.

The doctrine of res ipsa loquitur is inapplicable to cases between master and servant brought to recover damages for negligence, and the burden is on the plaintiff to allege and prove that the act of negligence of which he complains was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. § 265.*

Application of doctrine of res ipsa loquitur in actions for injuries to servants, see note to Carnegie Steel Co. v. Byers, 82 C. C. A. 121.]

4. MASTER AND SERVANT (§ 285*)—INJURY TO SERVANT—SAFE PLACE TO WORK —PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

The plaintiff, a carpenter, was employed boring holes and inserting lag screws into joists, which rested on iron corbels on posts, through holes in the arms of the corbels about six inches from the posts. He stood on a ladder, with his face upturned, within about two feet of the corbel, boring a hole or inserting a lag screw, when a piece of rust or rusty iron fell from the corbel into one of his eyes and blinded it. The work in process was the repair of a beef extract room, by taking out old joists and putting in new ones. He knew that the corbels were rusty, and that dust and pieces of rust fell when the old joists were taken out. The room was so dark that he could not see the holes in the corbels, but he found them by feeling for them and inserting his fingers in them, and

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

successfully bored six or eight holes, and inserted lag screws, when, after working from 10 a. m. until 5 p. m., the accident happened. At 11 in the forenoon and at 1 in the afternoon he had asked his foreman for more light, and had told him it was dangerous to work without it, and the foreman had promised to furnish light, but did not.

Held, here was no substantial evidence that the lack of light was the proximate cause of the accident, that the evidence left the issue whether or not the injury was caused by the lack of light to the mere speculation of the jury, and the court should have given a peremptory instruction for the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.*]

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

Action by William Harcrow against Armour & Co. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to grant a new trial.

William G. Holt, of Kansas City, Kan. (C. Angevine and J. K. Cubbison, both of Kansas City, Kan., on the brief), for plaintiff in error.

L. C. True and E. C. Little, both of Kansas City, Kan., for defendant in error.

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

SANBORN, Circuit Judge. Armour & Co., a corporation, complain that the court below erroneously refused to direct a verdict in its favor at the close of the evidence and permitted a judgment against it on the verdict of the jury in this case for $2,750.

[1, 4] Counsel for the defendant in error, the plaintiff below, ask in their brief in reply to that of the defendant below that the writ of error be dismissed, because in the printed record the case is entitled on the first page thereof and at the top of each printed page thereafter Armour Packing Co. v. William Harcrow, the bill of exceptions bears no title, but recites that at the opening of the trial Messrs. Angevine, Cubbison, and Holt appeared for Armour Packing Company, and the clerk certified that the copies of the bill of exceptions and other proceedings in the transcript were copies from the record of the proceedings in "Case No. 9030, C. C., entitled William Harcrow v. The Armour Packing Company." They argue that these facts show that the record brought here is of the proceedings in a case against Armour Packing Company, while the writ of error challenges the trial in a case against Armour & Co. An examination of the printed transcript, however, discloses the facts that the complaint and amended answer, the petition for removal from the state court, the order of removal, the journal entry of the trial, which recites the names of the witnesses whose testimony is recorded in the bill of exceptions, the verdict and judgment, and the petition for the writ of error were entitled "William Harcrow v. Armour & Co.," that the bill of exceptions has no title in the printed record because a rule of this court requires the omission of its printing, and it is presumed to

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

have the same title as the pleadings, that Messrs. Angevine, Cubbison, and Holt, who are recited in the bill of exceptions as appearing for Armour Packing Company, signed the answer as attorneys for Armour & Co., removed the case from the state court for that company, procured the writ of error for that company and have acted for it throughout the proceedings, and that "Case No. 9030 C. C.," which the clerk of the court recites in his certificate is entitled "William Harcrow v. The Armour Packing Company," appears by the printed record to be the case of William Harcrow v. Armour & Co. by the number on the amended answer, on the journal entry of the trial, and on the journal entry of the verdict and judgment. There is, therefore, no doubt that the word "Packing" where it appears in the title in the printed record was inserted by a clerical error, the motion to dismiss the appeal is frivolous, and it is dismissed.

The action was for negligence. The only alleged negligence of the defendant submitted to the jury was a failure to provide sufficient light for the plaintiff to work by. The accident was the falling of something which the plaintiff did not see, but testified was rust or rusty iron, from an iron corbel, through a hole in which he was boring a hole or inserting a lag screw into a joist above it with his face upturned beneath it. The court charged the jury that, unless the plaintiff had proved that the accident and the injury to the plaintiff were directly caused by the defendant's failure to provide him sufficient light, he could not recover, and the defendant insists that it was the duty of the court to instruct the jury in its favor, because there was no substantial evidence that the lack of more light was the direct cause of the injury. The great preponderance of the evidence was that the room in which the plaintiff was working was sufficiently lighted, but the evidence to that effect is laid aside, and the case is considered and decided on the undisputed facts and the evidence for the plaintiff. The material facts of the case derived from these sources are these:

The defendant was engaged in repairing its beef extract room, which was 11 feet and 4 inches high from the floor to the joists and 110 feet long by 86 feet wide. There was at the time of the accident no ceiling to the room, and the employés of the defendant were removing the old and putting in new joists, which rested on iron corbels, each of which was supported by a post and had two arms or brackets, one extending each side of the post. In each of these arms and about 6 inches from the post there was a hole about three-eighths of an inch in diameter through which a lag screw was driven into the joist above the corbel about 3 inches to hold the joist in place. In the division of the labor of making these repairs the plaintiff was assigned to the duty of boring the holes in the new joists for these screws and screwing them up into their places. While doing this work he stood on a ladder, placed his bit through the holes in the corbels, bored the necessary holes in the joists and then inserted the lag screws. Plaintiff was a carpenter, and had been engaged in rough carpenter work for 14 years. He had assisted in remodeling and repairing old wooden structures, and had done such work as taking out old timbers and

inserting new ones. On the day of the accident he commenced boring holes and inserting screws at 10 a. m., and with an intermission for dinner worked until 5 p. m., when a piece of rust or rusty iron, as he believed, fell into his eye, from which it became blind. At the time of the accident his face was about 2 feet from the corbel. When he commenced work in the morning, he did not know the condition of the corbels and joists. He testified that:

"Every time I take out the old girders there would be dust—pieces of dust or rust fly off." "Q. Well, do you say you did or did not know that all the castings were rusty and the rust was liable to fall off the castings? A. Sure, the castings bound to be rusty. Q. Well, you knew that, didn't you? A. Couldn't think anything else but know they were rusty to some extent, but not shattering. Q. Not what? A. Not shattering, so a man couldn't work under them."

He testified that he had bored six or eight holes before the accident happened; that it was dark all day, so dark that he could not see the holes in the corbels; that he found the holes by feeling for them and inserting his fingers in them; that after that he inserted his bit in the holes and had no trouble in boring the wood; that about 11 o'clock he went to his foreman and told him he would have to have some light there—couldn't see how to do the work, and really dangerous for a man to work there—and the foreman said he would get lights; that he made a like complaint and received a similar answer about 1 in the afternoon; and that he would not have continued to work if the promises had not been made. The foreman never furnished more light. Was there any substantial evidence in the facts and testimony recited that insufficient light was the proximate or direct cause of the fall of the rust or rusty iron into the eye of the plaintiff?

[2] An injury which is the natural and probable cause of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury that could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause or no cause whatever of the injury. The natural consequence of an act is the consequence which ordinarily follows it, the result which may reasonably be anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is not to follow it. Chicago, St. Paul, Mpls. & Omaha Ry. Co. v. Elliott, 55 Fed. 949, 952, 5 C. C. A. 347, 350, 20 L. R. A. 582; St. Louis, K. C. & C. R. Co. v. Conway, 156 Fed. 234, 237, 86 C. C. A. 1, 4; Teis v. Smuggler Mining Co., 158 Fed. 260, 266, 267, 85 C. C. A. 478, 484, 485, 15 L. R. A. (N. S.) 893; Chicago, Burlington & Quincy R. Co. v. Richardson, 202 Fed. 836, 841, 842, 121 C. C. A. 144, 149, 150; Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Hoag v. R. R. Co., 85 Pa. 293, 298, 299, 27 Am. Rep. 653; Cole v. German Savings & Loan Soc., 124 Fed. 113, 115, 59 C. C. A. 593, 595, 63 L. R. A. 416; Mella v. Northern S. S. Co. (C. C.) 162 Fed. 499, 512, 513.

[3] The plaintiff knew the corbels were rusty, he knew that dust or rust flew off when an old joist was removed, he knew where the

hole he was boring or in which he was inserting the screw was, and that if he placed his open eye directly beneath it the chips from his boring or from the insertion of the screw might fall upon it, and this knowledge imposed upon him the duty to use reasonable care to prevent such a result. According to his testimony the place was so dark he could not see the hole, but he had no trouble in finding it with his fingers and inserting his bit and screw therein. Concede that it was the natural and probable consequence of turning his face up to the corbel and opening his eyes beneath it, while he was boring or inserting the screw, that chips or rusty iron or rust would fall into it. It does not follow that this would have been more likely to happen in the dark than in the light, for if he could not see the hole in the dark, there was less inducement and reason for him to open his eyes beneath it in the dark than there would have been if there had been light enough to have enabled him to see it, and it is common knowledge that articles fall into and injure the eye in the light as well as in the dark. No one could have foreseen or have reasonably anticipated that the lack of light would cause a chip or a piece of rust or of rusty iron to fall into the plaintiff's eye, and the truth is that the facts of this case prove that the proximate cause of the injury was the boring of the hole or the insertion of the screw, while the plaintiff held his open eye beneath and within about 2 feet of the corbel on which he was operating, and there was no substantial evidence that the absence of light in any degree induced it, or that it would not have resulted in the same way if more light had been provided.

The accident did not tend to prove that it was caused by the absence of light. The plaintiff alleged, and the burden was on him to prove, that it was. The doctrine res ipsa loquitur is inapplicable to cases between master and servant brought to recover damages for negligence. Cryder v. Chicago, R. I. & P. Ry. Co., 152 Fed. 417, 419, 81 C. C. A. 559, 561; Chicago & N. W. Ry. Co. v. O'Brien, 132 Fed. 593, 596, 598, 67 C. C. A. 421, 424, 426. And where the evidence leaves the issue whether or not an injury was caused by an act of negligence to speculation without substantial evidence to sustain the averment that it was, it is the duty of the court to instruct the jury to return a verdict for the defendant. Patton v. Texas & Pacific R. R. Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361.

The judgment below must therefore be reversed, and the case must be remanded to the court below, with directions to grant a new trial.

It is so ordered.

CLARK v. HAMILTON.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4134.

(Syllabus by the Court.)

BANKRUPTCY (§ 314*)—CREDITOR OF BANKRUPT CORPORATION—MONEY LOANED —STOCK ISSUE.

One who subscribes $5,000 in full payment for $10,000 par value of the contemplated fully paid increase of the stock of a corporation, pays the $5,000, and obtains the promissory note of the corporation to his trustee for that amount before the corporation has authorized the increase, on the condition, clearly expressed in the contract of subscription, that the $5,000 shall be treated as a loan to the corporation drawing interest at 6 per cent. until the corporation is ready to issue the fully paid stock of the par value of $10,000, becomes thereby the creditor of the corporation, and when the corporation never issues, or takes any steps to issue, the increase of stock, because it cannot legally issue it for a payment of 50 cents on a dollar without making the taker liable to pay another 50 cents on the dollar therefor, and is adjudged a bankrupt, he remains a creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

A claim of Claude Hamilton against the estate of the Smith Automobile Company, a bankrupt, was allowed by the District Court, and F. B. Clark, trustee in bankruptcy of the bankrupt company, appeals. Affirmed.

The trustee in bankruptcy of the estate of the Smith Automobile Company, a corporation of the state of Missouri, appeals from an order of the District Court directing the allowance of the claim of Claude Hamilton as a general creditor for $5,000 and interest. The issue presented is whether Hamilton should be treated as a creditor or as a stockholder of the Smith Company. The material facts that determine the answer are these:

The Smith Company in the winter of 1909 owned a plant at Topeka, Kan., where it was making and selling automobiles. It had an issued capital stock of $181,000, of which L. Anton Smith owned about $60,000 and Walter L. Smith $49,000. In December, 1909, the corporation was in financial difficulty, and Walter L. Smith offered to sell to citizens of Grand Rapids, Mich., $50,000 of the stock of L. Anton Smith for $25,000 and to put his own stock in the name and control of a trustee, so that the Grand Rapids parties would have control of a majority of the stock and of the corporation. The latter parties appointed O. H. L. Wernicke, E. D. Conger, and A. C. Denison a committee to represent and act for them. After the plant and property of the corporation had been examined by the Grand Rapids parties, this committee made a contract with Walter L. Smith, evidenced by two writings made and signed at the same time, on or about January 1, 1910, wherein they recited that a group of Grand Rapids citizens contemplated providing the necessary additional capital "to relieve the corporation from its distressing financial situation and assuming, so far as may be desirable, control of the corporation," that this group had underwritten a proposition to raise $100,000 new capital, that this group was "the new stockholders" in the agreement, that the purchase of the $50,000 stock of L. Anton Smith "by the new stockholders is perfected" simultaneously herewith, and that "the new stockholders" were represented by Messrs. Wernicke, Conger, and Denison, who should execute the contract on behalf of such group. By the terms of the contract this committee agreed

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

for these new stockholders that they would buy $50,000 of the stock of L. Anton Smith and pay $25,000 therefor, that they would proceed as rapidly as possible to obtain subscriptions for $100,000 in cash of new capital for the company in addition to the purchase price of the L. Anton Smith stock, that such steps should be taken that the subscribers for this new capital should "participate in the corporation on the same basis as those who purchase the L. Anton Smith series B stock at the agreed price 50 cents on the dollar," that within 10 days "the new stockholders," who had perfected the purchase of L. Anton Smith's stock and who were represented by their committee, would furnish $10,000, within 30 days $15,000 more, and the further sum of $25,000 within 90 days, that the remainder of the $100,000 new capital should be fully subscribed on or before June 1, 1910, and that "so far as such new capital is furnished to the corporation at dates before new stock is ready to be issued to the new stockholders therefor, such fund shall be, for the time being, evidenced by the notes of the corporation and shall be debts of the corporation, but, within the time here limited, such debts shall either be paid by the corporation out of the new capital furnished, or the new stockholders shall cancel the same pro rata in exchange for their new stock." Walter L. Smith agreed to sell and cause to be conveyed $50,000 par value of L. Anton Smith's stock for $25,000, to cause this stock and further stock to the amount of $60,000 par value to be surrendered and transferred to Arthur C. Denison, a trustee, to hold and vote this stock for the purpose of performing the contract, and that he (Walter L. Smith) would cause four (a majority) of the directors of the corporation, to resign, would transfer one share of stock to each of four persons to be specified by the Grand Rapids group, and would cause these persons to be chosen as directors in place of those who should resign. Walter L. Smith performed his part of this contract, and the new stockholders paid L. Anton Smith $25,000 for his $50,000 stock by January 8, 1910. The corporation was placed in their control by the change of directors and the transfer of a majority of its stock to Denison, their trustee, and Wernicke was made its president and Conger its treasurer.

Claude Hamilton was not one of "the new stockholders" who purchased the stock of L. Anton Smith, was not a party to the contract and writings between them and Walter L. Smith, and the record fails to show that he had any knowledge or notice of their terms. But some time after the foregoing contract was made, and after the new stockholders had taken over the control of the corporation, he signed a written subscription for $10,000 additional stock of the corporation, and paid to E. D. Conger, as trustee for him and other subscribers, $5,000, and Conger, as such trustee, loaned this money to the corporation and took its promissory note for it to himself as trustee. The subscription contract which Hamilton signed provided that the subscriptions were made on these terms: "A group of Grand Rapids men have taken over the control of the Smith Automobile Company and have underwritten an agreement that $50,000 of its present $200,000 series B stock shall be taken at 50 cents on the dollar. The stock will be ready for issue about March 15th. It is to be issued at this price as fully paid, to put the new stockholders in the same position as the present stockholders. Stock payments made before the new stock is ready for issue shall be treated in the meantime as loans to the company drawing interest at six (6) per cent. Subscriptions are now requested for the entire amount of $250,000 par value. * * * The underwriters will subscribe on the same basis as others, and their subscriptions will be, as far as they extend, in substitution for that underwriting liability." E. D. Conger, by common consent of the subscribers, and perhaps formally at one of their meetings, was made and acted as a trustee for the subscribers, to receive their subscriptions and use them as loans to the company until the new stock was issued, and, as the subscribers paid, he loaned their money to the company and took notes for it to himself as such trustee. They paid in about $73,000, and he took and still holds such notes for about that amount. Before the time came to issue the new stock the officers of the company ascertained that under the Constitution and laws of Missouri subscribers who took new stock from the corporation as fully paid when they actually paid only 50 cents on the dollar for it would be liable to pay as much more. The corporation never took the requisite legal steps to issue any increase of stock,

such as passing a resolution of its stockholders to increase it, publishing the record of such meeting, and paying the fee of the state therefor (Ann. St. Mo. 1906, §§ 1328, 1329, 956), and never issued any additional stock. Hamilton claimed, and the court below held, that he never became a stockholder.

W. S. McClintock, of Topeka, Kan. (D. W. Mulvane, C. E. Gault, D. R. Hite, and A. L. Quant, all of Topeka, Kan., on the brief), for appellant.

Hugh E. Wilson and Edgar H. Johnson, both of Grand Rapids, Mich. (Charles M. Wilson, of Grand Rapids, Mich., on the brief), for appellee.

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

SANBORN, Circuit Judge (after stating the facts as above). The first position taken by counsel for appellants to support their claim that Hamilton became a stockholder, and not a creditor, of the Smith Company, is that the claim of the defendant is founded on notes issued pursuant to the contract of January 1, 1910, and is conditioned by the terms of that agreement, and they argue that the fact that Wernicke, who, as president of the company, executed its notes to Conger as trustee for the paying subscribers, was, as was Conger also, a member of the committee who made that contract on behalf of "the new stockholders" who purchased Smith's $50,000 of stock, sustains this view. But this contention disregards the plain facts of the case and the true relations of the parties. Hamilton was not one of "the new stockholders," who purchased Smith's stock and were represented by their committee, nor was he a party to the contract of January 1, 1910. He was a mere subscriber to a proposed increase of the capital stock of an old corporation. He dealt with that corporation at arm's length, a party adverse to it, when he made and acted under his contract of subscription, and the terms of that contract and of no other govern his rights. He made that contract after the contract of January 1, 1910, had been made, and after the part of it relating to the purchase of L. Anton Smith's stock and of the control of the corporation had been performed. He was neither a party to it, nor was he represented by the committee who made it, nor did he know its terms, and it does not condition, determine, or measure the rights or liabilities of either Hamilton, the corporation, or its creditors arising from his subscription and his payment thereon. Hamilton acted for himself, and never had any representative or agent in the transactions involved in this suit, except Conger, and the extent of his power to represent him was to loan his money to the corporation when he paid it on his subscription, and to take a promissory note of the corporation to himself as trustee for Hamilton, in accordance with the terms of his subscription contract.

The second contention is that the payments of the Grand Rapids parties to Conger were intended by them as contributions to capital and not as loans—and it rests on the contract of January 1, 1910, and fails to distinguish between the situation of "the new stockholders," who purchased the Smith stock and were represented by the committee

who made that contract for them, and a subscriber to the stock after that agreement had been made and partly performed. It is not persuasive.

It is next argued that, as against creditors, the Grand Rapids parties occupy the position of stockholders of the corporation, because the underwriters, the new stockholders, who controlled the corporation, had the power to comply with the requirements of the statutes of Missouri, and to increase and issue the stock, and because a certificate of stock is not indispensable to the creation of the relation of a stockholder. But Hamilton was not one of the new stockholders. He had no control over, or vote or influence on, the management of the corporation; nor had he any representative who had any power to act for him in directing its course. That corporation and all the parties in control of it were adverse parties to him in the contract of subscription which measured his relation to them.

It is true that where one subscribes for stock in a corporation unconditionally, and the contract of subscription is substantially performed, and he either takes his place and acts as a stockholder, or receives dividends or benefits as such, he may be estopped as against creditors from denying that he is a stockholder, although a certificate of stock has not been issued to him, or some formal prerequisite, such as publishing or recording the vote authorizing the issue of additional stock, has not been complied with. Stutz v. Handley (C. C.) 41 Fed. 531, 538, 540; Pacific National Bank v. Eaton, 141 U. S. 227, 233, 11 Sup. Ct. 984, 35 L. Ed. 702; Hawley v. Upton, 102 U. S. 314, 26 L. Ed. 179; Manufacturers' Paper Co. v. Allen-Higgins Co. (C. C.) 154 Fed. 906. But Hamilton never subscribed for stock unconditionally. He made a plain written contract that he would temporarily loan to the Smith Company $5,000, and that, on condition that the company would issue and deliver to him valid full-paid increased stock of the par value of $10,000, he would accept it in payment of his loan and become a stockholder. Neither the company nor the underwriters ever caused the other $5,000 required to purchase $10,000 of full-paid increased stock to be paid for it; neither took any legal steps to cause any increased stock to be issued, and Hamilton's loan, evidenced by the promissory note of the corporation to his trustee, Conger, remained unpaid, and he remained what he was from the beginning, a creditor of the corporation. He is not estopped from holding this position and enforcing his claim as a creditor as against other creditors of the corporation, because he never said, did, or omitted anything which tended to deceive them into the belief that he was other than a creditor, and there is no eveidence that any of them was induced by any representation, act, or neglect of Hamilton to change his position in reliance upon any such belief. His relation of creditor was evidenced by his written subscription contract and by the corporation's promissory note to his trustee, and he made no representation that these did not disclose his true relation to the corporation. The other creditors of the corporation have no greater rights than the corporation here. Hamilton was a creditor of the corporation when it received his $5,000, and he is a creditor still. One who subscribes $5,000 in full pay-

ment for $10,000 par value of the contemplated fully paid increase of the stock of a corporation, pays the $5,000, and obtains the promissory note of the corporation to his trustee for that amount before the corporation has authorized the increase, on the condition, clearly expressed in the contract subscribed, that the $5,000 shall be treated as a loan to the company drawing interest at 6 per cent. until the corporation is ready to issue the fully paid stock of the par value of $10,000, becomes thereby the creditor of the corporation, and when the corporation never issues or takes any steps to issue the increase of stock, because it cannot legally issue it for a payment of 50 cents on the dollar, without making the taker liable to pay another 50 cents on the dollar therefor, and is adjudged a bankrupt, he remains a creditor. McFarlin v. First National Bank of Kansas City, 68 Fed. 868, 871, 16 C. C. A. 46; Winters v. Armstrong (C. C.) 37 Fed. 508, 515; Bircher v. Walther, 163 Mo. 461, 63 S. W. 691; Mathews v. Columbia National Bank (C. C.) 77 Fed. 372, 373; Wolf v. Chicago Sign Printing Co., 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369.

Other objections to this conclusion, which have not escaped consideration, are: (1) That Wernicke about January 11, 1910, advertised that new capital to the amount of $100,000 had been subscribed; but Hamilton was not represented by Wernicke, or estopped by any action, representation, or omission of Wernicke, Conger, or any of the other new stockholders or parties in control of the corporation with regard to the issue of the increase of the stock or the subscription for it. (2) That the amounts paid by Hamilton and other subscribers were embarked in the corporation business, augmented its capital, and increased its credit, and therefore these subscribers became liable as stockholders for its debts. The evidence fails to convince that the amounts so advanced increased its capital, and if they increased its credit and were embarked in its business they only took the usual course and had the ordinary effect of moneys loaned to failing debtors, and these facts cannot be permitted to transform creditors into debtors or stockholders in violation of the terms of written agreements which clearly fix their situation. (3) That only about $48,000 out of the $73,000 paid in by the subscribers, and evidenced by the notes of the corporation given to Conger, their trustee, therefor, was received by the corporation; but the other $25,000 was paid for the $50,000 stock of L. Anton Smith, and that the subscriptions were for the purchase of the Smith stock as well as for the increase of stock. But Hamilton paid his full $5,000 to Conger, his trustee, and his trustee delivered it to the corporation and took that company's promissory note for it. If that corporation expended any part or all of it for the purchase of the Smith stock, and this is not clearly proved, that is no defense to the claim of Hamilton, for the corporation never delivered or offered to issue or deliver to him any of the stock purchased from Smith, or any other stock, and it received full consideration, the entire $5,000, for the claim of Hamilton, and he is neither liable nor accountable for the use the corporation made of the cash he paid it. (4) That the contract of January 1, 1910, between Walter L. Smith and the committee of the new stockholders provided that the $100,000 of new capital

should be subscribed by June 1, 1910, and that the notes given by the corporation should be paid out of such new capital. And (5) that the corporation has a claim against "the new stockholders," the underwriting committee, for their failure to procure the subscriptions for $100,000 and to take the necessary steps to cause the corporation to issue the contemplated increase of stock, which should be set off against the claim of Hamilton, because Conger, his trustee, who took the notes for him and the other subscribers, was one of the new stockholders, one of their committee, and one of the underwriters. But the limit of Conger's authority and liability as trustee for Hamilton and the other subscribers was to take the notes of the corporation for their benefit for the amounts they paid on their subscriptions. This he faithfully did. Hamilton and other subscribers under similar circumstances were in no way liable for the claims of the corporation against the new stockholders, their committee, the underwriters, or Conger as a member of or trustee or agent of them, and no claim against any of them constitutes a set-off against the claim of Hamilton against the corporation for his $5,000 and interest.

The order of the District Court that the claim of Hamilton be allowed as a general claim against the estate of the Smith Company, the bankrupt, was legal and righteous; and it is affirmed.

BRAVIS v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4163.

(Syllabus by the Court.)

1. COMMERCE (§ 27*)—INTERSTATE COMMERCE—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]) protects only those employed in interstate commerce. Those employed in the preparation or construction of roadbeds, rails, ties, cars, engines, and other instrumentalities which are intended for use in interstate commerce, but have never been and are not in use therein, are not employed in interstate commerce and are not protected by that act.

An employé engaged in the construction of a bridge, 600 feet distant from a railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, is not employed in interstate commerce, although his employer is so engaged and intends to use the cut-off therein when completed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*

Employés engaged in interstate commerce within Employers' Liability Act, see note to Baltimore & O. R. Co. v. Darr, 124 C. C. A. 571.]

2. PLEADING (§ 369*)—INCONSISTENT CLAIMS—ELECTION OF CAUSES.

Where at the close of the plaintiff's evidence, in an action for negligence by an employé upon a complaint which in a single count sets forth a cause of action under the state law, the plaintiff so amends his complaint as to make it state in a single count a cause of action under the federal Employers' Liability Act, he thereby makes an election to abandon his cause of action under the state law and to rely on his cause of

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

action under the federal act, which he is estopped from revoking or repudiating after a directed verdict against him on his pleading and evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199–1209; Dec. Dig. § 369.*]

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

Action by Nick Bravis against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff relies for a reversal of this case upon the single alleged error that at the close of his case the court directed a verdict for the defendant, on the ground that he had alleged and elected to claim a cause of action under the federal Employers' Liability Act and had failed to prove that the plaintiff at the time of his injury was employed by the defendant in interstate commerce. These were the facts relative to this question which had been proved when the court directed the verdict. The plaintiff had pleaded a cause of action for negligence of the defendant, but had not alleged that either the plaintiff or the defendant was engaged in interstate commerce when the trial commenced and the plaintiff's evidence was introduced. At the close of his evidence he amended his complaint by adding thereto allegations that at the time of the accident the plaintiff was employed by the defendant in interstate commerce and the defendant was engaged therein. Thereupon the defendant admitted that it was engaged in interstate commerce, and denied that it employed the defendant in interstate commerce, and the court held that there was no substantial evidence in the case that it did so. The evidence upon that subject presented this state of facts: The defendant owned and operated a railroad with a single track from Hopkins, Minn., to Aberdeen, S. D., a distance of about 277 miles, and was conducting interstate and intrastate commerce over it. There were many curves in the railroad, and the company was engaged in straightening and laying double tracks over it. At a place about 4 miles west of Chanhassen, Minn., it was building a cut-off from the railroad on one side of a curve about 3 miles in length to a point on the other side of it. It had laid the roadbed, but no rails, on this cut-off, and was building a concrete bridge upon it for a cattle pass at a point about 600 feet south of the railroad. The plaintiff was employed by the defendant in building this bridge. He boarded in a camp at Chanhassen, went on a hand car furnished by the defendant from Chanhassen to a point on the railroad north of the bridge, and thence walked to his work, and in the evening walked back to the railroad and returned on the hand car to the camp. The gang in which he was employed consisted of about 15 men, and they used two hand cars to transport themselves from and to Chanhassen. As they were returning to camp one evening, the plaintiff, who with his companions was engaged in pumping the forward hand car, fell off the rear of it, and the rear hand car ran over him and injured his right hand before the men upon it could stop it after they saw him.

Maurice Rose, of Minneapolis, Minn. (George B. Leonard, of Minneapolis, Minn., on the brief), for plaintiff in error.

F. W. Root, of Minneapolis, Minn. (Nelson J. Wilcox, of Minneapolis, Minn., on the brief), for defendant in error.

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

SANBORN, Circuit Judge (after stating the facts as above). The chief contention of counsel for plaintiff in support of their specifica-

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

tion of error in this case is that the facts established by the evidence sustain the conclusion that the plaintiff was employed in interstate commerce while constructing the bridge on the cut-off. But there were no rails on the roadbed on this cut-off. It never had been used, it was not then used, and until it should be ironed it could not be used, by the defendant in interstate commerce. The mere fact that it was the purpose and intention so to use it at some future time did not make it an instrumentality of interstate commerce. That purpose and intention might be changed, and it might never be used in interstate commerce, or at all. The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant's instrumentality for conducting interstate commerce is too remote and inconsequential to convince. The building of such a cut-off is new construction for use in interstate commerce, as much as the building of a new engine or car on plans prescribed by a railroad company to run over the cut-off or to take the place of an engine or car worn out in interstate commerce would be.

[1] The federal Employers' Liability Act protects only those employed in interstate commerce. Those employed in the preparation or construction of roadbeds, rails, ties, cars, engines, and other instrumentalities which are intended for use in interstate commerce, but have never been and are not in use therein, are not employed in interstate commerce, and are not protected by that act. There was no error in the ruling of the trial court that an employé engaged in the construction of a bridge, 600 feet distant from a railroad, on a cut-off more than a mile in length, which had never been provided with rails or used as a railroad, was not employed in interstate commerce, although his employer was engaged, and when the cut-off should be completed intended to use it, in interstate commerce. Pedersen v. Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125; Wabash R. R. Co. v. Hayes, 234 U. S. 86, 34 Sup. Ct. 729, 58 L. Ed. 1226, filed May 25, 1914; Jackson v. Chicago, Milwaukee & St. Paul Ry. Co. (D. C.) 210 Fed. 495.

Counsel cite San Pedro, L. A. & S. L. R. Co. v. Davide, 210 Fed. 870, 127 C. C. A. 454, to the point that the plaintiff was employed in interstate commerce when he was injured, because he was assisting to run the hand car and to keep it out of the way of interstate commerce moving over the railroad. But in Davide's Case the employé was employed in interstate commerce during the day, and the court held that his employment extended from the time he started from his camp on the hand car in the morning until he returned to the camp at night. The plaintiff was not employed in interstate commerce during the day, and by the same mark he was not so employed while he was going on the hand car to and returning from his work. He bore the same relation to the defendant while he was on the hand car that he would have borne to it if he had walked on the railroad with its permission and at his own risk on his way to and from his work.

[2] It is said that the complaint, after its amendment, stated a good cause of action under the state laws and also under the federal Employers' Liability Act, and it is insisted in view of that fact that the

court erred in directing the verdict. This case does not present a complaint where, in separate counts, a cause of action is pleaded under the federal act and another under the state law, and no election is made, and we do not determine the effect of a motion for a directed verdict in such a case. It presents a case in which the plaintiff at the close of his own case so amended his complaint, which stated in a single count a cause of action under the state law, as to make it state a cause of action under the federal Employers' Liability Act. The plaintiff thereby elected to abandon his cause of action under the state law and to insist upon a recovery under the federal act. The defendant then moved for a directed verdict, and the court could not lawfully escape the decision of the only question thus presented, the question whether or not the evidence sustained the cause of action which alone the plaintiff had then pleaded and on which he had elected to rely. There was no error in its decision of that issue, and the plaintiff was estopped from repudiating his election. St. Louis, I. M. & S. Ry. Co. v. Hesterly, Adm'r, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031; Union Pacific Ry. Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983; Northern Pacific Ry. Co. v. Slaght, 205 U. S. 122, 131, 27 Sup. Ct. 442, 51 L. Ed. 738; Matz v. Chicago & A. R. R. Co. (C. C.) 88 Fed. 770; Whalen v. Gordon, 95 Fed. 305, 314, 37 C. C. A. 70, 79.

Let the judgment below be affirmed.

LANE v. SARGENT.

(Circuit Court of Appeals, First Circuit. October 23, 1914.)

No. 1084.

1. EVIDENCE (§ 52*)—JUDICIAL NOTICE—STATE LAW.

Where suit is instituted in the federal court for the district of New Hampshire to recover damages for injuries received by plaintiff by being run into by defendant's automobile in Massachusetts, the court will take judicial notice of the law of the road of Massachusetts, and decisions of the Supreme Judicial Court of that state are therefore not admissible in evidence to prove the Massachusetts law as a fact.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 52.*

Judicial notice of public laws and regulations, see note to Smith v. City of Shakopee, 44 C. C. A. 4.]

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

In an action for injuries to plaintiff by being struck by defendant's automobile approaching from the rear, while he was crossing from one side of a street to the other, requests to charge that defendant was entitled to assume that plaintiff would continue in the direction he was going until he gave reasonable notice of going in a different direction, and that plaintiff, who when first observed was walking in a place of safety, would continue to exercise ordinary care, not only in crossing, but in continuing on his way, were properly refused, as assuming, contrary to the evidence, that plaintiff, if he had continued on his way, walking beside a car track, would have been in a place of safety, and that he did not seasonably indicate his intention to change his course, and was not in the exer-

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

cise of ordinary care in attempting to cross the street when he did, observing the automobile from 100 to 300 feet away.

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

3. TRIAL (§ 260*) — INSTRUCTIONS — REQUESTS TO CHARGE — INSTRUCTIONS GIVEN.

Where the jury were properly instructed on the issues in the case, the refusal of requests to charge is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

4. MUNICIPAL CORPORATIONS (§ 705*)—STREETS—USE—CARE REQUIRED.

A pedestrian and the operator of an automobile have equal rights in a city street, and each is bound to use ordinary care to avoid the other.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. § 705.*]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by Alvah W. Sargent against John P. Lane. Judgment for plaintiff, and defendant brings error. Affirmed.

Edward C. Stone, of Boston, Mass. (Sawyer, Hardy & Stone, of Boston, Mass., on the brief), for plaintiff in error.

John L. Mitchell, of Portsmouth, N. H. (John H. Bartlett, of Brockton, Mass., on the brief), for defendant in error.

Before PUTNAM and BINGHAM, Circuit Judges, and BROWN, District Judge.

BINGHAM, Circuit Judge. The plaintiff, Sargent, a citizen of the state of New Hampshire, brings this action against the defendant, Lane, a citizen of the commonwealth of Massachusetts, in the District Court of the United States for the District of New Hampshire, to recover damages for injuries received on August 4, 1912, by being run into by an automobile operated by the defendant. The accident took place while the plaintiff was crossing Main street, in Salisbury, Mass. There was a trial by jury and a verdict for the plaintiff. The case is now here on defendant's bill of exceptions, and the errors assigned are to the exclusion of certain evidence offered by the defendant and the refusal of the judge to give certain requests for rulings.

The accident having occurred in Massachusetts, and the law of the road of that state being a material point in the case, the defendant offered to show what the law of Massachusetts on that subject was by introducing in evidence three decisions of the Massachusetts Supreme Judicial Court, as reported in Galbraith v. West End St. Ry. Co., 165 Mass. 581, 43 N. E. 501, Scannell v. Boston Elevated Ry. Co., 176 Mass. 173, 57 N. E. 341, and Commonwealth v. Horsfall, 213 Mass. 232, 100 N. E. 362, Ann. Cas. 1914A, 682. The evidence was excluded, and the defendant excepted. The trial court, in excluding the evidence, made the following ruling:

"I think this question is a question of law for the court to pass upon, and the court is very glad to have any citation of Massachusetts law submitted to the court, and the court will instruct the jury upon what the Massachusetts

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

law is. Upon that assumption, with this view of the law, the court will not allow the opinions of the Massachusetts court which have been called to its attention to be read to the jury."

[1] The defendant contends that the law of Massachusetts, where the accident occurred, is the law of a foreign jurisdiction, and must be proved as a fact; that the court could not take judicial cognizance of it. This contention cannot be sustained. In Mills v. Green, 159 U. S. 651, 657, 16 Sup. Ct. 132, 134 (40 L. Ed. 293), Mr. Justice Gray, in delivering the opinion of the court, said:

"The lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the Constitution and public laws of each state of the Union. Owings v. Hull, 9 Pet. 607, 625 [9 L. Ed. 246]; Lamar v. Micou, 112 U. S. 452, 474 [5 Sup. Ct. 221, 28 L. Ed. 751]; Id., 114 U. S. 218, 223 [5 Sup. Ct. 857, 29 L. Ed. 94]; Hanley v. Donoghue, 116 U. S. 1, 6 [6 Sup. Ct. 242, 29 L. Ed. 535]; Fourth National Bank v. Francklyn, 120 U. S. 747, 751 [7 Sup. Ct. 757, 30 L. Ed. 825]; Gormley v. Bunyan, 138 U. S. 623 [11 Sup. Ct. 453, 34 L. Ed. 1086]; Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 678 [14 Sup. Ct. 533, 38 L. Ed. 311]."

And in Hanley v. Donoghue, 116 U. S. 1, 6, 6 Sup. Ct. 242, 245 (29 L. Ed. 535), the same Justice, in speaking for the court, said:

"In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. * * *

"But on a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green v. Van Buskirk, 7 Wall. 139 [19 L. Ed. 109]. * * *

"Where by the local law of a state (as in Tennessee, Hobbs v. Memphis & Charleston Railroad, 9 Heisk. 873) its highest court takes judicial notice of the laws of other states, this court also, on writ of error, might take judicial notice of them."

See Martin v. Baltimore & Ohio Railroad, 151 U. S. 673, 678, 14 Sup. Ct. 533, 38 L. Ed. 311.

The Pawashick, 2 Low. 142, Fed. Cas. No. 10,851, a case relied upon by the defendant in support of his contention, is not in point. There the question was whether a federal court would take judicial notice of the law of a foreign country or it should be proved as a fact.

[2] The defendant also complains of the refusal of the court to give the following instructions:

(1) "The defendant had the right to assume as he drove down the state highway that the plaintiff would continue in the direction he was going until and unless the latter gave reasonable notice of his going in another direction."

(2) "The defendant had the right to assume that the plaintiff, who was, when first observed by the defendant, walking in a place secure from injury, would continue to exercise ordinary care, not only in crossing, but in continuing on his way."

Both of these requests were properly denied. They assumed, contrary to the evidence in the case, that the plaintiff, if he had continued on his way walking beside the car track, would have been in a place of safety, that he did not seasonably indicate his intention to change his course, and that he was not in the exercise of ordinary care in attempting to cross to the east side of the street at a time when, as he observed, the defendant was from 250 to 300 feet back of him, and, as the defendant testified, from 100 to 300 feet. As the requests were not applicable to the facts as presented by the evidence, and would have tended to mislead and confuse the jury, the court did not err in declining to give them.

[3, 4] Furthermore, the jury were properly instructed. The court charged them, in substance, that the plaintiff and the defendant had equal rights in the use of the street, and each, in the exercise of his rights, was bound to use ordinary care with reference to the other.

The judgment of the District Court is affirmed, and the defendant in error recovers his costs on appeal.

CACHE CREEK MINING CO. v. BRAHENBERG.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2387.

1. MINES AND MINERALS (§ 38*)—FORFEITURE OF CLAIM—PLEADING.

Where, in a suit to determine an adverse claim to a mining location, defendant answered, admitting plaintiff's location as alleged, but denied that plaintiff since 1909 had performed the annual assessment work required by law to hold the claim, and alleged that by reason thereof it became forfeited, and reverted to the public domain. *Held* that, in the absence of objection at the trial, the allegations of the answer were sufficient to support a plea of forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. § 38.*]

2. APPEAL AND ERROR (§ 1056*)—REVIEW—RULINGS ON EVIDENCE—PREJUDICE.

Where, on an issue as to whether plaintiff's work on a mining claim had been sufficient, the court gave careful instructions touching the amount of labor necessary to be done, and how the jury should ascertain and determine the value of such that was done, the admission of evidence of the opinion of a workman as to the value of the work, with which he was personally familiar, was not prejudicial to plaintiff, though not fully qualified as an expert.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.*]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Robert W. Jennings, Judge.

Action by the Cache Creek Mining Company against Henry Brahenberg. Judgment for defendant, and plaintiff brings error. Affirmed.

The complaint in this case (plaintiff in error being the plaintiff below) in brief shows that on July 28, 1905, one Joseph Anderson located claim No. 1 above on Dollar creek, in the district of Alaska, stating the manner of loca-

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

tion, and that for a valuable consideration Anderson thereafter sold, transferred, and set over the said claim to plaintiff; that plaintiff has since been entitled to the possession of said claim, and has in each year done and performed the full and requisite amount of assessment and development work for holding it under existing law; but that in the year 1912 the defendant did trespass thereon, and unlawfully, wrongfully, and without right take possession thereof from plaintiff, and so wrongfully withholds the same from plaintiff, to its damage in the sum of $5,000. Judgment for possession and for the damages alleged is prayed. The answer of defendant admits the location by plaintiff as alleged, but denies that plaintiff has, since the year 1909, performed the annual labor required by law to hold said claim, or any labor thereon, and alleges that by reason thereof the claim became forfeited, and reverted to the public domain. The answer further sets up location by the defendant in August, 1912, his entry into possession, and claim of right thereunder. The cause was tried by a jury, and verdict and judgment resulted for defendant.

John Lyons, of Valdez, Alaska, James E. Fenton, of San Francisco, Cal., and William A. Gilmore, of Nome, Alaska, for plaintiff in error.

T. C. West, of San Francisco, Cal., and E. E. Ritchie, of Valdez, Alaska, for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). But two assignments of error are relied upon in the briefs of counsel for plaintiff in error for a reversal of the cause. These are:

First, the validity of plaintiff's location being admitted by the answer, it was incumbent upon the defendant to plead forfeiture of the claim through failure to do the proper annual assessment work, and that this the defendant has not sufficiently done; and,

Second, the admission of certain testimony of the witness Rimmer over objections and exceptions.

[1] As to the first assignment, it must be conceded that the allegations setting up forfeiture are meager, but they do state that "all of plaintiff's right to and in said claim became forfeited, and the said claim and all of it became a part of the public domain, subject to location according to law as mineral land, long prior to the year 1912," and this in conjunction with a denial that plaintiff has performed the annual labor required by law to hold said claim since the year 1909, or that it has performed any labor upon said claim subsequent to that date. A trial was had upon practically the sole issue as to whether plaintiff had performed the requisite annual labor for holding the claim, and whether by reason of a failure in that respect it had suffered a forfeiture, and the concrete question was concisely submitted to the jury by clear instructions for their finding. No objection, so far as the record shows, was ever interposed or made to the sufficiency of the pleading until upon this appeal, and the question now is whether in the light of the record, judgment having been entered upon the verdict, the allegations of the answer are sufficient to support a plea of forfeiture.

A forfeiture must be set up before it can be insisted upon. Bishop v. Baisley, 28 Or. 119, 41 Pac. 936. This the defendant attempted to do, and meagerly and imperfectly stated his defense. The result is an imperfect statement of a good defense. Such a statement, it has gen-

erally been held, is sufficient to support the verdict and judgment. The rule has been stated thus:

"A defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required, on the trial, proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict." Houghton & Palmer v. Beck, 9 Or. 325.

See, also, Booth v. Moody, 30 Or. 222, 225, 46 Pac. 884.

The pleading in the case at bar, in the light of the rule, must be held to be sufficient.

[2] Referring to the second assignment, the witness Rimmer was permitted to give his estimate as to what certain work was worth, shown by the plaintiff to have been done as assessment work. His testimony, so far as is necessary to illustrate the situation is as follows:

"In September, 1911, I was working about a mile or a little over from there mining. I afterwards saw the work that was done there. It was just plowing, scraping, preliminary work, about 1,400 feet long. The going rate of wages in that district at that time was $5 a day and board. I don't know what horses were worth up there. Q. Are you familiar with the country there along Dollar creek; that is, the character of the ground? A. Yes, sir. Q. Do you know about how much work it takes to move such dirt as was removed by the Cache Creek Mining Company there? A. I think I do. Q. What would you say that work is worth? By the Court: What is that work worth, done the way the plaintiff says he did it—not what is it worth done some other way? A. Why, I think about $150 would be a liberal allowance for that kind of work in the ditch."

The real objection is that it was not proper for Rimmer to give his opinion touching the value of the work done. He was probably not fully qualified to testify as an expert, yet he had the general knowledge that most workmen about mines have touching the value of assessment work. The court gave careful instructions touching the amount of labor necessary to be done, and as to how the jury should ascertain and determine the value of such as was done, and in view of this fact we are strongly impressed that no reversible error was committed in allowing Rimmer's testimony to go to the jury. If error at all, it was harmless.

Other questions were discussed, and are suggested in the brief of counsel; but they are not presented by the record, and cannot be considered.

Judgment affirmed.

SMITH v. BELL.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

(Syllabus by the Court.)

1. COURTS (§ 311*)—MORTGAGES (§ 427*)—JURISDICTION OF FEDERAL COURT—FORECLOSURE.

The citizenship and residence of the trustee in a mortgage to secure the payment of a claim owned by another, and not those of such owner, condition the jurisdiction by a national court of a suit to foreclose the mortgage, because the trustee is, and the cestui que trust is not, an indispensable party to the suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. § 311;* Mortgages, Cent. Dig. §§ 1269, 1272–1287; Dec. Dig. § 427.*

Mortgage foreclosure in federal courts, see note to Seattle, L. S. & E. Ry. Co. v. Union Trust Co., 24 C. C. A. 523.]

2. GAS (§ 13*)—BREACH OF CONTRACT—PLEADING.

A pleading that one failed to operate wells and furnish gas therefrom continuously discloses no breach of a covenant to sell the surplus such wells may produce.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 5–9; Dec. Dig. § 13.*]

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Frank A. Youmans, Judge.

Action by John A. Bell, Jr., against P. F. Smith. From decree for plaintiff, defendant appeals. Affirmed.

H. B. Martin and A. F. Moss, both of Tulsa, Okl., for appellant.

James A. Veasey and J. P. O'Meara, both of Tulsa, Okl., for appellee.

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

SANBORN, Circuit Judge. The defendant below, P. F. Smith, complains of a decree of foreclosure of a mortgage he made to John A. Bell, Jr., because the court below struck out of his answer that part by which he sought to question the jurisdiction of the court and that part by which he sought to set up a counterclaim and set-off.

The complaint pleaded the mortgage and the notes it secured, and copies of them were attached to it. The mortgage and the notes ran to John A. Bell, Jr., trustee, and the mortgage provided that the defendant should keep the buildings and personal property described therein insured, with the loss payable to Bell or his successors in trust; that if default should be made in any of the conditions of the mortgage the whole sum intended to be secured by the mortgage should, at the option of Bell, or his successors in trust, or any other legal holder of the indebtedness, become due; and that any or either of them should then have full right and authority to take possession of the premises mortgaged and to foreclose the mortgage.

[1] The plaintiff alleged in his complaint, and the defendant admitted in his answer, that the former was a resident and citizen of the state of Pennsylvania and that the latter was a resident and citi-

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

zen of the state of Oklahoma; but the defendant alleged that the Standard Oil & Gas Company of Bartlesville, Okl., was the owner and holder of all the beneficial interest in the notes and mortgage and the real party in interest in the case, that that company was a citizen and resident of the state of Oklahoma, and that for that reason the court below had no jurisdiction of the suit. It was this portion of the answer that defendant first insists it was error for the court to strike out. But by the terms of the stipulation made by the defendant in the mortgage he expressly agreed that upon default in the conditions thereof either Bell, the trustee, or his successor in the trust, might take possession of the property and foreclose the mortgage, and he is thereby estopped from denying the competency of the trustee so to do. The legal title to the mortgage was in the trustee. He was the indispensable party plaintiff in the suit, and while the owner of the notes, the beneficiary of the trust, may have been a proper party, it was not an indispensable one, and its citizenship was immaterial to the jurisdiction of the court below. The citizenship and residence of the trustee in a mortgage to secure the payment of a claim owned by another, and not those of such owner, condition the jurisdiction by a national court of a suit to foreclose the mortgage, because the trustee is, and the cestui que trust is not, an indispensable party to the suit. Dodge v. Tulleys, 144 U. S. 451, 455, 456, 12 Sup. Ct. 728, 36 L. Ed. 501; Rust v. Brittle Silver Co., 58 Fed. 611, 612, 7 C. C. A. 389, 390; Johnson v. City of St. Louis, 172 Fed. 31, 41, 96 C. C. A. 617, 627, 18 Ann. Cas. 949; Allen West Commission Co. v. Brashear (C. C.) 176 Fed. 119, 121; Knapp v. Railroad Co., 20 Wall. 117, 122, 123, 22 L. Ed. 328; Gardner v. Brown, 21 Wall. 36, 41, 22 L. Ed. 527; Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211, 47 L. Ed. 245.

[2] The portion of the answer which sought to set up a counterclaim or set-off made an agreement between the Standard Oil & Gas Company, the cestui que trust under the mortgage, a part of the answer, and alleged a breach of it by that company in these words:

"That the said Standard Oil & Gas Company, from time to time from the said 3d day of January, 1912, until about the 15th day of November, 1912, continued to own and operate the aforesaid oil wells, but failed, neglected, and refused to operate said wells continuously, frequently permitting the operation of their said wells to lapse and be discontinued for considerable periods of time, thereby interrupting the supply of gas necessary for the operation of defendant's plant, so that defendant's machinery and labor necessary for operating the same were obliged to lie idle for many days, to defendant's great injury and damage in the sum of five thousand dollars."

But repeated perusals and careful consideration of the agreement have disclosed no promise or covenant by the oil company to operate its oil wells continuously or to furnish an uninterrupted or sufficient supply of gas for the operation of the defendant's plant. On the other hand, the oil company by an express stipulation of the contract reserved to itself sufficient gas to operate its leases, and the extent of its obligation to furnish gas to the defendant was that so long as the leases owned by it on January 3, 1912, when the agreement was made, within a radius of two miles from defendant's plant, or other leases

thereafter acquired by it within such radius, should, after reserving sufficient gas to operate its leases, "produce casing-head gas in sufficient quantities to be desirable for manufacture in said plant," it would sell such gas to the defendant for three cents per cubic foot. The contract contains no covenant by the oil company to operate its wells continuously or at all, none to produce sufficient or any gas to operate the defendant's plant, nothing but a promise to sell whatever gas they do produce in excess of the gas required to operate them at three cents per cubic foot so long as the wells produce an excess sufficient to make it desirable for manufacturing purposes in the defendant's plant, and the answer contains no allegation that the wells produced such an excess, or that the oil company failed or refused to furnish any of the excess actually produced.

The result is that this portion of the answer failed to state facts sufficient to state a cause of action, counterclaim, or set-off against the oil company or the plaintiff, there was no error in striking it out, and the decree below must be affirmed.

It is so ordered.

THE CURTIN.

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

No. 1245.

1. COLLISION (§ 18*)—LIABILITY—NEGLIGENCE NOT A PROXIMATE CAUSE.
   Acts of negligence which do not contribute to a collision as a proximate cause do not render a ship liable.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 16; Dec. Dig. § 18.*]

2. COLLISION (§§ 149, 153*)—SUITS FOR DAMAGES—FINDINGS OF FACT—REVIEW.
   Whether negligence imputed is the proximate cause of a collision, or merely collateral or immaterial, is a question of fact; and, where the conclusion of the District Court is not against the preponderance of the evidence, it cannot be disturbed by an appellate court.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 149, 299–301, 305–307, 310, 311; Dec. Dig. §§ 149, 153.*]

3. COLLISION (§ 105*)—STEAM VESSELS MEETING—CHANGE OF COURSE.
   A finding that a collision on the Elizabeth river in the evening between a gasoline launch and a meeting tug was due solely to the fault of the tug in changing her course shortly prior to the collision *held* supported by the evidence; it appearing that until such change the vessels were on safe courses.
   [Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in admiralty by William S. Bensten, owner of the gasoline launch Cecilia, against the steam tug Curtin, Charles Gring claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 205 Fed. 989.

---

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

Ralph H. Riddleberger, of Norfolk, Va. (Riddleberger & Roper, of Norfolk, Va., on the brief), for appellant.

R. M. Hughes, Jr., of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges.

WOODS, Circuit Judge. On December 18, 1911, the gasoline launch Cecilia was going up the Elizabeth river from Hampton Roads to Norfolk. The tug Curtin was coming down the river on the south or Portsmouth side of the river near the middle of the stream on its way to Pinner's Point. The tug Pinner's Point with a barge alongside was crossing the river from Pinner's Point to Ft. Norfolk. The Cecilia and the Curtin collided astern the Pinner's Point, with the result that the Cecilia was sunk. The District Court held the Curtin entirely at fault, and adjudged that William S. Bensten, owner of the Cecilia, should recover of the Curtin and its owners $1,566.52. There is no substantial difference as to the law. While the testimony in its details is irreconcilable and confusing, we think the controlling fact is established by the preponderance of the evidence. The witnesses differ somewhat as to the precise point of collision, but they agree that it occurred near midstream at about 5:45 in the afternoon.

The master of the Cecilia admits hearing two whistles from the Pinner's Point, and the answer of two whistles from another vessel, which turned out to be the Curtin, indicating the intention of the answering vessel to pass astern of the Pinner's Point. The fact that the master of the Cecilia held his course up and gradually across the stream and astern of the Pinner's Point without giving any signal, and with knowledge from the signal of the Curtin that a down-going vessel was about to pass astern of the Pinner's Point, would be fatal to his claim of exemption from blame, if this course of conduct contributed as a proximate cause to the collision. But we think the preponderating evidence shows that it did not. The master of the Cecilia testified that he did not signal the Pinner's Point because she was so far away that a signal was unnecessary. The master of the Norfolk and the master of the Pinner's Point, both impartial witnesses, corroborate his statement that the Cecilia and the Curtin were showing green to green, and would have passed each other safely but for the sudden change of course of the Curtin toward the Cecilia, after the Pinner's Point had passed.

There was evidence that the Cecilia was out of the course prescribed by the rules, and this, together with the signal of the Curtin, might well be held to impose upon the Cecilia the burden of keeping out of the way of the Curtin. Assuming that she was bound to keep out of the course of the Curtin, the evidence that there was no danger to either vessel until the Curtin changed her course tends to show that she discharged this duty—that she did nothing which put either vessel in danger, and that the cause of the collision was the Curtin's change of course. Singleton, the mate of the Curtin, who was navigating her, is alone in his testimony that the collision was caused by the Cecilia changing her course and trying to cross his bow, and that the master of the Cecilia when taken on his vessel and asked his reason for the change did not deny it.

[1] Acts of negligence which do not contribute to the accident as a proximate cause do not render a ship liable, even under the American as distinguished from the English rule of liability. The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The City of Macon, 92 Fed. 207, 34 C. C. A. 302; The Lord O'Neill, 66 Fed. 77, 13 C. C. A. 337; Marsden on Collisions at Sea (6th Ed.), 14.

[2] Whether negligence imputed is the proximate cause or merely collateral or immaterial is a question of fact, and where the conclusion of the District Court is not against the preponderance of the evidence it cannot be disturbed.

[3] It seems clear beyond dispute that the proximate cause of the collision was the negligent change of course by one or the other of the vessels. Enough of the evidence has been set out to show that the preponderance supports the finding of the District Judge that the courses of the two vessels were safe, that it was the Curtin that suddenly changed her course and struck the Cecilia, and that the danger of such a change would have been evident if the Curtin had had an adequate watch.

Affirmed.

MOTION PICTURE PATENTS CO. v. CENTAUR FILM CO.

(District Court, D. New Jersey. October 8, 1914.)

No. 727.

PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

Equity has jurisdiction of a suit for infringement of a patent for a kinetoscope for taking motion picture negatives from which an unlimited number of positive pictures may be printed for exhibition purposes, although the bill was filed only two days before the expiration of the patent, where there was no laches, and the bill alleges that defendant has in its possession a large number of negatives taken with the infringing camera, and prays for an injunction to restrain their use, and may grant such injunction even after the patent has expired.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. § 283.*]

In Equity. Suit by the Motion Picture Patents Company against the Centaur Film Company. On motions by complainant for preliminary injunction and by defendant to dismiss. Motion to dismiss denied, and restraining order granted.

John Robert Taylor, of New York City, for plaintiff.
Kenyon & Kenyon, of New York City, for defendant.

HUNT, Circuit Judge. Letters patent No. 589,168 were granted on August 31, 1897, to Thomas A. Edison, for certain improvements in kinetoscopes. Later, on June 10, 1902, application was made for the reissue of said letters patent No. 589,168 in two divisions, the application alleging that by reason of a defective or insufficient specification, or by reason of said Thomas A. Edison claiming as his invention more than he had a right to claim, the original letters patent were inoperative; and on September 30, 1902, letters patent 12,037 and 12,-

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

038 were issued to Edison. Letters patent 12,037 were for improvement in kinetoscopes, and letters patent 12,038 were for improvement in kinetoscope films. Claims 1, 2, and 3 of reissue letters patent 12,037 were held valid by the Court of Appeals of the Second Circuit, and claim 4 was held to be void. Edison v. American Mutoscope & Biograph Co., 151 Fed. 767, 81 C. C. A. 391.

By certain mesne assignments on November 16, 1907, and December 31, 1908, the plaintiff became possessed of the entire right, title, and interest in and to the invention and the reissued letters patent 12,037, and possessed of the same rights that would accrue and had accrued as if the mesne assignments had not been made. Thereafter application was made for the reissue of letters patent 12,037, alleging that the reissued letters patent were inoperative by reason of a defective or insufficient specification or by reason of Thomas A. Edison claiming as his own invention more than he had a right to claim, whereupon, on December 5, 1911, reissue letters patent No. 13,329 were issued. This reissued patent contained the three claims held valid in reissue 12,037, and in addition claims 4 and 5; these latter two claims being more limited in scope than the claims contained in reissue 12,037. Claims 1, 2, 3, and 5 of reissue 13,329 were held valid.

The greatest commercial value of reissue letters patent 13,329, which comprises the apparatus of a camera employed in the production of motion pictures, resides in the *use* of the camera to photograph scenes or objects in motion. This produces motion picture negatives, from each of which may be printed an unlimited number of positive motion pictures for use for exhibition in theaters. Licensees of the plaintiff under the reissue letters patent have been for some years past using the invention of the plaintiff in the production or manufacture of such motion picture negatives, for which the plaintiff has been paid royalties, based upon the number of running feet of motion pictures thus produced.

It is charged that subsequent to December 5, 1911, and before the commencement of this suit, the defendant wrongfully made, used, or sold, and now continues to make or use or sell, kinetoscopes or motion picture cameras, embodying the inventions set forth in reissue letters patent 13,329. By reason of the infringement, plaintiff has suffered, it is charged, and still suffers irreparable loss and injury, and has been deprived of great gains and profits which it otherwise would have received and enjoyed. Discovery of the number of motion picture cameras employing the invention that have been made and sold is prayed, and a preliminary and permanent injunction are prayed for, as well as an accounting, and the delivery into court for destruction of the pictures made by said defendant with the invention, prior to the date of the expiration of the patent, is also asked.

The bill of complaint was filed August 27, 1914. The subpœna upon the defendant was served August 29, 1914, only two days before the expiration of the patent.

On September 18, 1914, the defendant obtained a rule to show cause why the suit should not be transferred to the law side of the court

on the ground that equity did not obtain and has no jurisdiction. On September 22, 1914, defendant served notice of motion to dismiss the suit on the ground of lack of equity jurisdiction.

Plaintiff by affidavit set forth, in support of right to injunctive relief, that, to prove infringement of the patent in suit, it was necessary to see the interior mechanism of a camera being used, evidence of infringement being obtained only with the greatest difficulty and expense; that a suit under reissue 12,037 was commenced against the Centaur Film Company, a corporation of the state of New York, David Horsley, and Ludwig Erb in the Southern district of New York; that service of subpœna was not obtained against Horsley, and subsequently a new suit against Horsley alone was brought in New Jersey; that a preliminary injunction was issued; that, ten days after the suit against the New York Centaur Film Company was begun, Horsley incorporated in New Jersey another corporation with the same name, the defendant here; and that this corporation was intended by Horsley to enable continued infringement without interruption.

It further appears by affidavit that in July, 1914, the plaintiff sent a man to investigate rumors that Horsley was infringing the patent in suit; that Horsley said then that, while he was preparing to make motion pictures, he had no intention of commencing to manufacture until after the patent had expired; that on August 25th, however, McCoy, the person sent, accidentally saw a company taking pictures in Bayonne with a Pathe professional camera, and that Horsley admitted that the Centaur Company was the one using the camera; that, on receipt of McCoy's report, the present suit was instituted; that on August 31, 1914, pursuant to an arrangement, Mr. Horsley expressed to Mr. Taylor, of the Motion Picture Films Company, willingness to settle the suit amicably; that settlement failed, and the suit was pressed; that the defendant company has a capital of only $10,000 and very little assets, and that therefore a judgment for damages and profits would be of little value; that defendant has in its possession a large number of negative motion pictures made by the infringing camera before the patent in suit had expired; that to permit defendant to dispose of these pictures would work injury by depriving plaintiff of royalties; and that, because such royalties are unascertainable, a judgment for nominal damages would in all probability result.

The case of Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975, is relied upon by both the plaintiff and the defendant. A brief statement of the facts in that case may be of service here: The assignee of certain letters patent for an improvement in railroad car brakes filed his bill against the defendant over five years after the expiration of the patent, charging that the defendant had been guilty from August 6, 1869, to July 6, 1873 (the date on which the letters patent expired), of using upon its railroad cars the patented brakes, but how many the bill stated the complainant did not know and could not set forth. It was averred that the number so used was large, and that the defendant had derived, received, and realized great gains and profits therefrom in amount unknown. The bill prayed an accounting. Demurrer was filed on the grounds that the bill did not contain any

matter of equity jurisdiction, and that defendant had a plain, adequate, and complete remedy at law. The statute of limitations was also set forth as a defense. The demurrer was sustained by the lower court, and the bill was dismissed. On appeal the Supreme Court of the United States exhaustively reviewed the authorities and the course of legislation on the subject. In affirming the decision of the lower court, it said (105 U. S. 215–216, 26 L. Ed. 975):

"Our conclusion is that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but that grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal, and such an equity may arise out of, and inhere in, the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in a legal tribunal difficult, inadquate, and incomplete, and, as such cases cannot be defined more exactly, must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exceptions from the general rule."

It is to be noted that one of the grounds claimed by the plaintiff herein as entitling it to equitable relief is the fact that the accounts are involved in such obscurity that equitable relief alone would make its remedy plain, adequate, and complete.

In concluding its opinion in the case of Root v. Railway Co., the court said:

"It does not appear from the allegations of the bill in the present case that there are any circumstances which would render an action at law for the recovery of damages an inadequate remedy for the wrongs complained of; and, as no ground for equitable relief is presented, we are of opinion that the Circuit Court did not err in sustaining the demurrer and dismissing the bill."

In Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, also relied upon by both parties, the Supreme Court upheld the power of the lower court, which took jurisdiction in a case where the patent had only 15 days to run after the filing of the bill. The court said:

"As to the first point, the bill does not show any special ground for equitable relief, except the prayer for an injunction. To this the complainant was entitled, even for the short time the patent had to run, unless the court had deemed it improper to grant it. If, by the course of the court, no injunction could have been obtained in that time, the bill could very properly have been dismissed, and ought to have been. But, by the rules of the court in which the suit was brought, only four days' notice of application for an injunction was required. Whether one was applied for does not appear. But the court had jurisdiction of the case, and could retain the bill, if, in its discretion, it saw fit to do so, which it did. It might have dismissed the bill, if it had deemed it inexpedient to grant an injunction; but this was a matter in its own sound discretion, and with that discretion it is not our province to interfere, unless it was exercised in a manner clearly illegal. We see no illegality in the manner of its exercise in this case. The jurisdiction had attached, and although, after it attached, the principal ground for issuing an injunction may have ceased to exist by the expiration of the patent, yet there might be other grounds for the writ arising from the possession by the de-

fendants of folding guides illegally made or procured whilst the patent was in force. The general allegations of the bill were sufficiently comprehensive to meet such a case. But even without that, if the case was one for equitable relief when the suit was instituted, the mere fact that the ground for such relief expired by the expiration of the patent would not take away the jurisdiction and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort. This has often been done in patent causes, and a large number of cases may be cited to that effect; and there is nothing in the decision of Root v. Railway Co., 105 U. S. 189 [26 L. Ed. 975] to the contrary. Cotton Tie Co. v. Simmons, 106 U. S. 89 [1 Sup. Ct. 52, 27 L. Ed. 79]; Lake Shore, etc., Railway v. Car-Brake Co., 110 U. S. 229 [4 Sup. Ct. 33, 28 L. Ed. 129]; Consolidated Valve Co. v. Crosby Valve Co., 113 U. S. 157 [5 Sup. Ct. 513, 28 L. Ed. 939]; Thomson v. Wooster, 114 U. S. 104 [5 Sup. Ct. 788, 29 L. Ed. 105]. It is true that where a party alleges equitable ground for relief, and the allegations are not sustained, as where a bill is founded on an allegation of fraud, which is not maintained by the proofs, the bill will be dismissed in toto, both as to the relief sought against the alleged fraud and that which is sought as incidental thereto."

The court would have had power to grant a measure of the equitable relief prayed before the patent in suit expired, and the jurisdiction of equity having been assumed, even on a narrow ground, at the inception of the suit, the jurisdiction may be retained to grant a more extended relief. Equity may, however, be invoked on the ground that the court will take jurisdiction to prevent the sale of negatives made with the infringing camera before the expiration of the patent.

In Keyes v. Eureka Consol. Mining Co., 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929, in the course of its opinion, the Supreme Court said:

"No notice of an application for a preliminary injunction was given, nor any application made therefor, nor was there any showing on the pleadings or otherwise of irreparable injury to the complainants by the continued use of the invention for 29 days after the bill was filed and before the expiration of the patent. Such a contention after 17 years of use by appellee with appellants' knowledge would have been absurd, and, even if appellants had applied for a preliminary injunction before the return day, the court would have been justified in refusing to award it. Obviously the laches of appellants were such, upon their own showing, for the delay was unexplained, as to disentitle them to a preliminary injunction, as ruled by Mr. Justice Brewer, when Circuit Judge in McLaughlin v. People's Railroad (C. C.) 21 Fed. 574, and by Judge Blodgett in American Cable Railway Co. v. Chicago City Railway Co. (C. C.) 41 Fed. 522. See, also, Keyes v. Pueblo Smelting Co. (C. C.) 31 Fed. 560. This record discloses that the invention had been used for more than 17 years with the knowledge and assent of appellants and without any complaint on their part, except that appellee had not paid royalties after complainants quit its employment. This being so, the case clearly falls within Root v. Railway Co., 105 U. S. 189 [26 L. Ed. 975], Clark v. Wooster, 119 U. S. 322 [7 Sup. Ct. 217, 30 L. Ed. 392], and Lane & Bodley Co. v. Locke, 150 U. S. 193 [14 Sup. Ct. 78, 37 L. Ed. 1049], and the decree was fully justified."

In the case just cited it will be observed the question of laches was involved, but in the case at hand that principle is not applicable. This suit was filed soon after the discovery of the infringement; the slight delay in the proceedings being due, apparently, to the suggestions of the defendant that a satisfactory settlement might be reached without resort to the courts. If the facts set forth are true, plaintiff would seem to be entitled to equitable relief, if for no other purpose than to restrain defendant from selling, leasing, or in any manner disposing of any motion picture or photographic negative produced by taking

pictures with the camera in suit. It is well held that the making of articles which infringe a patent during the existence of the monopoly which is created by that patent is in violation of the patent law, and infringing articles so made during the life of a patent cannot lawfully be sold after its expiration. Underwood Typewriter Co. v. Elliott-Fischer Co. (C. C.) 156 Fed. 588. It follows that the articles produced by an infringing apparatus may not be sold after the expiration of a patent, if they have in fact been made prior to the expiration of the patent.

The restraint of the sale of these negatives would make fitting the exercise of equitable jurisdiction. Otherwise plaintiff's remedy would not be plain, adequate, and complete.

Defendant's motion to dismiss plaintiff's bill is overruled. Plaintiff may have a temporary restraining order.

JAMES CLARK, JR., ELECTRIC CO. v. UNITED STATES ELECTRICAL TOOL CO. et al.

(District Court, N. D. Illinois, E. D. October 12, 1914.)

No. 59.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PORTABLE DRILL.

The Willey patent, No. 750,744, for a portable drill, claim 2, which is very narrow and specific, as was required by the prior art, *held* valid, as disclosing invention, but not infringed.

In Equity. Suit by the James Clark, Jr., Electric Company against the United States Electrical Tool Company and the Schneider Sales Company. On final hearing. Decree for defendants.

Sheridan, Wilkinson & Scott, of Chicago, Ill., for plaintiff.

Rector, Hibben, Davis & Macauley, of Chicago, Ill., for defendants.

SANBORN, District Judge. Suit upon claim 2 of the James F. Willey patent, No. 750,744, issued January 26, 1904, for a portable drill, as follows:

"2. A motor hand-drill comprising the armature and field-magnet of an electric motor, a casing, a drill-spindle, and gearing connecting the same with the said armature, the said casing comprising three members arranged in line with each other and longitudinally bolted together, each of the end members having a bearing for the said armature, one of the said members carrying the drill-spindle, the bearing therefor in the said member being arranged to one side of the armature-bearing, the other of said end members provided with an operator's body-piece arranged in line with the said drill-spindle, and the middle member supporting the field-magnet of the electric motor, whereby upon disconnection of the three casing members the drill-spindle and gear thereupon will be removed with one of the said end members, and the body breast-piece with the other of said members, permitting free removal of the armature and free access to the field-magnet supported by the middle member."

The defenses pleaded and urged on the hearing are invalidity of the patent, noninfringement, and laches. The first one of the patent

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

drills was made between April 28, 1901, and June 17, 1901, when the drill was photographed. Patent was applied for March 5, 1903.

The claim in suit was made very narrow and specific, which was necessary in view of the prior art. Counsel for complainant in their brief say:

"When we compare the Willey patent structure with the 30 or more patents of the prior art, and the half dozen Kimman drills that were discussed by defendants' expert, we see that it is much simpler in construction than any of them. * * * Evidently the inventor, Willey, was not the first to think of the desirability of an electric drill, for not less than 10 of the patents referred to by Mr. Haesseler purport to show electric drills. But we maintain that Willey was the first to invent a practical and successful electric drill; the fact is well established that he was the first to put such a drill on the market. Of course, drills were old in the prior art—drills operated by hand and operated by power, as from a flexible belt. To drive an old drill by an old electric motor would not be invention, unless some peculiar simplification or combination of elements were effected."

Mr. Carter, complainant's expert, also says:

"Now, the construction, as I understand it, which is set forth in claim 2 is not merely the application of electric power to a drill, but it is a specifically convenient tool, convenient in structure, convenient and simple in structure and for purposes of manufacturing, convenient to take down and inspect and repair and to restore after such inspection, convenient to manipulate when completed, and offering those advantages which come from offsetting the spindle, the drilling spindle, so as to get the drilling spindle at one side, particularly for work in corners and up against closely adjacent surfaces."

It is urged that the patent is a valid one for the same reasons which influenced the Supreme Court in the case of the Grant tire. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. The patent in that case was a highly specific one, as in this, but the difference between them is that the Grant tire was the final form in which it was possible to produce a rubber tire for vehicles. It cannot be practically departed from in any possible way. The Supreme Court said of the Grant tire that the coaction of its parts was so dependent upon their shape and relation that any alteration destroys their co-operation and the utility of the tire. This seems to be one of the chief reasons why the patent in that case was sustained.

However, the patent in this case may be sustained as a specific development in an old art, so that any later machine made exactly in the form of the Willey drill might be held an infringement. It may be said that Willey discovered deficiencies in the prior devices and pointed out the means of overcoming them, and that this was an exercise of the inventive faculty. General Electric Co. v. Sangamo Electric Co., 174 Fed. 246, 98 C. C. A. 154.

On the question of infringement it appears that the Willey drill and the Smith drill, which is used by defendants and claimed to be an infringement, were produced about the same time. It is clear, however, from the testimony, that the Willey drill was complete as early as the 17th of June, 1901, while the testimony in regard to the Smith drill is not clear enough to make it earlier than this date. The defendants' drill is slightly different from complainant's. The front

head is not secured directly to the main casing, but a disk or circular plate is interposed between it and the casing. The function of this disk is to support the armature shaft, and also to form a grease or lubricant chamber for the gearing. Then as to that part of the drill which is held against the body, the device of defendants has a body-piece which is not integral with the back head, but consists of a handle which is secured to the head in line with the armature axis, and adjustable on the head, so that the handle or body-piece can be turned to any position desired in operation. Thus the body-piece may be brought in defendants' machine out of line with the drill-thimble, while in the Willey drill it is always in such direct line.

It is true that these differences are not very great, but the patent in suit is so narrow that I think they should be held to distinguish it. I think, also, that this is a case where two persons have adopted different forms of a device in a highly developed art, and that each is entitled to his own specific form.

The question of validity is, indeed, a very doubtful one. See Milwaukee Bronze Casting Co. v. Avery et al., 209 Fed. 616, 126 C. C. A. 572; Standard Electric Works v. Manhattan Electrical Supply Co., 212 Fed. 944, 129 C. C. A. 464.

There should be a decree dismissing the bill for want of equity.

UNITED STATES v. NASHVILLE, C. & ST. L. RY.

(District Court, M. D. Tennessee. Nashville Division. September 4, 1914.)

No. 1138.

1. MANDAMUS (§ 165*)—HEARING—MOTION FOR ISSUANCE OF WRIT.

Where a motion for the issuance of a writ of mandamus followed literally the prayer of the petition, and was heard on the petition and supporting affidavit, the answer, and a copy of the order of the Interstate Commerce Commission, to enforce which the writ was desired, the motion was equivalent to a demurrer to the answer, and admitted the truth of all averments of fact well pleaded therein.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 360½-364; Dec. Dig. § 165.*]

2. COURTS (§ 265*)—FEDERAL COURTS—ORIGINAL JURISDICTION—ISSUANCE OF MANDAMUS.

In the absence of statutory authority, the District Courts of the United States cannot issue mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights in aid of a jurisdiction previously acquired by the court for other purposes.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 802-805, 1353; Dec. Dig. § 265.*]

3. STATUTES (§ 23*)—SENATE RESOLUTIONS—FORCE AND EFFECT—INTERSTATE COMMERCE COMMISSION—AUTHORITY.

A resolution of the United States Senate, adopted November 6, 1913, directing the Interstate Commerce Commission to investigate and report to the Senate the relations existing between defendant and another railroad, and the relations and conduct of those and other railroads in respect to various matters set out in the resolution, including the matter of free passes issued by defendant after January 1, 1911, to public offi-

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

cials or at their request, etc., not having been concurred in by the House of Representatives nor approved by the President, was not a law of the United States, and did not enlarge the jurisdiction of the Commission to inspect the records and correspondence of defendant company, conferred by the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 26, 27; Dec. Dig. § 23.*]

4. MANDAMUS (§ 129*) — INTERSTATE COMMERCE COMMISSION — COMPELLING CARRIER TO PRODUCE CORRESPONDENCE—STATUTES.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 12, 24 Stat. 383 (U. S. Comp. St. 1901, p. 3162), confers on the Interstate Commerce Commission the right to obtain information from carriers engaged in interstate commerce and to compel by subpœna witnesses to testify and produce documentary evidence. Section 20, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), authorizes the Commission to require sworn reports of the receipts and expenditures of carriers with reference to specified matters, including information relating to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same, and to require specific answers to questions, and provides that the Commission shall have direct access to the accounts, records, and memoranda kept by the carriers and may inspect the same through examiners. It also provides that the Commission, in its discretion, may prescribe forms for any and all accounts, records, and memoranda to be kept by carriers, subject to the provisions of the act, which the Commission's agents and examiners are authorized to inspect, etc. *Held*, that the "accounts, records, and memoranda" of carriers to which the Commission is given access and the right of examination by section 20 are those, the form of which the Commission is, by the preceding sentence, authorized to prescribe, and that the phrase "accounts, records, and memoranda," as used in such section, does not relate to or include correspondence or other original papers or documents in the possession of carriers, constituting part of their business acts and transactions, which correspondence the carriers are not required to disclose to the Commission's examiners, and an inspection of which can be obtained by the Commission only by subpœna in the instances and for the purposes within the provisions of section 12.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 264; Dec. Dig. § 129.*]

On motion by the United States for a writ of mandamus against the Nashville, Chattanooga & St. Louis Railway to compel defendant to disclose to examiners employed by the Interstate Commerce Commission correspondence received by defendant and copies of correspondence sent by it and the indices pertaining to the same, etc. Writ denied.

Abram M. Tillman, former U. S. Atty., and Lee Douglas, U. S. Atty., both of Nashville, Tenn., for petitioner.

P. J. Farrell, of Washington, D. C., for Interstate Commerce Commission.

Claude Waller, of Nashville, Tenn., W. B. Lamb, of Fayetteville, Tenn., and Helm Bruce, of Louisville, Ky., for defendant.

SANFORD, District Judge. The plaintiff's verified petition for a writ of mandamus alleged that this suit was instituted by the district attorney, under the direction of the Attorney General and at the

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

request of the Interstate Commerce Commission; that the defendant is a common carrier engaged in interstate commerce and subject to the Interstate Commerce Act; that the Commission is, under sections 12 and 20 of said Act, as amended, vested with certain powers and charged with certain duties as set forth in the petition, including, under section 20, the right, at all times, to have "access to all accounts, records and memoranda" kept by carriers subject to the Act and to "employ special agents, or examiners who shall have authority under the order of the Commission to inspect and examine" any and all of the same; that on November 6, 1913, the Senate of the United States adopted a certain resolution set forth in the petition (which fully appears in United States v. Louisville Railroad [D. C.] 212 Fed. 486, 489), whereby, in thirteen separate paragraphs, the Commission was directed to investigate and report to the Senate as to the relations between the defendant and the Louisville & Nashville Railroad and the relation and conduct of these and other railroads in respect to various matters set out in the resolution, including, in the last paragraph, the number of free passes issued by the defendant, since January 1, 1911, to public officials, or at their request, with the total mileage and money value thereof; that the Commission for the purpose of enabling it to perform the duties imposed upon it by the Act had appointed two special agents and examiners and "duly authorized them to inspect the accounts, records and memoranda" of the defendant; that on February 6, 1914, the Commission, through one of said agents and examiners, had applied to the defendant "for access to and opportunity to examine the accounts, records and memoranda kept by said defendant, including the correspondence received by said defendant and copies of correspondence sent by said defendant and also the indices pertaining to said correspondence and copies; that the defendant had failed and refused to give the Commission or its said agent and examiner, access to or opportunity to examine the same, "namely, said correspondence and copies of correspondence and indexes thereto;" that in many instances the only detailed account, record and memorandum of a transaction relating to the defendant's business as a common carrier kept by it, is contained in the said correspondence and copies; and that "in pursuance of said Commission's duty under the law, and in obedience to said resolution of the Senate hereinabove set out, and to enable said Commission to perform the functions for which it was created," it was the duty of the Commission to obtain access to and examine through said agents and examiners all of said accounts, records and memoranda, including said correspondence, copies and indexes, and the duty of the defendant to give it and them such access and opportunity of inspection. Wherefore, the plaintiff prayed the court to issue a writ of mandamus commanding the defendant to comply with said provisions of the Interstate Commerce Act, and to give the Commission, its agents and examiners, access to its accounts, records and memoranda, including said correspondence, copies and indexes, and opportunity to examine the same, and "also opportunity to inspect and examine any and all other accounts, records and memoranda, including correspondence, copies of

correspondence, indexes to such correspondence and other indexes kept by said defendant," and for general relief.

The affidavit of said special agent and examiner, which was filed with the petition, set forth the demand made by him upon the defendant for access to and opportunity to examine its accounts, records and memoranda, including said correspondence, copies and indexes, and the refusal of the defendant to give him, as such special agent and examiner, either access to or opportunity to inspect and examine the same, "namely, said correspondence and copies of correspondence and indexes thereto."

The defendant's verified answer alleged that on November 10, 1913, the Commission had passed an order, set forth in the petition, instituting an investigation concerning the matters set forth in said Senate resolution, which was served upon the defendant and "is the order of the Commission for the examination mentioned in the petition"; that about February 2, 1914, two examiners of the Commission had reported at the defendant's offices and were given access to its "accounts, records and memoranda" as contemplated in section 20 of the Interstate Commerce Act; that they subsequently demanded the privilege of examining all papers relating to the issuance of free transportation, and, while the defendant did not recognize their authority to inspect said papers, it had nevertheless complied with said demand and furnished them the list of those to whom annual passes had been issued, the stubs showing to whom trip passes had been issued, and all correspondence relating thereto; that about February 6, 1914, one of said examiners applied to the defendant for complete and unlimited access to and opportunity to examine the general correspondence files and indexes pertaining thereto, in the offices of the President and General Manager, the Vice-President and Traffic Manager, and other officers and agents of the defendant; that this application and demand was refused; that said examiner made no demand for any special or particular files of correspondence, but his demand was a general one to have complete, full and unlimited access to the correspondence files and their indices, and this was the only demand of said examiner which was refused by defendant; that the "accounts, records and memoranda" to which the examiners were given access under section 20 of the Act did not embrace such correspondence or indices; that the defendant's general correspondence files contained private and confidential communications between its various officers and agents relative to its internal affairs, its proposed constructions and extensions, and a variety of other subjects of a private and confidential nature which did not in any way relate to the provisions of the Interstate Commerce Act or any other Act as to whose enforcement any duty had been imposed upon the Commission, and also contained confidential, private and privileged communications between the defendant and its attorneys; that the only detailed account, record and memorandum of a transaction relative to its business as a common carrier was not in many instances contained in such correspondence and copies; that it was not the duty of the Commission to obtain access to or examine, through its agents and examiners, defend-

ant's said correspondence, copies of correspondence and indices and not the duty of the defendant to give said examiners access thereto; that the first twelve paragraphs of said Senate resolution, as embraced in the aforesaid order of the Commission, involve matters wholly foreign to the authority, duties and obligations of the Commission under the Interstate Commerce Act, and are beyond the purview and jurisdiction of the Commission and pertain wholly to the enforcement of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), as to which there is no duty imposed upon the Commission; that four of said paragraphs pertain to matters as to which the defendant is in no way concerned or connected; that as to the inquiries made in the thirteenth paragraph in regard to passes, the defendant had furnished information to the examiners, as stated; that section 20 of the Interstate Commerce Commission Act authorized the Commission to prescribe the forms of any and all "accounts, records and memoranda" to be kept by carriers subject thereto, and that, under said provision, the Commission had prescribed a uniform system of railway accounting, including orders as to the Classification of Operating Expenses, of Expenditures for Road and Equipment, of Revenues and Expenses for outside Operations, of Locomotive Miles, Car Miles and Train Miles, and of Expenditures for Additions and Betterments, and Forms of General Balance Sheet Statement and of Income and Profit and Loss Statement, and had thereby prescribed in detail a general accounting system for all carriers subject to the Act; that the defendant had complied with all the forms that had been prescribed by the Commission, and the Commission and its examiners had had full and complete access to same; that the Commission had never undertaken to prescribe any forms for correspondence between officials of the various departments of the defendant, or between such officials and officials of other carriers or the general public, and that obviously forms for correspondence could not be prescribed; that said Senate resolution could not confer upon the Commission or its examiners any authority which the Commission did not have under the Interstate Commerce Act and its amendments; that the demand for a general inspection of all the defendant's indices and correspondence was in violation of the provision of the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures; and that if the Interstate Commerce Act should be construed as conferring upon the Commission and its examiners the authority to have access to all such correspondence files and indices, it is unconstitutional and in violation of said amendment.

[1] The motion for the issuance of a writ of mandamus, which follows literally the prayer of the petition, was heard upon the petition and supporting affidavit, the answer, and a copy of the Commission's order of November 10, 1913, instituting an investigation of the matters set forth in the Senate resolution. Being thus heard upon the pleadings the motion is equivalent to a demurrer to the answer, and admits, for present purposes, the truth of all averments of fact well pleaded therein. Merrill v. County Treasurer, 61 Mich. 95, 97, 27 N. W. 866; Beard v. Board of Supervisors, 51 Miss. 542, 544; Ward v.

Flood, 48 Cal. 36, 46, 17 Am. Rep. 405; State v. Adams, 161 Mo. 349, 362, 61 S. W. 894; Harris v. State, 96 Tenn. 496, 513, 34 S. W. 1017; High, Extra. Leg. Rem. (3d Ed.) § 527, p. 490. And see Matter of Steinway, 159 N. Y. 250, 254, 53 N. E. 1103, 45 L. R. A. 461.

It is to be noted, at the outset, that neither the petition nor supporting affidavit alleges, in effect, any refusal by the defendant to give the examiner access to any of its "accounts, records and memoranda" other than correspondence received, copies of correspondence sent and the indices thereto. And since the answer alleges that the Commission and its examiners have had complete access to all the defendant's "accounts, records and memoranda" kept in accordance with the forms prescribed by the Commission, and that the examiners have also been furnished with all correspondence relating to the issuance of passes, and that the only demand made by the examiner which the defendant refused was a "general" demand to have "complete, full and unlimited access" to its general correspondence files and the indices thereto (a fact which was not denied at the hearing), it is clear that the sole issue now presented is as to the plaintiff's right to a writ of mandamus compelling the defendant to allow such unlimited access to its general correspondence.

[2] It is well settled that in the absence of statutory authority, the district courts of the United States cannot issue a writ of mandamus, as an original and independent remedy, and are limited to its use as a process in the enforcement of rights in aid of a jurisdiction previously acquired by the court for other purposes. Heine v. Levee Commissioners, 19 Wall. 655, 660, 22 L. Ed. 223; Smith v. Bourbon County, 127 U. S. 105, 112, 8 Sup. Ct. 1043, 32 L. Ed. 73; United States v. Louisville Railroad (D. C.) 212 Fed. 492. The plaintiff's right to the issuance of the writ in the present case must therefore rest, if it exists at all, upon the provision in section 20 of the Interstate Commerce Act that the district courts of the United States "shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to Regulate Commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them."

[3] It is earnestly insisted by the defendant, in limine, that under the general averments of the petition (which nowhere specifically alleges that the Commission has by any "order" authorized its agents and examiners to inspect the defendant's accounts, records and memoranda for any purpose coming within the provisions of the Interstate Commerce Act, or states the specific objects of the examination of the defendant's correspondence sought to be made by the examiners), and in view of the allegation in the answer that the order of the Commission instituting an investigation into the matters set forth in the Senate resolution (which does not direct any investiga-

tion by means of examiners), it must be held, under the rule of pleadings above stated, that the sole order of the Commission authorizing the examiners to inspect the defendant's correspondence is one made for the purpose of carrying out the investigation directed by the Senate resolution, and that as this resolution is not a law of the United States and does not enlarge in any manner the authority or jurisdiction of the Commission under the Interstate Commerce Act, the defendant's refusal to permit an examination of its correspondence under such order and for such purpose would not, in any event, be a violation of any provision of the Act, and that, hence, all other questions aside, there would be no authority under section 20 of the Act for the issuance of a writ of mandamus as prayed. Without, however, determining this question, which depends primarily upon a narrow question of pleading, whose solution is rendered unsatisfactory by the somewhat general and vague nature of the allegations of both the petition and answer, I think it proper, in view of the importance of the question involved on the merits of the case, to proceed to its consideration, upon the assumption, for present purposes, that, upon this motion, it sufficiently appears that the examiner to whom access to the defendant's general correspondence was refused, had, by proper order of the Commission, been duly authorized to inspect the accounts, records and memoranda of the defendant for the double purpose of performing the general duties devolving upon the Commission under the Interstate Commerce Act and of making the specific investigation directed by the Senate resolution. It is clear, however, that the Senate resolution, which does not appear either to have been concurred in by the House of Representatives or approved by the President, is not a law of the United States, and does not, as was conceded at the hearing, enlarge in any manner the authority or jurisdiction of the Commission under the Interstate Commerce Act. United States v. Louisville Railroad (D. C.) 212 Fed. 492. Obviously, therefore, in so far as the examination sought to be made by the Commission for the purpose of carrying out the investigation directed by the Senate resolution did not fall within the general authority of the Commission, independently of such resolution, the defendant's refusal to permit an examination of its correspondence for such purpose, would not be a failure to comply with any provision of the Interstate Commerce Act or a violation thereof, or constitute a ground for the issuance of the writ of mandamus herein. United States v. Louisville Railroad (D. C.) 212 Fed. 492. And, in its ultimate analysis, the plaintiff's right to the issuance of the writ must hence, in this aspect of the case, depend upon the question whether, under the Interstate Commerce Act, the Commission is authorized in the general performance of its duties to obtain, through its duly authorized examiners, access to the general correspondence of the defendant and opportunity to examine same, and, consequently, whether in denying such access and opportunity for examination, the defendant has violated any provisions of said Act. If so, independently of other considerations, the plaintiff is entitled to the writ of mandamus; otherwise not.

[4] The provisions of sections 12 and 20 of the Interstate Commerce Act, in so far as pertinent to the consideration of this question, are, in substance, as follows:

Section 12 of the Act, as amended, provides:

"That the Commission * * * shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement * * * of this Act and for the punishment of all violations thereof * * *; and for the purposes of this Act the Commission shall have the power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, tariffs, contracts, agreements, and documents relating to any matter under investigation. * * * And in case of disobedience to a subpœna the Commission * * * may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

Section 20 of the Act, as amended, authorized the Commission to require annual reports, under oath, from all common carriers subject to the Act, which shall show in detail their receipts and expenditures and various other specified matters and "also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require"; to "prescribe the manner in which such reports shall be made and to require from such carriers specific answers to all questions upon which the Commission may need information; and also to require any or all of said carriers, by general or special orders, to file periodical or special reports, under oath, "concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce"; the failure to file said annual reports, or any such periodical or special report or to make specific answer to any such authorized question, within the time required, subjecting the carrier to a forfeiture of one hundred dollars for each day of default.

Section 20 (as amended by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 593) further provides that "the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. * * * The Commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records and memoranda of the move-

ments of traffic, as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed or approved by the Commission; and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records and memoranda kept by such carriers. * * * In case of failure or refusal on the part of any such carrier * * * to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners," such carrier shall forfeit five hundred dollars for each day of the continuance of such offense. "Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or * * * falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor" and shall be subject to a fine of from one thousand to five thousand dollars or imprisonment from one to three years, or both; "provided" (as amended by the Act of February 25, 1909, c. 193, 35 Stat. 649), "that the Commission may at its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

It will be observed that these sections deal with several separate and distinct matters, namely, the right of the Commission, under section 12, to obtain "information" from the carriers, and to compel, by subpœna, witnesses to testify and produce documentary evidence; its right, under section 20, to require the carriers to file annual, periodical or special reports concerning matters within the scope of the Commission's duties, and to require specific answers to questions; and, finally, under section 20, its right, to have direct access to the "accounts, records and memoranda" kept by the carriers and to inspect the same through its examiners. All of these provisions, however, except the last, relate either to information furnished to the Commission by the carriers, through reports or answers, or to information obtained by it through the process of subpœna; and only the last relates to its right of direct access to records in the possession of the carriers for the purpose of an independent examination. The present case involves only the extent of the last mentioned right; and the crucial question is as to the true scope and meaning of the words "accounts, records and memoranda" as used in this clause of section 20 of the Act.

The provisions of this section of the Act in reference to the "accounts, records and memoranda" to be kept by common carriers are to be construed in the light of the well-settled principles governing the construction of statutes in derogation of the common law and of a penal nature; and they are to be read not only in connection with the other provisions of the Act, above mentioned, in reference to the obtaining of information by the Commission through other methods than direct examination, in which broad language is used in marked contrast to the limited phrase "accounts, records and memoranda," but also, in such manner that, if reasonably possible, these words may be given the same meaning wherever used, and a harmonious and consistent construction given to the several provisions of the Act in reference thereto.

After careful consideration, I have reached the conclusion that the "accounts, records and memoranda" of common carriers to which the Commission is given the right of access and examination are those whose form it is, by the sentence immediately preceding, authorized to prescribe; and that the phrase "accounts, records and memoranda" as used in this section of the Act does not relate to correspondence or other original papers or documents in the possession of the carriers, constituting part of their business acts and transactions, but to the records of such acts and transactions, including the movements of traffic as well as accounts of receipts and expenditures, which the carriers are required to enter "on the books and in the manner" and forms which the Commission may prescribe, constituting book entries of their acts and transactions, in the nature of a general system of accounting, which shall be at all times subject to inspection and examination by the Commission.

In Harriman v. United States, 211 U. S. 407, 421, 29 Sup. Ct. 115, 53 L. Ed. 253, such "accounts, records and memoranda" are referred to, in general terms, as "accounts"; in Interstate Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729, they are variously designated as "a system of accounting" provided in the orders of the Commission (p. 211), "accounts to be kept in a uniform way and to be open to the inspection of the Commission" (p. 211), "accounts" (p. 211) and a "general form of accounting" (p. 212); and in Kansas City Railway v. United States, 231 U. S. 423, 34 Sup. Ct. 125, 131 (58 L. Ed. 296), reference is made to the "declared object of standardizing railroad accounts" (p. 440) and to the purpose manifested by Congress "to standardize and render uniform the accounts of the different carriers both with respect to matters that entered into property and the improvements thereof, on the one hand, and the current operations of the company, on the other" (p. 442).

It further appears that all of the provisions in question in reference to the "accounts, records and memoranda" of common carriers, which were incorporated by the Act of 1906 as an amendment to the Interstate Commerce Act, are derived, in literal and exact terms, from the draft of a bill submitted to Congress by the Commission, in 1905, the passage of which it recommended; and that in recommending to Congress the adoption of this amendment the Commission entitled that

portion of its report dealing with this matter "*Examination of Books of Account,*" and under this heading, said:

"An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe the form in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants. This recommendation has been urged upon the attention of Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this toward the detection and punishment of rebates or kindred wrong-doing." (Nineteenth Annual Report of Interstate Commerce Commission, 1905, at pp. 11, 177 and 182.)

I cannot believe that Congress in adopting the amendment thus recommended for the purpose of giving the Commission authority "to prescribe the form in which books of accounts shall be kept by railways" and to examine "such books" at all times through expert accountants, contemplated that such amendment would give the Commission the right of free and unlimited access at all times, to the entire general correspondence of the railways, upon all subjects whatsoever, however remote from the purposes of the Act or foreign to the province of the Commission, and including, it is to be noted, letters sent to the carriers by their correspondents, as to which the Commission could obviously prescribe no form. There are in the Act as thus amended, no words indicating this intention on the part of Congress, such as a general provision giving the Commission the right to inspect all correspondence of carriers subject to the Act, or all their books, papers and documents, or other apt words of general and unrestricted import; and nothing, in short, that in my opinion, indicates or suggests such intention. I am therefore constrained to conclude that such right of examination of the general correspondence of the carriers is not conferred upon the Commission by section 20 of this Act; although the inspection thereof may be obtained by the Commission under writ of subpœna in the instances and for the purposes coming within the provisions of section 12 of the Act. See Harriman v. United States, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253. And while apparently the effect of the proviso incorporated in section 20 of the Act by the Act of 1909, is to confer upon the Commission, by implication, the additional right to examine such "records, books, blanks, tickets, stubs or documents" of a carrier, relating to "operating, accounting, or financial" matters, as it may, by orders require to be preserved, this obviously does not confer upon the Commission any right to inspect a carrier's general correspondence which is neither alleged nor shown to contain any accounts of this character.

It therefore follows that, in the instant case, the defendant in refusing the examiner access to its general correspondence files, as demanded by him, neither failed to comply with, nor violated, any provision of the Interstate Commerce Act or of its amendments; and hence the plaintiff is, all other considerations aside, not entitled under the Act, to the writ of mandamus sought.

Being of opinion that, for this reason, the plaintiff is not entitled to the issuance of a writ of mandamus to compel the inspection of the defendant's correspondence, it is hence unnecessary to determine

whether, if otherwise entitled, such writ should, in the instant case, be denied, in the exercise of the discretion vested in the court in the granting of a writ of this character, either upon the ground that the examination appears to be sought, in part at least, for an unauthorized purpose, that is, the investigation of many matters set forth in the Senate resolution, which, it is insisted, are entirely beyond the scope of the Commission's authority; or because of the broad and sweeping character of the demand made upon the defendant, overstepping, it is insisted, the limits of a reasonable search. See 26 Cyc. 147, 150; United States v. Louisville Railroad (D. C.) 212 Fed. 494.

For the reasons stated, however, an order will be entered denying the plaintiff's motion for the issuance of the writ.

PUGET SOUND TRACTION, LIGHT & POWER CO. v. CITY OF TACOMA.

(District Court, W. D. Washington, S. D. September 19, 1914.)

No. 16.

1. INJUNCTION (§ 136*)—PRELIMINARY INJUNCTION—RIGHT TO REMEDY.
An electric company is not entitled to a preliminary injunction to restrain a city from asserting its right to certain poles and wires claimed by both parties, nor to restrain enforcement of an ordinance requiring complainant to place its wires underground, where no force or violence is threatened in either case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

2. ELECTRICITY (§ 9*)—ELECTRIC COMPANIES—ORDINANCE REQUIRING PLACING OF WIRES UNDERGROUND—CONSTRUCTION.
A city ordinance passed June 11th, requiring an electric company to place all its wires constructed after May 1st preceding underground, *held* not to apply to lines which had been purchased by the company after May 1st from another company, which had constructed the same in accordance with the ordinance then in force.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 4; Dec. Dig. § 9.*]

3. ELECTRICITY (§ 9*)—ELECTRIC COMPANIES—FRANCHISE—POWERS RESERVED BY CITY—"CORPORATION."
An ordinance granting a franchise to an electric company provided that the city should have the right at any time to require it to place its wires underground, but that it should not be required except on the same streets and to the same extent as the wires "of all other persons or corporations used to transmit electricity" were required to be placed underground. Throughout the ordinance the city was referred to as "the city." *Held*, that the word "corporations," as used in such provision, did not include the city, and the fact that the city itself maintained wires above ground did not invalidate an ordinance requiring the company to place its wires underground.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 4; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, First and Second Series, Corporation.]

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

4. LIS PENDENS (§ 11*)—PERSONS BOUND—PURCHASERS PENDENTE LITE—EFFECT OF SUPERSEDEAS.

An electric company brought suit in a state court to enjoin a city from forfeiting its franchise, the result being a decree adjudging a forfeiture, that the company was no longer entitled to exercise any privilege thereunder "except to remove its poles, lines, wires, and other property from the streets of the city," and that unless so removed within 60 days the same should be the property of the city, as provided in the franchise ordinance. Pending an appeal by the company, the court granted a supersedeas, containing a provision that "all proceedings under said judgment shall be stayed, and said judgment shall not become effective pending the said appeal to the Supreme Court. It is the intention of this order that the running of the 60-day period, allowed for the removal of the poles and wires from the streets, should be suspended during the pendency of this appeal." *Held*, that the effect of such order was only to stay affirmative action on the judgment pending the appeal, and that on its affirmance it became in full force and effect; that another company, which bought the poles, wires, etc., from the plaintiff pending the appeal, obtained no greater rights than the seller, and only the right to remove the same within the time given by the decree.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 28-30; Dec. Dig. § 11.*]

In Equity. Suit by the Puget Sound Traction, Light & Power Company against the City of Tacoma. On motion for preliminary injunction. Denied.

James B. Howe, of Seattle, Wash., J. A. Shackleford, of Tacoma, Wash., and Hugh A. Tait, of Seattle, Wash., for complainant.

T. L. Stiles and Frank M. Carnahan, both of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. Application is made by complainant for a temporary injunction, restraining the defendant from enforcing a certain ordinance requiring the complainant to put its wires underground, and further restraining the defendant from interfering with or taking possession of certain wires and poles, alleged to have been purchased by complainant from the Tacoma Railway & Power Company.

In 1904 and 1905 identical franchises were granted by the city of Tacoma—one to the Seattle-Tacoma Power Company, complainant's grantor, and the other to the Tacoma Railway & Power Company, also complainant's grantor of the poles and wires in question in this suit. By these franchises the usual privileges in the streets and alleys were granted for the installation and maintenance of poles and wires to transmit electricity for the purpose of furnishing heat and power within the city of Tacoma.

The ordinance granting the franchise to the Tacoma Railway & Power Company provided that the Tacoma Railway & Power Company should not have any right, by virtue of said ordinance, to supply electric current to be used, directly or indirectly, for lighting purposes, except current for lighting street cars, and—

"Section 2. That each and every right, privilege and authority and franchise by this ordinance granted, shall without the passage of any resolution, ordinance or any action of any kind whatsoever, on the part of the city of

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

Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns, to perform any and all of the conditions in the ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the commissioner of public works of said city, under the directions and authority of the city council of said city to the effect that said city will, if said failure is not corrected before the expiration of thirty days from the serving of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the conditions herein, the said grantee, its successors or assigns, shall also forfeit and surrender to the city of Tacoma all poles, lines, wires, or other property that may be located or constructed in pursuance hereof, within the city of Tacoma, unless the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said city of Tacoma."

It further provided that the stipulations in the ordinance should not prevent the city's granting the railway company, by special permit, the right to furnish electric current for lighting purposes, subject to the city charter and laws of the state, "such permit, however, to be revocable at any time at the option of the city."

In 1908, the Tacoma Railway & Power Company entered into a contract with the Northern Pacific to furnish the latter company electricity for power and lighting purposes at its depot and shops in the city of Tacoma. In April, 1913, the city, desiring to take over all the lighting business within its boundaries, by resolution revoked the permit which it had granted the Tacoma Railway & Power Company to furnish current for lighting purposes, in which resolution it is provided that, on and after April 15th of said year, it should cease furnishing current for such purposes.

On April 21st the council passed a resolution reciting that the Tacoma Railway & Power Company was continuing to supply such current for lighting purposes, and directing notice to be given such company that, in case of its failure to comply with the conditions of the ordinance, the city would claim a forfeiture of the franchise and the poles, wires, and other property, located or constructed in pursuance of the ordinance, unless the same should be removed within 60 days, specified in section 2.

The notice was served. The Tacoma Railway & Power Company declined to comply with the city's requirement, and in May of said year commenced an action in the superior court of the state, seeking to have the city enjoined from repealing the franchise ordinance and from asserting a forfeiture. The city answered, and by counterclaim prayed that the Tacoma Railway & Power Company be enjoined from furnishing power to be used, directly or indirectly, for lighting purposes, and that the franchise ordinance, and every right, privilege, and authority granted thereby, be forfeited and declared null and void.

A forfeiture of the franchise was adjudged and an injunction granted against the maintenance of lines for such purposes. It was further adjudged that the Tacoma Railway & Power Company be no longer entitled to exercise any privilege under it "except to remove its poles,

lines, wires, and other property from the streets of the city," and that, unless the Tacoma Railway & Power Company should, within 60 days after the entry of the decree, remove its poles, wires, and other property from the streets, alleys, and public places of the city, the same should be forfeited to, and be the property of the city of Tacoma.

At the time of the rendition of said decree the Tacoma Railway & Power Company gave notice of appeal, and the court thereupon ordered that, upon the giving of a supersedeas bond, proceedings under the judgment—

"shall be stayed, and that said judgment shall not become effective pending the said appeal to the Supreme Court. It is the intention of this order that the running of the 60-day period, allowed for the removal of the poles and wires from the streets, should be suspended during the pendency of the appeal."

The bond was given, and upon the appeal to the Supreme Court of the state the decree of forfeiture was affirmed on May 7, 1914. The petition for a rehearing was denied June 21, 1914, and the remittitur to the superior court, affirming said judgment, issued and was filed in the superior court on the 22d day of June, 1914.

On the 11th of that month, the Tacoma Railway & Power Company, it appears, sold and transferred all of its interest in the poles and wires in question, theretofore used in the distribution of electricity for power purposes under said franchise, to the complainant herein. Where poles supported wires, a portion of which were used for power and railway purposes, a half interest in such poles was transferred. Since such sale, the complainant has been supplying the former customers of the Tacoma Railway & Power Company with electric power, by use of the poles and wires so purchased.

On June 11, 1914, the city passed an ordinance requiring complainant to place all electric wires which it had constructed, or should construct after May 1, 1914, in underground conduits. Complainant and defendant each claim to own the poles and wires installed under the ordinance.

[1] It is asserted by complainant that the city threatens to forcibly disconnect the wires so purchased from the wires of complainant which transmit electricity to the wires so purchased, to destroy and remove such poles and forcibly disconnect the customers receiving electricity from complainant, and that complainant's damage, if such were permitted, would be in excess of $30,000.

The members of the city council each make affidavit, denying any threat or intent of proceeding with violence in taking possession of such poles and wires, and aver that it is not their intent to remove any of such poles and wires, except such as are unnecessary, but to take orderly and legal possession of them and use them in the prosecution of the city's business. Upon the hearing, assurance was given by the attorney for the city that the city intended only to secure from the state court a writ of assistance to carry into effect the judgment of forfeiture vesting the property in the city.

No contention is made that the city is threatening to interfere with any of complainant's property, in order to enforce the provisions of

the ordinance requiring it to put its wires underground. Complainant seeks to have this underground ordinance declared void, as arbitrary and unreasonable—as not affecting it in the matter of the poles and wires purchased, because only becoming effective after such purchase. It is further attacked upon the ground that it was not passed in good faith as a police measure, but in order to interfere with the transfer of the poles and wires purchased by complainant from the Tacoma Railway & Power Company, and to aid the city, as a business competitor of the complainant, by such hindrance.

If immediate force was threatened in carrying this ordinance into effect, to the irreparable damage of complainant, a temporary injunction might be proper to preserve the status quo. In the absence of such a showing, complainant is not entitled to this extraordinary relief.

This conclusion having been reached, it is not now necessary to consider the question of whether the ordinance was passed in good faith as a police regulation, or whether it is so arbitrary and unreasonable as to be void. There is one phase in which it is proper to consider the ordinance as bearing, not upon any threatened action or asserted right upon defendant's part, but as bearing upon the title and rights in this property of complainant.

The underground ordinance requires all wires constructed by complainant after May 1, 1914, to be put underground. The ordinance itself was not passed for six weeks after that day. The complainant did not, strictly speaking, construct these wires. It bought them, already installed, from the Tacoma Railway & Power Company.

It is contended that, as the Tacoma Railway & Power Company could, within 60 days after the decree of forfeiture becoming effective, have removed the poles and wires from the street, and, when removed, have sold them to the complainant, and the latter, under its franchise, could then have installed or constructed such wires in the streets as they now are, it is unreasonable to require the expenditure of thousands of dollars to accomplish this, when the same result is reached by its purchase from the Tacoma Railway & Power Company of the already installed wires; that such purchase is equivalent to construction.

[2] The question then remains whether the underground ordinance would not apply to such purchased wires as it did to wires actually constructed after May first. No question is made but that the wires were constructed—when originally placed—in accordance with the then effective ordinance. A reasonable construction of the ordinance is that it was only intended to apply to original construction and not to installed wires purchased, which had been constructed in accordance with the then existing ordinance.

[3] Complainant's franchise provides that the city should have the right at any time to require it to place all or any portion of its wires in underground conduits, except the main transmission lines, from where the same enter the corporate limits from the generating plants to the main distributing stations, but that it should not be required to place the poles and wires underground except upon the same street or alleys, or streets and alleys and to the same extent as the wires of

all other persons or corporations used to transmit electricity for power and heat are required to be placed underground.

It is contended by complainant that the city is a corporation; that it has not, and does not intend to, put its heat and power wires underground; that to require complainant so to do is contrary to the foregoing provision of its franchise.

In view of the conclusion reached, that the underground ordinance does not apply to the purchased poles and wires, it is not necessary to decide this question; but, in view of the earnestness with which it has been argued, it is deemed not improper to express the court's view.

Throughout the ordinance granting complainant's franchise the city is always spoken of as "the city" or the "city of Tacoma." This fact and the fact that, as ordinarily used and understood, the word "corporation" does not include cities, while they are, in fact, municipal corporations, render it clear that the words "persons or corporations" were not intended to include the city itself.

In Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353, by the franchise there in controversy the city agreed "not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville * * * for the full period of 30 years." It was held that the city was not, in the absence of special stipulations to that effect, precluded from establishing its own system of waterworks. The Knoxville Case was followed by this court in Washington-Oregon Corporation v. Chehalis (D. C.) 202 Fed. 591. The reasoning in the Knoxville Case cannot be distinguished from that controlling in the present case.

[4] The remaining and main question in the case is whether complainant acquired title, by its purchase from the Tacoma Railway & Power Company, after decree of forfeiture. The decree of forfeiture was self-executing, both as to the forfeiture of the franchise and the poles and wires in the streets, used thereunder. No further process was ordered or in contemplation.

It is not necessary to speculate or consider whether the decree effected a transfer of the title to this property as of the date of its rendition, or, by relation, as of the date of the company's refusal to comply with its franchise, for, in either event, it was long prior to complainant's acquiring any interest in it. Complainant asserts no interest, other than that it claims to have acquired from the Tacoma Railway & Power Company, and does not contend that it was an innocent purchaser, or had no notice of the proceedings resulting in the decree of forfeiture.

Nothing appears in the action of the court and the order made by it in granting the supersedeas to show that more was intended than to secure the appellant in its statutory rights under a supersedeas—to stay affirmative action upon the decree, but not to deprive it of any other force or effect. This to the end that the appellant should not be penalized for exercising its right of appeal; that, if it eventually won, it would not be a barren victory, after the city had removed its property from the street; that, if it finally lost, it would still be al-

lowed the 60-day period for the removing of said property from the city streets.

It is true that the order of supersedeas provided that the "said judgment shall not become effective pending the said appeal to the Supreme Court." It is likewise true that the transfer of the poles and wires in question from the Tacoma Railway & Power Company to complainant was made during the pendency of said appeal.

Standing alone, this language in the order might be susceptible of a very broad meaning, and necessitate the determination of the question whether a court could suspend all of the effects of its final judgment; but the language is not to be considered by itself. It was part of an order made upon appellant's motion for a stay and supersedeas of the judgment and proceedings thereunder. The language used occurred in the following connection:

"All proceedings under said judgment shall be stayed and said judgment shall not become effective pending the said appeal to the Supreme Court. It is the intention of this order that the running of the 60-day period allowed for the removal of the poles and wires from the streets should be suspended during the pendency of this appeal."

That nothing more than the usual supersedeas was intended is clearly apparent. The intention to annihilate the judgment cannot be attributed to the court from the use of this language. The language is not that the judgment shall not become effective "for any purpose," and the context shows for what purpose it was not to be effective—that is, as a basis of process commanding, or the taking of any affirmative action in its enforcement.

Indisputably the decree was of some effect, else an appeal could not have been based upon it. Almost as clear is it that such affirmative action alone was intended to be stayed, and that otherwise the judgment was to be given full effect as of its rendition. Rem. & Bal. Code, § 1722; Fawcett v. Court, 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894; State v. Stallcup, 15 Wash. 263, 41 Pac. 251; 2 Cyc. p. 908, note 53; State v. Court, 31 Wash. 481, 71 Pac. 1095; State v. Poindexter, 43 Wash. 147, 86 Pac. 176.

If there is any reason to modify the judgment of the state court and afford any escape from the forfeiture for which it provides, other than that decreed—the removal of the property—such modification can only be secured in the court decreeing it, or upon review in an appellate court, providing the state court had jurisdiction to pronounce the decree of forfeiture.

No question is made here but that the state court had such jurisdiction. No such question was raised in the state court. It was a court of general jurisdiction and the Tacoma Railway & Power Company, owning the franchise, poles, and wires, went into that court and asked a decree against forfeiture, the right to which the city was asserting. The city joined issue with that company and prayed a forfeiture, for which the decree was granted. As long as the poles and wires were not removed, they remained subject to the decree of forfeiture, and the only way to free them from it and render them subject to sale,

unaffected thereby, was to remove them from the streets, for which the decree itself made provision.

Complainant, in support of its contention that it would be unreasonable to require the removal of this property from the streets in order to enable the Tacoma Railway & Power Company to effectually transfer them to complainant, relies upon the case of Wood v. Seattle, 23 Wash. 116, 62 Pac. 135, 140 (52 L. R. A. 369), wherein it was said:

"We think counsel have attached undue importance to this provision of the proposed ordinance. Had it not been provided that the existing railways, on the surrender of the franchises under which they are being operated, shall be deemed new construction, to the extent that they shall be made to conform to the requirements of the proposed ordinance, this would have been the effect of the ordinance in any event. Without this provision, all the city could have required would have been a street railway constructed in accordance with the requirements of the ordinance. It reserved no right to dictate from whom the material used in the construction of the railway should be purchased, nor what particular material should be used in that construction. These matters were left to the discretion of the purchasers of the franchise. If, then, they purchased a railway track which complied with the terms of the ordinance, on what theory could the city have prohibited its use? Must the idle ceremony of tearing it up and relaying it be gone through with? It would seem not; and much less would it seem that the grant of a franchise accompanied by permission to do a particular thing, which the grantee may lawfully do without such permission, would change the nature of the grant."

The reasoning of the foregoing would be apposite, and complainant's position persuasive, if it were not for the fact that, by the decree itself, claimant was, in default of the removal of the poles and wires, not only deprived of all title thereto, but by such default complainant's title vested in the city. This beneficial interest to vest in the city upon such default, prevents title being acquired by complainant, other than in the manner expressly left open by the decree and contract, or ordinance upon which it was based. Exact compliance, under such circumstances, could not correctly be styled an "idle ceremony."

The foregoing propositions are so clearly apparent that there is no warrant for withholding a ruling thereon until the final hearing and further preserving the status quo.

The petition for a temporary injunction is denied.

KERN TRADING & OIL CO. et al. v. ASSOCIATED PIPE LINE CO. et al.

(District Court, N. D. California, S. D. September 14, 1914.)

No. 35.

1. COURTS (§ 508*)—JURISDICTION OF FEDERAL COURT OF EQUITY—ENJOINING ACTION BY STATE COMMISSION.

A federal court of equity will not enjoin a state commission from taking action against a corporation under a statute of the state, on the ground that such action will be a violation of the corporation's constitutional rights, where the statute gives it the right to have any action by the commission reviewed by the highest court of the state, unless some exceptional necessity is shown.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*]

2. CONSTITUTIONAL LAW (§ 247*)—COURTS (§ 508*)—DENIAL OF "EQUAL PROTECTION OF THE LAW"—EXCESSIVE PENALTIES FOR EXERCISE OF LEGAL RIGHT—JURISDICTION OF FEDERAL COURTS—ENJOINING ACTION BY STATE COMMISSION.

In such case, however, where the statute also subjects the corporation and its officers and employés to such excessive and cumulative penalties for disobedience of the orders of the commission as to deter it from exercising its right of legal review, a federal court will enjoin enforcement of such provisions pending the legal proceedings, on the ground that they are unconstitutional, as denying the corporation the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 247;* Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. § 508.*

For other definitions, see Words and Phrases, First and Second Series, Equal Protection of the Law.]

In Equity. Suit by the Kern Trading & Oil Company and the Associated Oil Company against the Associated Pipe Line Company, Ulysses S. Webb, Attorney General of the State of California, John M. Eshleman, Harvey D. Loveland, Alex. Gordon, Edwin O. Edgerton, and Max Thelen, constituting the Railroad Commission of the State of California, and Max Thelen, attorney for the Railroad Commission of the State of California. On motion for preliminary injunction. Granted in part.

Stanley Moore, Edmund Tauszky, and Henley C. Booth, all of San Francisco, Cal., for plaintiffs.

Max Thelen, of San Francisco, Cal., U. S. Webb, Atty. Gen. of California, and R. Benjamin and Douglas Brookman, both of San Francisco, Cal., for defendants.

Before GILBERT and MORROW, Circuit Judges, and DOOLING, District Judge.

DOOLING, District Judge. This is a bill in equity seeking to enjoin the defendant Associated Pipe Line Company from obeying, and the other defendants from enforcing, the so-called pipe line acts passed by the Legislature of the state of California at the session of 1913, and approved on June 4th of that year. The present proceeding is an

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

application for a temporary injunction. It appears from the bill, which is very voluminous, that the plaintiff corporations are the owners, each owning one-half, of all the stock of the defendant Associated Pipe Line Company, except a few shares, which are held by the directors of said defendant, for the purpose of enabling them to become such. The Associated Pipe Line Company is the owner of, and is operating, two pipe lines for the transportation of oil from the oil fields of California to Port Costa. One of these lines, known as the "rifled-pipe line," extends from Volcan, in the Kern River oil field, of Kern county, to Port Costa, in the county of Contra Costa, and is approximately 280 miles in length. For most of this distance it is laid along the right of way of the Southern Pacific Railroad Company and the Central Pacific Railway Company. The other line, known as the "hot line," extends from Port Costa, through the Coalinga, the McKittrick, and other oil fields, to Maricopa, in the Sunset Midway oil field of Kern county, a distance of 278.44 miles. From Port Costa to Mendota, a distance of 140.06 miles, this line is laid along the Southern Pacific Railroad right of way, and from Mendota to Maricopa along a pipe line right of way belonging to the defendant Associated Pipe Line Company, of which no portion was acquired by the exercise of the right of eminent domain. Each line crosses a number of public highways. All of the railroad rights of way mentioned are, by agreements with the Southern Pacific Railway Company and the Central Pacific Railway Company, under the control of and in use by the Southern Pacific Company, a third railroad corporation, which is engaged in interstate and intrastate transportation as a common carrier, and which owns all the stock of the other two, except a few shares held by the directors of each. Plaintiff Kern Trading & Oil Company was incorporated in 1903 by the Southern Pacific Company as its agent and instrumentality for the purpose of developing, handling, and furnishing to it fuel oil for its locomotives. The Southern Pacific Company also owns all the stock of the Kern Trading & Oil Company, except 25 shares held by the directors of the latter. The Kern Trading & Oil Company does not sell and has never sold any oil commercially, but all of the oil developed or acquired by it is and has been devoted to the use of the Southern Pacific Company for its railroad purposes. The Southern Pacific Company has advanced all the moneys, in amount more than $9,000,000, necessary for the Kern Trading & Oil Company, and all of the oil handled by the latter has been developed upon lands owned or controlled by the former. In 1907 the Kern Trading & Oil Company entered into a contract with its coplaintiff, Associated Oil Company, for the incorporation of defendant Associated Pipe Line Company, which is an operating company, for the construction and operating of oil pipe lines for the transportation of oil belonging to the other two companies, but not as a common carrier. The Associated Pipe Line Company was incorporated pursuant to this agreement, which also provided that the pipe lines constructed by it should be used exclusively for the movement of oil belonging to the other two companies in the proportion of their ownership of its stock. The capacity of the pipe lines of the defendant Associated Pipe Line Company is 38,000 barrels, of 42 gallons each, per day. Of this quantity 19,000 barrels

are transported for plaintiff Kern Trading & Oil Company for the use of the Southern Pacific Company, and 19,000 barrels are transported for the plaintiff Associated Oil Company, and sold by said plaintiff in this and other states and in foreign countries. Neither of the plaintiffs purchases any oil, but each develops the oil so transported upon its own lands, or upon lands under its control. These, broadly speaking, are the relations existing between the plaintiffs, and among the plaintiffs, the defendant Associated Pipe Line Company, and the Southern Pacific Company, as disclosed by the bill. The defendant U. S. Webb is the Attorney General of the state of California, and the defendants John M. Eshleman, Harvey D. Loveland, Alex. Gordon, Edwin O. Edgerton, and Max Thelen are the members of the Railroad Commission of said state; the defendant Max Thelen being also attorney for such commission. The Railroad Commission exercises its powers pursuant to the public utilities act, approved December 23, 1911, which provides, among other things:

That such commission is vested with power and jurisdiction to supervise and regulate every public utility; that it is the duty of the commission to see that the provisions of the Constitution and statutes affecting public utilities are enforced and obeyed, and violations thereof promptly prosecuted, and penalties due the state therefor recovered and collected; and that all penalties accruing under the act shall be cumulative, and the recovery of one penalty shall not be a bar to or affect any other penalty or forfeiture, or be a bar to any criminal prosecution against any public utility, or against any officer, director, agent, or employé thereof, or any other corporation or person, or be a bar to the exercise by the commission of its power to punish for contempt. It also provides that any public utility violating or failing to comply with any provision of the Constitution or of the act itself, or failing to obey any order, decision, decree, rule, direction, demand, or requirement of the commission, is subject to a penalty of not less than $500 nor more than $2,000 for each offense, and that every violation of the provisions of the act, or of any order, decision, decree, rule, direction, or requirement of the commission, or any part or portion thereof is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense. The act, omission, or failure of any officer, agent, or employé of any public utility, acting within the scope of his employment, is to be deemed the act, omission, or failure of such public utility. The officer, agent, or employé failing to obey any of the provisions of the act, or any order of the commission, is also guilty of a misdemeanor, and punishable by a fine not exceeding $1,000, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. In addition to these penalties the public utility and its agents are further liable to punishment for contempt. The act also provides that the commission may direct its attorney to bring an action in the superior court to have threatened violations of the requirements of the law or of the orders of the commission prevented, either by mandamus or injunction, and that appeals may be had to the Supreme Court of the state from any final judgment entered in such action. It is also made the duty of the Attorney Gen-

eral, and of the various district attorneys, upon the request of the commission, to aid in any investigation, and to prosecute actions for the enforcement of the Constitution and statutes affecting public utilities, and for the punishment of all violations thereof.

The so-called pipe line acts are three several acts passed, as stated, by the Legislature at its regular session in 1913, and all approved on the same day, June 4th, and being chapters 327, 285, and 286 of the Acts of 1913 (St. 1913, pp. 657, 523, 532). The first of these (chapter 327), known as the "declaratory act," declares to be a common carrier, and subject to the provisions of the public utilities act, every private corporation and every individual or association of individuals owning, operating, managing, or controlling any pipe line for the transportation of crude oil or petroleum, either directly or indirectly, to or for the public for hire, or consideration of any kind, or engaged directly or indirectly in the business of so transporting the same, or owning, operating, managing, or controlling any such pipe line for the transportation of oil, directly or indirectly to or for the public for hire, compensation, or consideration of any kind paid or received directly or indirectly for such transportation, and which line is constructed or maintained upon, along, over, or under any public highway, and in favor of whom the right of eminent domain exists, or which is constructed or maintained across, upon, along, over, or under the right of way of any railroad corporation or other common carrier required by law to transport oil as a common carrier, or owning or controlling or participating in the control of any pipe line by which is secured or attempted to be secured, or which attempts or tends to secure the control of, or monopoly of the purchasing of, or control of, or monopoly of the transportation of crude oil or the products thereof; also every corporation organized or existing under the laws of the state of California, or of any other state, to transport or engage in the business of transporting in California any crude oil or petroleum, or for the purpose of acquiring, constructing, leasing, owning, maintaining, or operating, directly or indirectly, or controlling or participating in the control of any pipe lines, maintained for the transportation of crude oil or petroleum, actually engaged or engaging in such operation or transportation, directly or indirectly, or shares, directly or indirectly, in the business of such operation or transportation. The act further declares any pipe line constructed, acquired, owned, operated, maintained, managed, or controlled for any of the foregoing purposes or under any of the foregoing conditions to be a public utility, and subject to the provisions of the public utilities act.

The second of the pipe line acts (chapter 285) declares to be illegal any contract, combination, arrangement, or conspiracy between a common carrier railroad operating from any oil-producing field, for a distance of 35 miles or more, to any refinery, or to or through any selling or marketing point, and any oil pipe line transporting crude oil, otherwise than as a common carrier, from the same oil-producing fields for a distance of 35 miles or more, to or through the same refining, selling, or marketing points, and which last transportation is accomplished in whole or in part by such oil pipe line, and whereby such pipe line secures, or is enabled to secure, or attempts or tends to secure, any un-

reasonable control or monopoly of the purchase, sale, or transportation of such oil, or is enabled to secure, or attempts to secure, any unreasonable restraint on or over competition or trade in the purchase, sale, or transportation of such oil. The act further declares that in every action or proceeding thereunder, when it shall appear to the court that any such arrangement exists, and that the pipe line is constructed in whole or in part along the right of way of such common carrier railroad for the distance of five or more miles with the consent of such railroad, and whether or not the pipe line is owned or controlled directly or indirectly by such railroad, or whether or not such railroad and pipe line have any common or interlocking owner or owners, or director or directors, and it further appears that such line is engaged in the business of buying, transporting, and reselling such oil, or of buying and transporting the same, or of providing, transporting, and reselling the same, or of producing and transporting the same, and it further appears that the schedule of rates for the transporting of such crude oil filed by said railroad with the Railroad Commission, or published, fixed, or charged by such railroad, are sufficiently high as compared with the actual cost of transportation of such oil by such pipe line as to tend to prevent the transportation of such oil over or upon such railroad, or to tend to prevent competition between such railroad and such pipe line, or to restrain competition among the producers of such oil, or to tend to enable such pipe line to restrain competition in the sale or purchase of such oil among the producers or consumers thereof, or to tend to enable such pipe line to secure the control or the monopoly of the purchase of such oil, or to fix the selling price thereof at the oil fields, or to secure the control or monopoly of the transportation of such oil from such oil fields, then such arrangement or combination is declared to be an unfair practice, and the same must be deemed by such court to be an unreasonable contract, combination, arrangement, or conspiracy in restraint of trade, and the same shall and must be deemed illegal. The act further provides that every person who hereafter makes, or who continues to execute, any such agreement, without having procured a license as provided in the act, shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both such fine and imprisonment. The superior courts are given jurisdiction to prevent and restrain violations of the act, and it is made the duty of the several district attorneys and of the Attorney General to institute proceedings to prevent and restrain such violations. The right is also given to any person injured in his business or property by any violation of the act to sue in the superior court and recover threefold the damages sustained by him, with costs and attorney's fee. The act further provides that every pipe line used or operated for the transportation of oil under the above conditions, and not as a common carrier, must within 30 days either file with the Railroad Commission its written consent to transport oil for the public and as a common carrier, together with its schedule of rates for such transportation in accordance with the provisions of the public utilities act, or, failing to do this, must either cease to transport oil other than as a common carrier, or must procure a license from the secretary of state

permitting it to transport oil other than as a common carrier, and its failure to comply shall subject it to the penalties herein specified. A fee of $250 must be paid to the secretary of state at the time of procuring such license, and thereafter monthly such pipe line must pay to the state of California the sum of 50 cents for each barrel of oil transported through such pipe line, which sums are made a lien upon the line. Every pipe line, and every agent, attorney, or employé of the same, failing to comply with any of the provisions of the act, or failing to observe or obey any order, rule, direction, demand, or requirement of the Railroad Commission, is guilty of a misdemeanor, and punishable by fine not exceeding $5,000, or by imprisonment in the county jail not exceeding one year or by both such fine and imprisonment.

The third pipe line act (chapter 286) provides that every corporation, individual, or association owning, operating, managing, or controlling any pipe line for the transportation of crude oil, or engaged directly or indirectly in the business of transporting by pipe lines crude oil or petroleum, or any of the products thereof, from producing points to any marketing point, for an aggregate distance of 35 or more miles, not as a common carrier, and which pipe line is constructed or maintained for any distance whatsoever across, along, over, or under any public highway or public road is required, within 20 days, before continuing to transport such oil through any part of such pipe line for any distance whatsoever across, along, over, or under any public highway or public road, to procure a license from the secretary of state permitting the continuance of such transportation of oil through such part or parts of such pipe line as is constructed or maintained for any distance whatsoever across, along, over, or under any public highway or public road. The amount to be paid for such license, and the monthly amounts to be paid thereafter, are the same as those provided for in chapter 285, hereinbefore set out. The other provisions of the act, in so far as material here, are substantially the same as those above set forth, except that the fine for violations is not to exceed $1,000, instead of $5,000.

The constitutionality of these pipe line acts, which contain many other provisions not necessary to be noted here, is challenged by the bill on a number of grounds, and the action is brought by the plaintiff corporations, as stockholders of defendant Associated Pipe Line Company, which company, the bill avers, has declared its intention to conform to the said acts, for the reason that it and its directors are deterred by the severe penalties imposed from contesting the same. This method of procedure is in accord with the principles laid down in 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, which determines, as correctly stated in the syllabus:

"A bill by stockholders of a railroad company to enjoin it from complying with a statute relating to rates sufficiently sets out the reason for their commencing it and making the company a party defendant by alleging that they had demanded of the corporate officers that they refuse obedience to the statute, and should institute suits to prevent its enforcement, but that the company and its officers had positively refused to do so, not because they considered the rates just, or that they would not be confiscatory, but because of the severity of the penalties provided for violation of the statute, to the

ruinous consequences of which they would not subject themselves, and which no action by themselves, their stockholders or directors, could avoid.

"Whether or not a railroad company is deprived of the equal protection of the laws, and its property rendered liable to be taken without due process of law, by a state statute providing for the establishment of rates of transportation, because the penalties fixed for violation of the statute are so enormous as to require obedience to the law rather than risk the penalties in testing it, although such obedience might, in the end, result in confiscation of the railroad property, is a federal question, within the jurisdiction of the * * * United States courts."

Such "a statute, * * * which fixes penalties for disobedience of its provisions by fines so enormous and imprisonment so severe as to intimidate the corporations and their officers from resorting to the courts to test the validity of the rates, is unconstitutional, as depriving the corporations of the equal protection of the laws."

The cumulative penalties provided for failure to obey the provisions of these various acts, and the enormous license fees required as a condition precedent to the right of a pipe line company falling within their terms to continue to operate other than as a common carrier, bring this case within the foregoing principles.

[1] It is urged by the defendants other than the defendant Associated Pipe Line Company that no temporary injunction should be granted, but that the bill lacks equity, and should be dismissed, because the only action which the bill discloses to be threatened by them is an investigation on the part of the Railroad Commission to ascertain whether or not the defendant Associated Pipe Line Company comes within the provisions of chapter 327 or so-called declaratory act, and that it does not show any contemplated action on their part under either of the so-called license acts, being chapters 285 and 286.

The bill avers that on August 11, 1913, the day after the so-called pipe line acts became effective, the Railroad Commission upon its own motion instituted an investigation to ascertain what corporations, associations, and individuals are subject to the provisions of the act known as chapter 327, or declaratory act, and that it issued an order to a number of corporations, including the defendant Associated Pipe Line Company, to show cause on September 4, 1913, why the said commission should not make its order requiring each of said companies to file with the commission schedules of their rates and charges for the transportation of crude oil and petroleum, or the products thereof, and their rules and regulations in connection with such transportation, and otherwise to comply fully with said chapter 327 of the Laws of 1913. This is the only really threatened action which the bill discloses, and is taken under the provisions of the public utilities act, to which provisions the oil pipe lines described in chapter 327 are made subject. The public utilities act (St. 1911, Extra Sess. p. 54), in section 66, provides that, after any order or decision has been made by the commission, any party to the proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing, and the commission may grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear. Section 67 of said act contains the following provisions:

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of

the decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review * * * for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. * * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California."

In Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, the Supreme Court held to have been prematurely brought an action by certain railroad companies to restrain the Virginia State Corporation Commission from enforcing certain passenger rates fixed by it; the reason being that the railroad companies had not availed themselves of the right which they had, to appeal to the Supreme Court of Virginia from the order of the commission establishing such rates, and in this connection the court says:

"The state of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is intrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded that they should make sure that the state * * * would not respect what they think their rights to be, before resorting to the courts of the United States."

And Mr. Chief Justice Fuller in a vigorous opinion in the same case uses the following language:

"In my opinion, a preliminary objection is fatal to the maintenance of these bills. It appears on their face that the appellees did not avail themselves of the right of appeal to the Court of Appeals of Virginia, which was absolutely vested in them by the Constitution and laws of that commonwealth. Such an appeal would have brought up the question of the alleged unreasonableness of the designated rate, and appellees cannot assume that the decision of the commission would necessarily have been affirmed. If reversed or changed to meet appellees' views, the whole ground of equity interposition would disappear. In such circumstances it is the settled rule that courts of equity will not interfere. The transaction must be complete, and jurisdiction cannot be rested on hypothesis. A fortiori this must be so where federal courts are asked to interfere with the legislative, executive, or judicial acts of a state, unless some exceptional and imperative necessity is shown to exist."

[2] If there be any exceptional and imperative necessity existing in the case at bar, it arises from the excessive penalties and fees, which deter the defendant Associated Pipe Line Company from testing in the ordinary way, and through the channels, provided by the public utilities act and the pipe line acts themselves, the constitutionality of such of these acts as is drawn in question here. If it were not for these penalties and fees, and the fear inspired by them in the defendant Associated Pipe Line Company and its directors, the present plaintiffs would not be entitled to sue here at all. This court should be called upon to interfere with the action of officers of the state only at such time and to such an extent as is necessary to secure the guaranties of the Constitution, and of the laws enacted in pursuance thereof. Under all the circumstances the measure of relief accorded to the plaintiffs here should not exceed the right upon which it is based.

For this reason, and having in mind the principles hereinbefore stated, they will have secured everything to which they are entitled at this time, if the defendant Associated Pipe Line Company and its directors be relieved of the dread under which, as is averred, they are constrained to refrain from testing the validity of the pipe line acts, through the methods provided in the public utilities act, in the pipe line acts themselves, and in the Constitution and laws of the state of California. No further relief can be based upon the present bill; nor is this court disposed to interfere with the state or its officers to any greater extent than, as above stated, is necessary to secure the constitutional guaranties. The bill, therefore, will not be dismissed, but jurisdiction of the subject-matter and of the parties will be retained, and an injunction will issue enjoining the defendants, other than the Associated Pipe Line Company, from enforcing or attempting to enforce against said last-named defendant, or any of its agents or employés, any of the penalties provided in the public utilities act, or in any of the so-called pipe line acts, and from collecting or attempting to collect from said defendant any of the license fees, other than the primary fee of $250 provided for in any of said acts, which penalties or fees shall have accrued or may accrue at any time before the validity of said pipe line acts shall have been finally passed upon by the courts of the state of California. The defendant Associated Pipe Line Company will not be enjoined from complying with said acts; but, being thus set free from the dread under which it claims to have been resting, it and its directors may pursue such course as to them may seem best.

UNITED STATES v. CHEHALIS COUNTY et al.

(District Court, W. D. Washington, S. D. September 21, 1914.)

No. 1119.

1. TAXATION (§ 611*)—LANDS OF INDIAN ALLOTTEES—SUIT BY UNITED STATES TO PROTECT.

During the time the United States holds the title to lands in trust for Indian allottees it may maintain a suit to enjoin the collection of taxes imposed on the lands by local authorities in violation of the trust agreement, and may prosecute the suit to a decree, even after the trust period has expired, in the absence of objection by the allottees.

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

2. TAXATION (§ 611*)—INDIAN LANDS—SUIT BY UNITED STATES TO PROTECT—LACHES.

The fact that such a suit was not commenced promptly, when the taxation of the lands was first attempted, does not constitute laches, such as will bar the right to relief.

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

3. INDIANS (§ 13*)—LANDS OF ALLOTTEES—MISTAKES IN PATENTS—JURISDICTION OF EQUITY.

Act April 23, 1904, c. 1489, 33 Stat. 297, which authorizes the Secretary of the Interior to correct certain mistakes in conditional patents

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

issued to Indian allottees, does not provide an exclusive remedy, and where through mistake the restriction against alienation and taxation in such patents was made 20 years, instead of 25 years, as provided by the statute, a court of equity has power to grant relief against such mistake at suit of the United States.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.*]

4. TAXATION (§ 543*)—LAND OF INDIAN ALLOTTEES—RECOVERY BY UNITED STATES OF TAXES PAID.

The United States has such an interest in the lands of Indian allottees, which it has agreed to hold in trust for a stated term free from liens or taxes, that it may maintain a suit to recover back taxes which were unlawfully imposed on such lands during the term and collected from the allottees.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1006–1016; Dec. Dig. § 543.*]

5. TAXATION (§ 538*)—LAND OF INDIAN ALLOTTEES—RECOVERY BY UNITED STATES OF TAXES PAID.

The rule that taxes voluntarily paid cannot be recovered back is made for the benefit of the state, and has no application to a suit by the United States to recover taxes wrongfully collected on lands of Indian allottees, which the government has assumed the duty of holding in trust and protecting from taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 999, 1000; Dec. Dig. § 538.*]

In Equity. Suit by the United States against the County of Chehalis, W. B. Paine, County Treasurer, and W. G. Hopkins, George L. Davis, and C. N. Wilson constituting the Board of County Commissioners for said County. Decree for complainant.

Clay Allen, U. S. Dist. Atty., of Seattle, Wash., and Geo. P. Fishburne, Asst. Dist. Atty., of Tacoma, Wash., for complainant.

J. E. Stewart and A. E. Cross, both of Aberdeen, Wash., for defendants.

CUSHMAN, District Judge. The United States sues to enjoin the county of Chehalis, state of Washington, and its treasurer and board of county commissioners, from enforcing or collecting taxes levied upon certain lands, praying that the cloud upon the title of complainant, on account thereof, be removed, and an accounting be had of certain of the taxes which have been paid. The cause has been submitted to the court by the parties upon the following stipulated facts:

"3. That all the lands and premises hereinafter described are situated in said Chehalis county in the Western district of Washington, and until on or about June 1, 1886, were a part of the public domain of the United States of America and open to entry by members of the Indian tribes under and pursuant to the homestead laws of the United States with reference thereto.

"4. That on the 16th day of November, 1886, certain Indians, members of the Chehalis Indian tribe, whose names are hereinafter set forth, had made their respective homestead entries to said lands and had made due and regular application for Indian homestead patents for said respective selections as members of said Chehalis tribe. * * *"

Patents containing the following provision were issued by the United States to the applicants:

" 'This patent is issued upon the express condition that the title hereby conveyed shall not be subject to alienation or incumbrance, either by volun-

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

tary conveyance, or by judgment, decree or order of any court, or subject to taxation, of any character, but shall remain inalienable and not subject to taxation for the period of twenty years from the date hereof as provided by act of Congress approved January 18, 1881.'

"6. That each of said Indians was in possession of and located upon his respective homestead entry on and after the date of his respective entry.

"7. That no second patent has ever been issued to any of the homestead entrymen, or their heirs, assigns or successors in interest (with certain specific exceptions).

"8. The said defendant Chehalis county and its county commissioners have proceeded to levy and assess taxes against the property described in Exhibit B, hereto attached and made a part hereof, for the years therein set forth, for the purpose of raising revenue for the state, county, school, road, and other purposes, all of which said taxes are still unpaid.

"9. That a portion of the taxes assessed and levied has been heretofore paid to said Chehalis county by certain ones of said patentees, and by others, as set forth in Exhibit C, which is hereto attached and made a part hereof.

"10. That said defendants, and each of them, unless restrained by order of this court, will continue to levy and assess taxes against the said described property and will, unless restrained by this court, issue and cause to be issued delinquent tax certificates on said premises for said taxes, and cause foreclosure sale of said premises therefor."

The second patents mentioned in paragraph 7 were issued in March, 1911. The taxes stated in paragraph 8 as levied were for the years 1909, 1910, 1911, and 1912.

The United States contends that the restriction upon alienation and taxation, stated in each patent as 20 years from its issuance, was a mistake, and should have read 25 years. Upon the hearing, the defendants made the following admission:

"We concede that, under the acts of Congress applicable, the trust patents should have contained a 25-year provision, instead of 20-year provision, against taxation and alienation."

This suit was begun in 1912. All of the patents, save one, were issued in June, 1888; the later patent having been issued in February, 1890. Therefore the restriction upon taxation as to all, save the one tract covered by the later patent, terminated in June, 1913.

[1] The defendants contend that the suit cannot be maintained by the United States, or any one, save the Indian allottees, as the trust period has expired. Act Feb. 8, 1887, c. 119, § 5, 24 Stat. 389, 3 Fed. Stat. Ann. 494, under which the patents were issued, provides:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made. * * *"

It is well settled that, during such trust period, the lands are not subject to taxation by the state or territory. United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; Frazee v. Spokane County, 29 Wash. 278, 69 Pac. 779. The suit having been begun before the expiration of the trust period, no particular reason appears, in the absence of objection of the Indian allottees, for now dismissing it without prejudice to the right of such allottees to proceed in separate suits. A probable result would be a multiplicity of suits, to avoid which is itself a ground of equity jurisdiction.

[2] If this suit may not proceed to decree, it is apparent that the United States is denied the right to make good its undertaking to these Indians—that the title should be held by it for the Indians for 25 years, not subject to incumbrance or taxation of any character. It is manifest that the only reason to support such a consequence would be because of the delay on the part of the officers of the United States in promptly securing injunctive relief when taxation was first attempted. Statutes of limitation, in the absence of special provision, do not apply to the United States. Laches may, but it is deemed that it would not in such a case as this, where a promise of protection had been made Indian wards and had not been promptly fulfilled.

[3] It is the further contention of defendants that the only remedy afforded by the law for such a mistake as that made in these patents is provided by Act April 23, 1904, c. 1489, 33 Stat. 297, 10 Fed. Stat. Ann. 141, which provides:

"That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent cannot be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry; and provided, that such lands shall not be open to settlement for sixty days after such cancellation; and further provided, that no conditional patent that shall have heretofore or that may hereafter be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress."

If it be conceded that the list of mistakes enumerated in the act includes the mistake made in these patents, it does not follow that the remedy provided by that act is exclusive. It is a part of the general equity jurisdiction of the court to correct such accidents and mistakes, and, the United States being a party, this court has jurisdiction over such question.

The above-quoted law was doubtless enacted to give the Secretary of the Interior the extraordinary power to correct certain mistakes in patents to Indians because of the condition of wardship. It has long been the settled law, in the absence of express statutes, that after the issuance of patents the Secretary could no longer correct any mistakes therein; while before such issue he had such jurisdiction, the courts alone have such power after issue. To give the Secretary such power as to a special class of patents would evidence no intention to take from the court its general jurisdiction in such matter.

[4] The further question as to the right of the United States to recover the taxes which have been wrongfully collected presents greater difficulty in its solution, but it is believed to be controlled by what has

already been determined. Notwithstanding the condition of wardship of the Indians, it may be conceded that, when an Indian is imposed upon and money wrongfully exacted from him, in general, the United States would have no right of action. But when such exaction is successfully accomplished because of an asserted claim to property expressly held in trust by the United States, as in this case, and the United States, charged with the duty of protecting the property against such claim, has delayed doing so while the exaction has been accomplished, such circumstances furnish the necessary interest in the matter to give the United States the right to ask the undoing of the wrong consummated, because it was, presumably, busy with other concerns and did not prevent its accomplishment. If, by reason of such delay, equities on the part of the county had arisen, a different question would be presented; but there is nothing in defendants' position to appeal to the conscience.

[5] The familiar doctrine that taxes voluntarily paid cannot be recovered is invoked by the defendant. Putting to one side the question whether payment by persons under such disabilities as tribal Indians can correctly be designated as voluntary, and the further question whether such rule is one to be invoked in equity, yet it is clear that it has no application here. The exacting requirements necessary to take a given case out of the rule as to voluntary payment grows, in part, out of the policy of protecting the state from embarrassment in the matter of collecting its revenues. In such matter it does not enter itself in the lists under the same rules by which ordinary litigants must abide. It is hedged about by special privileges in such matter. The disadvantage of the individual in this particular does not obtain in a case such as the present, where the government itself seeks such recovery. To invoke such rule in the latter case would be to grant immunity to the state—to facilitate the performance of its functions to the detriment of the United States in the discharge of its duties. The reason of the rule has then ceased to exist, and therefore the rule is inapplicable.

In United States v. Rickert, 188 U. S. 432, 442, 23 Sup. Ct. 478, 482 (47 L. Ed. 532), it was said:

"Counsel for the appellee suggests that the only interest of the United States is to be able at the end of 25 years from the date of allotment to convey the land free from any charge or encumbrance; that if a house upon Indian land were seized and sold for taxes, that would not prevent the United States from conveying the land free from any charge or encumbrance; and that, in such case, the Indians could not claim any breach of contract on the part of the United States. Those suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract, each party to which is capable of guarding his own interests; but the Indians are in a state of dependency and pupilage, entitled to the care and protection of the government. When they shall be let out of that state is for the United States to determine, without interference by the courts or by any state. The government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them. In Choctaw Nation v. United States, 119 U. S. 1, 28, 7 Sup. Ct. 75, 90, 30 L. Ed. 306, 315, this court said: 'The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed

under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a custom of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.' See, also, Minnesota v. Hitchcock, 185 U. S. 373, 396, 22 Sup. Ct. 650, 46 L. Ed. 954, 966.

The foregoing is particularly applicable in the present case and the same "superior justice" should obtain, rather than the technical rules framed to regulate municipal jurisprudence, where private persons alone are concerned. It may be that the individual allottees could maintain suits to recover such taxes wrongfully collected from them. Frazee v. Spokane County, 29 Wash. 278, 69 Pac. 739. But that alone is not sufficient to deny the United States the right to enforce the return of such taxes in a matter touching it so near.

The defendants have not pleaded a defect of parties plaintiff, other than as pointed out. The county should not be left subject to the risk of a second suit by the individual allottees to recover the same money. Protection in this respect may be provided by provision in the decree that the money be paid into court, not to be paid out to the allottees, or their successors in interest, or withdrawn for their benefit, until a proper release of all claims against the county because thereof be executed, and that if, after the expiration of a reasonable time, any of the money remain not accepted under such condition, it should be repaid to the county.

It is presumed that the patents issued in 1911, although the stipulation does not disclose it, were issued under other provisions of law than have been discussed, and that their issuance prior to the expiration of the trust period was not an inadvertence. In such cases no injunction will issue, nor accounting be required for taxes levied or paid after the issue of such second patents.

It is considered that the complainant is only entitled to an accounting in those cases where taxes have been paid by either the Indian allottees, their successors in interest, or persons acting for or in privity with such allottees, or their successors in interest; otherwise, the defense of voluntary payment is held to be good.

Decree may be prepared in accordance with the foregoing, and, if the parties cannot agree to the instances in which the defense of voluntary payment is held to apply, they will be heard further upon the settlement of the decree.

GRIER et al. v. UNION NAT. LIFE INS. CO.

(District Court, E. D. Pennsylvania. August 28, 1914.)

No. 423.

1. CORPORATIONS (§ 215*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS.
Except where elements of estoppel supervene, the general rule is that a shareholder is not liable to creditors upon insolvency of the corporation, unless the circumstances are such that he would have been liable to the corporation itself.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826–828, 845–848, 852, 854; Dec. Dig. § 215.*]

2. CORPORATIONS (§ 170*) — WHO ARE SHAREHOLDERS — ENTRY OF NAME ON BOOKS.
One is not bound as a stockholder of a corporation merely because his name has been entered on its books as a stockholder, unless in some manner, either expressly or impliedly, he consented to such entry.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 624–632; Dec. Dig. § 170.*]

3. INSURANCE (§ 50*)—INSOLVENCY OF INSURANCE COMPANY—STOCKHOLDERS —CONDITIONAL SUBSCRIPTION—ENFORCEMENT.
Defendant insurance company, in order to conduct the business for which it was organized under the laws of Pennsylvania, was required to obtain a capital of $300,000, and to that end issued and sold stock, some of which was bought by claimants, who were each given an agreement that the money paid should be retained in a special fund and returned unless the full amount was subscribed and paid in within 60 days. It was not kept in such special deposit, but was mingled with other funds of defendant, for which a receiver was appointed within a few days; only a small part of the required sum having been subscribed. Certificates of stock were issued to claimants and retained by them. The money they paid could for the most part be traced and identified. It was not shown that defendant had contracted debts on the strength of the subscriptions, or that claimants had acted or represented themselves as stockholders. *Held*, that the fact that they had not returned their certificates before the commencement of the suit, the 60 days not having expired, did not create an estoppel, but that the agreements under which they subscribed were valid and enforceable against the receiver.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 8, 58–61; Dec. Dig. § 50.*]

In Equity. Suit by one Grier and others against the Union National Life Insurance Company. On exceptions to report of special master. Exceptions sustained.
See, also, 217 Fed. 293.

Charles D. McAvoy, of Norristown, Pa., and W. W. Mentzinger, Jr., and Henry T. Williams, both of Philadelphia, Pa., for exceptants.
Garrett A. Brownback, Thomas J. Norris, and Owen J. Roberts, all of Philadelphia, Pa., opposed.

THOMPSON, District Judge. The exceptions are based upon the disallowance by the special master of the claims of subscribers to the capital stock of the Union National Life Insurance Company to recover from funds in the hands of the receiver of the company the sums paid by them upon subscriptions to its stock under the following circumstances:

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

The company was organized and doing business under the laws of Pennsylvania, and on or about February 26, 1910, in an effort to raise $300,000 deemed necessary for purposes of capitalization to enable the company to continue in business in conformity with the requirements of the insurance commissioner of the state of Pennsylvania, authorized its agents to solicit subscriptions to shares of its capital stock at $125 per share. Of this amount the par of the stock, to wit, $100, was to be placed in a special capital stock fund, and there held intact, and the remaining $25 per share was to be charged to a "contingent fund," and was to go to the company and its agents for commissions and expenses. Between February 26 and 28, 1910, the exceptants subscribed and paid for the par value of stock to the total amount of $6,475. Within a day or two thereafter each of the subscribers received from the company an agreement in the form of a letter as follows:

"This is to certify that the proceeds on subscriptions given by you for stock of the Union National Life Insurance Company, up to the full par value of the same, will be placed in the special capital stock fund and held there intact, until the full three hundred thousand dollars ($300,000), authorized by the board of directors of this company, shall have been subscribed and paid in for capital stock, after which time it will be transferred to the stock account. The capital stock of this company like that of any other company, insurance or banking, is a 'guaranty fund' and will always remain intact. The surplus funds of the company are the only funds for development or organization work. It is hereby specifically understood and agreed that should the full amount of the capital stock, as authorized by the board of directors, not be subscribed within sixty (60) days from this date, that all subscriptions for said capital stock, taken subsequent to February 26, 1910, will be returned to the subscribers.

"Union National Life Insurance Company.
[Signed] W. E. A. Wheeler, President.
"[Corporate Seal.] [Signed] Edgar C. Van Dyke, Treasurer.
"Attest: W. C. Van Dyke, Ass't Secretary."

The letter set forth substantially the terms of an agreement made contemporaneously by the company's agents when the subscriptions were made.

Between the time of the subscriptions and March 1, 1910, inclusive, all the subscribers received certificates for the number of shares covered by their several subscriptions, and the certificates of stock so received were retained by them. The money paid upon the subscriptions was not deposited in a special capital stock fund in accordance with the agreement, but was mingled with other funds of the company. On March 12, 1910, the bill in this case was filed by the holders of certain profit-sharing certificates issued by the company, alleging inter alia gross fraud and misrepresentation, and praying that a receiver be appointed to take charge of the assets of the corporation until further order of the court. On March 31, 1910, a receiver was appointed, "with instructions to take possession of the defendant company's property of every description and hold it until further notice." The total amount of the $300,000 authorized stock issue was not sold or subscribed within 60 days of the dates of the exceptants' subscriptions, and it does not appear that any part of it, except to the extent of $7,225, was ever obtained. The special master finds, as a conclusion of law, that the money paid upon subscriptions, made in reliance upon the so-

called contingent agreements, constituted, as between the insurance company and the subscribers, a trust fund which could be followed and claimed as long as it could be traced and identified. He finds as a fact that the fund has been sufficiently traced and identified, except that, in the case of George B. Moore, but $350 of $500 paid by him could be traced and identified. To this finding of fact there is no exception by any party in interest. The special master further finds that inasmuch as the several subscribers subscribed for the stock of the corporation and received certificates of stock which they retained in their possession without objection to the company, and as they appeared as stockholders of record, and the company continued to do business and incurred liabilities up to the time of the appointment of the receiver, they are to be deemed stockholders, whose rights must be postponed to the rights of the creditors of the company. The position of the claimants and of the receiver representing the creditors, as stated in the special master's report, is as follows:

"On the one hand, it has been contended that the funds derived from the contingent subscriptions constituted a trust fund; that this trust fund has been followed and identified; that this fund belongs to the claimants; that the corporation had merely the legal title, but not the equitable or beneficial ownership, and, the conditions governing the subscriptions never having been fulfilled, this fund, even after the appointment of the receiver, may be reclaimed as against creditors of the corporation; that one does not become a stockholder merely by receiving and failing to return a stock certificate; that one cannot be made a stockholder without his consent or the intention appearing; that the agreement plainly indicates the intention of the parties that the proceeds of the subscriptions should not become corporate funds until after the expiration of 60 days, and obtaining subscriptions to the full amount of $300,000; that the subscribers could not be deemed stockholders until the money became the money of the corporation; that, as the conditions precedent were never fulfilled, the subscribers never acquired either the rights or liabilities of stockholders; that their subscriptions were in aid, not in fraud, of creditors; that it does not appear that any obligations were incurred on the strength of such subscriptions; that the obligations in fact incurred subsequent to such subscriptions were inconsiderable in amount; and that such subscribers might reasonably presume, inasmuch as they constituted an entire class and not individual, isolated cases, that the conditions of their subscriptions would be part of the record of the issue of the stock. On the other hand, it has been urged that while in the absence of insolvency, or proceedings practically amounting to a winding up of a corporation, the special agreement was enforceable against the corporation, the situation is changed by the intervening receivership; that the subscribers were stockholders of record without condition; that there was nothing on the books to differentiate them from ordinary stockholders; that they subscribed to stock and received stock; that they had all the rights of stockholders, and must be deemed to have all the liabilities; that, by accepting certificates of stock, they acquiesced in the position of the company in making them stockholders; that their opportunity to rescind ended with the appointment of the receiver."

Under the conditional subscription to the stock of the company, as evidenced by the agreement between the company and the subscribers, it is clear that, as between the subscribers and the corporation, the amounts paid by them could not be withheld from them by the company, unless the condition, upon which the subscription was based, had been fulfilled. The relation of subscribers to the stock of a corporation is one of contract, and their rights and liabilities are determined by their contract with the corporation. When they subscribed and paid

for the stock, the agreement was that the amounts of their subscriptions should be held in a special deposit and returned, unless the full amount of $300,000 was subscribed and paid. Under the contract, the purpose of the subscribers was that they should hold stock in the company after the $300,000 had been subscribed and paid in as capital which would enable the corporation to continue to carry on its business under the ruling of the insurance commissioner of Pennsylvania. They surely never intended, and it is impossible to conceive, that they would intend to pay for stock in a corporation which could not carry on the business for which it was incorporated. As between the corporation and the subscribers, the special master finds that the money could not have been withheld, and that, inasmuch as it can be traced and identified, it cannot be withheld by the receiver, unless the rights of creditors have in some way intervened, and the subscribers, having become owners of the stock, are in some manner estopped from claiming repayment of the amounts paid for it.

[1] Except where elements of estoppel supervene, the general rule is that the shareholder is not liable to creditors upon insolvency of the corporation, unless the circumstances are such that he would have been liable to the corporation itself. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Hahn's Appeal (Pa.) 7 Atl. 482.

In order to sustain the conclusion of the special master, therefore, it is necessary that facts appear which estop the subscribers to deny that they had in fact become stockholders, and that the money which they had paid for the stock was the money of the corporation. The ground of estoppel found by the special master consists alone in the retaining by the subscribers of the stock certificates, and making no claim for return of the money and no offer to return the certificates during the period between the time of their receipt by the several subscribers and the time when the bill was filed or the time when the receiver was appointed. That there was actual misrepresentation on the part of the subscribers is not even suggested. There is, moreover, no evidence to show that the subscribers had knowledge between the time of the receipt of the certificates and the appointment of the receiver that the remainder of the $300,000 had not been secured from other subscribers. It is difficult to see why, being ignorant of the status of the transaction, it was their duty to surrender their certificates and demand a return of their money. There is no evidence to show that any liabilities were incurred by the corporation, in the creation of which the creditors relied upon the fact that the several sums had been received upon subscriptions of the exceptants to the stock. The learned special master bases his conclusions upon the fact that, the certificates having been issued and delivered to the subscribers, they became stockholders "of record."

[2] Even if the subscribers' names were entered upon the books of the company as stockholders, they must in some manner, either expressly or impliedly, have consented to the entry in order to be bound by it. Sigua Iron Co. v. Greene, 104 Fed. 854, 44 C. C. A. 221.

[3] There is nothing to show their consent to become stockholders in a corporation which, under the rulings of the insurance department of Pennsylvania, could not go on with its business without a capital of

$300,000, when only $7,225 of that amount had been subscribed, except that, having received the certificates, they did not immediately return them. While, as stated by the special master, the subscribers might have exercised the rights of stockholders, it is not shown that they did exercise, or attempt or claim to exercise, any such rights. If having received the certificates of stock, although, without demand upon their part, they had retained those certificates throughout a period during which the company was actively carrying on business, had exercised any rights thereunder, had appeared at the meetings of the stockholders, or had received dividends, a different situation would arise. The conditions upon which the certificates were issued are not shown to have been secret conditions, but must be assumed, as stated in the agreement, to have been properly authorized by the board of directors, and therefore a part of the "record" as to the stock. Sixty days were to be allowed the company to fulfill the conditions of the subscription. But 12 days had elapsed when the bill was filed, and 30 when the receiver was appointed. If, at the end of the 60 days, the subscribers had retained the stock without inquiry as to whether the balance of the $300,000 had been subscribed, it might constitute conduct indicating an intention to retain the stock, or the failure to act at the end of the 60 days might have estopped them as against the creditors, who became such relying upon the subscriptions. The bill for the appointment of the receiver followed so closely upon the receipt of the certificates of stock, and the appointment of the receiver so closely thereafter, that it would be unreasonable to hold, without proof that the subscribers knew that the conditions had not been fulfilled, that they must be deemed to have voluntarily retained their certificates and become stockholders merely because within that short time they had failed to act. There is nothing in the record to show that the rights of any creditor rise higher than the rights of these subscribers. If there were liabilities created after the names of the subscribers were placed upon the company's books upon the faith of their appearing there, it is incumbent, upon those alleging the estoppel, to establish it by clear and satisfactory evidence. Merrill v. Tobin (C. C.) 30 Fed. 738.

In the case of Newton National Bank v. Newbegin, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727, it was held that a subscriber for stock of a national bank, who had paid for shares of a proposed increase in its capital stock upon fraudulent representations of the cashier, could recover the money paid by him under those circumstances, even where insolvency of the bank occurred before action was taken by him. In that case Thayer, C. J., in delivering the opinion of the court, said:

"If a considerable period of time has elapsed since the subscription was made, if the subscriber has actively participated in the management of the affairs of the corporation, if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered, and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid, in all of those cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern."

In the present case, while the right to recover is not based upon fraud but upon the ground that the condition upon which the subscription was made had not been fulfilled, the principles of estoppel are the same. There was no considerable lapse of time after the subscription was paid and the stock received before the receivership to indicate that there was want of diligence on the part of the subscribers to take steps to deny their status as stockholders. There was no participation in the management of the affairs of the corporation. There is no evidence of any indebtedness having been created, based upon the subscriptions. This being so, the elements of estoppel do not exist in this case.

As was stated by Mr. Justice Field in Henshaw v. Bissell, 85 U. S. (18 Wall.) 255, at page 271 (21 L. Ed. 835):

"An estoppel in pais is sometimes said to be a moral question. Certain it is that to the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights have no such ingredient, and seldom work any such result. There are cases, it is true, where declarations may be made under such peculiar circumstances that the party will be estopped from denying any knowledge of his rights; but these are exceptional, and do not affect the correctness of the general rule as stated."

See, also, Commonwealth v. Moltz, 10 Pa. 527, 51 Am. Dec. 499.

Without evidence of any creditor having been misled to his injury by the conduct of the exceptants, it would work a manifest injustice to hold that the money paid by them should be distributed to creditors because they failed to assert their claims while in ignorance of their status under the conditional subscriptions and before the period for carrying out the conditions had expired.

The fourth, fifth, sixth, and seventh exceptions upon the part of Foster C. Moore, Benjamin Erickson, Mary F. Dyer, and George B. Moore are sustained. As to the first, second, and third exceptions, they were not urged at the argument and do not appear to be material to the disposition of the case; neither is any error pointed out in the findings of fact covered by these exceptions. They are therefore dismissed.

The fourth, fifth, sixth, and seventh exceptions upon the part of William S. Schlichter, Elmer E. Althouse, and James C. O'Donnell are sustained, and the first, second, and third exceptions, which are similar to the first, second, and third filed on behalf of Moore and others, are dismissed for the same reason.

GRIER et al. v. UNION NAT. LIFE INS. CO.

(District Court, E. D. Pennsylvania. October 6, 1914.)

No. 423.

1. APPEAL AND ERROR (§ 150*)—RIGHT TO APPEAL—INTEREST—RECEIVERS.
A receiver is a mere stakeholder, and has no right to appeal from a decree ordering distribution to certain claimants of funds in the receiver's hands as to which it is found that a trust arises in favor of the distributees.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. § 150.*]

2. TRUSTS (§ 377*)—DISTRIBUTION OF TRUST FUNDS—RECEIVERS—APPEAL BY CREDITOR.
Where a decree determined that certain funds in the hands of a receiver were impressed with a trust and ordered distribution, the costs of an appeal at the instance of an objecting creditor could not be imposed on the fund as a part of the expenses of administration, nor could the receiver be required to advance the expense of the proposed appeal at the instance of the objecting creditor out of the assets in his hands unaffected by the decree, in the absence of the consent of some of the general creditors.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 618; Dec. Dig. § 377.*]

3. TRUSTS (§ 377*)—TRUST FUND—ENFORCEMENT—EXPENSES.
When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, sues for its preservation or administration, equity will order that plaintiff be reimbursed his outlay from the property of the trust or by proportional contribution from those who accept the benefits of his efforts.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 618; Dec. Dig. § 377.*]

Suit by one Grier and others against the Union National Life Insurance Company. On petition for an order on a receiver to pay costs of an appeal. Denied.

See, also, 217 Fed. 287.

Henry Preston Erdman, of Philadelphia, Pa., for petitioner.

W. W. Mentzinger, Jr., of Philadelphia, Pa., opposed.

THOMPSON, District Judge. [1] The petitioner proposes to appeal from the decree entered this day ordering distribution to certain claimants of funds in the hands of the receiver as to which it is found that a trust arises in favor of the distributees. This decree fixes the equities between the general creditors and the claimants to the fund. As to the fund affected by the decree, the receiver is a mere stakeholder and has no right of appeal. Bosworth v. Terminal R. Association, 80 Fed. 969, 26 C. C. A. 279.

[2, 3] Hence the costs of the proposed appeal cannot be imposed upon the funds in his hands as a part of the expenses of administration. The petitioner asks for an order upon the receiver to pay in advance the expense of the proposed appeal out of the balance of assets in his hands which is unaffected by the decree. In this petition a large

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

part of the general creditors have joined, but others, who would be affected by the order sought for, have not joined. It is well settled that when many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust or by proportional contribution from those who accept the benefits of his efforts. 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; Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940.

No such situation exists here, and counsel has not attempted to point out any authority for an order which would reduce the fund in which all of the general creditors have an interest for the purpose of protecting the petitioner from loss, if the appeal should be unsuccessful, without the consent of the creditors who have not joined in the petition, and who will not be benefited if the petitioner fails in his appeal. No precedent for such an order has been called to the attention of the court.

The prayer of the petition is denied, and the petition dismissed.

SOUTHWESTERN SURETY INS. CO. v. WELLS et al.

(District Court, E. D. Pennsylvania. October 13, 1914.)

No. 1305.

1. PRINCIPAL AND SURETY (§ 179*)—EXONERATION.
   Where a surety's obligation to pay has become absolute, the principal may be required to pay in relief of the surety by an application of the doctrine of exoneration in equity.
   [Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 512–519; Dec. Dig. § 179.*]

2. GARNISHMENT (§ 17*)—PUBLIC MONEYS—EXECUTION PROCESS.
   Public moneys are not subject to levy under attachment in execution process, under the rule of public policy that municipalities, because of their governmental character, are not to be drawn into disputes only affecting other parties.
   [Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 32–34, 44; Dec. Dig. § 17.*]

3. PRINCIPAL AND SURETY (§ 179*)—RIGHTS OF SURETY BEFORE PAYMENT—EXONERATION—INJUNCTION.
   Where complainant was surety for a municipal contractor on two bonds, one to complete the work, and the other to pay materialmen and employés, and complainant's obligation on the latter bond had become absolute, though not so on the bond to complete the work, the contractor having become insolvent and having borrowed money from other parties, to whom it had assigned money payable under the contract by the city, complainant was entitled to maintain a suit in equity for exoneration, and to have a receiver appointed to apply the moneys due from the city in accordance with the equities of the parties.
   [Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 512–519; Dec. Dig. § 179.*]

---

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

4. PRINCIPAL AND SURETY (§ 179*)—EXONERATION OF SURETY—MUNICIPAL CORPORATION—STAKEHOLDER.

Where a contractor had agreed to do certain work for a city and to be paid as the work progressed, the city to retain a specified percentage pending completion of the contract, the city, in the absence of any claim of present indebtedness, was a mere stakeholder as to the amount that would be due to the contractor on completion of the work, and hence was not subject to suit by the contractor's surety in connection with other claimants to marshal the fund and have the same distributed according to the equities of the parties in exoneration of its liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 512–519; Dec. Dig. § 179.*]

5. COURTS (§ 347*)—FEDERAL COURTS—PROCEDURE—PLEADING—DEMURRERS—MOTION.

Demurrers in equity having been abolished, complainant's right to an injunction under the case made by its bill on application for preliminary injunction can be raised only on a motion called up and disposed of in the discretion of the court, or after having been set down for hearing on five days' notice, as provided by equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

In Equity. Suit by the Southwestern Surety Insurance Company against Mark P. Wells and others. On application for preliminary injunction. Granted.

Samuel D. Matlack and Albert L. Moise, both of Philadelphia, Pa., for plaintiff.

E. W. Lank, Asst. City Sol., Michael J. Ryan, City Sol., Charles E. Bartlett, and V. Gilpin Robinson, all of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The plaintiff and the city of Philadelphia, one of the defendants, respectively invoke and stand upon these two propositions. One is based upon the equitable doctrine of exoneration. The other is founded in a principle of governmental policy.

[1] The doctrine is that when the obligation of a surety to pay has become absolute the principal may be required to pay in relief of the surety. The basis of this is obvious. If the surety paid, his right, legal and equitable, to be reimbursed, is clear. Equity abhors mere formalities and works of supererogation, as nature abhors a vacuum. To require the surety to pay, in order that the principal might be required to pay, is a circumlocution and superfluous. The direct road to the same objective is to require the principal to pay. This is common sense, right, and equity. The limitations of the doctrine must not, however, be overlooked. The obligation of the surety to pay must have become absolute. To hold that because a surety may become involved he has an equity to be relieved would be to confer upon him the power to annul his own contract of suretyship. This equitable doctrine of exoneration is analogous to, or at least is often coupled with, the legal principle which permits the obligee in an indemnity bond to maintain his action as soon as a claim is made. He need not await the bringing of

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

an action against him. He may stand on the default in the condition to save him from the harassments of "claims and demands." It follows that an indemnifier may in a proper case invoke equitable relief. This is the accepted doctrine, as the following cases will suffice to show: Beaver v. Beaver, 23 Pa. 169; Ardesco Oil Co. v. Oil Co., 66 Pa. 381; Miller v. Bomberger, 76 Pa. 81; Smith v. Harry, 91 Pa. 124; Craighead v. Swartz, 219 Pa. 149, 67 Atl. 1003; Goodrich & Hick's Appeal, 109 Pa. 529, 2 Atl. 209; McAbee v. Cribbs, 194 Pa. 94, 44 Atl. 1066.

The principle of policy referred to is that municipalities, because of their governmental character, should not be drawn into disputes affecting only other parties. Following this policy government buildings, or other public property, are held not to be subject to the right of lien given, although in general terms, to materialmen and others. Wilson v. Huntingdon Co., 7 Watts & S. (Pa.) 197.

[2] Public moneys are not subject to levy under attachment in execution process. Erie v. Knapp, 29 Pa. 173. The principle has been extended, in Pennsylvania, at least, to proceedings in equity. It is not the principle of equity following the law, but a principle of policy. Granite Co. v. Douglass, 3 Pa. Dist. R. 133.

There is no reason in sight for not extending the full protection to afford which the policy has been adopted. There would be little in a policy which saved actions at law, but permitted proceedings in equity. It is founded upon the regard of the law for the persons of such litigants. It is a reflex of the sanctity of the sovereign. The limitations of this principle of policy must likewise be observed. The controversy must wholly concern third parties, and must not be in conflict with other policies of the law or equitable principles. If a right, legal or equitable, belongs to a litigant, he may enforce it against a municipal corporation, as well as against any one else. It is only when the municipality is clear of all obligations, and no other policy of the law intervenes, that it goes scathless. It is upon this limitation of the principle that all the well-considered cases arising in jurisdictions which give recognition to the policy may be reconciled.

It only remains to consider whether the plaintiff and the city of Philadelphia are respectively within these principles. This case was argued on what is in effect a demurrer under the former practice. The plaintiff has moved for a preliminary injunction, and at the hearing the city of Philadelphia, one of the defendants, asked to have the bill dismissed as to the city. In this the other defendants have joined. It was stipulated that the motion for a preliminary injunction should be considered by the court as if the plaintiff had introduced testimony and evidence in support of every averment of the bill and the defendants in support of their counter affidavits. The suggestion was made that the case might be further heard as if the defendants had moved to dismiss the bill after five days' notice under the rules; each side further stipulating to stand or fall according to the equities as disclosed by the bill.

The strength of the appeal made by the plaintiff to the court consists in this: The defendant Wells entered into a contract with the city of Philadelphia, containing the usual provision for payments as the work progressed, a certain percentage to be held until completion. He further entered into bonds, with surety, one for the completion of the

contract, and the other for the payment to materialmen and employés for material furnished and work done under the contract. The plaintiff became his surety. There is a time limit in the contract, with a per diem penalty of $50. The time of completion has expired, and the work is still unfinished. There is still in the hands of the city, not only the reserved final payment, but also other payments, which have been withheld thus far because the work done had not been accepted by the city.

The Wells Construction Company, another of the defendants, is a subcontractor on the work. This company is a Delaware corporation, unregistered in Pennsylvania. The contract with the city provides that it shall not be assignable. The plaintiff received the usual indemnifying agreement of the contractor, backed with collateral, and an assignment of moneys which would become due under the contract. Clark, another defendant, advanced moneys to the contractor for work done for the city, and the funds to become due by the city were also assigned to him.

[3] The averments of the plaintiff are that the contractor is insolvent, that the city is proposing when the moneys become due to pay over to him moneys remaining unpaid on the contract, and that these moneys are to be paid by the contractor over to Clark to reimburse him for his advances, whereby the bills for labor and material will remain unpaid and the plaintiff, as surety for the contractor, will be compelled to pay them. It, therefore, prays that all the parties concerned be enjoined from receiving any moneys from the city, to the end that all such moneys may remain in the hands of the city, to be applied to the payment for the work done and materials supplied toward the completion of the contract, and that a receiver may be appointed to receive the moneys in order to assure this application. It is asked that the city be included in this restraining order.

The plaintiff advances the proposition that it would be an inequitable thing to permit the moneys which come out of this contract to be diverted from the payment of debts incurred in the completion of the contract and to force the payment upon the plaintiff. The defendants, other than the city, set up that, Clark having advanced his money toward the completion of this contract and therefore in relief of the plaintiff, his equities are higher than those of the plaintiff, and it is equitable and proper that he should be reimbursed. The city takes the position that such an order would be tantamount to an attachment of the funds in its hands, and invokes the principle already discussed that it is the policy of the law not to subject municipalities or bodies exercising governmental functions to the entanglements of being mixed in the contentions of third parties.

The first inquiry is whether, under the facts of this case, the plaintiff is within the protection of the principle of exoneration invoked. The inquiry has a twofold aspect. The plaintiff is surety on the bond of the contractor for completion. The obligation of the surety upon that bond has not become absolute as yet. The plaintiff is therefore outside of the limits of the protecting influence of the principle, so far as respects its obligations under this bond. The plaintiff, however, is also surety on the bond to secure payment to materialmen and work-

men money which is now due them. The obligation of the surety on this bond has become absolute, and this fact brings the plaintiff to this extent within the protection of the principle. This disposes of the first question, and entitles plaintiff to the relief hereinafter awarded.

[4] The next inquiry is whether the controversy wholly concerns parties other than the city of Philadelphia, or whether the city itself is so involved, or there is any occasion to withhold from the city the protection of the principle of policy which has been invoked. There is no obligation of the city averred. It is not alleged that the city owes anything as yet. The case as it stands upon the averments of the bill makes it a stakeholder pure and simple. No equity as against it is suggested, and no principle or policy of the law countervailing that which has been invoked for its protection has been made to appear. To the city, therefore, belongs the right to be relieved of all part in the contentions between the other parties to this bill.

To the extent indicated the equities of the plaintiff carry the right to a preliminary injunction. A writ for this purpose may go out upon bond being given, but it is to exclude the city of Philadelphia from its operation, and require the other defendants to apply so much of the moneys received to the payment of the claims presently due and payable to materialmen and others for which the plaintiff is liable as surety by paying the moneys received under the contract to a receiver to be appointed. A decree to this effect, with bond, may be submitted for approval.

The earnestness and ability with which counsel have urged propositions upon the court with which the above is not in accord justify the extending of this opinion, so as to cover a general discussion of the cases to which we have been referred as supporting the propositions so advanced. The discussion of the cases cited on behalf of the plaintiff other than those already mentioned may be confined to the general observation that there is no well-considered case which extends the equitable doctrine of exoneration beyond the limitation stated. The authorities referred to upon the subject of exemption of municipalities from attachment process, or its equivalent, so far as apparently inconsistent with the views above expressed, may be classified as of three kinds. The one consists of cases which have been ruled in jurisdictions which do not give recognition to this rule of policy. Another consists of cases in which the municipality was in some way, or to some extent, itself concerned in the litigation, so that an obligation rested upon it which it was the right of the plaintiff in the bill to have enforced. If, for illustration, a municipality was under an obligation to pay, which obligation could be enforced by an action, then equity might enforce this obligation for the benefit of the surety. The other class consists in a line of cases in which some other principle or policy of the law is involved, which so far as is necessary overrides the policy of the law upon which the principle of exemption is based. An illustration of this is afforded by the line of cases in which it is proposed to take the moneys owned by the municipality from without the jurisdiction of the court and away from creditors who are citizens of the same state with the municipality, and transfer the fund to another jurisdiction for the benefit of foreign creditors. Here a plaintiff by a bill in equity may

invoke another policy of the law, which has been adopted for his protection under such circumstances.

The difficulties in the way of giving accord to the propositions advanced by the defendants other than the city of Philadelphia are twofold: First, the policy of the law which accords freedom to a municipality from being drawn into litigation with which it is not concerned is extended to the municipality alone and is not to be applied in relief of other litigants. The case of McElroy v. Hathaway et al., 44 Mich. 399, 6 N. W. 867, is not authority for the proposition in its entirety as advanced in reliance upon that case. The case is really only authority for the well-known principle that a court of equity will not usurp the powers and authority of a probate court by itself taking over the assets of a decedent's estate and administering them. This was what the court was asked, and refused, to do in that case. So far as the observations made by the judges who delivered opinions in that case bear upon the principle now under discussion, they recognize at least the possibility that "a court of equity proceeding in accordance with its own maxims and keeping within the limits given to it in this state" may grant relief to a surety by the application of the principle of exoneration. They also give recognition to the limitation of the principle, to which we have already adverted, that it did not place the power in the hands of a surety to relieve himself of his contract of suretyship merely because he had become apprehensive that he might suffer a loss by reason of it. There is an expression in the part of the opinion quoted which may mean that a court of equity under the laws of the state of Michigan, as in Pennsylvania, is not a court of general chancery jurisdiction, but is a court possessing only the limited powers which have been conferred upon it by the statute.

[5] It remains only to bring the future disposition of this case within the technical rules of pleading. Strictly speaking, all we have before us is the motion for a preliminary injunction, which we have already disposed of. As demurrers in equity have been abolished, the real question intended to be raised by the defendants can be raised only under rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi). This must be either on motion called up and disposed of in the discretion of the court, or on motion set down for hearing upon five days' notice. If counsel representing all the parties are in accord upon the suggestion that the case be finally disposed of as if upon demurrer, they may by stipulation, or by conforming strictly with the requirements of rule 29, put the case in formal shape to be finally ruled.

For the present, we confine ourselves to the awarding of a writ of preliminary injunction to the extent already indicated, and leave the equities of the parties to be determined after final hearing.

THE EDITH.

(District Court, W. D. Washington, N. D. August, 1914.)

No. 2723.

1. SHIPPING (§ 69*)—WAGES OF MASTER—STATE STATUTE GIVING LIEN—"FOR ALL SERVICES RENDERED ON BOARD."

Under Rem. & Bal. Code Wash. § 1182, which makes vessels liable "for services rendered on board," a master, as well as members of the crew, has a lien for wages.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 201, 293–307, 312, 313, 315, 317, 318; Dec. Dig. § 69.*]

2. MARITIME LIENS (§ 37*)—SUPPLIES AND REPAIRS—LIMITATION OF TIME—PUGET SOUND TUGS.

The rule adopted for future cases in the Western district of Washington, fixing a limitation of 90 days beyond which claims for repairs, supplies, etc., furnished in their home port to Puget Sound tugs and vessels making daily or weekly trips, shall lose their priority and the right to share pro rata with claims arising within that time.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58–70; Dec. Dig. § 37.*]

In Admiralty. Suit by the Heffernan Dry Dock Company against the steamship Edith, in which the Carbon Hill Coal Company, the Turner & Pease Company, Barton & Co., E. A. Swift, and William Whiteside became interveners. On exceptions to report of commissioner. Overruled.

Bronson & Robinson, of Seattle, Wash., for libelant.

Huffer, Hayden & Hamilton, of Tacoma, Wash., for intervener Carbon Hill Coal Co.

Frank A. Paul, of Seattle, Wash., for interveners Barton & Co. and Turner & Pease.

Tucker & Hyland, of Seattle, Wash., for interveners Swift and another.

NETERER, District Judge. On April 15, 1914, libel was filed by Heffernan Dry Dock Company, a corporation, monition issued, and steamship Edith taken into custody by the United States marshal. Thereafter various intervening libels were filed for furnishing supplies, repairs, and other necessaries, also by the master and members of the crew for wages. The vessel was duly sold and the money paid into the registry of the court. The cause was referred to the United States commissioner, who took the testimony, reported his findings of fact and conclusions of law, and the matter is now before the court on the exceptions to the report of the commissioner.

[1] The claims of the master and crew were reported as first claims, and, on stipulation of the parties, the sum due the members of the crew was paid. Exception was filed to the allowance of the master's wages on the ground that, under the admiralty rule, he had no lien. While the master is presumed to look solely to the credit of the owner, and, in the absence of a statute, it is well settled in this country that he has no lien (The Rupert City [D. C.] 213 Fed. 263), the statute

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

of Washington (section 1182, Rem. & Bal. Code) makes all vessels liable "for services rendered on board," without any exception. Hence the master, as well as the mariners, has a lien for unpaid wages earned on board. The Laurel (D. C.) 113 Fed. 373.

Intervening libelants, Carbon Hill Coal Company, Barton & Co., and Turner & Pease have filed exceptions. The exceptions of Turner & Pease are simply based upon the fact that the commissioner failed to report that the certificate of trade-name was filed, and that no proof was reported of the payment of the corporate license fee, as provided by the laws of Washington, but since the claims were allowed, and no exception filed, the omission is immaterial. Exception No. 2 of the Barton Company is in the same condition. Exception No. 1 of the Barton Company was allowed by consent of parties.

[2] The Carbon Hill Coal Company excepts to the allowance of libelant and intervening libelants' claims of equal class with it, on the ground that such parties "have been guilty of such laches and extension of credit that they are not entitled to share pro rata with the intervener Carbon Hill Coal Company, whose supplies were furnished between the 12th day of December, 1913, and the 14th day of February, 1914, and that such laches have prejudiced said Carbon Hill Coal Company," etc. It is shown that the vessel operates in the Seattle Harbor and Puget Sound, and that the material and labor of the various claimants were furnished at various periods of time, ranging from 30 days to 8 months prior to the institution of this action. It is urged that the court fix an arbitrary period in which claims for supplies, materials, repairs, etc., shall lose their priority, and that the claims be classified into 40-day periods and given priority in the inverse order. The admiralty rule gives supplies furnished for a late voyage rank over those of a prior voyage, but where frequent short voyages are made, and perhaps daily trips, occasioning open, overlapping accounts, a different proposition is presented than vessels navigating the high seas, and in such cases the rule cannot be applied, as the business could not be carried on with daily libels, which would be necessary, since the last supplies furnished would have priority. No arbitrary rule has been followed in this court, but it has been the custom to prorate admiralty claims of the same class, irrespective of priorities of time. This practice, no doubt, was adopted because liens for materials, supplies, etc., furnished a vessel in the home port prior to the act of June 23, 1910 (36 Stat. 604, c. 373 [U. S. Comp. St. 1901, §§ 7783–7787]), depended upon the statute of Washington (Rem. & Bal. Code, § 1182). This section extends the limitation for continuance of the lien for a period of three years from the time the cause of action accrued. This section, while it establishes a priority of time, quality, or degree, for services rendered on board, for materials furnished and work done, etc., wharfage and anchorage, for performance or nonperformance of contract, and for damages to person and property, in the order given, did not fix a time of priority as between the claimants. This statute has been, so far as the supplies and materials in issue are concerned, superseded by the act of June, 1910.

Various periods have been fixed by the courts in the various dis-

tricts. In New York Harbor, claims less than 40 days old are preferred. The Gratitude (D. C.) 42 Fed. 299; The Samuel Morris (D. C.) 63 Fed. 736; The Glen Island (D. C.) 194 Fed. 744. In South Carolina the funds will be distributed pro rata where the claims were created within a year The Thomas Morgan (D. C.) 123 Fed. 781. On the Great Lakes the claims of equal rank arising during the same season are paid pro rata without respect to the particular voyage. The Nebraska, 69 Fed. 1009, 17 C. C. A. 94. The same rule has been applied to the operation of canal boats. The J. W. Tucker (D. C.) 20 Fed. 129.

The period of limitation fixed by the state statute is no guide in the fixing of any period of limitation under the admiralty rule on claims coming under the act of Congress, and it being impossible, consistent with the operation of vessels in the local harbor cases, to apply the general maritime rule, except as to the spirit and purpose, it would seem as though some rule should be adopted. The spirit and purpose of the general maritime rule is to give the vessel a credit of sufficient time to earn her charges for transportation, whatever they may be, collect the same, and pay her bills. It seems to be an anomaly that the Alaska and San Francisco vessels and the steamships to the Orient, sailing from the port of Seattle, do, under the general admiralty rule, shift these priorities with every voyage (that is, about every month, and many of them several times a month), and the vessel which remains here, amenable to process at all times, should continue for three years. The long extension of time leads to evils and abuses which can well be avoided. An admiralty lien being a secret lien, no one except the parties directly interested having any knowledge, the abuses which may be occasioned become, upon the suggestion, apparent. In a place where the custom is that all settlements shall be made at least every 30 days, it seems that a period fixed beyond which the claims will lose their priority is a matter which fair dealing requires, and that a time sufficiently long to permit the owners of vessels to make all reasonable arrangements and adjustments with relation to the earnings in their business, but which would also afford a reasonable safety to persons extending credit to the vessels, would be welcomed by all. I think that, as between claimants, to retain priority 90 days should be the limit of time in these cases, where vessels are operating from the local harbors in the district, and from which they make daily or weekly trips, unless there is a special reason why the application of the arbitrary rule should not be made, which should be made to appear in the particular case.

I have conferred with Judge Cushman of the Southern Division, and am authorized to say that he agrees with this limitation of 90 days.

In view of the rule heretofore followed in this court, the rule will not be applied in this case. The exceptions are therefore overruled, and an order may be presented confirming the report of the referee.

HIDDEN v. WASHINGTON-OREGON CORPORATION et al.

(District Court, W. D. Washington, S. D. October 21, 1914.)

No. 16-E.

1. TIME (§ 10*)—COMPUTATION—REMOVAL OF CAUSE—PETITION.
Rem. & Bal. Code, § 221, provides that a defendant shall answer within 20 days after service of summons, exclusive of the day of service. Section 252 declares that the time for doing an act shall be computed by excluding the first day and including the last, but if the last day falls on Sunday it shall be excluded. Section 150 also declares that if the last day is a holiday or Sunday it shall be excluded. *Held* that, where the twentieth day after service of summons fell on Sunday and the succeeding day was a holiday under the state statute, a petition for removal, which must be filed at or before the time when, by state law, defendant is required to plead or answer to the complaint in the state court, was properly filed on the succeeding day.
[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 34–52; Dec. Dig. § 10.*]

2. CORPORATIONS (§ 479*)—DEED OF TRUST—REMOVAL OF TRUSTEE—PARTIES.
In a suit to remove a mortgage trustee, the corporate mortgagor is a necessary party.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

3. REMOVAL OF CAUSES (§ 27*)—CITIZENSHIP.
Where plaintiff, a citizen of Washington, brought suit against defendants, a Washington corporation, a trust company which was a Pennsylvania corporation, and a citizen of Pennsylvania, to remove the Pennsylvania corporation from the office of trustee under a deed of trust executed by the Washington corporation, the latter being a necessary party and properly aligned as a defendant with the trustee, there was no controversy wholly between citizens of different states, so as to justify a removal of the cause to the federal court.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 64–68; Dec. Dig. § 27.*]

In Equity. Suit by L. M. Hidden against the Washington-Oregon Corporation and others. On motion to remand. Granted.

Glenn E. Husted, of Portland, Or., for plaintiff.
Sullivan & Christian, of Tacoma, Wash., for defendant Trust Company.

CUSHMAN, District Judge. This suit is one brought in the state court by a citizen of Washington, holding as collateral security certain mortgage bonds of the defendant Washington-Oregon Corporation, a corporation of the state of Washington. By the complaint the removal is sought of the trustee to whom the mortgage securing the bonds was executed. This trustee, the Philadelphia Trust, Safe Deposit & Insurance Company, a Pennsylvania corporation, and Randolph W. Childs, a citizen of Pennsylvania, are made defendants. The cause was removed to this court, and plaintiff now moves its remand to the state court.

[1] The statute requires the petition for removal to be filed in the state court at or before the time when, by the state law, the defendant

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

is required to plead or answer to the complaint in the state court. The summons in this case was served August 17, 1914. Under the statutes of Washington (Rem. & Bal. Code, §§ 221, 222, 223), defendant is required to answer "within twenty days after the service of the summons, exclusive of the day of service." The petition for removal was filed September 8th. September 6th (the twentieth day) was Sunday. September 7th was Labor Day, a holiday under the state statute. Section 252, Remington & Ballinger's Code, provides:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day falls on a Sunday it shall be excluded." Laws of 1893, p. 415, § 26.

It is contended, as this statute only extends the time when the last day for the performance of an act falls upon Sunday, and as no mention is made of holidays, that the petition was filed too late. Section 150, Remington & Ballinger's Code (section 4790, Bal. Code; title 81, § 1875, Pierce's Code 1912), provides:

"The time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last, unless the last is a holiday or Sunday, and then it is also excluded." Approved Jan. 27, 1888. Laws 1888, p. 32.

In Kubillus v. Ewert, 40 Wash. 38, 82 Pac. 147, a decision rendered in 1905, it was held that, where the last day for moving for a new trial fell upon the 4th of July and the 5th of July was Sunday, the time was extended to and included Monday, the 6th of July. It is therefore held that the petition for removal was filed in time.

[2] On account of the conclusion reached, it will not be necessary to determine, in a cause such as the present, where the removal of a mortgage trustee is in controversy, whether it is of such nature as to make capable the measure of the value of the matter in dispute giving the court jurisdiction, if it is shown to be sufficient.

The Washington-Oregon Corporation, mortgagor, is clearly an indispensable party to the controversy. If the principal is not interested in the selection and removal of its agent, it is difficult to conceive of any party who would be.

The accused trustee may feel more keenly the allegations of misconduct, and defend against them with greater zeal; but its interest cannot be said to be greater than that of the mortgagor, for which it holds, in part, trust powers under the mortgage. Minnesota v. Northern Securities Co., 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499; California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; Venner v. Great Northern Ry. Co., 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666; United States v. Northern Pacific R. Co., 134 Fed. 715, 67 C. C. A. 269; Inhabitants of Anson et al., Petitioners, 85 Me. 79, 26 Atl. 996; Elias v. Schweyer, 13 App. Div. 336, 43 N. Y. Supp. 55; Maxwell v. Finnie, 6 Cold. (Tenn.) 434; 39 Cyc. 268.

In Meyer v. Delaware Railroad Construction Co., 100 U. S. 457, 25 L. Ed. 593, a trustee under a mortgage made by a railroad company sought to remove a cause in which the mortgagor was a party, and, if a necessary party, the cause was not removable. The right of re-

moval was upheld; but that the ruling is not controlling of the present case is shown by the following extract:

"In the present case, it appears that the suit was originally brought by a citizen of Iowa against another citizen of Iowa and citizens of Pennsylvania and Ohio. There were then, according to the pleadings, two matters about which there might be dispute—one between the construction company and the railroad company, both citizens of Iowa, as to the amount due the construction company and the actual existence of a mechanic's lien; and the other between the construction company and the trustees of the mortgage, citizens of different states, as to the priority of the mortgage over the mechanic's lien. But before the trustees of the mortgage were actually brought into court by service of process, the dispute between the construction company and the railroad company had been finally disposed of. The amount due the construction company had been ascertained so far as that company and the railroad company were concerned, the mechanic's lien established, and the property sold under the lien to pay the debt. There was after that nothing left of the suit, except that part which related solely and exclusively to the priority of the mortgage lien, and as to this the controversy was between the construction company on the one side, and the mortgage trustees on the other. If the railroad company still continued a party to the suit, it was a nominal party only, and its interests were in no way whatever connected with those of the trustees. It did not, therefore, occupy a position in the controversy on the same side with them." 100 U. S. at page 469 (25 L. Ed. 593).

The question there having become solely one as to priority between two claims, both of which were against the railroad company, such company was not a necessary party. So far as that controversy was concerned, the trustee was the representative alone of the bondholders, the priority of whose claim it sought to establish. If the trustee is removed, it is removed, not only as representative of the bondholders, but of the mortgagor as well. Its interest is therefore clearly apparent.

[3] As the Washington-Oregon Corporation is properly aligned as a defendant with the trustee sought to be removed, the cause does not present a controversy wholly between citizens of different states, and will therefore be remanded to the state court.

ODELL v. H. BATTERMAN CO.

(District Court, E. D. New York. October 10, 1914.)

1. RECEIVERS (§ 174*)—CORPORATIONS—ADMINISTRATION OF PROPERTY—RIGHT TO SUE—CONSENT.

Where a business corporation occupying rented premises was in the hands of receivers appointed by a federal court, and the landlord desired to terminate the lease because of an alleged breach of a condition to perform an order of the fire department of the city of New York to make certain changes in the premises, as it was required to do by the laws, the landlord's application to sue in the state court in ejectment while the receivers were in possession would be denied, except that it might be permitted to sue the corporation alone, with a stipulation that the receivers might intervene and stay the action during the period of their possession.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333-343; Dec. Dig. § 174.*]

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

2. COURTS (§ 500*)—JURISDICTION—FEDERAL COURTS—RECEIVERS.
Where property of a tenant corporation was in the hands of receivers appointed by the federal court, such court had jurisdiction to hear and determine a question as to the landlord's right of entry for alleged breach of a condition in the lease.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. § 500.*]

In Equity. Suit by William P. Odell against the H. Batterman Company. On application by the Barwin Realty Company for leave to institute an action of ejectment. Denied conditionally.

Henry A. Ingraham, of Brooklyn, N. Y. (William D. Guthrie, of New York City, of counsel), for petitioner.
Corbitt & Stern, of New York City (Ernest J. Ellenwood, of New York City, of counsel), for receivers.
White & Case, of New York City (P. H. Noyes, of New York City, of counsel), for noteholders' committee of H. B. Claflin Co.

CHATFIELD, District Judge. Receivers in equity of the H. Batterman Company were appointed by this court upon the 25th day of June, 1914. They are occupying premises leased by the H. Batterman Company in 1909 for a 30-year term from the Barwin Realty Company.

Performance of the conditions of this lease was guaranteed by one of the individuals connected with the Batterman corporation, but under existing circumstances this guaranty gives assurance for the future of no more security than will be present in the value and business of the Batterman Company itself.

On March 14, 1914, two orders of the fire department of New York were issued, directing the making of certain changes in the Batterman store. This order was addressed to the estate of Henry L. Batterman, owner, etc., and served upon the executor, who happened to be president of the Barwin Realty Company. This notice was sent by him to the tenant, who was bound by the terms of the lease to carry out any "orders" of the city departments "applicable to the premises," with privilege of re-entry by the owner in case of breach thereof.

Rent was paid up to and including June 10, 1914, and accepted by the landlord, which had no actual knowledge, and did not inquire, as to whether the directed changes had been made. The rent for July and the succeeding months has been tendered and refused by the landlord, who on July 13th sent a notice to the Batterman Company and the receivers of its election to terminate the lease because of the neglect of the aforesaid order, and demanded surrender of the premises. The landlord now makes its motion for leave of this court to bring an action for ejectment against the Batterman Company and the receivers in the courts of New York state.

Since the pendency of the motion, the order of March 14th has been rescinded, and another order made directing the same changes, but addressed to the *receivers* and to the *Barwin Realty Company*. Under

the terms of the lease; these changes will now have to be made by the receivers, if the validity of the order is accepted by the tenant and the owner, or upheld by the courts, although the receivers will probably occupy the premises but a short time, even if liquidation occurs.

[1] It is urged that this will not result, and that the property will be, under some form of reorganization, turned back to the Batterman Company, or a successor thereto. So long as the receivers remain in possession, the rent reserved in the lease will be available for the landlord (as it is admittedly a fair value for use and occupation), and even if the landlord be allowed to exercise the right to bring suit, the receivers must continue to occupy the premises while conducting business under present circumstances. But it is apparent that the desire of the landlord to determine his security as to the future term of the lease and his right to insist upon a new contract, or a new guarantor for the contract of leasing, is a substantial matter, which the court is loth to consider upon a motion having to do only with the receivers' present status. Whether the lease was broken by failure to obey an order of the fire department, which the department apparently recognizes might be successfully contested, should not be determined collaterally upon the face of the present papers, on an application for leave to raise the question by suit.

But this does not dispose of the legal right claimed by the landlord on July 13, 1914, to terminate the lease, and the only question before this court is whether the landlord should be allowed to *now* institute a suit to test the question of its demanded right to eject the tenant and the receivers. If the receivership is to be continued for any time, and particularly if the receivers are compelled under the new order of the fire department to make the repairs ordered, then the right of the landlord to *present* possession of the property must still be litigated in these equity proceedings, for the receivership and the liability of the receivers to pay for occupation of the property will not be terminated by a decision as to the rights of the tenant under the lease which the receivers are now complying with in the tenant's place and stead. After the receivership is ended, or any adjustment is arranged, so that the property is to be turned back to the tenant, then the state court would be the only forum to litigate the question of the rights of the tenant and the landlord.

The conclusion from the whole matter is that the landlord, if he has a right to insist upon a new lease, or new terms of the lease, should not be precluded from the immediate benefit of asserting those rights by a mere forcible stay incidental to the presence of the receivers. But neither should the landlord's claim of rights (merely because the court cannot dispose of it upon a statement of the question) be allowed to interfere with the receivership by litigation which promises to extend far beyond the limit of the receivership, and to be entirely a matter for the consideration of those seeking to take the property from the hands of the receivers and enter into relations with the landlord, freed from the jurisdiction of this court. It is evident that, if liquidation occurs and the lease be terminated or given up, the present question is of no importance. If the receivers seek to sell the

lease as an asset, they will have to dispose of the question before so doing. But neither of these considerations affect the present motion.

For these reasons, the application to begin an action in the state court at the present time will be denied, unless, as indicated upon the argument, the landlord wishes a limited permission to begin such an action against the tenant alone, to preserve its alleged rights, and with the stipulation that the receivers may intervene and temporarily stay the action, during the period that they may be in possession.

[2] On the other hand, the landlord may, upon the present papers, or such other papers as he may be advised, apply to this court (as the court having present jurisdiction over the entire property) for a determination as to the landlord's right of entry (subject to the actual occupation by the receivers), and that issue, if raised, may be properly disposed of upon the answering affidavits after a full hearing.

Ex parte CHAN FOOI.

(District Court, N. D. California, First Division. September 22, 1914.)

No. 15661.

1. ALIENS (§ 28*)—EXCLUSION OF CHINESE—STATUTES—CONSTRUCTION.
Chinese Exclusion Act (Act May 6, 1882) c. 126, § 6, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 (U. S. Comp. St. 1913, § 4293), providing for the presentation of certificates of identification by Chinese persons other than laborers seeking admission to the United States, executed by Chinese authority and viséed by the indorsement of the United States diplomatic representative in the country from which it issues, etc., declares that such certificate so viséed shall be prima facie evidence of the facts set forth therein, and shall be the sole evidence permissible "on the part of the person so producing the same to establish a right of entry." Section 12 declares that no Chinese person shall be permitted to enter the United States without producing to the proper Chinese inspector the certificate in the act required by persons seeking to land from a vessel. *Held*, that section 6 should not be construed to make the certificate the sole evidence permissible only on the part of the persons producing the same, so as to exempt from such provision a minor claiming the right to enter the United States because his father was a regularly domiciled Chinese merchant in the United States; the intention of Congress being that no person falling within section 6 may be allowed to enter without the required certificate.

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

2. ALIENS (§ 25*)—CHINESE PERSON—MINOR—PRODUCTION OF CERTIFICATE.
Where petitioner, at the time he sailed from China for the United States, was entitled to enter as the minor son of a regularly domiciled Chinese merchant of San Francisco, but such right was lost because of the death of his father, which occurred eight days before petitioner's arrival, he was not entitled to enter as a student or merchant without the certificate required by Chinese Exclusion Act, § 6.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. § 25.*]

Application for a writ of habeas corpus for and on behalf of Chan Fooi. On demurrer to petition. Demurrer sustained, and writ denied.

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

Catlin & Catlin, 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. Chan Fooi, designated herein as petitioner, according to the averments of the petition for a writ of habeas corpus presented on his behalf, is the minor son of Chan Sing, late a regularly domiciled Chinese merchant of San Francisco, who died on March 15th of this year. Prior to his father's death, and on March 2d petitioner, being then less than 19 years of age and a native resident of China, embarked therefrom for San Francisco on the steamship Korea, intending to avail himself of his right to enter this country as the minor son of a resident merchant. The vessel, however, did not arrive at San Francisco until March 23d, and petitioner was denied the right to land, because of his father's death, which had occurred eight days before his arrival.

It is not contended that petitioner is a laborer, or that he is not the son of the late Chan Sing, or that the latter was not a bona fide resident merchant; but he is excluded for the reason that, his communicated status as the minor son of a merchant having been destroyed by the death of his father, before he can enter this country by any right of his own, whether as student, merchant, or otherwise, he must produce the certificate provided for in section 6 of the so-called Chinese Exclusion Act. This section requires, among other things, that every Chinese person, other than a laborer, who may be entitled to come within the United States, shall obtain the permission of and be identified by the Chinese government, to be evidenced by a certificate issued by such government, which shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled to come within the United States. If the person applying shall be a merchant, the certificate shall, in addition, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application. This certificate must be viséed by the indorsement of the United States diplomatic representative in the country from which it issues, or of the consular representative at the port of departure, and "such certificate, viséed as aforesaid, shall be prima facie evidence of the facts set forth therein, * * * and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States."

[1] It is urged by petitioner that, as he was not compelled under the conditions existing at the time of his departure from China to procure the certificate required by section 6, because his right to enter as the minor son of a merchant was not dependent upon the production of such certificate, he should now be permitted to make

other proof of his status as a student or a merchant, and should not be put to the expense and trouble of returning to China to secure the certificate, which, it is further urged, the act makes the sole evidence permissible *only* on the part of a person producing the same; the implication being that a person not producing the same may be permitted to furnish other evidence of his right to enter. To this latter contention I cannot agree. Section 12 of the same act provides:

"No Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act *required* of Chinese persons seeking to land from a vessel."

This provision indicates quite clearly the intention of Congress that no person falling within the provisions of section 6 may be allowed to enter the United States in the absence of the certificate therein required.

[2] Equally untenable is the other contention that petitioner is relieved from producing the certificate, and entitled to furnish other evidence of his status as a student or a merchant, because of the circumstances attending his departure from China, and the hardship that would be occasioned by compelling him to return thereto. Had his father lived, he could have entered by virtue of his communicated status as the son of a resident merchant. With the death of the father, this status was destroyed; but this fact does not relieve him of the necessity of producing the evidence required by law, if he desires to establish another and very different status upon which to base a right to land. For students or merchants coming to the United States for the first time, the act prescribes the only evidence upon which entry into the United States may be had. If petitioner desires to enter as a student or a merchant coming here for the first time, he must fortify himself with the evidence which the law declares "the sole evidence permissible." That it would work a hardship upon him to require the production of this evidence is beside the question. That he left China without this evidence, because of his right to enter as the minor son of a merchant, cannot now relieve him of the necessity of producing it. The law is too clear upon this point to warrant a construction setting aside its terms. If, indeed, petitioner be a student, or a merchant, as claimed, he might have procured a certificate to that effect before his departure from China. Failing to do so, and relying solely upon his communicated status, he cannot now complain of hardship, because such communicated status was destroyed by the happening of a contingency, the death of his father, which in the nature of things might happen at any time.

The demurrer to the petition is therefore sustained, and the writ denied.

THE EMMA F. ANGELL (two cases).

(District Court, E. D. Pennsylvania. October 21, 1914.)

Nos. 25, 30.

1. SEAMEN (§ 10*)—BURDEN OF PROOF—PROVISIONS.
In a suit by seamen for failure of the owner to provision the ship, in accordance with the shipping articles and as required by statute, the owner has the burden of meeting the accusation by proof that the ship was properly provisioned.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 34–38; Dec. Dig. § 10.*]

2. SEAMEN (§§ 10, 19*)—WAGES—WRONGFUL DISCHARGE.
Seamen, *held*, on the evidence, to have been furnished with an inadequate supply of provisions on a voyage, and to have been wrongfully discharged in a foreign port before the completion of their term of service, and awarded damages and wages for the full voyage.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 34–38, 83–85; Dec. Dig. §§ 10, 19.*]

In Admiralty. Suits by James Thomas and by Arthur Johnson against the schooner Emma F. Angell, which have been consolidated. Decree for libelants.

Lionel Teller Schlesinger, of Philadelphia, Pa., for libelants.
Howard M. Long, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. To decide a controversy such as this the trier of facts has need of something little short of omniscience. As is to be expected, the real facts cannot be found from the testimony of two men, or sets of men, who are shut up together in a ship and look at everything, not only from different, but antagonistic, points of view. The main controversy is over the fact as to whether this vessel was properly provisioned. The contract fortunately is clear. The act of Congress is plain. If this act is not to be enforced, except in that class of cases in which owners and masters admit dereliction of such a duty, the act might as well never have been passed. To the credit of American owners and masters, few instances for occasion to apply this law arise. It goes without saying, however, that any man who would send out a ship without an adequate supply of provisions for the crew could not be expected to hesitate to deny the fact. Furthermore, if sailors who find themselves at sea without grub are to be denied the protection of the act, because they failed to be amiable under such circumstances, it is of very little practical benefit. A controversy between such unscrupulous masters and sailors in such a dissatisfied, unruly, and ugly mood must evoke a tangle of contradictions which no one can unravel, and produce a whirlpool of charges and countercharges which will swamp any craft which enters it.

[1] Some general rule must be found to afford us a compass by which to steer. That rule is that, when a controversy arises over the provisioning of a ship in accordance with the shipping articles, the owners and masters must carry the burden of meeting the accusation

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

by establishing the fact that the ship was properly provisioned. This burden they can easily carry. They are within the principle that the litigant who has control of the proofs must produce them. If innocent owners or masters are unfortunately charged by unruly and untruthful members of their crews with failure to properly provision their vessels, they are in a position to establish the fact of the groundlessness of the charge beyond all fair controversy, and any reasonable owner or master would willingly assume this burden for the general good.

Measured by this rule, the respondents in these cases have not met this burden. The testimony of the libelants and their witnesses is direct and positive, although, of course, it possibly may not be in accord with the real facts. The master and mate have each testified to their belief that the complaints of the crew were groundless, and prompted only by unruliness and a spirit of insubordination. Neither of them, however, has any knowledge of what the men had to eat which could be accepted as evidential. They base the inference that the crew were well fed upon the fact that they themselves had enough, and upon the further inference that cabin and forecastle were served alike, except in the matter of milk. The fact of a supply of proper provisions might have been shown, and the consequence of a failure to meet the testimony of the crew with a show of facts, not opinions, is to have a finding of the fact against the ship.

[2] The same thing may be said of the discharge of the libelants in a foreign port. The captain wanted to get rid of them. This he makes clear enough. They were arrested on a complaint telephoned to a magistrate, or perhaps only to a constable. No one appeared against them. We have not been referred to a copy of the treaty which authorizes arrests of sailors on American ships. It doubtless sets forth what sort of a complaint will justify an arrest, and how it is made. What offenses are within the treaty we do not know, nor do we know what the charge against these men was. There is room to infer that assault and battery is the charge which might, under the treaty, have been made. We know there was no ground for such a charge. There had been an exchange of "sailor talk" between crew and mate, and master and crew. Beyond this it did not go. The captain paid some money over to a constable, who returned him the receipts of the men for $44 each, with the statement that the men had paid the costs and were willing to call quits. This the men deny. On this quoted say-so of a constable, whose name even is unknown, we are asked to find that the men gave up their contract and left the vessel voluntarily. The men deny this, and we are unable to find the fact against them. The receipts are not conclusive, and are open to the explanation which has been given under oath and is not contradicted.

No court is disposed to make any finding which would weaken the discipline necessary to be enforced on ships, or the control of officers over their crews. We simply find that there is direct and positive testimony as to the salient facts, which not only justifies, but unanswered compels, a finding in favor of the libelants as to the question of provisions and discharge, and nothing in the way of evidence to

the contrary. If the findings are not in accord with the real facts in respect of the two points indicated, it is because the evidence of the facts has not been produced.

An order may be drawn incorporating these awards in favor of the libelants and against the respondents:

(1) Full wages for the term of the voyage in accordance with the shipping articles, less the moneys received by each of the libelants, respectively, and a further allowance for all loss and damage, so that the net amounts awarded shall be as follows:

James Thomas.....$115.00
Arthur Johnson.....$117.20

(2) The allowance to each libelant of costs against respondents.

In re RAFLO.

(District Court, E. D. Pennsylvania. October 29, 1914.)

No. 4066.

1. PAYMENT (§ 17*)—EXECUTION OF NOTE.
Where a bankrupt executed a note to his landlord for rent in arrears and to accrue, there was no presumption of fact or law that the giving of such note constituted payment, so as to deprive the landlord of his right to enforce payment of the rent by distraint, etc., in the absence of proof that such was the intent of the parties.
[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70–77; Dec. Dig. § 17.*]

2. APPEAL AND ERROR (§ 1017*)—REVIEW—FINDINGS OF REFEREE.
Findings of fact by a referee establish the fact on review in the District Court, and will not be disturbed in the absence of good reason therefor.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996–4005; Dec. Dig. § 1017.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Jacob Raflo. On petition to review a referee's determination allowing a landlord's claim. Affirmed.

Potter, Dechert & Norris and Sheldon F. Potter, all of Philadelphia, Pa., for landlord.

Gordon A. Block and Clinton O. Mayer, both of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. The facts necessary to an understanding of the question involved in this petition are few and may be soon outlined.

David Mann leased premises at Twenty-Seventh and York streets, in the city of Philadelphia, to Raflo, who is now the bankrupt, for the term of five years from July 1, 1904. The lease was in writing and contained the usual waiver of exemption. On May 10, 1911, the landlord distrained for the rent in arrears up to May 1st; levy being made upon the personal property of the tenant on the leased premises. On

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

May 11, 1911, the petition in bankruptcy was filed. All the goods upon the premises were sold as a whole. The amount of exemption to which the bankrupt was entitled, and to which he laid claim, was set aside to him upon his giving the usual bond. The required bond, in the sum of $300, with the United States Fidelity & Guaranty Company as surety, was filed. On July 5, 1911, the landlord filed a claim for $308.63 for rent alleged to be due him.

On October 22, 1913, the referee entered an order requiring the landlord to exhaust the debtor's exemption before preferring a claim against the general fund. On March 23, 1914, the referee, after the allowance of a rule on the bankrupt and his surety on the bond filed, answer thereto, and hearing thereon, entered an order directing that the sum of $300 be paid by the bankrupt, or by his surety on his default, to the landlord, and that the balance of the landlord's claim be paid out of the general fund. On March 24, 1914, this petition for a review was filed.

[1] To complete the recital of the facts, and to bring out the only question in the case which has been discussed by the referee in his report and by counsel, there should be added a statement that the tenant gave to the landlord a note for $213, covering the rent then in arrears and rent which it was then within the expectation of the parties would subsequently accrue. The note was made for four months, and included also interest for the deferred payment. The note was not paid. Standing upon this fact, the bankrupt takes the position that the debt as an indebtedness for rent had been extinguished, and the landlord thereafter was landlord no longer, but a general creditor as a mere note holder. In substance and essentially this is the defense of payment. In substance and effect it is a plea of payment. This is an affirmative plea, which at the trial must be supported by proof. The burden of proof would be upon the pleader. No presumption of fact or of law that the giving of a check or note for an existing debt is payment arises out of the mere circumstance of the check or note having been given. Whether payment or not is a question of fact.

[2] This is the view taken by the referee, and in this he is right. He has found the fact against the tenant, and this finding establishes the fact for us, unless there is good reason to disturb the findings. No such reason has been presented to us, nor is any suggested by anything appearing in this record. The referee is therefore sustained in this finding.

This disposes of the only question upon which we have been asked to pass. There is, however, the other question of whether the landlord should be paid out of the exemption or the general fund. This question is raised by the pleadings, but has not been referred to by the referee in this report, nor discussed by counsel. It has not been discussed by the referee because already treated by him in the former order. Counsel for the bankrupt makes a passing reference to it in his brief. It is not mentioned by counsel for the landlord, probably for the reason that the question was not raised at the oral argument. We do not feel called upon to dispose of questions not raised.

If it is intended to be raised, counsel has leave to set the case down for reargument within five days; otherwise, petition dismissed, and report and findings of referee affirmed.

LEE LASH CO. v. NORTHWESTERN CONSOL. MILLING CO.

(District Court, E. D. Pennsylvania. October 26, 1914.)

No. 3034.

PLEADING (§ 367*)—STATEMENT—DEFINITENESS.

Where the statement set forth the contract in suit, which provided that for named services plaintiff should receive a stipulated sum, that if any services were unsatisfactory additional or extra service should be rendered before the stipulated sum should be due, and that plaintiff should furnish at its own expense certain lantern slides, which should be exchanged for new ones at defendant's request, the cost to be allowed against claims for extra service, and alleged performance by plaintiff, the furnishing of new slides at a named cost, and the rendition of certain extra services which were not specified, defendant cannot require plaintiff to make a more specific statement of the extra service rendered, for, an allegation of the performance of extra services being unnecessary until nonperformance in an amount greater than the cost of the new slides is set up in defense, the allegation may be wholly disregarded as surplusage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173–1193; Dec. Dig. § 367.*]

At Law. Action by the Lee Lash Company against the Northwestern Consolidated Milling Company. Sur rule for more specific statement. Rule discharged, and leave to amend granted.

Henry Budd, of Philadelphia, Pa., for plaintiff.

Sullivan & Cromwell, of New York City, and Roberts, Montgomery & McKeehan, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. We are asked by the rule in this case to confine ourselves to the two points in respect of which the statement is criticized. Just what these points are and their bearing upon the sufficiency of the statement can be most clearly shown by an outline of the salient facts.

The claim is based upon a contract in writing, a copy of which is incorporated in the statement. The contract contemplated that the plaintiff was to receive a calculable sum of money for certain services to be rendered. If any part of this service was unsatisfactory, the plaintiff was still to receive the stipulated sum, but before being entitled to it was to render other like service in lieu of that which was unsatisfactory. This is termed by counsel "extra service." The plaintiff was to supply at its own expense certain lantern slides. These, however, should be exchanged for new slides at the defendant's desire; but, if so exchanged, the cost of the slides was to be allowed for as against any of this so-called "extra service." There was some unsatis-

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

factory service rendered, which the plaintiff supplied by extra service. There were new slides provided at a cost of $2,681. The plaintiff admits payments on account, and claims a balance of $5,055.

The defendant asks that the plaintiff be required to set forth what the "extra service" rendered was, on the ground that unless this is set forth the plaintiff is in effect claiming to be paid for the cost of the new slides in money. This does not necessarily follow. The case of the plaintiff proceeds upon the averments that it had a contract calling for the payment to it of a given sum of money upon the rendering by it of certain specified services, and that it performed its part of the contract. By virtue of this the stipulated sum became payable to it, less the moneys received on account. Its right of action for the balance is thus made out. If part of the required service was not rendered, this goes to a denial of one of the averments on which plaintiff's claim is founded, and is prima facie a good defense. The only part which the $2,681 fact plays in the plaintiff's case is that a shortage on its part in performance does not defeat its claim, unless that shortage exceeds $2,681. It was not necessary for the plaintiff to aver any extra services rendered. The averment might have been reserved until nonperformance was set up in defense. It was done probably to make the narrative statement complete. At the most, therefore, it was surplusage, and this does not vitiate the statement.

We cannot, therefore, make this rule absolute, because the basis for it is a fact which cannot get into the case until the trial, or at least until the defense, is presented of record. When it gets in, however, it may show the statement to be defective. The touchstone test is to forecast what may happen at the trial. The plaintiff's statement sets forth what it did to entitle it to the payment promised by the defendant. This is made up of the service required by the contract, extra service (not set forth), and $2,681 expended for slides. Its probata will, therefore, be confined to these allegata. If it develops that what it performed and the $2,681 for slides entitles it to the contract moneys, it has made out its case, without going into its proofs beyond what it has set forth in its statement. If, however, the shortage in performance amounts to more than $2,681, then it must prove other services not in its statement before it can recover. These proofs could not be introduced without being based upon the averments of its statement, and, as the averments would be lacking, the plaintiff would be driven to make the very amendment to its pleadings for which this rule calls. The plaintiff knows what the necessities of its proof will be. If it will not be required to prove facts not alleged, it need not, of course, allege them. If it must prove facts not now set forth, it must first set them forth.

Leave is granted plaintiff to amend its statement, but we cannot require it to do so, and the rule is therefore discharged.

Ex parte LEW LIN SHEW.

(District Court, N. D. California, First Division. August 4, 1914.)

No. 15673.

1. ALIENS (§ 32*) — CHINESE — DEPORTATION PROCEEDINGS — CHARGE — DEFENSES.

While, in proceedings before the immigration officers for deportation of a Chinese alien, no such particularity is required as is essential in court proceedings, yet a mere omnibus charge of being in the country in violation of law, which does not in any degree advise the alien as to what he is called on to meet, is improper.

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

2. ALIENS (§ 24*)—CHINESE—DEPORTATION PROCEEDINGS—GROUNDS—CHINESE MINOR—LABOR AFTER MAJORITY.

Where a Chinese alien has been admitted into the United States as the minor son of a Chinese merchant, he may not be lawfully deported for the sole reason that, after attaining his majority, he has worked as a laborer.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

Habeas corpus proceedings to obtain the release of Lew Lin Shew, a Chinese alien, from custody under a deportation warrant. Writ granted, and petitioner discharged.

John L. McNab, and Timothy Healy, both 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. This matter was heard upon the petition for a writ of habeas corpus and a return filed thereto, by which all the facts were presented to the court. It appears that Lew Lin Shew, a Chinese alien, was duly admitted at the port of San Francisco, on April 24, 1912, as the minor son of a resident Chinese merchant. He was later arrested on a warrant, dated March 3, 1914, which warrant charged:

"That the said alien is unlawfully in the United States, in that he entered without inspection under the Immigration Law (section 20), and in that he entered in violation of another ("any") law of the United States, to wit, the Chinese exclusion laws (section 21 of the Act of February 20, 1907)."

Upon a hearing being had, a warrant of deportation was issued; the grounds of such deportation being, as stated in said warrant:

"That the said alien is unlawfully in the United States, in that he has been found therein in violation of the Chinese exclusion laws, and is therefore subject to deportation under the provisions of section 21 of the act of February 20, 1907, as amended March 26, 1910."

[1] The charge that the alien entered without inspection finds no support in the evidence, and has apparently been abandoned. The statement in the warrant of deportation that "he is unlawfully in this

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

country, in that he has been found therein in violation of the Chinese exclusion laws," is so broad as to convey absolutely no idea of the specific reason for which the alien has been ordered deported. It is quite true, and has been frequently so held, that in proceedings before the immigration officers, looking to the deportation of aliens, no such particularity is required as is essential in court proceedings; but this does not mean that an omnibus charge of being in this country in violation of law, which does not in any degree whatever advise the alien as to just what he is called upon to meet, will satisfy the requirements either of the law, or of good faith or of fair dealing. An examination of the record would indicate that the real reason for the deportation is the fact that the alien was found laboring in this country without having the certificate of residence required by section 6 of the Act of May 5, 1892 (27 Stat. 25, c. 60), as amended November 3, 1893 (28 Stat. 7, c. 14, § 1 [U. S. Comp. St. 1913, § 4320]).

[2] In the Case of Yee Ben, it was recently decided by this court, following the decision of Judge Connor in United States v. Lim Yuen (D. C.) 211 Fed. 1001, and the earlier decision of Judge Hunt in United States v. Foo Duck (D. C.) 163 Fed. 440 (affirmed by the Circuit Court of Appeals of this circuit in 172 Fed. 856, 97 C. C. A. 204), that a Chinese alien, admitted into this country as the minor son of a resident merchant, may not be deported for the sole reason that after attaining his majority he has worked as a laborer.

Passing over, therefore, the question as to whether this order of deportation could in any event be upheld, because of its indefiniteness, as the only reason for deportation that can be found in the evidence is the fact that the alien has been found laboring after he attained his majority, and as this is not, in the opinion of the court, a valid reason for such deportation, it is ordered that the alien, Lew Lin Shew, be discharged.

GIMBEL BROS., Inc., v. ADAMS EXPRESS CO.

(District Court, E. D. Pennsylvania. October 16, 1914.)

No. 3140.

1. PLEADING (§ 49*)—STATEMENT OF CLAIM.

It is permissible for a plaintiff to so state the facts in his statement of claim as to leave him free to evolve any theory at the trial which is supported by them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 107-111; Dec. Dig. § 49.*]

2. PLEADING (§ 316*) — RULE FOR BILL OF PARTICULARS — DISCRETION OF COURT.

A rule for a bill of particulars is an appeal to the discretion of the court, and this appeal will be granted or refused according to the circumstances.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 951; Dec. Dig. § 316.*]

---

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

At Law. Action by Gimbel Bros., Incorporated, against the Adams Express Company. On rule for more specific statement. Rule discharged.

Morton Z. Paul and Wm. A. Glasgow, Jr., both of Philadelphia, Pa., for plaintiff.

John Lewis Evans and Thomas De Witt Cuyler, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1, 2] At the argument of this case at bar the offer was made by the plaintiff to join with the defendant in the work of making a comparison of the records of all shipments involved in the present contention, with a view to reach an agreement upon the uncontested facts. If this is done, the defendant will have all the information which could be given by the fullest and most elaborate bill of particulars which could possibly be filed in the case, and the anticipated labors of the court and of the jury be very much curtailed at the trial. The present rule has, in the judgment of the court, no other bearing than that of answering to the functions of a rule for a bill of particulars. We cannot subscribe to the proposition that a plaintiff can be compelled to attempt to forecast, with absolute accuracy, the theory of either the law or the facts which he will be finally compelled to unfold at the trial. If he was so compelled and did not accurately forecast the theories, both of law and of fact, which he finally at the trial determines to be the true ones, he would be driven to an amendment of his pleadings. It is permissible for him to so state the facts as to leave him free to evolve any theory at the trial which is supported by them. The practical conditions of the trial compel him eventually to make an election among the possible theories on which the case may be tried, but he is under no compulsion to make his election in advance of the trial. A rule for a bill of particulars is an appeal to the discretion of the court, and this appeal will be granted or refused according to the circumstances. No necessity now exists for requiring the plaintiff to give to the defendant the information of which it was suggested at the argument it is in need, because apparently the whole field of information is within its reach.

The rule for a more specific statement is therefore discharged, with leave to the defendant to make a further application should need for information arise.

TODD et al. v. WHITAKER.

(District Court, E. D. Pennsylvania. October 15, 1914.)

No. 1223.

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

The complainant in an infringement suit cannot be required to fix in his bill the date of the invention of the patented device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. § 310.*]

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

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

Where the answer in an infringement suit pleads anticipation by a prior device which may be made the subject of an exhibit, the defendant will not be required to set out drawings of such device, but complainant may be entitled to an inspection of the same before the taking of testimony.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. § 310.*]

In Equity. Suit by George W. Todd and Libanus M. Todd, doing business as G. W. Todd & Co., against John Whitaker, doing business as the J. Whitaker Manufacturing Company. Sur motions for further particulars of bill and answer. Motion denied.

Cyrus N. Anderson, of Philadelphia, Pa., and Church & Rich, of Rochester, N. Y., for plaintiffs.

Howson & Howson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Plaintiff and defendant have each entered motions on the other for further particulars of answer and bill. Counsel have agreed to furnish to each other the further particulars asked for, except in these two respects: (1) The defendant asks that the plaintiff be required to state the date of the invention of the patented device. (2) The plaintiff asks that defendant be required to furnish drawings of the device which the answer sets up to have been an anticipation of that of the plaintiff.

[1] We see no occasion to make either order asked to be made. To require the plaintiff to fix the date of his invention would be an innovation in pleading, and a dangerous one. The defendant's motion is overruled.

[2] The motion of the plaintiff is likewise overruled. Where the answer sets up the existence of some concrete thing which may be made the subject of an exhibit as a publication, drawing, photograph, or device which is claimed to be an anticipation of the patented device, and which is proposed to be made the subject of expert testimony, the plaintiff may fairly ask to have it submitted in advance to the inspection of expert witnesses for the plaintiff. If a request for opportunity to make this inspection be denied, or if what is offered in evidence differs from what was submitted for inspection, the present rules furnish the means of preventing a plaintiff from being taken by surprise.

Rule 48 (198 Fed. xxxi, 115 C. C. A. xxxi) would furnish all the information which could fairly be asked, and there would seldom be occasion to resort to it. The discretion of the trial judge can readily afford all the additional protection required.

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

LEWIS, LEONHARDT & CO. v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. October 16, 1914.)

No. 2466.

1. CARRIERS (§ 32*) — MILLING IN TRANSIT — THROUGH RATES — DISCRIMINATION—REBATES.

Complainant at Knoxville manufactured a saccharine feed consisting of 50 per cent. oats and corn, 26 per cent. molasses, 10 per cent. cotton seed meal, 10 per cent. corn shive, and 4 per cent. salt. The corn and oats were shipped from points north of the Ohio river through Cincinnati and Louisville, and the other ingredients, except the salt, from points in the South. The feed was shipped from Knoxville to points east and south, and by an agreement with defendant complainant was allowed a milling in transit privilege, by which the feed was shipped out on the through rates applying to the corn and oats. Since these grains composed only half of the feed, complainant at first was compelled to sell locally one-half of the corn and oats shipped in, but, this being inconvenient, it was later arranged that complainant should be permitted to ship out double the quantity of feed as compared with the corn and oats shipped in. Complainant paid the inbound local rates on the articles entering into the product and the outbound proportional rates on the feed and, under arbitrary calculations, was afterwards reimbursed in the form of refunds on the hypothesis that the ingredients were all transit articles like the corn and oats, and so entitled, when milled, to the transit rate. *Held*, that such agreement violated Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1913, § 8564]) § 2, prohibiting rebates, sections 6, 10, as amended by Act March 12, 1889, c. 382, §§ 1, 2, 25 Stat. 855, 856 (sections 8569, 8574), forbidding the collection or receipt of less compensation for transportation of property than is specified in published schedules of rates, and Elkins Act Feb. 19, 1903, c. 708, 32 Stat. 847 (sections 8597–8599), prohibiting concessions, rebates, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 83–85; Dec. Dig. § 32.*]

2. CARRIERS (§ 35*)—INTERSTATE COMMERCE—ILLEGALITY OF CONTRACT—ACTION FOR DAMAGES

Where a contract between a shipper and a carrier for a milling in transit privilege was in material part violative of the Interstate Commerce Act, such illegal portion was alone sufficient to vitiate the whole contract, and prevent recovery of damages for its breach.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. § 35.*]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by Lewis, Leonhardt & Co. against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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

Leon Jourolmon, of Knoxville, Tenn., and C. B. Northrop, of Washington, D. C., for defendant in error.

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

WARRINGTON, Circuit Judge. This was an action to recover damages ($100,000) for breach of a contract, set out in the first and

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

third counts of the declaration. The contract in each of the forms alleged concerned a milling in transit arrangement, entered into by the parties in 1901, and in one form or another observed until 1907, when the ultimate breach complained of occurred. At the close of plaintiff's evidence a motion to direct a verdict in favor of defendant was allowed, and plaintiffs bring error.

[1] Prior to and in 1901 the plaintiffs were engaged in the business of selling hay, grain, and feed, at Knoxville, and in December of that year they added to their business the manufacture and sale of dairy feed, called "Saccharine Feed." The contract is alleged to have been made through letters, schedules, and documents appearing in the record, and in substance to have been this: That plaintiffs should establish a manufacturing plant at Knoxville, and pay upon the raw material shipped to and manufactured at the plant and upon the feed shipped out no greater rate than the established through rate on the product from the point of original shipment of raw material to the point of sale and delivery of the feed; that for every 50 pounds of oats and corn, or corn products, shipped to Knoxville and there milled as part of the feed, the plaintiffs should have the right to ship over defendant's lines to ultimate destinations 100 pounds of the product, or in like ratio or proportion; and that defendant for a short season complied with the contract, and issued and published its tariff and rate sheets accordingly. The provision stating the relation in quantities between raw material shipped in and finished product shipped out, is called in the evidence a "two for one" arrangement; this provision appears in the first count, but not in the third, and constitutes the main difference between the counts; and, while it is said to have originated with the railroad and to have been forced on plaintiffs, it was acquiesced in too long by all parties to escape the effect of the rule touching the practical construction of contracts. It was further alleged that the arrangement was to be continued so long as the privilege of milling in transit was granted to other persons at Knoxville. The saccharine feed, according to schedules filed by defendant, consisted of ingredients and in proportions: corn 35 per cent., oats 15 per cent., molasses 26 per cent., cotton seed meal 10 per cent., corn shive 10 per cent., salt 4 per cent. An article known as marsden feed, which is described as "composed of the entire stalk of corn, blade and shuck" except the pith of the stalk, was for a time used in the mixture in question, but was changed in name to that of "corn shive" at the instance of the railroad; and later rice chaff was used in place of corn shive.

It will be observed that oats and corn constituted 50 per cent., and that the remaining articles made up the other 50 per cent. of the ingredients entering into the feed. The oats and corn so used at Knoxville, were shipped from points north of the Ohio river through Cincinnati and Louisville. The other ingredients were shipped into Knoxville generally from the following places: Molasses and rice chaff from New Orleans, cotton seed meal from Memphis, and salt from Cincinnati. While the feed was shipped from Knoxville to many points east and south of that city, it was stipulated by the parties that what was true in respect of such shipments from Knoxville out is suffi-

ciently illustrated by the facts in relation to shipments from Knoxville to Norfolk and Richmond. Thus Knoxville was the transit point within the territory indicated by the points of origin of the articles used in the milling process and the destinations of the product into which they were converted.

The local rates into Knoxville and out and the through rates upon the articles entering into the composition, as also the through rate applied to the product, and the use and application made of some of these rates, during the period in question, will serve to explain the operation and effect and the true intent of the contract in dispute. For present purposes it is enough to refer to the rates mentioned in the margin.[1] There are two methods of practical performance of the contract shown in the record. For a time prior to the "two for one" arrangement the plaintiffs shipped into Knoxville double the quantity of oats and corn used in any given quantity of feed shipped out. Of the oats and corn so shipped in, one half was sold locally and the other half, with an equal quantity of the other articles, was used in making the feed. When the product was shipped out, it was treated as equal to the total quantity of oats and corn shipped in, and so entitled to the through rate that would have been chargeable upon the product if it had moved from Cincinnati or Louisville to Norfolk or Richmond. This plan was apparently adopted as a basis for shipping out feed equal in quantity to that of the oats and corn shipped in. The plaintiffs complained of the plan because it imposed upon them the trouble of selling one-half the oats and corn locally, and unnecessarily complicated the accounts of both parties, as also the settlements of freight charges. The plan was abandoned and the two for one arrangement substituted as an "equivalent." The latter arrangement did not require shipping in more oats and corn than were needed in making the feed; thereafter, if not before, the molasses, rice chaff, cotton seed meal, and salt were in effect, though not in name, given the benefits of the privilege of milling in transit regardless of the differences in points of origin between these articles themselves and between such

[1] The local rate (per 100 lbs.) on oats or corn in car loads from either Cincinnati or Louisville to Knoxville was 19 cents, the through rate on corn or oats, as also on feed, from either of the first two cities named to Norfolk or Richmond in car loads was 12 cents per 100 pounds, and the local proportional rates allowed plaintiffs on their feed from Knoxville out, were 8 cents to Norfolk and 6.9 cents to Richmond (and these rates appear in the testimony of plaintiffs' principal witness and were used in the freight settlements, though they are not shown to have been set out in any published tariff), while the published tariff rate between the same cities on feed in either car loads, or less than car loads, was 27 cents. The local rates per 100 pounds in car loads into Knoxville on the other articles entering into the feed were: Molasses and rice chaff from New Orleans 25 cents and 20 cents, respectively; cotton seed meal from Memphis 13 cents; salt from Cincinnati 13 cents; and the through rates on these last-named articles from their several initial points to Norfolk or Richmond were, in the order just mentioned, 26 cents, 26 cents, 25 cents, and 18.5 cents. The through rates on feed (in 1901 to 1904) from Memphis to Norfolk or Richmond were 35 cents and 59 cents, and thereafter 29 cents and 41½ cents, respectively, in car loads and less than car loads; and the rates on saccharine dairy feed from New Orleans to Norfolk and Richmond were (in 1901 to 1905) 37 cents and (after March, 1905) 26 cents, respectively, in either car loads or less than car loads.

points (except as to the salt) and those of the oats and corn; and after the ingredients including oats and corn, were assembled and milled at Knoxville, the product was still treated as entitled to the through rate the same as it had been under the first plan.

It cannot escape notice that under the applicable rate classification none of the articles comprised in plaintiffs' saccharine feed was "feed" when shipped into Knoxville; and that the through rate on feed between Cincinnati or Louisville and Norfolk or Richmond was lower than the through rate on any of the ingredients entering into plaintiff's mixture except oats and corn. True, there was a through rate alike on feed from Memphis and saccharine dairy feed from New Orleans, both to Norfolk and Richmond; but no milling in transit privilege concerning feeds or their ingredients originating at such points was shown, and, in short, they were not made transit articles at all. Hence, as regards the milling in transit privilege in question, we may safely eliminate feed originating at Memphis or saccharine dairy feed at New Orleans and, as respects transit articles, confine our attention to feed and oats or corn originating at Cincinnati or Louisville. It will be recalled that the through rate on feed from Cincinnati or Louisville to Norfolk or Richmond was 12 cents; and the plaintiff, Lewis, testified, in respect of plaintiffs' milling in transit privilege and of this rate, that "all in excess of 12 cents is the shipper's money when the transaction is completed."

The controlling question thus arises whether the contract relied on could be lawfully made. The insistence for plaintiffs in substance is: The contract related only to the milling in transit privilege and not to rates; it was entered into before the enactment of the Hepburn law, was not until the passage of that act within the jurisdiction of the Interstate Commerce Commission, and so the parties were at liberty to make such nonexclusive arrangement as they saw fit; and since the privilege was similar to other milling privileges given by defendant in Knoxville, the only course open to the railroad was either to withdraw all such privileges, including plaintiffs', or simply to introduce new rates. It is enough to say of "similar privileges" at Knoxville that no other privilege like the one now in issue was shown. The argument that this contract had no relation to rates cannot be sustained. The essential object of the usual milling in transit privilege is to enable shippers to employ a method of transit which, but for the privilege, would subject the material to local rates instead of entitling it to an ultimate through rate. The through rate is applied later upon the theory and the condition that stoppage at the transit point was for some legitimate treatment of the material, and that the continuation of the transit desired is of the same material, its product or equivalent, to a through rate destination. See In re Substitution of Tonnage at Transit Points, 18 Interst. Com. Com'n R. 280, 284. Thus the object at last is to escape local rates and secure a through rate; indeed, apart from this object a milling in transit privilege would have no reason to exist. The privilege of course enters into the cost of transportation, and so in effect is part of the contract for through shipment; this is ordinarily covered by the rate; and such is the theory upon which the privilege is required to be specified in the pub-

lished tariff. Unlawful Rates on Trans. Cotton by K. C. M. & B. R. R., 8 Interst. Com. Com'n R. 121, 135, opinion by Commissioner Prouty in 1899; and see Shiel & Co. v. Ill. Cent. R. R. Co., 12 Interst. Com. Com'n R. 210, 215, decided in 1907. True, the privilege may involve more service and expense (such as excessive switching and detention of cars and the like at the transit point) than the carrier can afford to undertake for the rate; in that event an additional reasonable charge may be imposed (Southern Ry. Co. v. St. Louis Hay Co., 214 U. S. 297, 301, 29 Sup. Ct. 678, 53 L. Ed. 1004), but this does not change the real nature and effect of the privilege. The integrity alike of the local rates and the through rate is manifestly dependent upon the nature of the privilege, as well as its observance. And if the privilege now in issue, either in terms or as it was practically understood and interpreted by the parties, failed to protect these rates, it was, as we shall see, quite as certainly violative of the law before the passage of the Hepburn Act as it was after; but it is to be observed that the right in Congress (and its right is conceded) to empower the Interstate Commerce Commission to regulate such privileges, logically leads to the conclusion that the power of the railroad in respect of the privileges is in its nature a continuing power and similar in character to the rate-making power. The free and proper exercise of such power cannot be fettered by contract. Armour Packing Co. v. United States, 209 U. S. 66, 82, 28 Sup. Ct. 428, 52 L. Ed. 681; Louisville & Nashville R. R. v. Mottley, 219 U. S. 468, 482, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S) 671. There can be no difference at bottom between the right directly to change or withdraw a rate and the right indirectly to do the same thing through alteration or withdrawal of a milling in transit privilege.

Furthermore, plaintiffs' argument fails to give due weight to the effect upon the rates, which resulted from shipping the ingredients of the feed from the different sources stated into the transit point and then shipping the feed out under a through rate which was not in terms applicable to substantial portions of the feed; in other words, the through rate on "feed" was evidently made in contemplation of the movement of materials shipped into the transit point from sources corresponding with those indicated by the rate itself. See opinion of Commissioner Clements in Shiel & Co. v. Ill. Cent. R. R. Co., supra, 12 Interst. Com. Com'n R., at page 215. This effect of the contract upon the rates became apparent the moment it was shown that the molasses, rice chaff and cotton seed meal were shipped to Knoxville from New Orleans and Memphis instead of Cincinnati or Louisville. We have seen that under the first method resorted to in performance of the contract the basis for each shipment of finished product out was the shipment in of a quantity of oats and corn equal to the total quantity of product shipped out, and that one-half the oats and corn was sold locally and the ingredients other than oats and corn entering into the product were substituted. This method treated the oats and corn disposed of locally the same as if they had been used in making the outgoing product, and the application of a through rate upon that theory was clearly opposed to the ruling of this court in Grand Rapids

& I. Ry. Co. v. United States, 212 Fed. 577, 585, 129 C. C. A. 113, and in Nichols & Cox Lumber Co. v. United States, 212 Fed. 588, 591, 592, 129 C. C. A. 124. That method was abandoned in July, 1904, and the "two for one" plan substituted as stated. This did not relieve the situation; the effect remained practically the same as before. The vice of the privilege was that the local rates and the through rate were not, and, consistently with the contract, could not be protected. The Interstate Commerce Commission dealt with the subject to some extent in Re Substitution of Tonnage at Transit Points, supra, 18 Interst. Com. Com'n R., at pages 284, 292. On the latter page it is said:

"The maker of mixed feed mills together a number of grains and sometimes cotton seed meal and molasses, producing what is practically a new commodity from various substances, some received upon transit rates and others secured either locally or upon nontransit rates. The present practice at many points is to forward cars of the mixture thus produced upon the transit of solid cars of grain. What has been said above regarding the blending of wheat by millers, and regarding the forwarding of mixed cars, and also regarding the substitution of the local supply for transit tonnage consumed locally, fully indicates the position of the Commission regarding this question of mixed feed. We are convinced that great abuses exist in shipments of this character, but they do not seem to be other than a combination of the abuses separately discussed above. Regarding this matter of the forwarding of mixed feed, it is proper to suggest that there must be a limit to the application of the transit practice, and this limit must be reached when there is such a process of manufacture and such a loss of identity of the inbound commodity that the shipment forwarded may be said to be a new creation. Some of the mixed feeds brought to our attention appear to be beyond the fair limits of a transit practice."

We are disposed to believe that the contract and its practical execution in the instant case contravened the acts of Congress concerning rebates, drawbacks, or other devices, as declared by section 2 of the act to regulate commerce (24 Stat. L. 379), forbidding the collection or receipt of less compensation for transportation of property than is specified in published schedules of rates, as prescribed by sections 6 and 10 of the act as amended March 12, 1889 (25 Stat. L. 855, 856), and also prohibiting rebates, concessions, or discrimination in respect of the transportation of property "whereby any * * * property shall by any device whatever be transported at a less rate than that named in the tariff published and filed by such carrier," as provided in the Elkins Act of February 19, 1903 (32 Stat. L., pt. 1, p. 847).

We shall gain a clearer view of the effect of this statutory policy upon the contract if in the light of the facts already pointed out we consider the methods of settlement, including the system of refunds, adopted, when applying the transit rate (i. e., the 12 cent through rate) to the feed. The plaintiffs paid the inbound local rates on the articles entering into the product and the outbound proportional rates on the product itself, and under purely arbitrary calculations were afterwards reimbursed, in the form of refunds, upon the hypothesis that the ingredients were all transit articles, like the oats and corn, and so entitled, when milled, to the transit rate. Judge Sanford found that the settlements were made by—

"calculating the milling in transit refund on one-half of the ingredients from their points of origin and then doubling the amount of this refund on the

theory that it represents approximately the milling in transit refund on the other one-half of the ingredients from their points of origin."

We understand this to mean, and the practical construction of the contract to have been, that such calculations were made with respect to the local rates on inbound shipments of oats and corn and the proportional rates on outbound shipments of product. This would seem to have been also in accord with the practical construction placed by the parties on the schedules (or circulars, as they are called in the record), which were filed with the Interstate Commerce Commission. It must be said that these circulars are ambiguous and difficult to understand, which augments the binding force of the interpretation placed on them by the parties in their performance of the contract. The substance and effect of the circulars are, we think, sufficiently shown in the margin.[2]

Under the method of settlement before mentioned the oats and corn were alone treated as transit articles and as constituting the entire product; but obviously this ignored the fact that 46 per cent. of the product (excluding the 4 per cent. of salt derived from Cincinnati) was composed of articles that were not shipped in from initial points corresponding with those of the oats and corn, and so were not open to treatment either as transit articles or as entitled to the transit rate. We say this notwithstanding the fact that the constituent elements of the feed are given in the circulars; for, as before shown, these ingredients (except corn and oats) were not made transit articles by any transit privilege, and we need not say again they were never in terms so regarded by the parties themselves. When we consider then the volume of plaintiffs' business, as indicated by the evidence, and the excess of the inbound local rates on molasses and rice chaff over the inbound local rate on oats and corn, it is manifest that the method inured to the substantial advantage of the plaintiffs; and it is equally plain that plaintiffs received in every settlement, under the guise of

[2] We find eight of these circulars in the record. All of them permit "oats and corn" to be shipped "from or through Louisville * * * or Cincinnati * * * to Knoxville * * * milled into dairy or saccharine feed and reshipped" to points named.

Paragraph 3: "For every 35 pounds of corn and 15 pounds of oats received at mill, 100 pounds of dairy or saccharine feed may be shipped out."

Paragraph 5: "Shipments of corn and oats to be milled in transit shall be billed at full tariff rate from point of origin to milling point."

After stating the percentages of the several ingredients entering into the feed, as set out in the opinion, it is provided that "expense bills for corn and oats only will be honored in milling in transit arrangement to the extent shown in paragraph 3."

After providing time limits as to expense bills, paragraph 9 of one of the circulars (relied on in plaintiffs' brief) is as follows: "When the conditions of the rules of this circular have been fully complied with, there will be due the miller at Knoxville, Tenn., refunds as follows: The excess over the sum of the rates paid on the corn and oats from point of origin into the mill and the dairy or saccharine feed out of the mill. And the rate (class D) on the dairy or saccharine feed reshipped from point of origin of the corn or oats to ultimate destination of the milled product as published in Southern Railway Southeastern Tariffs, or as amended by supplements or subsequent issues."

(We take it that the portion of this ninth paragraph, which succeeds the words "refunds as follows," was meant to be a single sentence.)

milling in transit refunds, distinct portions of the inbound local rates which they had previously paid on at least 46 per cent. of the non-transit tonnage of their output, and so obtained rates thereon less than the applicable published tariffs; and the statutes are too plain and the decisions too numerous and clear to justify elaboration in showing that every such refund was in material part a rebate. Armour Packing Co. v. United States, 209 U. S. 56, 71, 80, 81, 28 Sup. Ct. 428, 52 L. Ed. 681; N. Y., N. H. & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 392, 26 Sup. Ct. 272, 50 L. Ed. 515; United States v. Union Stockyard, 226 U. S. 286, 308, 33 Sup. Ct. 83, 57 L. Ed. 226; Kansas City So. Ry. v. Albers' Comm. Co., 223 U. S. 573, 596, 32 Sup. Ct. 316, 56 L. Ed. 556; Chicago & A. Ry. Co. v. United States, 156 Fed. 558, 562, 84 C. C. A. 324, 26 L. R. A. (N. S.) 551 (C. C. A., Seventh Circuit); Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, 204 Fed. 849, 852, 853, 123 C. C. A. 145, and citations (C. C. A., Sixth Circuit). It follows that filing the circulars with the Interstate Commerce Commission respecting such a milling in transit privilege was futile. The railroad company had no power to grant and the plaintiffs no right to receive such a privilege.

[2] Plaintiffs are now seeking recognition and enforcement of the contract through recovery of damages for its alleged breach. The illegal portion pointed out was alone sufficient to vitiate the whole contract and prevent its enforcement. Cleveland, C., C. & St. L. Ry. v. Hirsch, supra, 204 Fed. at pages 853, 854, 123 C. C. A. 145, and citations. We need not pass upon the other questions presented, although we have fully considered them.

The judgment must be affirmed with costs.

BUSCH et al. v. STROMBERG-CARLSON TELEPHONE MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1011*)—DECISIONS REVIEWABLE—CONFLICTING EVIDENCE.

   The decisions of questions of fact upon the weight of conflicting evidence in the trial of an action at law without a jury are not reviewable in the national courts.

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

2. CORPORATIONS (§ 472*)—SUBSCRIPTION AGREEMENT—CONSTRUCTION—ACTION AGAINST SUBSCRIBER—DEFENSE—"UNDERWRITING."

   An agreement whereby each of 56 subscribers covenants with the others, with a corporation, and with its manager, to sell at par or to take and pay at that rate for the amount of bonds of the corporation maturing 20 years later set opposite his name, in consideration of the covenants in such agreement of the corporation and its manager to sell and deliver to him or to others that amount of bonds at that rate and to pay him 5 per cent. commission in cash and 40 per cent. in full-paid unassessable stock of the corporation for selling or purchasing the subscribed bonds, is an "underwriting," a contract to insure the sale of the bonds at par, and, if they are not sold, to buy them at that price, and not a mere contract

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

to make a loan to the corporation. Neither the subsequent insolvency of the corporation nor the subsequent depreciation or worthlessness of the bonds and the stock constitutes any defense to an action against a subscriber for his breach of his agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*

For other definitions, see Words and Phrases, Second Series, Underwritten.]

3. CONTRACTS (§ 303*)—INDEPENDENT COVENANTS—BREACH.

Where acts are stipulated to be done at specified times by one covenant of a contract, and acts are stipulated to be done without fixing any time for their performance by another covenant thereof, the latter covenant does not condition the former, is independent of it, and a breach of the latter constitutes no defense to an action for a breach of the former.

The same rule generally governs where acts are stipulated by one covenant to be done at different times from those fixed by another covenant for the performance of other acts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1443; Dec. Dig. § 303.*]

4. CORPORATIONS (§ 472*)—UNDERWRITING—ACTION FOR BREACH—DEFENSE—BREACH OF INDEPENDENT COVENANT.

The subscribers agreed to take and pay for the bonds at times specified in the underwriting, if not sold to others before that time. Just before the defendant signed the underwriting, the corporation, at the demand of the defendant and other St. Louis directors, agreed to build a plant at St. Louis costing about $1,000,000, and the defendant thereupon raised his subscription from $50,000 to $100,000. This agreement fixed no time for the erection of the plant, and was neither embodied nor referred to in the underwriting and the plant was never built.

Held, these facts constituted no defense to an action against the defendant for a breach of his contract to sell or take and pay for the bonds at the agreed times.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*]

5. ASSIGNMENTS (§ 18*)—UNDERWRITING—ASSIGNABILITY.

An underwriting is assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 25–27; Dec. Dig. § 18.*]

6. CORPORATIONS (§ 472*)—BREACH OF UNDERWRITING—MEASURE OF DAMAGES.

The measure of damages for the breach by a subscriber of his contract of underwriting is the difference between the price at which he agreed to insure the sale or to purchase the securities and their value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. § 472.*]

Carland, Circuit Judge, dissenting from conclusion reached.

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

Action by the Stromberg-Carlson Telephone Manufacturing Company against Adolphus Busch and others. Judgment against Adolphus Busch, and Lillie Busch and others, executors, etc., bring error. Reversed and remanded with directions to grant new trial.

Franklin Ferriss, of St. Louis, Mo. (Allen C. Orrick, of St. Louis, Mo., on the brief), for plaintiffs in error.

Irvin V. Barth, of St. Louis, Mo. (Warwick Hough and Warwick M. Hough, both of St. Louis, Mo., and Hubbell, Taylor, Goodwin & Moser, of Rochester, N. Y., on the brief), for defendant in error.

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

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

SANBORN, Circuit Judge. [1] The complaint of the plaintiffs in error is that a judgment was rendered against Adolphus Busch, the defendant below, for $27,636.67, because he failed to pay the last installment of $20,000 of his subscription of $100,000 to an underwriting contract for the bonds of the United States Independent Telephone Company, a corporation. A jury was waived, and at the request of both parties the court made a special finding of the facts in this case. Exceptions were taken to some of the findings, and to some failures to find as requested, but an examination of the record has convinced that there was substantial evidence to sustain the findings made, and that the evidence in support of the material findings requested and refused was not conclusive; so these exceptions are here dismissed. The decisions of a court in the trial of an action at law without a jury upon the weight of conflicting evidence are not reviewable in the national courts. Gibson v. Luther, 196 Fed. 203, 204, 116 C. C. A. 35, 36.

[2, 4] The defendant was one of the directors of the telephone company and the first of about 56 subscribers to sign the underwriting. This contract was made on November 23, 1895. By it Mr. Busch subscribed for $100,000 at par value of the bonds of the telephone company, which were secured by the pledge of personal property under a collateral trust agreement, and agreed to pay the amount of this subscription in five equal installments on February 1, 1906, May 1, 1906, August 1, 1906, November 1, 1906 and February 1, 1907, respectively. He paid the first four installments and took $80,000 of the bonds, which were dated October 2, 1905, and were to mature October 1, 1935, and $32,000 at par full-paid, nonassessable stock of the company; but when the last installment of his subscription fell due, the company, which had been prosperous and promising when he made his subscription, had become insolvent, and he declined to pay it.

The main contention of counsel for the plaintiffs in error is that the underwriting agreement is a mere executory contract to loan money to the telephone company, and not an agreement to insure the sale of or to purchase its bonds, and that there can be no lawful recovery for the breach of such a contract by a subscriber: (1) Because an action for specific performance will not lie; (2) because the breach causes no damage, for the agreement to repay the loan offsets the contract to make it; (3) because no recovery can be had for a refusal to advance money on overdue bonds; and (4) because the insolvency of the company and the worthlessness of the bonds releases from the previous obligation to loan to it.

Conceding, without admitting that this might be the result if the underwriting were a mere contract to loan money, let us see if it was such an agreement. It is entitled "Underwriting Agreement." It recites that the telephone company has authorized the issue and the securing of the payment of its bonds, that it has sold or agreed to sell a part of them, that it desires to sell an additional $2,500,000 thereof to finance its future business "and to secure the underwriting of said $2,500,000 bonds or such portion thereof as it shall not sell," and that the

manager has acquired $1,000,000 of the stock of the telephone company (which the record shows had been previously acquired and donated to him by stockholders), and that the company has requested him to act as its agent to sell the $2,500,000 bonds at par with 40 per cent. of the amount thereof in stock or voting trust certificates representing the same. It contains these covenants: "Each underwriter agrees * * * with the manager and every other underwriter that he will take up and pay for at par and accrued interest to the date of delivery" the amount of bonds set opposite his signature. The telephone company covenants that the manager, at any time before the $2,500,000 bonds are taken up and paid for by the underwriters, may sell them at par and accrued interest, and that if he so sells them to others than the underwriters they shall be deemed to have been taken up and paid for by the underwriters and shall be credited to them pro rata. The manager covenants that, as each underwriter takes up and pays for all of said bonds underwritten by him, for each $1,000 par value of bonds taken up and paid for or deemed to have been taken up and paid for and credited to such underwriter, he will deliver to such underwriter $400 par value full-paid and nonassessable stock of the telephone company or a voting trust certificate representing such stock, and that he will pay such underwriter a commission of 5 per cent. in cash upon the sale of each of said bonds when all of the bonds underwritten by such underwriter have been taken up or sold.

This contract is in terms and in legal effect far more than an agreement to loan money to the telephone company. It is an agreement by the subscribers to insure the sale of the bonds subscribed at par, and if they are not so sold to others then to purchase and pay for them at par, in consideration of the covenants of the telephone company and the manager to deliver the bonds and to pay the subscribers for selling or purchasing them 5 per cent. commission in cash and 40 per cent. in full-paid nonassessable stock of the telephone company. It is a contract to insure the sale of the bonds subscribed, and, in case they are not sold before the installments fall due, then to purchase and pay for them at par. It is an underwriting, and not an agreement to loan money. Moreover, it is an entire contract, complete in itself, and the covenants of the telephone company and the manager furnish a valuable and sufficient consideration for those of the subscribers. It is, therefore, no defense to an action against one of the subscribers for his breach of his contract that the telephone company became insolvent and the bonds worthless after he made his contract; much less is it a defense to a subscriber who, like Mr. Busch, has performed four-fifths of his undertaking and received four-fifths of its fruits. Peck Colorado Co. v. Stratton (C. C.) 95 Fed. 741; Otis v. Cullum, Receiver, 92 U. S. 447, 23 L. Ed. 496.

The subscribers might have provided in their agreement that they should be released from their undertaking in case the company became insolvent or the bonds became worthless or depreciated in value. They did not do so, and the reason is manifest. It is that the very purpose and object of the agreement was to insure the telephone company against that contingency, and by their contract the subscribers agreed that either by a sale to others or a purchase themselves they would in-

sure the company the receipt of the par value of the bonds for which they subscribed, however worthless they might become. They agreed to assume the risk of the depreciation of the bonds for the chance that their prospective value, the value of their commission of five per cent. in cash and 40 per cent. in stock of the telephone company, would more than remunerate them for their undertaking; and it is no defense that their expectations have not been realized or that their trade turned out a bad bargain. There was no error in the ruling of the District Court that the underwriting was not a mere agreement to lend money to the telephone company.

Just before Mr. Busch signed the agreement, he and other directors of the telephone company demanded from it, and its board of directors by a resolution agreed that the company would build a plant costing about $1,000,000 in the city of St. Louis, and thereupon Mr. Busch raised his subscription from $50,000 to $100,000, but the company never built the plant. It is specified as error that the court below held that these facts constituted no defense to this action: (1) Because the contract to build was not embodied in the underwriting and did not alter its terms; and (2) because, even if the agreement of the defendant to take and pay for the bonds and the agreement of the company to build the plant had been parts of an entire contract, they were not mutual and dependent covenants, but the covenant to build was independent of the covenant to take and pay for the bonds.

In support of this specification counsel contend that "the signature of Mr. Busch to the underwriting was conditional upon the erection of a plant at St. Louis." The record, however, fails to convince that Mr. Busch conditioned either his signature or his covenant to sell or purchase the bonds by the erection of such a plant. Mr. Busch might have made his signature or his performance of his covenant conditional on the erection of the plant by an appropriate provision in the underwriting, and if he intended to condition them it was his duty to express the condition in that contract. He inserted no such provision. Not only this, but the plant never was built, and at a meeting of the board of directors of the company on March 5, 1906, that board determined and resolved that the construction of this plant was necessarily to be deferred for the present. Notwithstanding all this, Mr. Busch paid four of his five installments, amounting to $80,000, and he paid two of them, amounting to $40,000, after the resolution of March 5, 1906, deferring the construction of the plant. It cannot be held, in the face of these facts, that Mr. Busch either conditioned or intended to condition his signature to the underwriting or his covenant to purchase the bonds with the construction of the plant at St. Louis. And conceding, without admitting, that the agreement of the company to build the plant and the agreement of the subscribers to sell or take and pay for the bonds were parts of an entire contract, the former covenant was independent of the latter, because it was not to be performed at the times when the latter was, and no time for its performance was stipulated or fixed, while the times of the performance of the latter were specified in the covenant itself.

[3] Where acts are stipulated to be done at specified times by one covenant of a contract, and acts are stipulated to be done without fix-

ing any time for their performance by another covenant thereof, the latter covenant does not condition the former, is independent of it, and a breach of the latter, while it may raise a cause of action, is no defense to an action for a breach of the former. The same rule generally governs where acts are stipulated by one covenant to be done at different times from those fixed by another covenant for the performance of other acts. In Loud v. Pomona Land & Water Co., 153 U. S. 564, 578, 14 Sup. Ct. 928, 932 (38 L. Ed. 822), the Supreme Court said:

"In the learned note of Serjeant Williams to the early case of Pordage v. Cole, 1 Saund. 320a, it is said that 'if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act.'"

And this is still the law and the reason of such a case and of this case. Goldsborough v. Orr, 8 Wheat. 217, 223, 5 L. Ed. 600; American Emigrant Co. v. County of Adams, 100 U. S. 61, 71, 25 L. Ed. 563; Red Wing Hotel Co. v. Friedrich, 26 Minn. 112, 115, 1 N. W. 827; Clark on Contracts (1894) pages 655, 656. The court below rightly held that the contract of the telephone company to build the plant and its breach was no defense to the action against Mr. Busch for his breach of his agreement to take and pay for the bonds at the times he promised to do so.

[5] All the assignable rights of the telephone company in or under the underwriting have been duly transferred and conveyed to the plaintiff below, Stromberg-Carlson Telephone Manufacturing Company; but counsel argue that the contract was not assignable, because it recited that the telephone company desired "to sell an additional $2,500,000 for the purpose of financing its future business and to secure the underwriting of said $2,500,000 bonds or such portions thereof as it shall not sell," and because it evidenced a personal trust and confidence of the subscribers in the telephone company to use itself the money to be paid for the bonds for the future business of the company and not to pay its old debts. The argument is not persuasive. It was as indispensable to the successful financing of the future business of the company that its just debts should be paid as that new purchases of property should be made, and the underwriting evidences no legal or moral restriction of the use of the money to be secured by the sale of the bonds to purposes other than the payment of the debts of the company or to any specific purpose. It is the customary underwriting contract, and the money realized from it was legally applicable to the payment of the debts or to any other lawful use of the corporation. The general rule is that contracts and choses in action are assignable, and this contract falls under no exception to that rule. Kirkpatrick v. Eastern Milling & Export Co. (C. C.) 135 Fed. 146, 149; Litchfield Savings Society v. Dibble, 80 Conn. 128, 67 Atl. 476, 477.

[6] Finally, counsel contend that the court erred, in that it allowed a recovery of the entire $20,000 which Mr. Busch agreed to pay as the last installment of the price of the bonds for which he subscribed, when

the recovery should have been limited to the difference between the amount he agreed to pay and the value of the bonds and stock he was to receive for the payment. The agreement on which this suit is founded is a contract to insure the sale of the subscribed bonds at par, and to buy at par the subscribed bonds not sold, and the true measure of damages for the breach of this agreement is the difference between the agreed price and the value at and after the breach of the bonds and stock which the defendant was to obtain therefor. Gordon v. Norris, 49 N. H. 376, 383; Collins v. Delaporte, 115 Mass. 159, 162; 2 Sedgwick on Damages (9th Ed.) § 753; Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 444, 454, 456, 20 C. C. A. 503, 513, 515; Cherry Valley Iron Works v. Florence Iron River Co., 64 Fed. 569, 575, 12 C. C. A. 306, 312; Newark City Ice Co. v. Fisher, 76 Fed. 427, 22 C. C. A. 261; Salem Iron Co. v. Lake Superior Consol. Iron Mines, 112 Fed. 239, 245, 50 C. C. A. 213, 219; Denver Engineering Works Co. v. Elkins (C. C.) 179 Fed. 922, 927; South African Territories v. Wallingford, 1 App. Cas. (1898) 309, 1 Q. B. Div. (1897) 692, 695; Railroad Co. v. Seager, 7 Pa. Super. Ct. 268, 270, 271, 272; San Antonio Ry. Co. v. Busch (Tex. Civ. App. 1893) 21 S. W. 164; Id. (Tex. Civ. App.) 23 S. W. 308.

The recovery to which the plaintiff was entitled was, therefore, the difference between the $20,000 Mr. Busch agreed to pay and the value of the stock and bonds he was to receive for that payment, with interest on that difference. The court below did not find the value of the bonds and stock, nor the difference between that value and the agreed price, although there was evidence in the case tending to show that they had some value. The result is that the findings of the court fail to support the judgment, because they do not contain any finding of the value of the bonds at or after the breach of the contract, nor of the difference between that value and the agreed price of the bonds, and they convince that the damages for the breach were not measured by the true criterion.

For this reason, the judgment below must be reversed, and the case must be remanded to the court below, with directions to grant a new trial. It is so ordered.

CARLAND, Circuit Judge (dissenting as to result). The majority opinion declares:

"It is, therefore, no defense to an action against one of the subscribers for his breach of his contract that the telephone company became insolvent and the bonds worthless after he made his contract; much less is it a defense to a subscriber who, like Mr. Busch, has performed four-fifths of his undertaking and received four-fifths of its fruits. Peck Colorado Co. v. Stratton (C. C.) 95 Fed. 741; Otis v. Cullum, Receiver, 92 U. S. 447, 23 L. Ed. 496. The subscribers might have provided in their agreement that they should be released from their undertaking in case the company became insolvent or the bonds became worthless or depreciated in value. They did not do so, and the reason is manifest. It is that the very purpose and object of the agreement was to insure the telephone company against that contingency, and by their contract the subscribers agreed that either by a sale to others or a purchase themselves they would insure the company the receipt of the par value of the bonds for which they subscribed, however worthless they might become. They agreed to assume the risk of the depreciation of the

bonds for the chance that their prospective value, the value of their commission of 5 per cent. in cash and 40 per cent. in stock of the telephone company, would more than remunerate them for their undertaking; and it is no defense that their expectations have not been realized or that their trade turned out a bad bargain."

I concur fully in this clear and forcible statement of the law, and hence I fail to comprehend the opinion of the majority when as a result of the court's opinion it declares that the measure of damages is the difference between what Busch agreed to pay for the bonds and stock and what the actual value of the same may be shown to be at the trial. The only defense that plaintiffs in error made at the trial, upon the question of damages, was that the bonds and stock had become worthless by reason of the insolvency of the corporation which issued the same. The reasoning of the majority opinion in the language above quoted necessarily results in the affirmance of the judgment below, which I believe would be entirely correct, and for this reason I dissent from the conclusion reached in the opinion of the court.

If I buy bonds and stock at par to-day, I may not, in the absence of a special warranty or fraud, defend to-morrow on the ground that the stock has fallen to 50 cents.

PARRISH v. FOREMAN-BLADES LUMBER CO. et al.

(Circuit Court of Appeals, Fourth Circuit. February 21, 1914. On Rehearing, November 19, 1914.)

No. 1227.

1. ADVERSE POSSESSION (§ 101*)—CONSTRUCTIVE POSSESSION.
The holder of the older and better title is to be regarded as having constructive possession, and the holder of the junior and inferior title, that may overlap it, cannot hold adversely until he has entered into the actual boundary claimed by the older and better title and acquired adverse possession thereof or of some part of it; it being insufficient that he enters into possession of land outside the boundaries of the land in controversy, though within the limits of his paper color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 575–589; Dec. Dig. § 101.*]

2. ADVERSE POSSESSION (§ 53*)—COLOR OF TITLE—CONTINUITY OF POSSESSION.
Where a claimant under color of title takes possession and holds for a time adversely, but vacates before the statutory period expires, the moment such vacation occurs the owner, by reason of his legal title, will be regarded as in constructive possession, and the adverse possession of the wrongdoer is at an end.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 266–270; Dec. Dig. § 53.*]

3. ADVERSE POSSESSION (§ 112*)—BURDEN OF PROOF.
The burden is on him who asserts adverse possession to sustain every element involved therein by a preponderance of the proof, and, if he fails with reference to any element, it is the court's duty to charge that there is no sufficient evidence of adverse title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 651, 653, 654, 657–659, 661–663, 665, 666; Dec. Dig. § 112.*]

---

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

4. ADVERSE POSSESSION (§ 14*)—CONSTRUCTIVE POSSESSION.
No length of constructive possession will ripen a defective title into a valid one, but the possession for that purpose must be actual and continuous.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77–81; Dec. Dig. § 14.*]

5. ADVERSE POSSESSION (§ 14*)—POSSESSION OF TRUE OWNER.
Where there is no actual possession of land, the law carries the possession to the real owner.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 77–81; Dec. Dig. § 14.*]

6. ADVERSE POSSESSION (§ 44*)—COLOR OF TITLE.
Possession of land under color of title must be taken by the claimant himself, his servants or tenants, and by him or them continued for the statutory period, and is not established by proof of a single entry on the land against which an injunction has been promptly secured.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226–231; Dec. Dig. § 44.*]

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

Action by T. K. Parrish against the Foreman-Blades Lumber Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

George W. Ward, of Elizabeth City, N. C., and J. Crawford Biggs, of Raleigh, N. C. (Ward & Thompson, of Elizabeth City, N. C., and Winston & Biggs, of Raleigh, N. C., on the brief), for plaintiff in error.

A. D. MacLean, of Washington, N. C., and W. D. Pruden, of Edenton, N. C. (James H. Pou, of Raleigh, N. C., and J. B. Leigh, of Elizabeth City, N. C., on the brief), for defendants in error.

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

DAYTON, District Judge. The plaintiff in error, also plaintiff below, claimed, in this action, that, as tenant in common with the defendants, he was the owner of an undivided two-thirds interest in a tract of 3,306 acres of land, a part of the Josiah White tract, situate in Pasquotank county, N. C. He charged defendants with entering thereon, unlawfully cutting timber therefrom, and refusing to account to him therefor, or any part thereof, wherefore he had secured an injunction from the court below, inhibiting such timber cutting until this action could be instituted at law and the title inter partes could be determined therein. Replying to this complaint, defendants substantially pleaded adverse possession, under color of title, for 3, 7, or 20 years, according to whichever term of limitation, by law, might be necessary to bar plaintiff's right of entry. A trial had in the court below resulted in a verdict and judgment for the defendants.

Without setting forth the long and complicated chain whereby

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

plaintiff traced his title back to the commonwealth's grant to Hamilton, it is sufficient to say that on August 5, 1857, Skinner and Warren owned a two thirds undivided interest and one Cannon the other undivided third interest in this land. On that date they executed their deeds, one to the other, whereby they constituted a line running "south 21½ west from Temple's corner" as a division one between them. Numerous subsequent conveyances and judicial proceedings introduced in evidence substantially established the fact that this paper title, at the time of the institution of this suit, was vested, so far as the land in controversy lying west of this division line was concerned, two undivided thirds in plaintiff and the remaining third in defendants. But, while this is true, it also appears to be true that, after the division line was established, Warren and Cannon undertook, by deed of date September 16, 1866, to convey land lying west of this line, including the land in controversy, to Underwood and wife, and White, on his part, undertook to exclude Cannon and claim the whole of the tract, lying west of the line, in severalty, and in subsequent conveyances by White and his grantees (including three decrees in equity causes relating to his title) the whole of the tract is sought to be conveyed and transferred and not an undivided interest. In effect this gives rise to defendant's contention that, on both sides, the parties in interest, by their acts and deeds, undertook to and did oust each other as tenants in common as to the land in controversy and practically acquired paper colors of title, and the one, so acquired by them, by seven years' adverse possession, has barred plaintiff's right in their favor. On the other hand, it is very earnestly insisted by plaintiff that the general rule "that where one of the several tenants in common executes a deed purporting to convey the entire premises to one who enters in possession thereunder, claiming title or recording his conveyance, this will constitute a disseisin of his cotenants, and after the expiration of the statutory period of limitations their right to the land will be barred," is not upheld in North Carolina, but the contrary, and therefore, being tenants in common still, nothing short of 20 years' adverse possession could bar plaintiff's right. A number of North Carolina cases are cited to sustain this contention. In our view of the case this question becomes immaterial. It is conceded that only color of title could be secured by any such attempted disseisin, and that adverse possession must be held for at least seven years before such color could ripen into perfect title.

[1] Such possession must be adverse, actual, visible, exclusive, and continuous. The holder of the older and better title is always to be regarded as having constructive possession, and the holder of the junior and inferior title, that may overlap it, cannot hold adversely until he has entered upon the actual boundary claimed by the older and better title and acquired adverse possession of it or of some part of it. In other words, he cannot, by entry into and possession of land outside of the land in controversy, although it be within the limits of his paper color of title, overcome the superior right of the holder of the better title by reason of the constructive possession vested by law in the latter.

[2] In case, too, the claimant under color of title does take possession and hold for a time adversely, but vacates before the statutory period expires, that moment the owner, by reason of his legal title, will be regarded as in the constructive possession and the adverse possession of the wrongdoer at an end.

[3] It follows that the evidence of adverse possession must be preponderant, and that the burden is upon him who asserts it to sustain every element involved in it, and, failing in proof of any one of these elements necessary to constitute it, it is the duty of the court to instruct the jury that there is no sufficient evidence to allow him to hold the land. 1 Cyc. 981 et seq. and 1143. Davis v. Seybold (C. C. A. 4th Ct.) 195 Fed. 402, 115 C. C. A. 304; Jarvis v. Johnson (D. C.) 208 Fed. 353.

[4] As said by the Supreme Court of North Carolina in Williams v. Wallace, 78 N. C. 308 (side page 354):

(1) No length of constructive possession will ripen a defective title to land into a good one; the possession must be actual and continuous.

[5] (2) Where there is no actual possession of land shown, the law carries the possession to the real owner.

[6] (3) A possession of land under color of title must be taken by a man himself, his servants or tenants, and by him or them continued for seven years together; therefore, where, in an action to recover land, it appeared that the plaintiff under color of title had made occasional entries upon the land at long intervals for the purpose at one time of cutting timber, at another of making bricks, &c., held, that the plaintiff was not entitled to recover.

Governed by these well-settled principles of law, an examination of all the evidence introduced for the purpose of establishing adverse possession, under color of title in the defendants, of the land actually in controversy in this case, has convinced us that it was wholly insufficient for the purpose, but, on the contrary, tended to refute the claim that such possession had been attempted to be taken within the boundaries of the land lying west of the division line to which this controversy alone related, except upon one occasion, when an injunction was promptly secured against it. The learned trial judge, therefore, erred in refusing the plaintiff's motion for an instructed verdict in his favor.

The judgment of the court below will be reversed, and the case remanded, with instructions to set aside the verdict and award a new trial.

Reversed.

On Rehearing.

PRITCHARD, Circuit Judge. This case was heard and decided by this court at the February term, 1914, at which time the court filed an opinion, reversing the judgment of the lower court, in which it was held that there was not sufficient evidence offered in that court bearing upon the question as to the possession of the defendants to justify the jury in finding in favor of the defendants, and a reversal was directed, and judgment entered accordingly.

On June 13, 1914, a rehearing was granted upon a petition of de-

fendants in error, and the case was reargued at this term. After due consideration of the same, we are of opinion that the conclusion reached by this court in the first instance as respects this point was correct.

Therefore we adhere to our former decision reversing the judgment of the lower court.

McKINNON v. NEW YORK ASSETS REALIZATION CO.

(Circuit Court of Appeals, Second Circuit. July 30, 1914.)

No. 232.

1. INJUNCTION (§ 26*)—RESTRAINING PROSECUTION OF ACTION AT LAW—DEFENSES AVAILABLE IN LAW ACTION.

A court of equity will not enjoin the prosecution of an action at law against the complainant, to enable him to establish a defense which, under the statute, he might have pleaded as a counterclaim in the action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49, 54–61; Dec. Dig. § 26.*]

2. SUBROGATION (§ 26*)—PERSONS ENTITLED TO SUBROGATION—VOLUNTARY PAYMENT OF DEBT OF ANOTHER—"VOLUNTEER."

One who is under no legal obligation or liability to pay a debt is, if he pays it, a mere "volunteer," and cannot invoke the principle of exoneration through subrogation to the rights and securities of the creditor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 67; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, First and Second Series, Volunteer.

Nature and theory of right of subrogation, see note to Merchants' & Miners' Transp. Co. v. Robinson-Baxter-Dissoway Towing & Transp. Co., 113 C. C. A. 434.]

3. SUBROGATION (§ 26*)—VOLUNTARY PAYMENT OF DEBT.

Corporate stock owned by a bank was wrongfully pledged by another, with stock of another owner, as collateral security for his own note. On maturity he tendered payment of the note, which was refused. Subsequently the bank paid the note and received all of the collateral. *Held*, that the tender by the pledgor, while it did not discharge the debt, extinguished the lien of the pledgee, that the bank could have then recovered its own stock without payment of the note, and that such payment was voluntary, and gave it no legal right to exoneration or contribution from the stock of the other owner.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 67; Dec. Dig. § 26.*]

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

This suit comes here on appeal from an order and decree made in the District Court of the United States for the Southern District of New York and dated December 19, 1913, dismissing the bill of complaint for insufficiency of facts to constitute a valid cause of action.

On or about February 8, 1907, Arthur P. Heinze contracted to purchase from Clinton Gilbert and Charles W. Morse 2,815 shares of Chase National Bank stock at the price of $275 for each share, and on or about that day he paid $111,000 on account of the purchase price. On or about June 12th of the same year Heinze desired to borrow $150,000 to use in payment of a part of the purchase price, and made an arrangement with Charles W. Morse to give

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

the latter his note for $150,000 to be secured by 500 of these shares of the stock of the Chase National Bank, which were to be purchased with the proceeds thereof, and 2,000 shares of the common stock of United Copper Company; and this note Morse was to have discounted and devote the proceeds to the payment of the balance of the purchase price. In order to obtain for Heinze the money required, Morse made an arrangement with the Metropolitan Trust Company to borrow the sum of $150,000 on his own note to be secured by 1,000 shares of Chase National Bank stock. Heinze then caused to be delivered to Morse the 500 shares of the Chase National Bank stock, which he was able to obtain because the arrangement had been completed to obtain money to pay for the same out of the proceeds of the note. Thereupon on June 16, 1907, Morse gave his note for $150,000 to the Metropolitan Trust Company, secured by those 500 shares and other 500 shares of the Chase National Bank stock belonging to the National Bank of North America, all which shares had been taken for this purpose by Morse without the authority or consent of either Heinze or of the National Bank of North America. The proceeds of Morse's note were applied to the payment for the balance of the purchase price owing by Heinze upon his purchase of the Chase National Bank stock. Morse, having taken the bank's 500 shares to secure money to pay Heinze's indebtedness, transferred the latter's note to the bank, which still owns it. Before the maturity of the note at the Metropolitan Trust Company that company was notified that Morse was not the owner of any of the 1,000 shares which he had pledged, but that 500 shares belonged to the bank and the other 500 shares belonged to defendant Heinze, which the bank was entitled to receive as security for an indebtedness due to it by Heinze. The latter also notified the trust company that 500 of the shares belonged to him, but made no tender of the amount owing either upon the Morse note or upon his own note for the same amount. Upon the maturity of the note, Morse and one John L. Elliott tendered the full amount and interest of the Morse note to the trust company and demanded the return of the 1,000 shares of the Chase National Bank stock. This request was not complied with, on the ground that the stock did not belong to Morse and Elliott, and that 500 of the shares were the property of Heinze. Thereafter the trust company refused a tender made by the receiver of the National Bank of North America. An action was then begun by the receiver against the trust company for the conversion of the 500 shares of stock belonging to the bank, which action was successful, and by stipulation the trust company delivered 1,000 shares of the stock of the Chase National Bank on the payment to it by the receiver of $150,000 with interest. And on appeal to this court the judgment was affirmed. 172 Fed. 846, 97 C. C. A. 194.

The receiver paid the trust company the amount of Morse's note and received the 1,000 shares of Chase National Bank stock, and assumed to hold in accordance with the opinion of this court "the possession of all of the collateral, one-half as owner, the other as substituted pledgee." The receiver having thus obtained possession of the shares sold the whole 1,000 shares. The sale was made on September 3, 1911, was in accordance with the terms of the Morse note, and after notice to Heinze had been given; and the latter is alleged in the bill of complaint to have acquiesced in the sale.

Thereafter and on December 12, 1911, the New York Assets Realization Company, the defendant herein, as assignee of Heinze, commenced an action at law for the alleged conversion of these shares of stock through this sale, and demanded $275,000 damages. The complaint was dismissed; but on writ of error this court reversed the judgment, on the ground that Morse's tender had discharged the lien of the trust company (209 Fed. 791, 126 C. C. A. 515); and on rehearing this court adhered to its previous ruling (209 Fed. 795, 126 C. C. A. 515).

J. Markham Marshall and Alexander B. Siegel, both of New York City, for appellant.

Ferdinand E. M. Bullowa, of New York City (Ferdinand E. M. Bullowa, Emilie M. Bullowa, and Richard S. Harvey, all of New York City, of counsel), for appellee.

Before WARD, HUNT, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] This is a suit in equity in which the District Court was asked to enjoin the defendant from the prosecution of an action at law which it has brought against the complainant to recover for the alleged conversion of 500 shares of the capital stock of the Chase National Bank of New York, which shares are alleged to be of the value of $275,000 and to assume jurisdiction of the whole controversy existing between the parties in respect to the stock in question. The suit is brought upon the theory that the complainant is entitled to certain relief which a court of equity alone can grant; and it is necessary for us to determine whether the court below erred in dismissing the bill.

When Morse pledged with the trust company the Heinze shares and the shares belonging to the National Bank of North America, the trust company had no knowledge of the fact that Morse had no title to the stocks and was without power to make such use of them. The trust company advanced the money bona fide upon the Morse note without notice of the actual ownership of the shares and in reliance upon the apparent title of Morse. This wrongful pledge of the stock gave the trust company a lien upon it by estoppel under the authority of the well-known case of McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341 (1871).

And so long as the lien continued the National Bank of North America, if it desired to recover the possession of the shares, would have been under the necessity of paying the Morse note, and if it had, under such necessity, paid the note in order to protect its rights and save its property, it would, no doubt, have been justified in invoking the principle of subrogation and would have succeeded to the rights and securities of the trust company.

But the difficulty is that the lien which the trust company acquired on the collateral deposited with it was lost prior to the time when the bank paid the note. It appears from the allegations contained in the bill that after Morse's note had matured he tendered to the trust company the full amount, with interest, and demanded the return of the collateral, but the tender and the demand were refused. Likewise after the maturity of the note the receiver of the National Bank of North America tendered the trust company the amount due, with interest, and demanded the delivery of the stock, and this demand was also refused.

The refusal of the trust company to accept the tender made by Morse, the pledgor, did not discharge the debt, but it did discharge the lien. We have already passed on that question and decided that the lien was lost. New York Assets Realization Co. v. McKinnon, 209 Fed. 791, 126 C. C. A. 515 (1913). That question cannot be regarded as an open one in this court. We know of no conflict in the authorities, and the principle is as well established as any other in the law, that a valid legal tender of the amount of a lien debt discharges the lien and leaves the creditor to his personal claim against the debtor.

The receiver of the National Bank of North America, after the trust company refused its tender and demand for the return of the collateral,

brought an action against it for the conversion of the 500 shares which belonged to the bank. It had been stipulated before the case was tried that if a verdict should be found in favor of the plaintiff "judgment should be entered to the effect that the Metropolitan Trust Company should deliver the said note of Charles W. Morse, dated June 13, 1907, together with the said 1,000 shares of the stock of the Chase National Bank, to the said Charles A. Hanna, as receiver of the National Bank of North America in New York, upon payment to the said Metropolitan Trust Company, by the said Charles A. Hanna as receiver, as aforesaid, of the full amount due upon the said note." A verdict was directed in favor of the plaintiff, and judgment entered in accordance with the verdict and stipulation. Upon appeal to this court the judgment was affirmed. Metropolitan Trust Co. v. McKinnon, 172 Fed. 846, 97 C. C. A. 194 (1909). There were expressions contained in that opinion which indicated that the bank could only obtain possession of the collateral by paying the note, and that in paying the note the bank would not be a volunteer, nor an intermeddler, but would be protecting its own property. Thereupon the complainant paid the note and received the collateral; and having thus obtained possession of the 1,000 shares it sold them at the highest price obtainable, $362.50 a share. It applied the proceeds realized from the sale of Heinze's 500 shares to the payment of the Morse note, and what remained was applied to the payment of the note due from Heinze to the bank.

This led to the commencement of an action brought by the New York Assets Realization Company, as assignee of Heinze, to recover $275,000 for the conversion of the stock by the sale which the bank had made. The complaint was dismissed in the court below, but the case was reversed in this court. The reversal was based on the fact that the tender had discharged the lien, a fact which does not seem to have been brought to the court's attention in the earlier case in this court. That decision, therefore, established the right of the New York Assets Realization Company, as the assignee of Heinze, to maintain its action at law against McKinnon as the agent of the National Bank of North America to recover for the conversion of the stock, and that action is still pending. It is that action which we are now asked to enjoin.

It appears that, in the answer which McKinnon interposed to the complaint in that action, he failed to set up by way of counterclaim and in diminution of damage the amount of the Heinze note for $150,000 which was transferred to the National Bank of North America by Morse, and to the payment of which, as before said, the bank, after selling the stocks, had applied a part of the proceeds thus realized.

The Revised Statutes of the United States provide that:

"The practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held." U. S. R. S. § 914 (U. S. Comp. St. 1901, p. 684).

Under the New York Codes the complainant might have set up Heinze's note as a counterclaim in the action brought to recover for

the conversion. The Code of Civil Procedure provides (section 500) that the answer of the defendant may contain a statement of any new matter constituting a defense or counterclaim. And it is provided in section 501 that the counterclaim must be one of the following causes of action against the plaintiff or against the person whom he represents and in favor of the defendant:

(1) "A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

The matter which the complainant relies upon, and asserts he is entitled to counterclaim, he might have set up in the action at law, as it is a matter which arose "out of the contract or transaction set forth in the complaint." He did not, however, see fit to do so, and has never made any application to the court below to amend his answer and permit him to set it up as a defense in the action at law. The fact that he might have availed himself of this defense in the action at law and has failed to do so affords him no ground for coming into equity. Bispham in speaking of the right of set-off says:

"This right [of set-off], although it did not originally exist at common law, was, nevertheless, so effectually introduced by statute that it now, perhaps, furnishes no ground for interference by a chancellor as an equitable right."

This view he supports by an extended citation of the cases. And the law is settled that where one has a good defense at law, and failed to set it up when he had the opportunity, equity withholds any assistance, unless he can show that he was prevented from availing himself of the defense by fraud or accident unmixed with his own or his agent's negligence.

[2] The complainant also bases his appeal to the aid of a court of equity upon the theory that he is entitled to be exonerated from the payment of the Morse note and to be reimbursed for his payment of the note in accordance with the terms of the judgment against the Metropolitan Trust Company by the proceeds from the sale of the Heinze stock, and that this right of exoneration is recognized solely in equity. The answer to this is that the principle of exoneration is not applicable to the facts of this case. It is true that the 500 shares which belonged to the bank were taken without consideration to it and used to secure for Heinze the money wherewith to pay for the balance of the purchase price of the shares belonging to Heinze, and that the bank at one time may have been in a position where it would have been entitled to have had the shares of Heinze's stock belonging to it exonerated from the payment of the Morse note. But, whatever its right to do this may have been, it ceased to possess any such right when it voluntarily paid the Morse note. It paid that note as a volunteer, being at the time the payment was made under no compulsion to make it. While the trust company's lien on the stock continued it could not have recovered its own stock without paying the note, but when the trust company lost its lien on the stock by the tender the bank could at once have recovered the stock without paying the Morse note. One who is under no legal obligation or liability to pay a debt

is, if he pays it, a mere volunteer. In paying the note as a volunteer the complainant lost his right to invoke the principle of exoneration.

"The equities of contribution and exoneration arise only when the payment is made in discharge of a binding obligation." Bispham's Equity, § 332.

[3] We do not question the principle that where the owner of property pledges it for the debt of another such property occupies the position of a surety. That principle has been recognized in numerous cases. Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; Le Marchant v. Moore, 150 N. Y. 209, 44 N. E. 770; Farwell v. Bank, 90 N. Y. 483. And if complainant is right in thinking that the Bank of North America at one time had the right to compel the application of the Heinze shares to the payment of the Morse note before resort was had to the shares which it owned, we cannot see that that principle can be invoked now under the existing facts. If the bank's shares at one time occupied the position of surety, that position was lost when the tender was made and refused. In Mitchell v. Roberts (C. C.) 17 Fed. 781, the court said:

"When property of any kind is mortgaged or pledged by the owner to secure the debt of another, such property occupies the position of surety, and whatever will discharge a surety will discharge such property."

The jurisdiction of a court of equity to protect equitable rights by enjoining an action at law cannot, of course, be questioned. An injunction will be granted to restrain a legal proceeding whenever an equitable title is not recognized or an equitable right not enforced in the action at law, or when exact and complete justice cannot be had between the parties, except through the remedies of the equity court. But there is nothing in the facts of this case to show that the complainant has any right for which courts of law do not afford an adequate remedy.

Decree affirmed.

THE SAMSON.†

BARGES NOS. 8, 9, AND 27.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2393.

1. ADMIRALTY (§ 118*)—REVIEW ON APPEAL—FINDINGS OF FACT.

In cases on appeal in admiralty, when questions of fact are dependent on conflicting evidence, the decision of the district judge, before whom the case was tried, and who heard and saw the witnesses, will not be reversed, unless clearly against the evidence.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794; Dec. Dig. § 118.*]

2. COLLISION (§ 66*)—MEETING TOWS—UNMANAGEABLE TOW.

A finding by the district court that a collision on the Columbia river at night between barges loaded with stone in tow of a tug passing down, which had a barge on each side and one in front, and a steamer coming up with an oil barge on her side, was due to the fault of the tug, whose

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

† Rehearing denied November 17, 1914.

tow became unmanageable, and was carried by the current over toward the Oregon side of the river, *held* supported by the evidence.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 84; Dec. Dig. § 66.*

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

3. COLLISION (§ 132*)—SUIT FOR DAMAGES—MEASURE OF DAMAGES.

Where a vessel, which became a total loss as the result of a collision, had no market value, the cost of her construction, with proper deduction for depreciation, may properly be taken as the measure of damages.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 286; Dec. Dig. § 132.*]

Appeal from the District Court of the United States for the District of Oregon; Edward E. Cushman, Judge.

Suit in admiralty for collision by the Shaver Transportation Company, owner of the steamer Henderson, against the steam tug Samson and barges No. 8, No. 9, and No. 27, Columbia Contract Company, claimant, with the Standard Oil Company of California impleaded. Decree against respondent vessels, and claimant appeals. Affirmed.

For opinion below, see 208 Fed. 347.

Libel in rem against the steamer Samson and barge No. 8, barge No. 9, and barge No. 27, owned by the Columbia Contract Company, and libel in personam against the Standard Oil Company of California, owner of oil barge No. 93, for damages for loss of the steamer Henderson.

Teal, Minor & Winfree and Rogers MacVeagh, all of Portland, Or., for appellant.

Wood, Montague & Hunt, of Portland, Or., for appellee.

Snow & McCamant and George B. Guthrie, all of Portland, Or., for Standard Oil Co.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. 1. This action is the result of a collision between the steamship Henderson and a barge loaded with stone in tow of the tugboat Samson on the Columbia river on July 22, 1911, at about 1:40 a. m.

The Henderson was a stern-wheel river steamer 158 feet long with a beam of 31.6 feet. At the time of the accident, she was proceeding up the river at a speed of about three or four miles an hour, and was towing a steel oil barge, known as barge No. 93, owned by the Standard Oil Company. The oil barge was 300 feet long, with a beam of 34 feet. The Henderson was lashed to the port quarter of the oil barge in such manner that she extended along the port side of the barge a distance of about 100 feet; the stem of the Henderson being slightly inclined toward the side of the oil barge. The barge had no motive power of her own; but the pilot who was in command of both vessels was stationed on the oil barge, and the steering of both vessels was directed by him from the deck of the oil barge.

The Samson was a sea-going tugboat about 110.4 feet long with a beam of 25.4 feet. She was proceeding down the river at a speed of

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

about seven miles an hour, and was towing three barges (Nos. 8, 9 and 27), each of which was loaded with about 1,000 tons of stone. The barges were arranged in what is known as a "spike tow"; barge No. 8 being lashed to the starboard side of the Samson in such position that the stern of the barge was about abreast of the beam of the tugboat, barge No. 9 being lashed to the port side of the Samson and opposite to and abreast of barge No. 8, and barge No. 27 being lashed between barges Nos. 8 and 9 and directly in front of the tugboat, the stern of barge No. 27 setting against the stem of the tugboat. Barge No. 8 and barge No. 9 were about 160 feet long, with a beam of 38 feet. Barge No. 27 was 150 feet long, with a beam of 36 feet. Barges Nos. 8 and 9 extended in front of the stem of the Samson for a distance of about 90 feet, and barge No. 27 extended in front its full length of 150 feet. The barges were propelled and steered by the tugboat and were in command of a pilot who was stationed on the tugboat.

The night of the accident was dark, but clear. There was no fog, and lights were easily discernible. The tide was running downstream, and the ordinary flow thereof was increased by reason of the freshets of that season of the year. On the right-hand side of the river, ascending the same, was the Oregon shore; on the left-hand side was Puget Island. At the point of the accident, and for a distance of about a mile above the same, the river was about one-half of a mile wide. Deep water prevailed from shore to shore. The channel was designated by a range line extending approximately down the center of the river; the range line being delineated by range lights placed at appropriate points on the shore. About one mile up the river from the point of the accident it made a turn to the eastward around a point of Puget Island, forming an angle of about 135 degrees.

The pilot, who was in charge of the Samson and the barges which she was towing, testified that he first saw the Henderson and the oil barge coming up the river as he was rounding the point of Puget Island at the bend of the river; that the Samson was then well over on the island side of the river, and only about 400 feet from that shore; that, upon observing the Henderson, he immediately ported his helm; that, when the Henderson had reached a point about one-half of a mile down the river, she blew one whistle, thereby indicating that she intended to pass the Samson port to port; that he immediately answered with one whistle; that, upon the exchange of these signals, he ported his helm a little more; that about two minutes intervened between the time when he first saw the Henderson and the time when the whistles were exchanged and the helm of the Samson further ported; that at the latter time he was about 800 feet off of the Puget Island shore; that he continued to put his helm to port until he was within about 400 feet of the Henderson; that the Henderson then gave another whistle, again signifying her intention to pass port to port; that he answered this second signal, and then put the helm of the Samson hard over to port; that he was then about 800 feet from the Puget Island shore; and that the collision occurred almost immediately after the second whistles were exchanged. The evidence is conflicting as to which of the barges in tow of the Samson struck the Henderson. Both barge

No. 9, which was lashed to the port side of the Samson, and barge No. 27, which extended out in front of the Samson, were damaged to some extent, and it is very probable that both of them contributed to the hole which was torn in the port bow of the Henderson just aft of the stem. The oil barge was not damaged. The lines by which the Henderson was lashed to the oil barge were broken by the force of the impact, and she sank almost immediately thereafter, drifted down the river for some distance, and was later beached by the Samson in shallow water along the Oregon side of the river. After the collision, the oil barge was anchored in the river about 200 feet from the Oregon shore. The Samson's barges were also anchored, but the testimony is in conflict as to their positions; the pilot of the Samson testifying that they were anchored within 200 feet of the Puget Island shore, and some fishermen, who were tending their nets in the vicinity, testifying that two of them were anchored on the Oregon side of the river and the third on the Puget Island side.

So far as the signals exchanged between the vessels prior to the collision are concerned, the testimony is in all substantial respects without conflict. But the testimony relating to the position of the Henderson and of the Samson at the time of the collision, with respect to the range line marking the channel of the river, is absolutely irreconcilable. The range line, as we have stated, extended up the middle of the river. In view of the signals which had been exchanged between the vessels, the Henderson was therefore entitled to all of that portion of the stream lying on the Oregon side of the range line, and the Samson was entitled to all of that portion of the stream lying on the Puget Island side of the range line. Each of the parties, appreciating these facts, endeavored to show that its vessel was on its rightful side of the river, and that the collision was caused by the vessel of the other party transgressing thereon.

Witnesses for the libelant, including the pilot who was in charge of the Henderson and the oil barge, testified that the collision occurred on the Oregon side of the river, and the libelant contended that the position of the oil barge after the accident conclusively established the exact position of the Henderson at the time of the collision. On the other hand, witnesses for the claimant of the Samson testified that the collision occurred well over on the Puget Island side of the river, and the claimant points to certain testimony with respect to the position of the stone barges after the collision as conclusive of the question.

[1] Out of the great mass of conflicting testimony with respect to the maneuvers of the respective vessels prior to the collision, and the positions of the various tows thereafter, the learned judge of the court below found that the point of collision was well to the Oregon side of the channel, and concluded that the fault was with the Samson. This finding, under well-settled rules of appellate procedure, should not be disturbed. Spencer v. Dalles, P. & A. Navigation Co., 188 Fed. 865, 868, 110 C. C. A. 499. As said by this court in The Alijandro, 56 Fed. 621, 6 C. C. A. 54:

"The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging

their appearance, manner, and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence."

[2] In the present case we think the finding of the trial judge is fully supported by the great weight of the evidence. The reasonable inference to be drawn from the testimony of the pilot of the Samson is that at the time of the collision, and for some time prior thereto, he did not have complete control of his tugboat and the barges which he was towing. The tide was running down the river. In addition, it was the flood season of the year, when the currents of the river were particularly strong. The pilot testified that, at the point of the island where he made the turn to go down the river, the current had a tendency to set over to the Oregon shore, although the full sweep of the current did not commence until a point about 200 feet off the Puget Island shore was reached. Yet, despite his knowledge of these facts, he proceeded to round the point of the island, with the three barges heavily loaded with stone, at a speed of about seven miles an hour, and, as he himself testified, at a distance of about 400 feet off the Puget Island shore. That he got caught in the sweep of the current and lost control of the Samson and of her tows is shown by his testimony to the effect that when he first sighted the Henderson he had his helm aport and was about 400 feet from the Puget Island shore; that, after sighting the Henderson and receiving her first signal, he further ported his helm; that he continued with his helm almost hard aport for a distance of about one-half of a mile or until he got the second signal from the Henderson, and that at this latter time he was 800 feet from the Puget Island shore. In explanation of this he admitted that he thought the Samson drifted away from the island "on account of the current setting her off." He further testified as follows:

"Q. Still not seeing you were getting closer to the island, but on the contrary getting further away, why didn't you give hard aport helm? A. I gave her hard aport helm just before the second whistle was given. She was swinging, heading toward the island all the way. I couldn't do more than keep her that way, but she was going down broadside. Q. Didn't you think it was your duty when nervous about this bad steering and trying to give plenty of room, when you were not getting closer to the island but further away, don't you think it was your duty to put your helm hard aport? A. She was going over all the time. Giving more port helm all the time. Q. Wasn't she going away from the island? A. I couldn't help that. The boat wouldn't shove the scow in. That is all there was to it. Q. Could have by giving hard aport helm, couldn't you? A. I don't think so; would have laid right across the current with hard aport helm. Q. Do you mean you couldn't control the tow there? A. Not to get in the island that short a space; no, sir."

But the pilot insisted that, despite the fact that the Samson and the barges were caught in the sweep of the tide and were beyond his control, still at no time was he further than 800 feet from the Puget Island shore, or about one-third of the distance across the river. We think the position of the oil barge after the collision in and of itself conclusively refutes this statement. She was broken away from the Henderson by the force of the collision, and, although there is some conflict in the testimony, it is strongly in favor of the fact that her anchors were dropped within a few seconds thereafter. There is no dispute

that the oil barge was anchored about 200 feet, or, as some of the witnesses testified, within her own length (300 feet), of the Oregon shore.

[3] 2. The trial judge found that the Henderson, by reason of the collision, became a total loss; and, although there is some testimony to the effect that she could have been raised and repaired for a comparatively small sum, we think that the testimony to the effect that she was a total loss, coupled with the condition of the vessel as shown by the photographic exhibits introduced by the libelant, show that the conclusion reached by the court below was right. It appeared from the testimony of the libelant that there was no general market for vessels of the type of construction of the Henderson, and that no market value thereof could be deemed fixed. This testimony was not controverted by the claimant. The libelant then introduced testimony tending to show the original cost of the vessel, and also the extent to which she had depreciated in value. This, in the absence of market value, was the next best evidence of value.

"The measure of damages in case of total loss is the market value of the vessel at the time of the collision, together with its cargo and freight, and such other losses as are a direct result of a collision. * * * When the conditions are such that no market value can be shown, where there is no market value, or, if shown, it is so manifestly disproportionate to the intrinsic value of the vessel that to order a sale at such a price would be a hardship, the court may adopt as the value of the ship the cost of construction, with proper deduction for the deterioration in its value from the time of construction." Spencer on Marine Collisions, § 200.

By this method the court found that the value of the Henderson at the time of the collision was $38,888.21. From this sum was deducted $8,520.16, representing the net value of certain machinery salvaged from the wreck, leaving $30,368.05, to which was added the sum of $502.70, representing the value of supplies lost with the vessel, making a total of $30,870.75, for which a judgment was entered against the claimant.

The claimant contends that the amount of the judgment was excessive. We do not understand that it denies that the method employed by the trial judge in arriving at the amount of damages was not the correct one; but it insists that the amount was excessive, in view of certain testimony introduced by it showing a greater percentage of depreciation of the vessel than that adopted by the court, and also in view of certain testimony with respect to the amount which should have been awarded as the net value of the salvage. The testimony on each of these items is very conflicting. We have read all of it, and are unable to state that the record contains testimony of greater weight than that upon which the conclusion of the trial judge was based. The testimony of the builder of the Henderson was to the effect that she cost $51,597.60 at the time of her construction in 1901; that she was ten years old at the time she was sunk; and that the depreciation on all parts of her during that period would amount to $7,709.39, leaving a value at the time of the collision of $43,888.21. But, in view of other testimony tending to show a greater depreciation than that stated by the builder of the Henderson, the trial judge reduced the value of the Henderson $5,000, thus fixing the true value thereof at $38,888.21. We are of opinion that the latter amount is not excessive.

The judgment of the court below is affirmed.

JACKSON CO. et al. v. GARDINER INV. CO. et al.

(Circuit Court of Appeals, First Circuit. November 19, 1914.)

No. 1067.

CORPORATIONS (§ 584*) — LIQUIDATION — POWER OF MAJORITY — REVIEW BY COURTS.

A majority of the stockholders of the J. Company, having decided to liquidate the company, in good faith and without fraud, in corporate meeting voted to sell its assets to the N. Company for shares of stock in the N. Company of the market value of $585,000, which was to be distributed among its stockholders on the basis of 1½ shares of stock in the N. Company for each share in the J. Company; the N. Company also assuming all debts and liabilities of the J. Company. The market value of 1½ shares in the N. Company was equal to the market value of a share in the J. Company, or $975. An arrangement was also made by which the stockholders in the J. Company might receive $975 per share, instead of taking stock in the N. Company. In a suit to enjoin the sale, it was found that the market or sale value of the assets of the J. Company, as represented by a share of stock, was $1,174.94 when the sale was made, and $1,494.65 two years later, and that the replacement value was $2,721.25 when the sale was made. *Held*, that the transaction was a sale of the assets of the J. Company, and not an exchange of such assets for stock, and hence the value of the stock two years after the sale and its replacement value were immaterial, and the difference between the market value at the time of the sale as found, and the valuation placed thereon by the majority, was too slight to show gross mismanagement, and therefore the decision of the majority shareholders, made in good faith and without fraud, was not subject to revision and reconsideration by the court, and it would not enjoin the sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2343–2347; Dec. Dig. § 584.*

Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, M. & A. Co. v. Lombard, 68 C. C. A. 120.]

Putnam, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Suit by the Gardiner Investment Company and others against the Jackson Company and others. From a decree in favor of complainants, defendants appeal. Modified.

Frank S. Streeter, of Concord, N. H. (Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., and Peabody, Arnold, Batchelder & Luther, of Boston, Mass., on the brief), for appellants.

Burton E. Eames, of Boston, Mass. (Tyler, Corneau & Eames, of Boston, Mass., and Hollis & Murchie, of Concord, N. H., on the brief), for appellees.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. When this case was previously before the court (200 Fed. 113, 118 C. C. A. 287), on cross-appeals arising out of an order of the District Court for the District of New Hampshire entering an ad interim injunction, the answer of the respondents had not been filed, and a hearing upon the merits had not been had. Since

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

then certain parties other than the original complainant have been permitted by leave of court to come in either as interveners or under a supplemental bill of complaint, and various pleadings have been filed, including the answer of the respondents. The case has been sent to masters, who have heard the parties upon the merits and made their report. Upon the report a final decree has been entered in the District Court enjoining the carrying out of the sale of the assets of the Jackson Company to the Nashua Company, as voted on May 10, 1911, except upon payment to the complainants of the sum of $3,228.13 for each share of stock of the Jackson Company held by them. The case is now here on appeal by the respondents from this decree, assigning various errors.

Upon the prior appeal the respondents took the position that the District Court should have dissolved the injunction and dismissed the proceeding, on the ground that the controversy was res judicata by reason of a similar suit brought by other stockholders in the state court of New Hampshire (Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366), raising the same issue, and for want of equity in the bill. It was held that the decree in the state court did not render the questions here involved, and as between these parties, res judicata; that the bill in that court was brought by specific stockholders, without an allegation that it was brought in behalf of other stockholders who might join; and that in the absence of such an allegation other stockholders could not intervene as of their own right. It also appears from the opinion then delivered that the court understood from the allegations of the bill that, while each stockholder of the Jackson Company, who declined to take stock in the Nashua Company in payment of his interest in the assets of the Jackson Company on the basis of 1½ shares of Nashua Company stock for one of the Jackson Company, might have $975 in cash for his interest in those assets as represented by each share of Jackson Company stock, free from all indebtedness, nevertheless that sum was "apparently the ordinary market value" of each share of the stock, and not its intrinsic value as represented by the assets of the Jackson Company, which the bill alleged was of the value of $3,277.51, and that as under this "arrangement a shareholder of the Jackson Company would be compelled to exchange his stock for stock of the Nashua Company on the basis named, or to receive in cash less than one-third of the intrinsic value of what he surrendered," there could be no doubt about the equity of the bill and the power of the court to afford relief; that the complainant, having come "into equity, must be content to receive, under the circumstances, a fair equivalent of the intrinsic value of its shares, to be ascertained by the court in such manner as equity requires," and was not entitled to have the court order an auction sale of the assets, as requested in one of the prayers of the bill.

We therefore understand, from the allegations and prayers of the bill and from the decision of the court, that what the original complainant sought by the bill, and what the court meant by intrinsic value of the stock, was what the assets back of the stock would bring at a fairly conducted sale, or its equivalent, as ascertained by the court upon the reception of evidence leading to that conclusion.

In the masters' report, it is found that there was no fraud or bad faith on the part of either the Jackson Company or the Nashua Company, or their officers, with relation to the sale; that the offer of the Nashua Company (which was accepted by the stockholders of the Jackson Company, the vote being 490 shares for and 104 shares against the proposition, 6 shares not being represented) provided for the purchase of the property, franchises, and good will of the Jackson Company by the payment therefor of 900 shares of Nashua Company stock, of the market value of $585,000, and the assumption of all its debts and liabilities, amounting to $1,522,679.71; that the market value of 1½ shares of the stock of the Nashua Company was equal to the market value of one share of the Jackson Company stock, or $975, and that the 900 shares of Nashua Company stock were to go into the treasury of the Jackson Company, and were to be distributed among the stockholders of that company, on the basis above stated, if they consented to take it; that stockholders owning 460 shares of Jackson Company stock consented, thus taking care of 690 shares of the Nashua Company stock; and that an irrevocable offer under seal, to continue for one year, was procured, running from the American Trust Company to the Jackson Company, agreeing, in case the trade went through, to buy the remaining 210 shares of Nashua Company stock, or any part thereof, that was not taken by stockholders of the Jackson Company, and to pay therefor the sum of $650 a share, thus assuring to every stockholder of the Jackson Company, who might decline to take Nashua Company stock, the sum of $975 for his interest in the assets of the Jackson Company as represented by each share of stock owned by him. It is thus seen that a majority of the stockholders of the Jackson Company, having decided to liquidate the company, in pursuance of this purpose, and in good faith and without fraud, entered into an agreement to sell the assets of the company for 900 shares of Nashua Company stock, of the market value $585,000, and the assumption of all its debts and liabilities, and made provision whereby a stockholder who had not already consented to take stock might have cash, which, in the case of the owner of one share, would be the sum of $975. The transaction, therefore, though in form an exchange of the assets of the Jackson Company for stock in the Nashua Company, was in substance a sale for $585,000, and the assumption of the debts and liabilities of the Jackson Company, with a provision that stockholders who desired should receive stock, and those who did not so desire should be paid in cash.

The masters have found that the market or sale value of the assets of the Jackson Company as represented by a share of stock in that company was in May, 1911, when the sale was made, $1,174.94, or $199.94 more than the value fixed by the majority in their sale to the Nashua Company; and that their market or sale value in May, 1913, was $1,494.65. It was also found that their replacement value in May, 1911, was $2,721.27, and in May, 1913, was $3,228.13. The findings as to replacement values are of no consequence, for, as above pointed out, we are only concerned with market or sale values; and the finding as to the market or sale value of the assets in May, 1913, is unimportant, for the case as now presented is not one of an exchange of assets for

stock in the Nashua Company, as it was interpreted to be by the court when it was here on the previous appeal, for then it appeared, according to the allegations of the bill, that the interest of a Jackson Company shareholder was of the value of $3,277.51, and that the vote of the majority in fixing its value at $975 could result in nothing else than in compelling the dissenting Jackson shareholders to take stock in the Nashua Company, a thing which was beyond the power of the majority to require them to do. As the transaction was a sale, and the sale was not illegal, it is evident that the value of the Jackson Company assets must be determined as of the date of the sale.

The only remaining question of importance is whether the decision by the majority shareholders in the Jackson Company that the market or sale value of the assets of the Jackson Company, as represented by a share of its stock, was $975, is subject to revision and reconsideration by the court; it having been made in good faith and without fraud. This was one of the questions under consideration in Bowditch v. Company, 76 N. H. 351, 365, 82 Atl. 1014, Ann. Cas. 1913A, 366. It was there pointed out that, when a corporation is in the hands of the court for the purpose of liquidating its assets, it is open to the court to say whether the assets should be sold at auction, or a valuation should be placed upon them under its direction. But that liquidation was not necessarily a judicial proceeding, and judicial action with reference to it could not be invoked except for cause. It was there said:

"It is not a matter of course that a court of equity will interfere in the liquidation of the assets of a corporation or firm by a majority in interest. It is the right of the parties to conduct this part of their business for themselves. Before this right can be interfered with, it must be made to appear that the majority are assuming to exercise powers not conferred upon them, or are proceeding in a manner not authorized by law."

Then, further along, it is said:

"The majority are trustees, with not only the power, but also the positive duty, to liquidate the assets;" and having determined in good faith to negotiate a sale, and for a reasonable price, there is "no equity in the claim of a dissatisfied minority that the trust should be administered in accordance with their views and against the wishes of the majority;" that, "the sale being one the majority have power to make, and being free from all taint of fraud or irregularity, a court of equity will not interfere unless there be such inadequacy of price as to amount to proof of gross mismanagement." 76 N. H. 366, 367, 82 Atl. 1021 (Ann. Cas. 1913A, 366).

With these views we fully agree; and we are also of the opinion that the majority, having in the exercise of an honest business judgment voted to sell the assets of the Jackson Company for $585,000, and the assumption of its debts and liabilities, amounting to $1,522,679.61, and having fixed, as above stated, the price which a dissenting stockholder was to receive for each right held by him in the assets of the Jackson Company at $975, could not be said to have determined upon a value that was so inadequate as to amount to proof of gross mismanagement; that in a transaction of this magnitude the difference in value as fixed by the majority, and as found by the masters, is so slight that it is quite as probable the valuation was correct as that it was erroneous; that it discloses, if anything, nothing more than an error of judgment, and would not authorize a finding of gross mismanagement.

The other questions raised by the respondents' assignments of error are of minor importance, in view of the conclusions here reached, and we pass them by. It is to be observed, however, that inasmuch as the offer of the American Trust Company was to expire in one year from June 8, 1911, and may not have been renewed, the injunction granted in this case should be so modified as to make it conditional upon the payment to the complainants of $975 a share, instead of $3,228.13.

The decree of the District Court is reversed, and the case remanded to that court, with directions to enter a decree or decrees dissolving the injunction and dismissing the bill with costs to the respondents, appellants, upon payment, or the giving of security by them, in such form as the District Court may approve, for the payment to the complainants, appellees, mentioned in the third paragraph of the decree hereby reversed, of the sum of $975 for each and every share of stock in the Jackson Company held by said complainants, appellees; and said appellants recover their costs of appeal.

PUTNAM, Circuit Judge (dissenting). The opinion of the court necessarily plants itself for its support solely on the action of the stockholders of the Jackson Company, at a meeting where they voted to exchange the stock of the Jackson Company for shares of stock in the other corporation. No other corporate action was taken. This, in the prior opinion of the court in this same case, was held to be ultra vires, and therefore void, and so goes for nothing. The report of the masters, which subsequently followed the prior opinion of this court, fixed alternative values for the shares of stock of the Jackson Company, at alternative dates. It was strictly in accordance with the prior action of this court that one of those amounts should be accepted as the value the dissenting stockholders should receive. On the other hand, two judges of the court having changed since the first hearing, the views expressed by the court in the first opinion, though not formally thus ruled, have been repudiated, and the action of the majority of the stockholders, which we then held to be invalid, has been made the basis of the present final judgment.

As all the facts upon which the court now relies appeared by the record when the case was first heard, the judges who united in the first judgment thus became chargeable with the useless and vain and expensive and troublesome prolongation of the litigation. The judgment now entered might just as well have been entered as the result of the earlier hearing, if the court, as then constituted, had deemed it proper.

The rule which the court now applies is a wholesome rule when applied to proper circumstances; but it involves a lawful action of the corporation at a meeting duly held, when everybody, including the minority and majority, may have a proper hearing, and a consequent action, of a quasi judicial character, on the specific proposition offered for adoption. Such a meeting was had; but no proposition for sale of shares of stock in the corporation for cash was offered or adopted. Subsequently an offer was made by the American Trust Company of a price per share which the court now fixes, which, under the circumstances, was an unreasonable amount to obtain for it. As a result, what happened was a force-put, by which the minority stockholders

were forced to fix a price for stock which is below any admitted value for it, and far below that which the minority shareholders claim. At any rate, the price now fixed is an artificial and arbitrary one, admittedly varying from the real value, although claimed to be but little less than the real value. This comes about by the force of the power of the majority, instead as the result of a deliberate consultation after a conference among all shareholders where all might be heard.

Notwithstanding the fact that the rule referred to would be binding in reference to a reasonable proposition where all are consulted, followed by a formal vote of sale for cash, even though a minority did protest it, the rule sought to be applied here has no relation to proceedings of the character which in fact occurred; but it can apply only as a result of regular proceedings with reference to a vote for a sale for cash at a lawful meeting, as to which there might be full consultation, even though no complete concurrence. Under the circumstances, the position is an open one for a sale to be fixed by the court at a reasonable price, of the kind indicated by the prior opinion at several points, namely, the "intrinsic value."

FULKERSON et al. v. SHAFFER et al.

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

No. 4181.

1. BANKRUPTCY (§ 58*)—ACT OF BANKRUPTCY—PREFERENCES—CONVEYANCE TO HINDER AND DEFRAUD CREDITORS.

Where an alleged bankrupt, who was cashier and stockholder of an insolvent bank, while insolvent and subject to a double liability on his stock in the bank to the bank commissioner, after the bank had been taken possession of by the commissioner, executed a note for the full amount of such double liability, secured by a mortgage on nonexempt real property, with intent to prefer the commissioner over his other creditors, he thereby committed an act of bankruptcy, and was properly adjudicated a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72–79, 83; Dec. Dig. § 58.*]

2. BANKRUPTCY (§ 58*)—PREFERENCES.

Under Bankr. Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 (U. S. Comp. St. 1913, § 9587), providing that "acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors" over others, a transfer to a trustee for creditors will be treated as if made direct to the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 72–79, 83; Dec. Dig. § 58.*]

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

Petition by A. H. Shaffer and others against Martin M. Fulkerson and others. From an order adjudging Fulkerson a bankrupt, he and J. D. Lankford, as Bank Commissioner, appeal. Affirmed.

---

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

Charles West, Atty. Gen., and Joseph L. Hull, Asst. Atty. Gen., of Oklahoma, for appellants.

G. H. Buckman, of Winfield, Kan., Sam K. Sullivan, of Newkirk, Okl., and S. C. Bloss, of Winfield, Kan., for appellees.

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

SMITH, Circuit Judge. [1] A petition was filed in the District Court to have Martin M. Fulkerson adjudged an involuntary bankrupt. The petition contained the following:

"That within four months preceding the filing of this petition, viz., on the 9th day of August, 1913, the said Martin M. Fulkerson, while insolvent, committed an act of bankruptcy, in that he did on said date execute and deliver a certain mortgage deed to J. D. Lankford, bank commissioner of Oklahoma, and his assigns and legal representatives, wherein to secure the payment of a note for $13,900 of said date, due one year thereafter, he mortgaged the southwest quarter (S. W. ¼) of section nine (9), all in township twenty-seven (27), range fourteen (14) west, in Woods county, Oklahoma, subject only to a prior mortgage of $6,500; that said real estate above described was non-exempt, and was not transferred in the due course of business, and was not transferred for a valuable consideration, but that said transfer was made by the said Martin M. Fulkerson while insolvent as aforesaid, with intent to prefer the said J. D. Lankford, bank commissioner, over his other creditors, and with intent to hinder, delay, and defraud the creditors of the said Martin M. Fulkerson; that said real estate mortgage was filed for record in the office of the register of deeds of Woods county, state of Oklahoma, August 9, 1913, at the hour of 4:15 o'clock p. m."

Martin M. Fulkerson and J. D. Lankford, bank commissioner, both filed answers, admitting the execution of the mortgage to Lankford, bank commissioner, but denying any act of bankruptcy. The parties made an agreed statement of facts, upon which the case was submitted, and resulted in an adjudication of bankruptcy, from which Mr. Fulkerson and Mr. Lankford, bank commissioner, appeal.

It appears that Mr. Fulkerson was cashier and stockholder to the amount of $13,900 of the Alva Security Bank, a banking corporation of the state of Oklahoma, and on August 9, 1913, the bank commissioner of Oklahoma declared the bank insolvent and took possession thereof, and on the same day took the note and mortgage referred to in the petition in bankruptcy. Two days later, but in pursuance of an agreement made on August 9th, the acting bank commissioner made a contract with the Central State Bank of Alva that it should assume all the liabilities of the defunct Alva Security Bank in consideration of certain specified assets of the Alva Security Bank and $97,199.79 in state banking board warrants. Among other things the stipulation contained the following provision:

"Party of the first part also agrees to immediately deliver to the party of the second part one certain note and mortgage securing same of $13,900, signed by M. M. Fulkerson and Sara H. Fulkerson, and the same to be applied in the same manner as all other double liability assessments which are collected."

The statutes of Oklahoma provide for the appointment of one bank commissioner by the Governor, by and with the consent of the senate,

and the appointment of a number of assistants, and they also provide for the usual double liability of stockholders in banks; but this provision is not specific as to who shall collect such liability. All references to the Oklahoma statutes are to the Harris-Day Code.

Section 298 creates the state banking board. Section 299 provides for a depositors' guaranty fund by assessment on the banks of the state. Section 300 provides for replenishing the fund when depleted. Section 302 provides that, whenever the bank commissioner shall become satisfied of the insolvency of any bank, he may, after due examination of said bank and its assets, proceed to wind up its affairs and enforce the personal liability of the stockholders, officers, and directors. Section 303 provides that, in the event the bank commissioner takes possession of any bank, the depositors shall be paid in full, and when the cash available, or that can be made immediately available, is not sufficient, the said banking board shall draw from the depositors' guaranty fund and from additional assessments, if required, the amount necessary to make up the deficiency, and the state shall have, for the benefit of the depositors' guaranty fund, a first lien upon the assets of the bank and all liabilities against the stockholders, officers, and directors of said bank.

When this bank was taken possession of by the bank commissioner under section 302, he was authorized under the same section to collect the double liability of Fulkerson, and that liability and his other liabilities made him insolvent. Although his liability was under the statute of Oklahoma, it was contractual in character. Richmond v. Irons, 121 U. S. 27, 55, 7 Sup. Ct. 788, 30 L. Ed. 864; Stuart v. Hayden, 169 U. S. 1, 8, 18 Sup. Ct. 274, 42 L. Ed. 639; Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571. And his liability became fixed from the date of insolvency of the bank. Stuart v. Hayden, 169 U. S. 1, 8, 18 Sup. Ct. 274, 42 L. Ed. 639. But in this case Mr. Fulkerson settled all questions as to his liability by giving to the bank commissioner his note for the full amount of his double liability. This liability upon this note was clearly contractual, even if his liability had previously not been so. For what was this note given? It was in effect stated in the contract between the bank commissioner and the Central State Bank of Alva that it was given to represent his double liability. It is said that the—

"mortgage was given in consideration of Fulkerson's liability to the bank commissioner for advances to be made by him out of the depositors' guaranty fund to pay the depositors of the failed bank."

On the other hand, it is expressly agreed:

"That said bank commissioner demanded from said Fulkerson payment of his liability as stockholder, and said Fulkerson delivered, in compliance with said demand, said note and mortgage."

As the law provided for the double liability, and as section 302 clothes the bank commissioner with authority to enforce the liability, and he demanded its payment, and in compliance therewith Fulkerson gave the note and mortgage, there seems no basis for the claim that he gave it solely for his liability to the bank commissioner for ad-

vances to be made by him out of the depositors' guaranty fund which it was obligatory upon the state banking board to make under section 303. Nor does the fact that section 303 gave to the state, for the benefit of the depositors' guaranty fund, a first lien upon all liability against the stockholders, change this result, or make the transfer solely for the purpose claimed by appellants.

[2] Under the Oklahoma statute he owed Lankford, as bank commissioner; but, even if he did not, Lankford took the mortgage as trustee, and the giving of a mortgage to a trustee for a creditor, instead of direct to the creditor, cannot take it out of the plain terms of the bankruptcy statute, which are:

"Sec. 3.—a Acts of bankruptcy by a person shall consist of his having * * * (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."

This is a proceeding in equity, and under this statute a transfer to a trustee for the creditors would be treated as if made direct to the creditors. If Fulkerson, to secure his double liability, upon which a cause of action had already accrued to the bank commissioner, gave this note and mortgage to secure such double liability, the mere fact that the state law gave a lien in favor of the state for the depositors' guaranty fund upon the double liability made the double liability no less a liability of Fulkerson, and if the mortgage was in part to secure the state for its advances it would none the less subject Fulkerson to be adjudged a bankrupt under the section quoted.

The appellants seem to, in a measure, treat this case as if it were an action under section 60, clauses "a" and "b," to recover the mortgaged property as given in preference and even if their theory were sustained, upon which we express no opinion, the creditors of Fulkerson would none the less be entitled to have him adjudicated a bankrupt, because, if it be conceded that there was some other consideration for the mortgage, it will not be claimed that it did not secure his double liability, which already existed. He had therefore committed an act of bankruptcy under the section of the bankruptcy law quoted, and the decree is affirmed.

MIDLAND GUARANTY & TRUST CO. v. DOUGLAS COUNTY et al.

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

No. 4182.

1. TAXATION (§ 572*)—NATURE OF LIABILITY—"DEBT."

Under the Nebraska law, taxes are not "debts," in the ordinary sense, and an action will generally not lie to recover them.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1132–1137; Dec. Dig. § 572.*]

For other definitions, see Words and Phrases, First and Second Series, Debt.]

2. TAXATION (§ 507*)—TAXES ON PERSONAL PROPERTY—LIEN.

When taxes on personal property become delinquent in November of each year, as provided by Cobbey's Ann. St. Neb. 1911, § 10914, the tax

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

becomes a lien, not only on the identical personal property taxed, but on all personal property of the taxpayer within the county.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 937–941; Dec. Dig. § 507.*]

3. TAXATION (§ 573½*)—TAXES—"PERSONAL OBLIGATION"—ENFORCEMENT.
While, under the Nebraska law, each piece of real estate is liable only for the taxes assessed against it, and the owner is not personally liable therefor, the assessment of personal taxes is a "personal obligation" of the property owner, though he is not ordinarily subject to a suit to collect the same, because the statutes have provided another adequate and exclusive remedy.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1145, 1146; Dec. Dig. § 573½.*

For other definitions, see Words and Phrases, First and Second Series, Personal Obligation.]

4. TAXATION (§ 390*)—RAILROAD PROPERTY—ASSESSMENT—PERSONAL PROPERTY.
Where railroad property located in Nebraska was in the hands of a receiver, it was properly listed by him for taxation, and assessed as personal property, as provided by Cobbey's Ann. St. Neb. 1911, §§ 10927, 10985.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 652–655, 658, 659; Dec. Dig. § 390.*]

5. RECEIVERS (§ 153*)—CLAIMS—TAXES—COLLECTION.
Where railroad property located in Nebraska was in the hands of a receiver, and was properly assessed for taxes as personal property, the railroad company being hopelessly insolvent, the taxes were collectible from the receiver, as provided by Cobbey's Ann. St. Neb. 1911, §§ 10915, 10937.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 276, 277; Dec. Dig. § 153.*]

6. RECEIVERS (§ 153*)—CLAIMS—TAXES—COLLECTION.
Where a receiver of property of an insolvent railroad company was liable for taxes payable to the county, the proper method to collect the taxes was for the county to appear in the receivership case and pray for an order directing payment by the receiver.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 276, 277; Dec. Dig. § 153.*]

Appeal from the District Court of the United States for the District of Nebraska; W. H. Munger and Thos. C. Munger, Judges.

Claim by the County of Douglas and others against Arthur English, as receiver of the property of the Nebraska Traction & Power Company and the Midland Guaranty & Trust Company, trustee, in mortgage foreclosure proceedings, to recover certain taxes. From an order directing the payment of the taxes, the trustee appeals. Affirmed.

H. C. Brome, of Omaha, Neb. (Clinton Brome, of Omaha, Neb., on the brief), for appellant.

Charles Haffke, of Omaha, Neb., for appellees.

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

SMITH, Circuit Judge. This suit was commenced by the Carbon Timber Company against the Nebraska Traction & Power Company, hereafter called the Power Company, and the Midland Guaranty &

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

Trust Company, to foreclose a lien for materials used upon the property of the Power Company. The Power Company is a railroad corporation organized under the laws of Nebraska, and owned an interurban railway located in Douglas and Sarpy counties in that state. Arthur English was appointed as receiver of the property of the Power Company on October 28, 1910. The Trust Company named held a mortgage on the railroad, and it filed a cross-bill asking foreclosure. On May 20, 1913, decree was entered finding the amount due on the mortgage to be $192,400, and the receiver was ordered to sell the property and that:

"The proceeds of such sale be applied to the payment of the outstanding receiver's certificates, costs of suit, certain liens adjudged by the court to be prior to the lien of said mortgage, and the residue of the proceeds of said sale, if any, to be applied toward the payment of the amount due upon the bonds secured by said mortgage."

The property was sold by the receiver for $110,000, and the sale was confirmed by the court on July 5, 1913. The money having been paid, said receiver on August 15, 1913, executed a deed and delivered possession of the property. Pursuant to the order of May 20, 1913, the receiver had on November 1, 1913, paid upon receiver's certificates $71,941.35. On November 20, 1913, the court ordered the receiver to pay the balance in his hands on the liens adjudged paramount to the mortgage and the other liens and costs. By February 13, 1914, the said receiver had paid upon the liens adjudged to be prior to the mortgage the sum of $12,908.37, and had also paid a dividend of 12 per cent. upon the bonds secured by the mortgage. On the 15th day of April, 1913, the said receiver returned a schedule of such Power Company to the state board of equalization and assessment, and said board, having valued said property in the manner required by law, made its return of such value to the county clerks of the counties of Douglas and Sarpy, and the levy was such that the taxes due to the county of Douglas amounted to $710.85 and the amount due the county of Sarpy was $210.38. On the 10th day of November, 1913, said counties of Douglas and Sarpy demanded of said receiver the payment of said taxes from the funds in his hands, and the receiver applied to the court for its order and direction in the premises. The court found they should be paid, and the Midland Guaranty & Trust Company appealed to this court.

The following are excerpts from Cobbey's Annotated Statutes of Nebraska, edition of 1911:

"10911. All property in this state not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value."

"10914. Taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed from and after the first day of November of the year in which they are assessed, until paid."

"10915. When property is assessed to any person as agent for another, or in a representative capacity, such person shall have a lien upon such property, or any property of his principal in his possession, for the taxes thereon until he is indemnified against the payment thereof, or, if he has paid the taxes, until he is reimbursed therefor."

"10927. Personal property shall be listed in the manner following: * * * Seventh. The property of corporations whose assets are in the hands of receivers, by such receivers."

"10937. If the property of any taxpayer be seized by legal process so as not to leave a sufficient amount exempt from levy and sale to pay the taxes, then the taxes on the property of such taxpayer shall at once fall due, and be paid from the proceeds of the sale of the property so taken on such process in preference to all other claims against it."

"10983. The property of railroads, railroad corporations and car companies, shall be annually assessed as prescribed in this act by the state board of equalization and assessment."

"10985. The board on the first Monday in May, 1904, and annually thereafter shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right of way and depot grounds, and all water and fuel stations, buildings and superstructures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with the moneys, credits, franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided."

"11043. * * * No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

[1] Under the construction of the laws of Nebraska, by its Supreme Court, taxes are not debts in the ordinary sense, and generally an action will not lie to recover them. Richards v. Commissioners of Clay County, 40 Neb. 45, 58 N. W. 594, 42 Am. St. Rep. 650.

[2] When the time comes for a lien for personal property taxes, which is now on November 1st (section 10914), it attaches, not to the identical personal property taxed, but to all the personal property of the taxpayer within the county. Hill v. Palmer, 32 Neb. 632, 49 N. W. 718; Reynolds v. Fisher, 43 Neb. 172, 61 N. W. 695; Farmers' Loan & Trust Co. v. Memminger, 48 Neb. 17, 66 N. W. 1014; Foster & Smith Lumber Co. v. Leisure, 3 Neb. (Unof.) 237, 91 N. W. 556; Chamberlain Banking House v. Woolsey, 60 Neb. 516, 83 N. W. 729; Woolsey v. Chamberlain Banking House, 70 Neb. 194, 97 N. W. 241. But in Millett v. Early, 16 Neb. 266, 20 N. W. 352, it was held that while a suit will not ordinarily lie for taxes, a method exclusive of suit having been adopted by the Legislature for their collection, if the taxpayer dies and his property passes into the custody of the probate court, a claim for the taxes may be filed against the estate. The court said:

"The statute requires all claims against an estate, which are to be paid out of the general assets, to be filed and allowed; and as taxes upon personalty are to be collected from any personal property of the person against whom they are assessed that can be levied upon, they certainly constitute a claim against the estate. While such taxes are not a debt, in the ordinary meaning of the word, they do constitute an obligation imposed by law, for which the estate is liable. This being so, the claim was properly allowed against the estate."

In Toy v. McHugh, 62 Neb. 820, 87 N. W. 1059, it was held that a land tax created no personal liability against the owner of the land; that such tax must be collected, if at all, by a sale of the particular

tract against which it is charged and upon which it is by the statute made a specific lien.

[3] It thus appears, while each piece of real estate is liable only for the taxes upon it, and the owner thereof is not personally liable therefor, the personal taxes become a personal obligation of the owner, but do not subject the owner ordinarily to a suit, not because he is not liable, but because, the law having provided adequate means for their collection, that remedy is exclusive.

[4] The railroad was properly assessed as personal property under the express provisions of section 10985. Under section 10927 the railroad was properly listed by the receiver in the spring of 1913.

[5] The statute has not been construed as to whether this section means that railroads in the hands of receivers shall be assessed to the receivers as owners, and there is nothing in this case to show how this railroad was in fact assessed for 1913, whether to the railroad company or to the receiver. If the railroad was legally assessed to the receiver as owner, as this was a tax on personal property, it was not only a lien upon all personal property of the receiver as such, but was a personal claim against him as receiver.

It is conceded that the railroad, having been sold before November 1st, was free of the lien of the taxes for that year; and as the railroad company is hopelessly insolvent, if the railroad was assessed to the railroad company, the entire taxes must be lost to the counties, unless they are collectible from the receiver under some of the provisions of the statute referred to. We conclude that they were so collectible under sections 10915 and 10937.

[6] If the receiver was liable for these taxes, then the proper proceeding was to appear in the receivership case and ask an order for their payment. In re Tyler, 149 U. S. 164, 186, 187, 13 Sup. Ct. 785, 37 L. Ed. 689.

The decree of the District Court is affirmed.

FARMERS' OIL & GUANO CO. v. DUCKWORTH CO.

(Circuit Court of Appeals, Fifth Circuit. October 5, 1914.)

No. 2552.

1. COURTS (§ 280*)—FEDERAL COURTS—DETERMINATION OF QUESTIONS OF JURISDICTION.

In a federal appellate court, the question of the jurisdiction of that court, and of the trial court, must be determined, whether raised by the parties or not.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

2. COURTS (§ 280*)—FEDERAL COURTS—JURISDICTION—HOW SHOWN.

In the federal courts, jurisdiction must affirmatively appear in the record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. § 280.*]

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

3. COURTS (§ 322*)—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF CORPORATION—SUFFICIENCY OF ALLEGATION.

Allegations, in the petition in an action in a federal court, that plaintiff is a "corporation of New Jersey" and defendant is a "corporation of Georgia," are not the equivalent of allegations that the corporations were organized under the laws of such states, and are not sufficient to show the requisite diversity of citizenship to give the court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876–881, 887; Dec. Dig. § 322.*

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

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

Action at law by the Duckworth Company against the Farmers' Oil & Guano Company. Judgment for plaintiff, and defendant brings error. Reversed.

This is a suit brought to recover damages for breach of contract of sale of cotton for future delivery. In the petition commencing the suit the plaintiff below, as to jurisdiction, alleged as follows:

"First. That it is a corporation of the state of New Jersey, and was a corporation of the said state at the times hereinafter mentioned.

"Second. Your petitioner shows that the Farmers' Oil & Guano Company is a corporation of the state of Georgia, now having its principal place of business at Sandersville, in the county of Washington, in said state, within said circuit and district, and had its principal place of business therein at the times hereinafter mentioned, and is hereinafter called the defendant."

The petition further averred that among other objects for which the defendant was incorporated was buying and selling seed or lint cotton, and that on the 18th day of September, 1909, the said defendant through its president sold to petitioner 300 bales of cotton, basis good middling at 12⅝¢ f. o. b. Savannah, October shipment, a copy of the memorandum of sale being as follows:

"Savannah, Ga., September 18, 1909.

"Messrs. The Duckworth Company, Savannah, Georgia—Dear Sirs: We confirm the sale to you of 300 bales, basis good middling, at 12⅝ cents, f. o. b. Savannah, October shipment, weights and grades to be determined in Savannah, subject to the rules of the Savannah Cotton Exchange, weights to be fifty thousand pounds per hundred bales 5% more or less.

"Yours very truly, Farmers' Oil & Guano Co.,
"J. C. Cooper, Pres't."

The petition further alleges:

"Fifth. Your petitioner further shows that on the 21st of October, 1909, the said defendant, through its president, J. C. Cooper, agreed to sell said contract of sale with your petitioner on a cash basis at market differences on or before the last day of October, 1909, in lieu of shipping the cotton as per contract, a copy of said agreement being as follows:

"'Savannah, Ga., October 21, 1909.

"'Messrs. The Duckworth Company, Savannah, Georgia—Dear Sirs: Referring to our contract with you, dated September 18/09, for three hundred (300) bales at 12⅝¢, basis Gd. Midd., f. o. b. Savannah, we now beg to confirm conversation held this morning between the writer and your Mr. M. M. Hopkins, wherein it was agreed that we are to settle this contract with you on a cash basis at market differences on or before the last day of October, 1909, in lieu of shipping the cotton as per contract. Payment in cash to be made on day we agree upon for settlement. Settlement to be made at the average weight of fifty thousand pounds per one hundred bales.

"'Very truly yours, Farmers' Oil & Guano Co.,
"'J. C. Cooper, Pres't.'

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

"Sixth. Your petitioner further shows that the loss on said cotton, through the failure of said defendant to deliver the same as agreed on, was the sum of three thousand one hundred and eighty-seven and $^{50}/_{100}$ dollars ($3,187.50), besides interest from the 30th day of October, 1909, whereby said defendant became indebted to your petitioner in the said sum of three thousand one hundred and eighty-seven and $^{50}/_{100}$ dollars ($3,187.50), besides interest as aforesaid."

The defendant by answer admitted the contract of the sale of cotton for future delivery but denied liability for the sale on the ground that it was a wagering contract, and further that the plaintiff had suffered no damages whatever by the breach of the contract.

Upon this defense coming in, the plaintiff amended his petition by adding the following paragraph, to wit: "Petitioner further shows that said defendant has acted in bad faith, has been stubbornly litigious, and has caused the plaintiff unnecessary trouble and expense, whereby petitioner is entitled to recover expense of the litigation and his reasonable attorney's fees."

The case came on for trial, and thereon verdict was directed in favor of plaintiff in the amount claimed, but leaving to the jury the question as to whether the plaintiff could recover for attorney's fees on account of stubborn and litigious defense claimed. In the assignment of errors in this case, special stress is laid upon excess of damages as instructed by the court and the allowance of counsel fees as found by the jury, but no question of jurisdiction is presented.

Alexander Akerman, Charles Akerman, and John R. Cooper, all of Macon, Ga., for plaintiff in error.

George W. Owens, of Savannah, Ga., for defendant in error.

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

PARDEE, Circuit Judge (after stating the facts as above). [1] Although not questioned in the District Court, nor by assignment of error in this court, the jurisdiction of the District Court is the real question now to be determined. In Morris v. Gilmer, 129 U. S. 315–326, 9 Sup. Ct. 289, 292 (32 L. Ed. 690), our duty is clearly declared as follows:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relations of the parties to it."

[2] It is well settled in the federal courts that jurisdiction must affirmatively appear in the record. See Morris v. Gilmer, supra, and the cases there cited. This proposition has been announced and acted upon in very many cases in this court, and we announce it again for the information of the bar of this circuit.

[3] In this case, the sole showing of the diverse citizenship necessary to confer jurisdiction on the District Court is in substance the averments that the plaintiff is a corporation of the state of New Jersey and that the defendant is a corporation of the state of Georgia. A suit brought by a private corporation is practically a suit brought by all the stockholders of such corporation, and to give jurisdiction to the federal courts facts must be so specifically and sufficiently averred that the court on the record can conclusively presume that all the stockholders

of the plaintiff or defendant corporation are citizens of the particular state wherein the corporation claims citizenship.

In American Sugar Refining Company v. Johnson, 60 Fed. 503, 9 C. C. A. 110, this court, reviewing adjudged cases, considered the sufficiency of the showing necessary to confer jurisdiction on the federal court in suits by or against private corporations, and therein held that an averment that "the American Sugar Refining Company, a corporation domiciled and doing business in this city [New Orleans] and a citizen of New Jersey, and found within the Eastern district of Louisiana, and authorized to accept service of legal process, is indebted," etc., was insufficient, and the opinion concludes:

"From these considerations and authorities we conclude that in a suit for or against a corporation in the courts of the United States the matter of jurisdiction may be shortly stated as follows: That, in order to hold that a private corporation is a citizen of a particular state, within the meaning of the word 'citizen' as used in the judicial acts of the United States, and thereby conclusively presume that all of the shareholders of such corporation are citizens of the particular state, it must affirmatively appear that the corporation was created under the laws of such state; and it would seem that an averment that the body suing or sued is a corporation or a citizen or both of a particular state is insufficient."

See cases cited and Curtis on Jurisdiction, pp. 145–148; St. Louis & San Francisco Ry. Co. v. James, 161 U. S. 545, 562, 16 Sup. Ct. 621, 40 L. Ed. 802.

It may be noticed that, in further disposing of American Sugar Refining Co. v. Johnson, we said:

"This conclusion is sufficient to reverse the case; but, as the error in question may be cured by amendment in the court below, and the case retried, we proceed to consider the other assignments of error."

In the present case, identical in this particular aspect, we intended following much the same course; but as the judges were not all of the same mind as to the sufficiency of the assignments of error in relation to damages, and as the lamentable death of Judge Shelby has intervened, necessarily changing the personnel of the court, and as on sufficient averments and a new trial the precise questions may not again arise, we pretermit all further discussion of the case.

The judgment of the District Court is reversed, and the cause is remanded, with instructions to dismiss the same, unless by proper and sufficient averments the jurisdiction of the court shall be shown, in which case a new trial may be awarded.

CITY OF HARRISBURG v. NEW YORK CONTINENTAL JEWELL FILTRATION CO.

(Circuit Court of Appeals, Third Circuit. September 14, 1914.)

No. 1807.

1. PATENTS (§ 328*)—INFRINGEMENT—FILTRATION PLANT.
The Jewell reissue patent, No. 11,672, for a filter for municipal or other large waterworks plants, and the Jewell patent, No. 644,137, for the method of purifying water by the use of such filters, *held* not infringed, on uncontradicted evidence that experiments conducted during six months with the alleged infringing filters in use by defendant city, while being operated in the customary manner, failed to show the characteristics claimed to be inseparable from the operation of the patented apparatus and method.

2. WORDS AND PHRASES—"POSITIVE HEAD"—"NEGATIVE HEAD."
"Positive head," as used in connection with a filtration plant, means the weight of the water both within and above the sand bed, and is usually measured from the controller or the under drainage system to the surface of the water to be filtered. "Negative head," used in the same connection, means the force that comes into play when a partial vacuum is created either within or below the filter bed.

3. WORDS AND PHRASES—"EFFECTIVE SIZE."
Sand of "effective size," as used in connection with a filtration plant, means sand containing 10 per cent. by weight that is finer in grain than the diameter sought to be secured.

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

Suit in equity by the New York Continental Jewell Filtration Company against the City of Harrisburg. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 208 Fed. 10.

M. W. Jacobs, of Harrisburg, Pa., for appellant.

James I. Kay, of Pittsburgh, Pa., for appellee.

Before HUNT and McPHERSON, Circuit Judges.

HUNT, Circuit Judge. [1] The New York Continental Jewell Filtration Company, plaintiff herein, and hereinafter to be called the filtration company, brought suit against the city of Harrisburg, defendant in the court below and appellant here, alleging infringement of reissue letters patent upon a filter and of letters patent upon a method of purifying water, both alleged to be the invention of O. H. Jewell, and praying for an injunction and accounting. Defendant denied the validity of the patents and infringement of them. After trial, it was decreed by the District Court that the patents were valid, and that the claims had been infringed. Injunction and accounting were ordered, and from such decree the city of Harrisburg has appealed.

Claim No. 2 of the reissue patent involved is as follows:

"(2) A filter consisting of a filter tank, a pure-water pipe communicating with the lower portion thereof, a granular filter bed in said tank, the lower portion of said filter bed being compacted more closely than the upper por-

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

tion thereof, means for maintaining a partial vacuum in said filter bed during filtration, and means for reversing the flow of water through said filter bed, substantially as described."

The three claims involved in the method patent are as follows:

"(1) The method of purifying water, which consists in passing the impure water through a granular filter-bed having an exposed filtering-surface, and at the same time applying suction from below, substantially as described.

"(2) The method of purifying water, which consists in passing the impure water downward through a granular filter-bed of gradually-increasing compactness from the top downward, and at the same time applying suction from below, substantially as described.

"(3) The method of purifying water, which consists in passing the impure water through a granular filter-bed having an exposed filtering-surface, and at the same time extracting from the water by suction and retaining within the filter-bed a greater or less portion of the air contained in the water, substantially as described."

The invention disclosed by the patents in suit has reference to atmospheric filters, filters in which, by the creation of a partial vacuum within or below the filtering material, atmospheric pressure above the liquid to be filtered is rendered effective to force it through the filtering material.

There are two general types of such filters: The slow sand, or English, filters, and the rapid, mechanical, or American, filters. Of the latter, some use pressure, and some use gravity; the Jewell filter belonging to the gravity class. Essentially the bed of each type is of a granular material, usually sand, exposed to the air and resting upon gravel; the gravel containing a system of small pipes which collect the filtered water and deliver it into a large outflow pipe connecting with the distributing system. In both types, less water actually passes through the bed than its full capacity; the rate of flow is determined, not only by the type, but also by such conditions inter alia as the turbidity of the unfiltered water, the amount and kind of bacteria, and the quantity of water needed for use. The quantity is regulated by rate-controllers, devices which are in practically universal use. The slow sand filters deliver from 2,000,000 to 10,000,000 gallons per acre per day, and the bed is deeper and of finer sand. They use no coagulant, and are cleaned by scraping at infrequent intervals. The rapid gravity filters will deliver from 100,000,000 to 150,000,000 gallons per acre per day, and their beds are shallower and coarser; they use a coagulant and are cleaned frequently by reverse washing.

After a slow sand filter has been in use for a short time, various substances, bacteria, etc., accumulate on the surface, forming a sticky coating that lessens the spaces, or voids, between the grains of sand, and thus helps to retain the impurities that are suspended in the water. Some chemical action also takes place (oxidation, etc.), and this aids the process of purification. In a rapid or mechanical filter, however, the water passes through the bed so quickly that such a coating has little time to form out of natural materials, and certain coagulants are therefore added to produce an artificial coating. A coagulant often used is sulphate of aluminum, which in alkaline waters soon produces a flocculent substance that permeates the water and afterwards the

bed, and detains much of the suspended impurity. This flocculent matter is sticky and reduces the pore-spaces between the grains of sand. These rapid filters need cleaning frequently (as often as once a day, or even oftener), and this is accomplished by draining off the coagulated water down to a certain level, and then injecting from below a stream of clean water. This water disturbs the sand thoroughly and carries off the impurities that have accumulated in the bed. The process of washing by an upward current is usually assisted by mechanical agitation, as by arms or rakes, or by forcing a blast of air up through the bed.

[2] Several matters should be briefly alluded to. "Positive head" means the weight of the water both within and above the sand bed, and is usually measured from the controller or the underdrainage system to the surface of the water to be filtered. "Negative head" is the force that comes into play when a partial vacuum is created either within or below the filter bed. Under usual conditions, negative head cannot begin to operate until the bed becomes somewhat clogged with material. A gravity filter may operate exclusively by positive head, and all gravity filters use such a head to some extent; but a negative head filter uses both kinds of head, and is therefore provided with some means for producing a partial vacuum within the bed. This may be a pump, a trapped pipe, or some equivalent device. The trapped pipe may drop below the bed, thus adding to the total available head; or it may lead away horizontally at the bottom of the bed.

[3] Sand of "effective size" means sand containing 10 per cent. by weight that is finer in grain than the diameter sought to be secured. The ideal sand would have all its grains of uniform size, but, as this cannot be attained, the size is "effective," if about 10 per cent. by weight is finer. It is also true that some percentage of the grains is larger than the particular diameter aimed at. In all municipal filtration plants, careful provision is made for preliminary treatment of the water before actual filtering begins. This consists either of sedimentation or coagulation, or of both, and thus a certain quantity of suspended impurities is removed, and the filters proper are relieved from much of the work they would otherwise have to do.

In the specification accompanying the apparatus patent of 1895, and also in the specification accompanying the reissue, the invention involved in the present suit is described generally as follows:

"This invention relates to improvements in 'gravity-filters' of the kind adapted for filtering large masses of water, and which are provided with a power-driven agitator for stirring up the filtering material during the process of washing and cleansing the same. The object of the invention is to provide a filter having the highest efficiency, and which can be constructed and operated at minimum cost, for material and labor. The invention consists, briefly, in combining a filter and subsiding-chamber in one tank or vessel occupying but one foundation, and so constructed and arranged relatively that the accumulation of sediment in the subsiding-chamber may be conveniently removed and driven out therefrom by mechanical appliance and without other power or machinery than that found in connection with the agitator, which is thus utilized for this purpose. The invention further consists in the novel features of construction, combination, and arrangement of parts hereinafter described and set forth; reference being had to the accompanying drawings."

A description of the device is then given, in which a filtered-water pipe leading to the reservoir outside the tank is referred to. The specification then goes on:

"* * * Said pipe is provided with a water-trap 9. Said filtered-water pipe is extended some distance below the filter-tank to form a downdraft by removing the air-pressure from the under side of the filter-bed, and thus to make effective the air-pressure upon the water above said bed, and said trap is for the purpose of sealing the lower end of said filtered-water pipe to prevent the air from entering therein above said trap when the flow and velocity of water down the pipe is diminished by the accumulation of impurities in the bed."

In the paragraph just quoted appears the only reference to the presence and effect of a partial vacuum in the filter-bed; the vacuum being caused by the trap in the downdraft pipe. The single claim of the original patent referred to the subject (if at all) only by the implication of the italicized phrase:

(1) "In a filter the combination of a filter tank, a subsiding tank, and a filter material holding tank, *formed as described*, with a central communicating passage or opening between said tanks, an agitator for said filter, the shaft of which passes through said central opening, and projects into said subsiding chamber, and a pipe elbow rigidly secured to said shaft, and adapted to be rotated thereby, to give force and direction to the water passing down through said central opening and elbow, for flushing out and removing the sediment from said subsiding chamber, substantially as set forth."

But, when the reissue was applied for, this subject of partial vacuum was so expanded and emphasized as to become much the most important, as will appear from the following quotation of new matter in the specification:

"As soon as the water passes into the filter-tank from the subsiding-tank it begins to percolate through the sand or other granular material composing the filter-bed, and after passing through the bed is carried off by the filtered-water pipe 8. When a continuous flow of water is secured through the filtered-water pipe 8, the downdraft exerted by the column of water in said pipe creates and maintains a partial vacuum in the filter-bed; the vacuum being greatest in the lower portion of the bed. The granular filtering material is consequently compacted by atmospheric pressure, the lower part of the bed being compacted more closely than the upper part; the degree of compactness gradually diminishing toward the upper surface of the bed. As the result of this condition of the filter-bed, the impurities carried by the water to be filtered are not all collected at the surface of the bed, forming a crust or substantially impervious stratum, as is the case where granular filter-beds of substantially uniform density are used without suction, but only a part of the impurities are removed at the surface; a great portion of the suspended matter, by reason of its being in a more finely-divided state, being permitted to pass the more widely-separated granular particles in the upper portion of the bed to be intercepted afterward by the more closely-compacted particles in the lower portion of the bed. Furthermore, by employing the downdraft, as above described, the upper portion of the filter-bed, which usually contains a comparatively large proportion of the impurities, may be agitated by means of the agitators without interrupting the process of filtration, inasmuch as the lower portion of the bed is maintained in a compact state by the downdraft, preventing the passage of the impurities freed by the agitation of the upper portion of the bed, the partial vacuum maintained by the downdraft acting to prevent the agitation of any part of the bed except that which is directly operated upon by the agitators.

"In prior filters, where a loose granular filter-bed was used, it was impracticable to agitate the filter-bed during filtration, because, as soon as the upper crust of the bed was broken by the agitation, the impurities would at once be permitted to pass entirely through the bed and be carried off in the filtered water. In my improved filter the agitation of the bed may be repeated as often as may be desired, or it may be continuous, thereby permitting the mass of the impurities to penetrate further into the bed until the entire bed becomes saturated with impurities, when it is necessary to wash the bed, as will be hereinafter described.

"It will be evident from the above description that a filter constructed, as herein described, is capable of use without washing for a much longer period of time than prior constructions, thereby effecting a great saving both in labor and in the water used for washing. Furthermore, the capacity of the filter is greatly increased, as by distributing the impurities more or less uniformly throughout the bed, and preventing the formation of a thick crust at the upper surface, the water is caused to pass much more rapidly through the bed without interfering with successful filtration.

"The maintaining of a partial vacuum in the filter-bed, as above described, further improves the operation of the filter and increases its efficiency by effecting the coagulation of the suspended impurities; such coagulation being effected by the separation and concentration of the air contained in the water under filtration, thus increasing the bulk of such impurities and enabling the filter-bed to intercept and retain them. The air separated from the water remains to a great extent in the filter-bed, and is especially useful in washing the bed, as when the current of water is reversed in washing, as hereinafter described, the air rising through the filter-bed causes a violent agitation thereof, liberating the accumulated impurities and permitting them to be carried up with the wash-water to the overflow. (In filters of this class daily washing is usually required, while the sediment in the subsiding-chamber may accumulate for a month or more before its removal is necessary. The daily wash is performed by closing the valve to the subsiding-chamber, filtering the water down, closing the valve in the pure-water pipe, and opening connection therewith to the wash-water, stand-pipe, or pump, forcing the water up through the filter-bed, during which the agitator is kept in motion and the washed-out impurities flow over the top of the material-bank into the annular space surrounding it and pass out through the valve-opening at the bottom thereof. The wash-water is prevented from getting into the subsiding-chamber by the central pipe, which projects above the top of the material-tank for this purpose. The wash is completed by closing the valve of the annular space and permitting the first filtered water to pass out into the sewer instead of the pure-water reservoir.) As soon as the downdraft again becomes effective, the filter-bed is at once compacted to such an extent that it is necessary to draw off only a very small amount of water after washing."

The part we have placed in parenthesis appears also in the original specification, but the rest is new. The theory that was thus elaborated in the reissue is further dwelt upon in the specification of the method patent:

"My invention relates to purifying waters for potable purposes by filtering such waters through granular filters. As is well known, the principal object of filtering the water supply of towns and cities is to remove the suspended impurities, which in many instances are in a finely-divided state, and experience has proven that granular filters (that is to say, filters in which the water is caused to percolate through a filter-bed composed of loose sand or other granular material) furnish a filtering medium which is best adapted for removing the suspended impurities while permitting the water to flow at a rapid rate, as is necessary where the water supply of a town or city is being filtered. In using granular filters heretofore, however, it has been found that in most instances a granular filter-bed will not intercept and retain the suspended matter in the normal condition, and it has therefore been found necessary in almost all instances to introduce a coagulant, such as alum, into the

water before filtration, the coagulant serving to coagulate the suspended matter into masses which are larger and more susceptible of interception and retention by the granular particles composing the filter-bed; in some instances it being necessary to use such a large quantity of alum as to affect the taste of the filtered water.

"My present invention consists of an improved process of purifying water by filtration through a granular filter-bed by which the necessity of the use of alum or other coagulant is in many instances entirely avoided, and in other instances, where the impurities are in an exceptionally finely-divided state, the quantity of alum which under former processes would be necessary is very greatly reduced.

"To this end my invention consists in effecting what may be termed the 'coagulation' of the suspended impurities of the water by suction while passing through the filter-bed, the particles of suspended matter being thereby caused to come together into masses of sufficient size and of such character as to be readily intercepted and retained by the granules composing the filter-bed.

"My invention further consists in applying the suction principally at the lower portion of the filter-bed, so that it acts more strongly upon the finer particles of suspended matter which have passed through the upper portion of the filter-bed.

"My invention further includes the compacting of the filter-bed in such manner that the lower portion thereof will be of the greatest density, the density gradually decreasing toward its upper surface, as by this means, while the larger masses of impurities will be retained by the more widely separated granules at the upper portion of the bed, the lower portion of the bed will be sufficiently dense and compact to intercept the smaller particles of suspended matter, especially after they have been coagulated, as above stated.

"In the accompanying drawings I have shown apparatus designed to utilize my improved process, each apparatus in general consisting of a filter-bed of loose granular material contained in a suitable receptacle and a pure-water pipe in the bottom of said receptacle; said pipe being provided with suitable strainers to prevent the granular material from entering such pipe, and with an off-carrying pipe vertically arranged and of such length that, as the filtered water is carried off by said pipe, a partial vacuum will be created within the filter-bed; the vacuum being greatest in the lower portion of the bed and gradually diminishing toward the upper surface thereof. By this means, a continuous suction is exerted which is greatest in the lower portion of the bed, compacting it so that its density will be greatest at the bottom and will gradually diminish toward the upper surface thereof. Furthermore, the suction causes the air contained in the water to separate and concentrates it; the minute bubbles coming together, forming larger bodies of air, which are to a great extent retained within the filter-bed. As the fine air-bubbles converge they act to concentrate and coagulate the particles of suspended matter, so that finally the suspended matter is formed into larger bodies, which may easily be intercepted and retained by the filtering material. As the process of filtration continues, the air extracted from the water gradually accumulates in the bed, still further compacting it and increasing the efficiency of the filter to such an extent that, even though the bed contain large quantities of impure matter extracted from the water, the filter may nevertheless be continued in use with satisfactory results, thus making it unnecessary to wash the bed as frequently as has been necessary with other forms of filters employing granular filter-beds. * * *

"Referring to Fig. 1, which, as above stated, illustrates the condition of the granular material after filtration has commenced in accordance with my new process, it will be noted that the granular matter in the lower portion of the bed is compacted to a much greater extent than that at the upper portion thereof; the degree of compactness gradually diminishing as the surface of the bed is approached. Such compacting of the bed is effected by the creation of a partial vacuum, principally in the lower portion of the bed, by means of the downdraft through the pipe *10*. By thus compacting the bed it is much better adapted for removing the finer particles of suspended matter than would be the case were the bed of uniform density. Furthermore, the

entire body of filtering material is utilized instead of substantially the upper surface only, as in prior constructions.

"In Fig. 2 it will be noted that in the lower portion of the bed there are a number of air-spaces; the larger air-spaces being at the lower portion of the bed. Such spaces are formed in the bed by the accumulation of the air extracted from the water by suction, as hereinbefore described. After the air has performed its office of coagulating the suspended matter, it accumulates within the bed, as illustrated, and afterward is especially useful in washing the bed, as, when the current of water is reversed for the purpose of washing, the air being liberated rises through the bed and, escaping, agitates it violently, thereby freeing all the accumulated impurities, so that they may be carried off with the wash-water.

"The manner in which the impurities are coagulated by the extraction and concentration of the air contained in the water is clearly illustrated in Figs. 3, 4, 5, and 6. Fig. 3 illustrates, on a magnified scale, the condition of the air and the minute suspended impurities in the water; the circles representing the air-bubbles and the black marks the suspended impurities. It will be noted that the air-bubbles, as well as the impurities, are at first comparatively widely separated from each other. After suction has been applied to the filter-bed for a short time, the air-bubbles are drawn together, carrying with them the suspended matter, as shown in Figs. 4 and 5, until, as shown in Fig. 6, the air-bubbles finally come together, forming larger bubbles, the suspended impurities also coming together, forming clots or masses of sufficient size to be intercepted and retained by the granules of the filter-bed. In this way, with many waters, practically all the suspended impurities will be coagulated and removed without the use of a chemical coagulant, while with those waters in which coagulants must be used the quantity of the coagulant which it is necessary to use is greatly reduced.

"While in the apparatus shown in the drawings the necessary vacuum is secured by the action of the pure-water discharge, I do not limit myself to securing the vacuum in that way, as other means may be employed to secure such result. I prefer the apparatus shown, however, as by it the suction is applied uniformly through the lower portion of the bed and is substantially uniform in any given stratum."

Then follows a disclaimer in view of the prior art:

"I am aware that heretofore atmospheric pressure has been employed to force water through filtering material, such as stone or felt, but such use has been simply for the purpose of forcing the water through the filtering substance, and has not effected the extraction and concentration in the filtering material of all or a part of the air contained in the water or the coagulation or agglomeration of the impurities, as described; nor has it secured a bed of filtering material of varying density or compactness. My invention, therefore, does not contemplate the use of filtering materials such as those above referred to, but is limited to the use of a granular filtering material having an exposed filtering-surface, by which I mean a surface uncovered by felt or similar material which would prevent its use in connection with my improved process."

The basis of the decision of the District Court was that in Jewell's patent a pull of suction exists whereby a pulling force is created upon the material in the bottom of the filter, and that the use of such suction action tends to release air from the water which may be of advantage, and also tends to cause the sand grains in the vicinity of the strainer system to reseat themselves, and thereby compacts the section of the bed. In his opinion, among other things, the learned judge said:

"* * * That the process and apparatus disclosed by Jewell * * * do in practical use, by the creation of a vacuum, utilize the whole sand body

as a filtering agency, as it was never used before. Indeed that the workings of a downdraft or negative filter must in the nature of things be different from a gravity or positive head filter is self-evident, from the fact of its calling into play the powerful agency of atmospheric pressure. From this we can readily understand that such atmospheric force, whether venting itself as a weight from above or a suction from below, must cause new results in a process, the basic element of which is the pressure passage of liquid through impeding matter."

Thus the reasoning of the court was in effect that the process and theories disclosed by Jewell in his patent in practical use did, by the creation of a vacuum, utilize the whole sand body as a filtering agency as it had not been used before, and that the Jewell process does by the use of a downdraft, sealed, vertical outlet pipe create and maintain an operative vacuum, which vacuum effects a deeper utilization of the sand body for filtration than in positive head filters; that the presence of a released air incident to the use of a downdraft vacuum is helpful and not harmful by reason of the velocity imparted to the passing water by such vacuum; that the process makes the runs longer; and that both structural and maintenance costs are lessened by its use. Now it appears that, in the art of filtration, it has been the practice, when it is desired to lengthen the run of a filter or to obtain the more rapid passage of the liquid through the filtering material, to utilize atmospheric pressure upon the liquid by creating a partial vacuum within or under the filter, in this way unbalancing the atmospheric pressure which had previously been equal on both sides of the liquid. The way of accomplishing this is called "suction," and in the language of the patents in suit is described as "suction from below."

Application of this way has been accomplished in filters of many kinds. In British patent, No. 4393, of 1819, issued to Tritton for a filterer, the process was described to be one by means of an air pump or other mode of producing exhaustion or vacuum in the part or parts of the apparatus into which the filtered liquid flows, and thereby to create a difference between the atmospheric pressure acting on the liquid before and after filtration, and by means of that difference of atmospheric pressure more actively to force the unfiltered liquid through the pores, apertures, and interstices of the filter. Tritton also describes in his apparatus a part of the filter intended to receive the unfiltered liquid as communicating with the external air in such a manner that, when such part of the filter as is intended to receive the filtered liquid and the receiver are exhausted by an air pump or otherwise, the power of atmospheric pressure on the surface of the unfiltered liquid, together with the pressure used in ordinary filtration, may force it through the filter or filters by which it is to be strained.

In British patent, No. 6160, issued to James Neville (1831), and cited by the examiner in all of Jewell's applications, the invention being entitled "An improved apparatus for clarifying water and other fluids," the patent referred to a downdraft tube trapped, which, when filled with any fluid of the specific gravity of water and the cock is turned, the action of the atmosphere on the surface of the fluid contained in the cistern will be with immense force, whereby a large

quantity of the fluid would be driven through a clarifying medium in a short time. Neville used a filter bed of granular material and described his apparatus, stating that, in carrying the pipe as low as possible, he did so in order to obtain greater atmospheric pressure on the surface of the fluid contained in the vessel or reservoir, by which means a greater quantity of water would be forced though the clarifying medium. Neville disclaimed novelty as part of his invention, for the use of charcoal or sand as a clarifying medium, because that had been known and acted on for a long time before.

So, without going into greater detail, it is clear that, for many years before Jewell went into the field, there were filters with granular filter beds having exposed filtering surfaces with means for producing a partial vacuum in the filter bed and the actual application of suction from below, as well as means for reversing the flow of water through the filter.

In British patent, No. 8371, of 1899, to Edwards for "improvements in the prevention of the pollution of river waters and water courses from manufacturer's polluted waters and waste, and for cleaning and purify ordinary river waters," the filtering materials used were burnt coke reduced to small proportions, well washed river sand, and all or any or either of these materials, as best suited the special conditions under which the filter might be operated. The patent, after describing a siphon pipe and an ejector and a pipe for supplying steam, said that, in order to draw off the filtered water from each subcompartment, the inventor introduces into it one limb of a siphon, to which he attaches a steam jet ejector, by which he was enabled to acquire any required vacuum in the subcompartment and below the filter-bed. His patent also stated that such vacuum, if found to be more than required for perfect filtration, could be regulated by means of a small tap in each compartment to admit a portion of air when necessary.

The Lawrence city filtration plant, a slow sand filter, disclosed that in 1892, and prior thereto, trapped downdraft pipes were used upon slow sand filters having exposed filtering surfaces. They were apparently used in 1893 in the Lawrence city filtration plant, and in Hazen's book on the Filtration of Water Supplies, written before April, 1895, the author described the Lawrence experiment station filters.

In the Crocker mill filters, installed in 1891 at Holyoke, Mass., there were filter tanks containing filter-beds of sand with exposed filtering surfaces. In these filters, it is evident, from the testimony, a partial vacuum was created and maintained in the same sense as in the patents in suit.

In August, 1895, there was published in the Paper World the description of the Moore filter; the article referring to high and low pressure filters, and describing high-pressure filters as distinguished from the low. It was there said that, in the low-pressure class, a strong wooden case, open at the top, was employed, the water flowing as required, and after percolating through the sand was conducted away; the latter operation being generally aided by a pump, which,

establishing a partial vacuum, aided the passage of the water by suction. This reference appears to have been made as if such a use has been a common one, and certainly it fits a description of the operation of the filters of which the Crocker and one other filter theretofore in operation furnish instances. Prior art also shows means of producing a partial vacuum or suction in a filter, as illustrated by patents, such as the Neville, O. H. Jewell, No. 423,430 (1890), Sinclaire, No. 171,056 (1875) and Simmons No. 59,467 (1867).

The principle of physics which controls is that by diminishing the atmospheric pressure below (that is, by unbalancing the pressure), the atmospheric pressure above, which remains constant, always becomes effective for pushing or forcing the liquid through the filtering material. It therefore seems certain that nothing new can be claimed for "suction," or the creation of a partial vacuum within or beneath a filter-bed. Again, the compacting of the filter-bed greater at the bottom was described in the patent issued to Hyatt, No. 293,745, and, as a means employed to produce "suction," there are instances in which a trapped downdraft pipe has been used. In the present case, the patentee is confined to a downdraft pipe, trapped, inasmuch as untrapped downdraft pipes were well known in the art before the invention claimed by the patentee herein. The patents we have examined as introduced in evidence show that there were in use granular beds having exposed filtering surfaces in combination with suction, and that, when Jewell in 1895 made application for his original patent, there were means very like his for making effective the air pressure above the filter-bed. Again, the reissued patent uses the term "suction," based upon the idea that there is a pulling effect so compacting the lower portion of the filter-bed by the presence of a partial vacuum beneath it; and in the method patent the terms "suction" and "suction from below" are used with an attribution to them of a drawing effect. A witness for the filtration company, after describing compacting action under suction, states as follows:

"Third. Under these conditions the weight of the column of water descending in the suction or downdraft pipe causes the production of a larger output of properly filtered water; and the sediment separated from the water during filtration is carried farther down into the bed by the weight and velocity of the descending column of water below the bed, which force acts, as the upper portion of the bed becomes choked with sediment, to draw portions of such sediment layer downwardly into the bed, the upper portion of the bed being maintained in looser condition than it is in a positive head filter, and so allowing the free entrance of the suspended matters, and the lower portion of the bed being more compacted than the upper part, as before stated, and so tending to retain such impurities within the bed."

The "pulling of suction" theory does not stand under critical examination, however, for the testimony of scientific witnesses proves that the operative force of what is commonly called "suction" is not a pulling, but is atmospheric pressure exerted upon the liquid or other movable material to the extent of the difference of pressure upon the opposite sides of the movable material; that is to say, the operative force is unbalanced atmospheric pressure, and this atmospheric pressure acts in the direction of the area of diminished pressure, so it

becomes a pushing force, well described by one of the witnesses for the appellant in the following simple language:

"The operation of a partial vacuum in the lower part, or any other part of a filter, simply means that at a section above that part of the filter the sand is so clogged up that the water cannot pass through it as fast as it can run out of the outlet valve, and there is a tendency for the water in the filter to pull apart and leave in the sand a space not occupied by water (a partial vacuum), into which the air pressing on the surface of the water on top of the filter drives the water with increased force, measured by the degree of vacuum produced. Therefore, when a partial vacuum exists in a filter-bed, there is an added force applied on the surface of the water in the filter, tending to drive the water through the sand; under no circumstances can there be a force applied from below to pull the water through. The application of the force is from above downward, and acts, in driving the water through the sand, precisely as would an added equivalent head of water."

Another expert witness, whose scientific attainments are very clearly established, said:

"Suction does not mean that there is a pulling of the water: in fact, water has not cohesive properties to permit it to be pulled, but it must move either by being pushed or else by the force of gravity. Hence the expression 'suction applied from below,' intimating that there is a pulling force upon the bottom of the filter, refers to something that does not exist, and a force is actually applied at the top of the body of water resting upon the sand bed in the filter by virtue of the unbalancing of the atmospheric pressure."

It is proven that a partial vacuum is not made when the filter begins operation; nor is it shown that such vacuum is always greatest at the bottom of the bed. The supply from the filter-bed being regulated by a device or controller, the effluent pipe delivers less than the full capacity of the filter. From these facts it follows that, if we have a bed of clean sand, there can be no unbalancing of atmospheric pressure so long as the head presses the water through the bed at the rate set by the regulating device, and that it will be only when a clog happens that the effluent pipe will carry off water quicker than it is delivered and that a vacuum can occur. As explained by one of the witnesses for the appellant, the statement in the patents that the vacuum will be greatest at the bottom of the filter-bed is erroneous, if it is understood that such vacuum is normally and at all times or even usually found at the bottom, because such partial vacuum is a variable phenomenon conditioned upon the interval which has elapsed since the filter may have been washed, the degree of fineness of the superficial layer of sand, as compared with that below it, and the degree of clogging of the filter. The clogging would seem to be likely to be anywhere, depending upon size and kind of sand, rate of flow, presence of air, or other factors; hence the partial vacuum may occur at any time or place apparently not capable of determination by device or method of the patent.

We are uncertain whether or not, as a result of a partial vacuum at the bottom of the bed, there is a greater compactness at the bottom than above, or, as it is said, whether there is a differential compacting from below upward. Prof. John W. Langley, a distinguished physicist, said that such differential compacting did not occur in any filter where cleansing by upward washing was a feature of the action. He

said that the upward wash brings the finer grains of any heavy granular material to the top, forming thus a subsidence layer of such material of variable depth, in which the compacting is greater than in any other part of the bed. He added that any differential compacting which might occur below this top fine sand stratum would be very small in amount, and would be the result of natural forces, whereby a very small additional compacting of the sand might be near the bottom, due possibly to the friction of the water passing down through the sand as a necessary consequence of the properties of water and sand. Dr. Mason, another distinguished scientist, said that it would be impossible to make any actual measurements as to compacting of the filter-bed or near the strainer openings within the filter here involved, so as to determine the matter experimentally, and that, while he believed there would be an action toward compacting in the lower part of the bed, he could not say how far such action would extend, or what its amount would be, or whether it would be progressively smaller in a uniform degree.

We might quote at length from what scientific men testified to, but it would make our opinion needlessly long. We are agreed, however, that, when we weigh the evidence of one side against the other, it is highly probable that the lower part of the bed is but little affected by the so-called "pull of suction," and that there is but very little compacting by compression of the grains of sand, or by the sand grains moving because of the superincumbent weight of water and air. Moreover, such compacting of the lower part of the bed as occurs under the weight of water and air is not peculiar to filters operating under negative head. Neither has it been proved that the friction of the filtering water compacts the bed by rearranging the sand grains throughout the bed; and, in any event, such rearrangements would be as likely to occur in a filter under positive head as in a filter under negative head. There may be some rearrangement of sand grains near the strainer system; but, if so, it lacks the support of experiment, and would seem to be inconsiderable in extent, and as likely to be present in a filter under positive head as in a filter under negative head. Moreover, we think it is true that compacting due to overlying weight or to the downward flow of water is not the compacting contemplated by the patents. And, after a mechanical filter has been washed by a reverse current of water and air, the sand is finest and most compact at the top, because the bed must then rearrange itself in accordance with the subsiding values of the grains.

With regard to the assertion that the suspended impurities penetrate the bed more deeply under the operation of the patents, the only direct testimony on the subject is unsatisfactory. Some of the testimony relates to observations made from 8 to 15 years before the witnesses were examined; and, as no records were kept, we regard it as unsafe to rely on the unsupported recollection of witnesses after the lapse of so long a time. One other witness made a single experiment under conditions that were not very fully described and were apparently not conducted with caution. The other testimony on this point on behalf of the plaintiff was largely theoretical, and is so colored by the under-

lying assumption that "suction" is a pulling force as to be much impaired in value. Indeed, misconception of the principle of "suction" has destroyed appellee's case, for it is the real foundation thereof.

With regard to the liberation of air in the bed and its usefulness there as a "coagulant," the weight of the evidence seems to indicate that air does not of itself act as a coagulant, and that its presence in a filter-bed is almost always objectionable.

The objections to the theories of the patents have been strongly put in the able brief for the city, and we can do no better than quote them as follows:

"(1) In accordance with the pretensions of the patents, the whole invention of Jewell resides in the compacting of the granular filter-bed, greatest below and gradually diminishing towards the top, and the extraction and retention within the filter-bed of a greater or less portion of the air contained in the water. The cause of such differential compacting is alleged to be the formation of a partial vacuum in the filter-bed, greatest below and diminishing towards the top, which partial vacuum is also claimed as the cause of the liberation of air. The beneficial results of such compacting are claimed to be deeper penetration of suspended impurities into the filter-bed, and the consequent greater utilization of the entire filter-bed, and, of the liberation of air, the agglomeration or coagulation of suspended impurities, so as to dispense, entirely or to a great extent, with the use of a chemical coagulant, and the greater agitation of the filter sand in washing by a reverse current. Except the mere fact that air is liberated from water by diminution of pressure or the formation of a partial vacuum, every one of the pretensions is controverted and has, we believe, been shown to be false.

"(2) In a so-called negative head filter, as ordinarily constructed and operated, a partial vacuum does not occur at the commencement of the run and continue throughout it. It may not occur at all and, if at all, will occur only after the conditions of clogging have become such that the positive head, or pressure due to the superincumbent water, has been utilized in forcing the water through the clogged area or plane of greatest resistance, and this will be towards the end of the run. In the Harrisburg filters (said to be infringements), it occurred at all in only 25 per cent. of the runs, and then only for a short time at the end of the run.

"(3) Actual observation shows that it will occur, not necessarily or usually first or greatest at the bottom of the filter-bed, but always immediately below the plane of greatest resistance, which may be anywhere in the filter, from the strainer system up. In the Harrisburg filters it occurred indifferently at the top or bottom of the filter-bed or anywhere between, and was 'greatest' in the lower portion of the filter-bed,' 115 minutes in nearly 5 months, or .06 per cent. of the entire time the filters were in operation.

"(4) The time and place of the occurrence of a partial vacuum depends upon various conditions, viz., amount and character of suspended impurities, size of sand, rate of flow, use of coagulant, temperature of water, etc., and are wholly beyond the control of the operator. Complainant's testimony is of little or no weight, because it fails to take these things into account.

"(5) In a negative head filter there is no compacting of the filter-bed, greatest below, due to the creation and maintenance of a partial vacuum greatest in the lower portion of the bed, for the reasons: (a) That such vacuum does not so appear usually, but only occasionally, and then only at the end of a run; and (b) that such vacuum, when it occurs, is incapable of producing such compacting. Neither is there such compacting due to the pulling or drawing of 'suction' upon the sand grains, for the reason that what is commonly called 'suction' has no such effect, but operates merely by rendering effective the atmospheric pressure upon the water column within and above the sand bed, and thus adding to the effective head in the same manner as an additional depth of water or any other additional pressure.

"(6) Such differential compacting of the lower part of the filter-bed as may

be due to weight of superincumbent sand and water, by way of either compression or movement of the sand grains, is negligible in amount and has no effect upon the operation of the filter. It has no relation to suction and will occur, if at all, as well in positive as in negative head filters.

"(7) Movement of sand grains due to velocity of flow is, as to the lower part of the filter, also negligible in amount. It will occur more in the top layers of the sand, where the grains are free to move, than in the lower portion of the bed, where they are held in a state of great fixity by the superincumbent weight. It has no relation to suction, and there being no difference between negative and positive head filters, based upon rate of flow, will occur in the same manner and to the same extent in the latter as in the former.

"(8) Differential compacting due to superincumbent weight or velocity of flow is not the kind of compacting called for by the specifications and claims of the patents in suit, which is compacting alleged to be due to underlying vacuum or 'suction from below.'

"(9) In all filters whose sand beds are washed by a reverse current of water (which is the universal practice in all rapid or mechanical filters), compacting is always greatest at the top of the bed, by reason of the subsidence, after washing, of the finer grains of sand at the top and the coarser grains below. This is practically an admitted fact in this case, being testified to by defendant's four expert witnesses and substantially by complainant's witnesses, Dr. Mason and Mr. Milligan, and is not denied by any of complainant's witnesses, although there was ample opportunity to do so; and no attempt was made to show that such compacting, greatest at the top, is overbalanced or offset by any compacting below.

"(10) Penetration of suspended impurities is a function of the flow of the water carrying them. The depth to which the impurities will penetrate into the filter-bed depends upon amount and character of suspended matter, size of sand, rate of flow, amount of coagulant, temperature of water, etc., and is not affected by the character of the actuating head, which, whether positive or negative, is, as we have seen, pressure—in the one case, hydrostatic, and in the other, hydrostatic and pneumatic.

"(11) Penetration of the filter-bed is not effected by partial vacuum greatest in the lower portion of the bed, because, if the latter occur there at all, it is only occasional and of brief duration, and because it is incapable of producing such penetration; nor is it effected by the 'pull of suction,' for reasons already stated.

"(12) Utilization of the entire filter-bed and deep penetration of suspended impurities is neither desirable nor safe, because of the danger of the impurities passing entirely through the filter-bed and fouling the filtered water. It is always desirable to reserve the lower part of the filter-bed as a factor of safety to meet any abnormal conditions that might develop, and thus prevent deterioration of the effluent.

"(13) The possibility of deep penetration with safety to the effluent would depend upon the compacting of the filter-bed greatest in the lower portion. This is clearly admitted in the patents and is necessarily true. But such compacting does not occur in negative head filters using a reverse current in washing, for reasons already stated.

"(14) The liberation of air in the filter-bed, far from being useful, is a nuisance, and the greatest objection to negative head filters, because it causes 'air binding' of the sand bed, and because, when the air-bubbles grow large enough, they rise by their buoyancy and 'break through' the sediment layer, causing channel-ways and irregularities of filtration which seriously affect the effluent.

"(15) It is shown that in the best modern filter practice liberated air is gotten rid of as far as possible, and complainant has attempted to show that the velocity of the moving water carries the air off through the effluent pipe. But, if it is so carried off, it cannot perform the useful functions claimed for it in the patents. Besides, if it is carried off below, it clogs the drainage pipes, reducing their capacity and causing unequal rates of filtration when large bubbles of air are suddenly carried out. 'Whichever way it goes it makes trouble, decreasing the efficiency of filtration or the length of the run, and frequently both.'

"(16) Liberated air is not useful in washing the filters. This pretension was rejected by Dr. Mason and by defendant's witnesses, and was disclaimed by complainant's counsel at the oral argument.

"(17) The pretense that air bubbles are useful in agglomerating or coagulating suspended impurities is also without foundation. It is rejected by Dr. Mason, as well as by defendant's witnesses.

"(18) The same is to be said of reduction in the amount of coagulant used.

"(19) The liberation of air depends upon the reduction of atmospheric pressure or creation of a tendency to a vacuum, and hence depends upon the conditions above stated relative to the formation of a partial vacuum, and time, place, and amount are wholly beyond the control of the operator. It being an admitted fact that liberated air, if not gotten rid of or controlled, is harmful, the patents, while claiming its utility, fail to point out how it can be controlled so as to be made useful and not harmful.

"(20) All the above-mentioned things, maintenance of a vacuum greatest in the lower part of the filter-bed, compacting of the bed greatest below, deeper penetration of suspended impurities, utilization of entire filter-bed, coagulation of impurities by air-bubbles, and other utility of liberated air, upon which the reissue was asked for and the method distinguished from that of Neville, and upon which both patents are built up, are either admitted or shown to be without existence. All that remains, as the only useful function of the Jewell apparatus or effect of the Jewell method, is the unbalancing of atmospheric pressure so that the atmospheric pressure above the filter-bed may become effective to force the water through the filter-bed when the same becomes clogged; and this is expressly disclaimed in the method patent, because Neville had already done it, and is what many others had been doing for 75 years before Jewell came into the field."

In the main, these criticisms commend themselves to us as well founded. However, it is probably enough to say that (at the best) the evidence in behalf of the company leaves us in much uncertainty whether the theories of the patents are sound. We do not feel bound to go the length of declaring the patents invalid; the reissue patent, indeed, has already expired, leaving the patentee only a claim for royalties; but we are fully prepared to say that, while the subject is so surrounded by uncertainty, the company cannot reasonably object to the application of a test that tries the Harrisburg filters by the theories of the patents. If these filters do not produce the results called for by these theories, it is certainly fair to conclude that the company has not succeeded in making out the charge of infringement. On this point, there is one piece of evidence that is not referred to by the district court, but in our opinion is of decisive weight upon the issue of infringement. We mean the prolonged experiment that was made with the Harrisburg filters, the results of which may be summarized as follows: Filter No. 2, which is typical of the 12 filters operated by the city, was prepared for the experiment under Prof. Fuertes before January 9, 1909, when a preliminary or trial run was made. It was provided with a series of gauges to show loss of head, and these indicated upon a scale the pressure at seven levels—the first in the water just above the filter bed, the next four at different levels within the bed of sand, the sixth in the gravel, and the seventh in the outflow pipe carrying the filtered water away. These gauges were read hourly from January 21st to June 11th, inclusive. Diagrams, together with the record of these readings, were given in evidence; 256 runs of the filter were covered during the winter, the spring, and the early

sumner, when the water varied in temperature from 36° to 74° Fahr., and when the turbidity varied between 5 and 85 parts in a million gallons. There could hardly be better evidence of what goes on within an exposed filter-bed of sand, where means exist for producing suction, so far at least as a reduced pressure or a tendency to a vacuum is concerned. The filter was operated in the usual manner, so that nothing exceptional impaired the value of the experiment. Now, when the assertions of the patents are remembered, namely, that as the water flows down the trapped pipe a partial vacuum is created and maintained, that the vacuum is greatest below and gradually decreases towards the top, and that the filter bed is thus compacted, more densely below and gradually less towards the top, it is significant that the records of filter No. 2 do not bear these assertions out. On the contrary, they show that a partial vacuum never came into being at or near the beginning of a run; that 191 runs out of 256, or about 75 per cent. of the whole, did not show a partial vacuum at all; and that while 65 runs, or about 25 per cent., showed a partial vacuum, they did not show it until near the end of the run. Further, of these 65 runs, in which a partial vacuum appeared near the end of the run, it appeared at the bottom in only 8, while in the remaining 57 it appeared in different places, sometimes near the top of the bed, sometimes at varying levels between the bottom and the top. To state the matter from another point of view: During the whole experiment, the records show that a partial vacuum appeared first at the bottom and remained greatest in that part of the bed during only 115 minutes, or for only about .06 of 1 per cent. of the time during which the filter was in operation.

It is not easy to exaggerate the value of these carefully conducted experiments, and we think it within bounds to say that, while the Harrisburg filters are charged with infringement, it is remarkable that their customary operation during six months failed to show the characteristics that are asserted to be inseparable from the apparatus and the method of the patents. No counter experiments were made, and no serious attack was made upon these records, or upon the conclusions they seem to justify. In our opinion, therefore, the case may safely be decided by finding upon the evidence that the city has not infringed either patent.

We therefore reverse the decree, with costs, and direct the District Court to dismiss the bill.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. STERLING CORK & SEAL CO.

(Circuit Court of Appeals, Sixth Circuit. October 16, 1914.)

No. 2460.

1. PATENTS (§ 17*)—ADOPTION FROM ANOTHER ART.

Having gone into another art and adopted a device therefrom, and adapted it to this art, the patentee could not thereafter get a valid patent covering broadly another adoption from the same art for similar purpose.

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

There remained open for the later patent only the adaptation not the adoption.

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

2. PATENTS (§ 328*)—INFRINGEMENT—BOTTLE SEALING MACHINE.

The Painter patent, No. 638,354, for a machine for automatically sealing bottles, the essential feature of which is a yielding plunger on which the bottles rest, construed, and, as limited by the prior art, *held* not infringed.

3. PATENTS (§ 157*)—CONSTRUCTION OF CLAIMS.

Only when necessary to make the claims of a patent operative, or in case of ambiguity apparent on the face of the claims, or induced by their study in connection with the specification and prior art, is a court permitted to read in an element not named therein, in order to narrow a claim so as to make valid one otherwise invalid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229–232; Dec. Dig. § 157.*]

4. PATENTS (§ 328*)—INFRINGEMENT—FEEDING APPARATUS FOR BOTTLE SEALING MACHINES.

The Painter & Hawkins patent, No. 643,973, for an automatic feeding apparatus for bottle-sealing machines, claim 2, construed, and *held* infringed.

5. PATENTS (§ 168*)—CONSTRUCTION—EFFECT OF PROCEEDINGS IN PATENT OFFICE.

The effect of the rejection of a claim by the Patent Office, and an amendment, is not necessarily a limitation, but, even if so, it may not affect the claim in the particular involved in a subsequent litigation, and the exact thing done must be examined from all sides, and especially in connection with the point later in controversy, before its effect can be interpreted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*

Conclusiveness and effect of decisions of Patent Office in proceedings on applications, see note to Novelty Glass Mfg. Co. v. Brookfield, 95 C. C. A. 530.]

Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

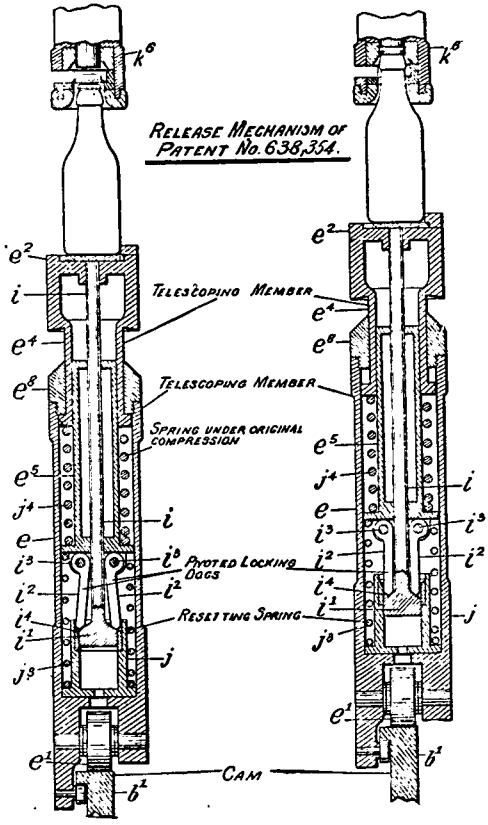
Suit in equity by the Crown Cork & Seal Company of Baltimore City against the Sterling Cork & Seal Company. Decree for defendant (210 Fed. 26), and complainant appeals. Reversed in part.

This was the usual infringement suit, brought by the appellant, as plaintiff, based on two patents—one granted to Painter, No. 638,354, December 5, 1899 (application filed October 28, 1898), for a machine for automatically sealing bottles, and one granted to Painter & Hawkins, February 20, 1900, No. 643,973, for an apparatus for automatically supplying to the former machine the crowns which it attached to bottles. These crowns are shallow metal caps containing a thin cork disc, and the two machines, co-operating rapidly and automatically, place these discs upon the tops of and over the bottles, and then, under very heavy pressure, form the edges down over the top of the bottle neck and so make an air-tight closure. The District Court thought that neither patent was infringed, and dismissed the bill. The two patents are so distinct that they require separate consideration.

Painter's patent is designed to meet a problem presented by the fact that bottles, supposedly alike, are not precisely of the same height, and that, if such a machine is adjusted to give a pressure of (say) 700 pounds in seal-

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

ing a bottle of the standard height, it will fail properly to close a bottle which is a trifle short, and it will crush a bottle which is a trifle high. The accompanying sketch shows his solution. The bottle was supported by a stand, which, with each revolution of the machine, was raised a certain distance by a supporting cam. The stand consisted of three telescoping members. The upper bottle-holding member is provided with a long rod carrying, at its bottom, a piston-shaped device adapted to enter the extreme bottom telescoping member or socket. Such entry, however, is normally prevented by locking dogs, which prevent telescoping and make the two members a unit in resisting pressure. An outer case serves as a third telescoping member, within which the bottle-supporting member passes downwardly whenever the bottom piston is permitted to enter the receiving socket. Within this case, and interposed below a shoulder on the upper member and above a sliding disc or horizontal portion, which normally is held rigid by the upper end of the locking dogs, but which may descend when these dogs are unlocked at the lower end, there is interposed a spring, known as the "spring under predetermined compression" (which we shall call the "upper spring"). It will be seen from the accompanying sketch that this horizontal disc or diaphragm which is the lower end of the part marked e^5, primarily receives and carries the entire thrust of the sealing operation, and does so through this upper spring; and it is evident that if this spring is set so that it will not be further compressed until it receives a pressure of more than (say) 700 pounds, all the parts named will at first be held in rigid, relative position, but that when this pressure is exceeded, and this spring yields very slightly, the dog-retaining piston, at the lower end of the rod, will descend correspondingly, the dogs will swing inwardly, the locking engagement will disappear, and, thereupon, if nothing further was provided, the entire upper part of the device, including the supporting stand and its rod, with the upper spring and the part e^5 and the dogs, would fall until stopped by the bottom of the receiving socket, and these parts would then have to be raised until the dogs could again spring into locking position to be ready for the next operation. To accomplish this resetting automatically, Painter provides a further spring, under suitable compression, but somewhat less than in the upper spring, and the bottom of the part, e^5, is supported in the casing by this resetting spring. The result is that, as soon as by the yielding of the upper spring the dogs have been unlocked, the entire thrust is transferred to the lower spring, which gives a yielding resistance thereto, and then, as soon as the pressure is relieved, sufficiently ele-

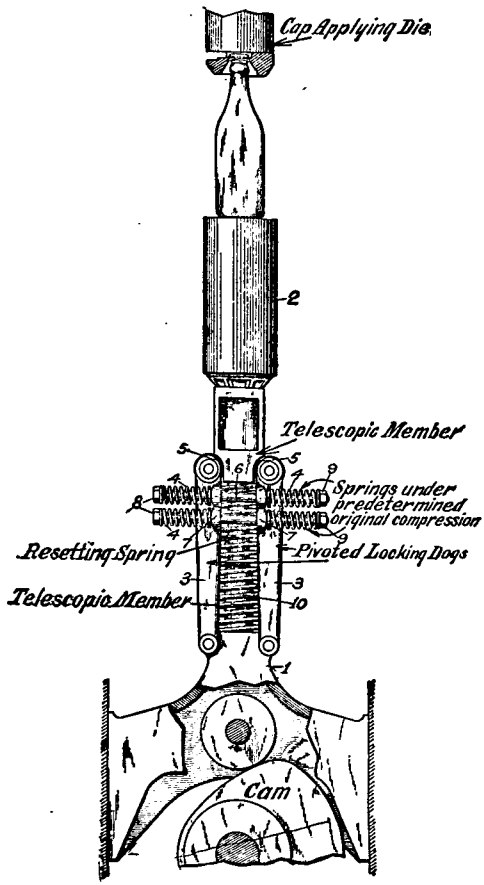


vates the upper parts and resets the device. The secondary resistance interposed by this spring to the thrust, thereby preventing the parts from being telescoped further than is necessary and avoiding a collapse, seems an important function, though it receives no mention in the specification.

Of the three claims sued upon under this patent, 4, 5, and 6, it is sufficient to quote claim 6, which is as follows:

"Claim 6.—In a pressure-limiting mechanism for bottle-sealing machines, a bottle-support, a compound cylinder, a spring between the two members thereof held under a predetermined compression, a tripping device for automatically releasing said predetermined compression, consisting of a pair of tripping-dogs pivoted to one member of said compound cylinder, and means carried by the other member of said compound cylinder for actuating the dogs, whereby said compound cylinder will become automatically shortened as a whole when the predetermined compression is reached and the pressure applied to the bottle resting thereon be automatically released, substantially as described."

Diagram Defendant's Machine.



The defendant uses the device shown by the accompanying diagram. It is sufficient to say that it has all the parts called for by the claim, accomplishing all the contemplated results, but that they are in such different form and arrangement, and reach their ultimate result under such variant conditions, that the question of infringement depends upon the breadth of equivalency allowed to the claims; and this necessarily brings us to the prior art.

The Painter patent in suit was not his first attempt to solve the problem. He had found another solution, by his patent No. 609,209, of August 16, 1898. This may fairly be called similar, in general construction and operation, to the patent in suit, excepting that the piston carried by the bottom of the rod was more truly a piston and rested upon a body of oil which filled the casing below that point. When the pressure overcame the resistance of the upper spring and the piston rod moved downward slightly, it opened ports in this piston and thereupon the piston would slowly descend as the pressure continued and as the liquid passed to the other side. The supposed breadth and scope of this invention are indicated by claim 1, which is as follows:

"Claim 1.—In combination in a bottle-sealing machine, a pressure-applying head, a table or rest for the bottle, means for moving one of said parts relatively to the other to obtain the desired pressure, and means for automatically limit-

ing the application of pressure when a predetermined degree is reached, irrespective of the length of stroke of the movable part, substantially as described."

J. Q. Rice, of New York City, and R. H. Parkinson, of Chicago, Ill., for appellant.

C. P. Byrnes and G. H. Parmelee, both of Pittsburgh, Pa., for appellee.

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

DENISON, Circuit Judge (after stating the facts as above). [1] It is familiar knowledge that, either on account of the injury to the material handled or on account of the breakage of the machine on an unexpected resistance, it has been common in many arts to provide a pitman or plunger which would exert force rigidly up to a predetermined point, and, if the resistance was not overcome, would then yield. The record informs us that this method of treatment has been so common and the plan which is devised for one situation is often so adaptable to other situations that the Patent Office maintains, in its classification list and under the class "Machine Elements," a subclass known as "Pitman—Longitudinally Yieldable." Yielding resistance by hydraulic cylinder, or by air cylinder, or by springs, were different principles invoked in the different forms. The conception which lay at the bottom of plaintiff's 1898 patent, viz., that he could go to the yielding plunger art, or to some specific art, and adopt a yielding plunger as an element of a bottle-sealing machine, was a meritorious conception. It may have entitled him to a broad monopoly upon any use of a yielding plunger in that association (as was apparently secured to him by the first claim of his 1898 patent). That question is not before us, and we do not mean to intimate any opinion; but, however that may be, having had this conception in 1898 and having received a patent, he could not have another patent in 1899 which would do more than cover the improvement which he then discovered. Having gone into the yielding plunger art, and adopted and adapted the hydraulic cylinder yielding plunger into and for a bottle-sealing machine, and having thus bridged over whatever gap there was between bottle-sealing machines and yielding plungers, and having thus incorporated the two arts together, he could not the next year adapt a mechanical trip-yielding plunger to bottle-sealing machine use and then get a valid patent covering any kind of a mechanical trip-yielding plunger when used in a bottle-sealing machine. Yet this is, in effect, his present position, and must be his position to succeed. There remained open for his 1899 patent only his adaptation, not his adoption. Judge Killits happily expressed this thought in his opinion below, when he said:

"But, when Painter patented the mechanism alleged to be infringed in this case, the art of bottle-sealing by crowns had already invaded the art of yielding pitman, of which the known forms were many, and had made an appro-

priation therefrom. Whatever may be the merits of his invention, we find nothing in his grant which shuts the door of opportunity to some other inventor to go to the yielding plunger art for an old device of this character."

[2] Defendant's structure is, speaking broadly, a reproduction of the pressure relief mechanism or yielding plunger which was shown by the now expired patent to Penfield, April 22, 1890, No. 426,315, as part of a brick machine. The parts in defendant's device are the same in number, form, shape, and arrangement as in Penfield (with the exception of the resetting spring hereafter mentioned). The Penfield structure was probably intended to prevent breaking the machine, which was of great weight and strength, when there was a large stone in the brick mold; and to adapt this machine to handling glass bottles required changes in details and very nice machining and adjustment. Whether these changes and this adaptation involved invention, and entitled the defendant to a patent, is a question not involved, except somewhat collaterally. It has no direct bearing on the inquiry whether the patent in suit is entitled to a sufficiently broad construction to include the defendant's form. It is sufficient to say that, for the reasons we have stated, Painter's second patent, which, to be valid, must be confined to the general type of resisting spring and mechanical trip which he shows, cannot cover another type of yielding plunger, the different typical character of which is demonstrated by its development from the older art, instead of from Painter's patented improvement.

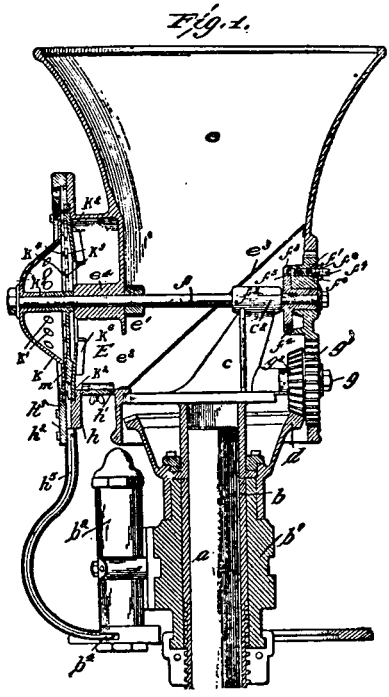
[3] Another feature with reference to this patent requires attention. So far as the record informs us, the lower spring, having the double function of furnishing secondary resistance and resetting the device, was quite new in this association, and it seems to give distinct and meritorious character to Painter's device, above and beyond the credit due him for devising an efficient form of mechanical trip. Apparently, he would have been entitled to a patent securing to him the use of this double function spring in combination with any suitable form and arrangement of the other elements. In this aspect of the invention, it has been appropriated by defendant, who was apparently compelled to add Painter's resetting spring to the Penfield brick machine in order to make it satisfactory for the desired purpose. This feature of the case leaves us dissatisfied with a conclusion of noninfringement, if any reasonable construction of the claim permits the inclusion of this resetting spring as a characterizing element; but we are convinced that such construction cannot be given without doing violence to settled rules. Only when necessary to make the claims operative, or in case of ambiguity apparent on the face of the claims, or induced by their study in connection with the specification and prior art, is a court permitted to read in an element not expressly named therein, in order to narrow a claim, so as to make valid one otherwise invalid. McCarty v. Lehigh Co., 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358. This court has applied this rule, and has refused thus to narrow a claim, and confine it to what turned out to be the real invention, in many cases (see National Co. v. Gratigny, 213 Fed. 463, 467 130 C. C. A. 109); and we have, for that purpose, limited a claim beyond its apparent

scope only in cases like Lamb Co. v. Lamb Co., 120 Fed. 267, 269, 56 C. C. A. 547, when it contained some general term of reference which was capable of being so narrowed by interpretation without importing an element distinctly foreign.

In the Painter patent in suit we can find no room for a suggestion of inoperativeness or uncertainty which would justify such interpretative treatment. All the 12 other claims of the patent, not selected for this suit, refer to the machine as a whole. One of them expressly includes this secondary or lighter spring as an element, and others contain phrases which might be construed as referring to that spring; but each of these 12 claims is, in other respects, so limited that, very likely, plaintiff was well advised in not bringing suit upon them. In distinction from the other 12, each of the 3 claims sued upon is confined to the "pressure-limiting mechanism" of the machine, and directed only to the pressure-limiting function, apparently with the distinct purpose that these claims might be broad enough to cover Painter's pressure limiting mechanism, no matter in what general association it was put. The "pressure-limiting function" is finished before this secondary spring begins to operate, and to read the secondary spring into these claims would be to say that a pressure-limiting mechanism, described as consisting of certain parts, included a part which was not named and which had no share in limiting the pressure. This is an impossible conclusion. If this suit were directed against a device which had no such secondary spring, but in which the telescoping cylinders completely collapsed when the dogs were tripped, and in which the table must, each time, be manually raised and reset, we would be compelled to find that infringement of these three claims was not avoided by the omission of this resetting spring. It is not improbable that the patentee and his solicitor regarded this secondary spring as of importance only where there was a series of sealing machines working in very rapid succession, as shown in the specification and as specified in the only claim which names the resetting spring, and that the patentee purposely drafted these three claims so that they would be broad enough to cover a slower device which should be reset by hand. To narrow them now by a limitation which the patentee refused to have would be to trifle with the patent contract. So far as the decree below finds noninfringement of the Painter patent, it must be affirmed.

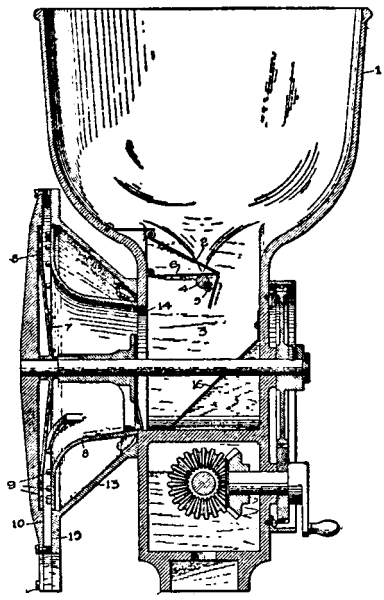
[4] The other patent in suit concerns a more complicated structure. The crowns come to the sealing machine in a confused mass and are poured into a hopper. Before these can be fed to the sealing mechanism through a suitable chute, it is necessary that they be arranged so that each will be presented in exactly the same position at the receiving end of the chute, and especially that they must all be the same side up. It was common to put buttons or rivets, in a mass, in a hopper, and, in connection with agitating them, assort and select and present them, so that they would pass through a suitably shaped delivery chute. In a broad sense, this was the same operation desired for crowns for bottles; but the record is convincing that the peculiar character of these crowns so far required special treatment as to leave

abundant room for invention in adapting to their manipulation the general features of construction used for handling buttons and rivets. The constructions involved are shown by the accompanying cuts. The single claim in suit, No. 2, is given in the margin.[1] Referring to this claim and the drawing of the patent, the hopper and its inclined bottom are apparent; the external chamber of the claim is marked *E*. In the form shown, it is a short cylinder with horizontal axis, which cylinder is a part of the frame or body of the structure, and carries, centrally, a suitable box or hub for a revolving shaft. Carried by and rotating on this shaft is what the claim calls a "receptacle or cage." The further or outer side of this cage is closed by a dome-shaped cap, *k*. The side adjoining the hopper (or, more accurately, adjoining the external chamber, *E*, here considered as part of the hopper) has a central opening surrounding the rotating shaft, and through which the closures may pass from the chamber, *E*, into the rotating cage. By reason of the inclined bottom of the hopper and the comparatively separated chamber, *E*, it follows that the crowns are not presented to the selecting mechanism in a large mass, or pressed by the weight of those in the hopper, but that comparatively few continually come down and fall over against the rotating side of the cage. This is provided with lifters or wings, which pick up the crowns from the bottom of the chamber, *E*, and carry them up to a higher position, from which they slide through the opening in the side of the cage into its interior. Here the comparatively few which enter at a time are tumbled, and in the periphery of the tumbling cage are passages or openings such that, whenever a crown is presented in



[1] "Claim 2.—In an automatic feeding apparatus for bottle-sealing machines, a hopper for the indiscriminate reception of the crowns or closures, a chamber external to said hopper, an inclined bottom to said hopper adapted to leading the closures to said external chamber, and a receptacle or cage rotating within said external chamber, having one side closed and a central opening in the side adjoining said hopper, adapted to receive the crowns or closures indiscriminately from the hopper, and containing in its periphery suitably-formed passages such that the crowns or closures can pass therethrough in one position only, whereby, by the tumbling action of said cage, the crowns or closures are changed in position therein until they present themselves in proper position to pass through said passages to a surrounding channelway, substantially as described."

proper position, it will fall out of the cage through the opening or passage and into the surrounding channel which leads to the delivery chute. The defendant's device is generally similar, but different in some respects. It clearly has the hopper, and there is an inclined hopper bottom and a rotating receptacle or cage, which, on the side away from the hopper, is more or less completely closed, which has an opening on the side toward the hopper, and which contains, away from its center and towards its periphery, passages suitable for receiving the crowns in one position only and for leading them to a surrounding channelway. Crowns in limited quantity fall from the hopper up against the interior surface of the rotating cage, when it is in the position shown. They are then impelled by inclined wings on the cage to fall through into the interior of the cage, where they are tumbled until they go out through the passageways. The distinctions which are claimed to be vital and to avoid the charge of infringement, when the claim is construed so as to save its validity, are three. It is said that the device does not contain the "external chamber" of the claim, that the rotating cage is not closed upon one side, and that the rotating cage does not have a central opening in the opposite side. As collateral to the lack of the external chamber, it would follow that there could be no inclined hopper bottom adapted to lead the crowns to the external chamber, and there could be no cage rotating within such chamber.



As to the first subject-matter, it is said that defendant's device is all one unitary hopper leading down to and against the interior surface of the rotating cage, and that the inclined part, marked "*2*," at the bottom of the upper wider portion, is only an agitator operated by cam *4*, preventing the crowns from arching at the hopper opening and delivering them down more slowly to the bottom of the hopper. We think it not very material to decide whether this plate *2* is or is not the "inclined hopper bottom" of the claim. The external chamber of the claim is not defined therein. So far as the terms of the claim go, the chamber may be directly below the hopper as well as at the side; and it is no distortion of the ordinary meaning of the words used to assume that plate *2* or plates *2* and *6* constitute the hopper bottom, and that everything below that point is an external chamber. We get the same result, however, if we assume that plate *16* is the inclined hopper bottom. Even then, all of chamber *3* which is above the extreme bottom and below the partition *6*, and which is at the left of an unde-

fined line connecting the external bottom point of *16* to some point in partition *6*, responds to the general idea of such external chamber. It is a chamber, and it is external to the main part of the hopper structure—that part which is permitted to operate as a hopper. If the phrase "external chamber" is treated as meaning merely a suitable passageway which will receive from the inclined hopper bottom a limited number of crowns and permit them, as they accumulate, to lie over against the face of the rotating cage, so that they will there constitute only a shallow pile (and this construction does no violence to the words used), then the defendant employs this feature.

As to the next point, it is quite fair to say that the defendant's rotating cage is closed on the side away from the hopper. There are openings, not clearly shown in the drawing, such that this side could not be called closed for all purposes; but, as used in this connection, the word merely contrasts with the open condition on the other side. "Open" and "closed" mean "open" so that the crowns will fall in, and "closed" so that they will not fall out, and with this natural and reasonable interpretation this side of the defendant's cage is closed. The fact that the closing plate does not usually rotate with the cage is not important.

The contention that the opening on the hopper side of the rotating cage is not central of the cage is not tenable. True, the exact center on this side of the cage is closed by the shaft and its box, and the opening is an annular one surrounding this box or shaft hub; but exactly the same thing is true of the patent in suit, and, in both cases, this opening is relatively central with reference to the extreme diameter of the cage.

[5] It being thus apparent that, upon a fair and natural construction of the claim language, there is infringement, the inquiry must be whether the state of the art or the Patent Office proceedings import into the language such limitations as to require the contrary result. Our study of earlier patents, as proved in this case, shows no anticipation (indeed, no complete anticipation is claimed); and we find nothing justifying any further claim limitations than were required during the progress of the application through the Patent Office; and so we come to the question, as the really vital one in the case, what the effect was of the various rejections and amendments. On this question it is as important not to exaggerate as it is not to minimize. Where there has been a rejection, followed by an amendment, it is natural to think of the net result as a limitation; but it may be or may not be. Not infrequently it is a mere expedient for overcoming the examiner's unfounded objection, or it only makes more clear to him the real meaning of the claim as it already existed, or, if a limitation, it is in some particular which is wholly without effect as to the point involved in the subsequent litigation where the proceedings are under examination; indeed, sometimes, the amendment is, in that particular, if not generally, a distinct broadening of the claim. The exact thing done must be examined from all sides, and especially in connection with the point later in controversy, before its effect can be interpreted. We therefore approach the study of the Patent Office proceedings from this point of view: Assuming that the claim lan-

guage, with reference to what is said to be the missing or the variant element, might otherwise properly be thought to read upon defendant's structure, did the applicant, before the grant of the patent, acquiesce in a construction which, as to this particular feature, is more limited? If so, the patentee is bound by that limited construction; otherwise, not.

First, as to the external chamber: Did anything occur by which the applicant agreed to a definition of this chamber as one on the side of the lower part of the hopper and with a clear and absolute line of demarcation between the two, rather than as merely a suitable passageway leading from the inclined hopper bottom and presenting at its further edge only the bottom of a sloping pile of crowns? The claims which involve this external chamber appeared in the original application as 1 and 2. One of them named this part as "a passage for supplying the crowns from the hopper to the cage" and the other named it as "an auxiliary chamber adapted to receiving the crowns from the hopper." These claims were rejected on reference to patents to Muslar, Gillette, and Bennett. Thereupon applicant canceled these claims and substituted four others, each of which contained, in some form, as an element, this external chamber, but in no one was there any restriction upon its location, size or shape. Neither did any one of the four claims carry any restriction upon the form or construction of the rotating, selecting cage, excepting that it rotated in the external chamber and was provided with exit passages. The rejection was repeated upon the same references. These claims were canceled, and two new claims were submitted. Each of these included a reference to "a chamber external to the hopper." These were again rejected. The applicant asked an explanation of the rejection, and the examiner pointed out that:

"Bennett discloses a hopper and chamber external to the hopper, an inclined bottom to the hopper for feeding to the external chamber and a selecting cage in the external chamber, an exterior portion of the cage forming part of the front wall of the chamber."

To this statement applicant responded with an argument pointing out the distinctions between his device and Bennett's. He insisted that Bennett had no selecting cage, in applicant's use of the phrase, and had only a notched disc which picked up buttons directly from the mass in the bottom of the hopper, and pointed out that in both the references the articles did not pass into a selecting cage to be tumbled, and said:

"In applicant's case, they pass in a mass into the interior of what is truly termed a rotating cage, and they are selected by passing through the pockets from the inside outward. This construction is the gist of applicant's invention, which enables it to successfully select and fit the crowns. * * * Thus neither Bennett nor Gillett really use a selecting cage. * * * The claims now presented have also the element of a rotating selecting cage, having one side closed and the other open."

Accompanying this argument was the claim now in suit, and it was thereupon allowed. It differed from and was more limited than the claims which had been rejected, not at all with reference to the external chamber, which was claimed in the same general language which

had been continually used, but in the provision that the rotating cage should have one side closed and should have a central opening in the opposite side, and that it should be adapted to receive crowns indiscriminately from the hopper, and that it should have in its periphery suitably formed selective openings.

This history demonstrates that no limitation upon the form or location of the element, which was sometimes called an external chamber and was sometimes called an intermediate passage, was, at any time, put upon the claim as the result of any rejection. The patent to Bennett is not included in the record. We must, therefore, take at their face value statements regarding it made by the application record. The two other patents cited, Muslar and Gillett, disclose nothing corresponding to the external chamber. However, since it was said to be contained in Bennett, and this was not denied by applicant, we must assume that it was. It follows that there is no patentable novelty in this external chamber alone, considered as a passageway which would present crowns to selecting mechanism in such a way as to prevent clogging; and the same conclusion would seem to follow as to the hopper with inclined bottom in connection with the external chamber or passageway; but it does not follow that there could be no invention in combining these two elements with a new form of a selecting cage adapted to receive and tumble and select the closures fed through the hopper and intermediate chamber.

When we trace the rotating cage through the history of the claim amendments, we find that it was at first named broadly as merely a rotary, selecting cage. Then, in the four claims, it was limited to a selecting cage rotating within the external chamber and containing exit passages. After these claims were rejected, the two next presented tendered a less limited description of the selecting cage, providing only that it should form one wall of the external chamber, but without any limitation upon its interior shape, construction, or operation. Then, when the Office pointed out that Bennett was thought to have a rotating cage responding to these two broadened claims, applicant presented the argument already quoted, insisting that the Bennett device had no rotating, selecting cage in the sense in which the claim used the term, and for greater certainty and better distinction pointing out that the rotating cage, which was to be an element of the combination in the patent being solicited, should be centrally open at one side, so that crowns could pass in a mass into its interior and be there tumbled, being kept in by the closed opposite side of the cage and being allowed exit only through suitable peripheral passages. The examiner, representing the government, acquiesced in this view, and a patent issued. Certainly there is, in this course of conduct, nothing limiting the claim to that form of central opening in one side of the cage or to that form of closing the opposite side of the cage which the drawings show. The proceeding, as a whole, shows that applicant in the end insisted that it was new to combine in one structure the hopper with the inclined bottom, the external chamber or intermediate passage leading from the inclined bottom to the selecting cage, and a rotating, selecting cage which had an interior cavity where a comparatively small number of

the articles would be tumbled, which would receive these articles through a central side opening, which was closed upon the other side and which had suitable exit openings, and shows that the Patent Office yielded to this insistence and issued the patent; and we can find nothing tending to limit the claim in any particular which will serve to distinguish the defendant's device. No one had before combined such a hopper and such a passageway with such a selecting tumbler cage. The combination successfully met the peculiar difficulties of handling this material; and even though there might have been no invention in selecting and combining these three elements, if all had been old, yet there was sufficient novelty in this cage itself, so that a patent for the combination of this cage with the other two elements necessary to make it satisfactorily do this work, although the other elements were old, was a valid patent.

It is not fully accurate to say that the selecting cage of the patent rotates "in the external chamber," and this descriptive phrase must be read with reference to the actual structure to which it refers. As the claims are worded in some of the amendments, this rotating cage forms one side of the external chamber. It is not wholly wrong to say that a rotating disc, which forms one side of the chamber, and so is one part of the chamber, rotates in the chamber. The function of the patent consisted in so relating the chamber and the cage that the crowns were passed slowly into the cage, so that it would contain only a few at a time. This was new, and we are not inclined to give the word "in" its most precise meaning; but even if we should, and should say, as defendant argues, that the cage of the patent rotates "in the external chamber" only by means of its vanes or lifters, which project into the chamber so as to contact with the crowns which lie at its extreme edge, and, therefore, that defendant's cage must be found to project into the chamber in the same way, it would not alter the result. Defendant also has vanes or wings projecting beyond the chamber surface of the cage, and so projecting and rotating in the chamber. The projection is slight, but it is sufficient to reach and affect the adjacent crowns. They are not lifted up and carried over, just as in the patent in suit, but they are pushed along, or agitated, and caused to fall over, with practically the same result.

Construed as we think the claim should be, no one of the distinctions between it and defendant's structure is material, and there should be the usual decree for injunction and accounting. In this particular, the decree below is reversed, and, for that purpose, the case is remanded, with costs.

BLISS et al. v. SPANGLER. †

(Circuit Court of Appeals, Ninth Circuit. October 19, 1914.)

No. 2370.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BUCKLE.
The Spangler patent, No. 972,937, for a clasp or buckle, while its elements are all or nearly all old, embodies a new combination of utility and requiring more than mechanical skill; also *held* infringed by the device of the Bliss patent, No. 1,034,681.

2. PATENTS (§ 25*)—"INVENTION"—WHAT CONSTITUTES.
An aggregation and association of old elements may constitute invention, if it rises above mere mechanical skill and produces utility of a superior virtue to that previously attained.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–29; Dec. Dig. § 25.*
For other definitions, see Words and Phrases, First and Second Series, Invention.]

3. PATENTS (§ 39*)—INVENTION—"NOVELTY."
Novelty, appertaining to invention, may be but a simple change in construction, if productive of a marked advancement in utility.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 46; Dec. Dig. § 39.*
For other definitions, see Words and Phrases, Patentable Novelty; also Second Series, Novelty.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Suit in equity by George P. Spangler against Walter B. Bliss and the Fresno Monogram Adjustable Buckle Company. Decree for complainant, and defendants appeal. Affirmed.

G. E. Harpham, of Los Angeles, Cal., for appellant Fresno Monogram Adjustable Buckle Co.

Neighbours, Sproul & Hoag, of Los Angeles, Cal., for appellant Bliss.

Raymond Ives Blakeslee, of Los Angeles, Cal., for appellee.

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

WOLVERTON, District Judge. The appellee, who was complainant in the court below, made application May 5, 1910, to the Commissioner of Patents for patent on a clasp or buckle of which he claimed to be the original, sole, and first inventor, and was on October 18, 1910, awarded letters patent numbered 972,937. Claiming that defendants Fresno Monogram Adjustable Buckle Company, the Modern Sales Agency of America, Limited, and Walter B. Bliss were jointly infringing his letters patent, he instituted the present suit to enjoin such infringement. Decree pro confesso was entered against the defendant Modern Sales Agency, and the defendants Adjustable Buckle Company and Bliss answered separately. Bliss denies that the defendants have jointly, as partners, or separately manufactured, or participated in the manufacture, use, and sale of, complainant's clasp or buckle, and denies infringement jointly or separately. The Buckle Company makes

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

† Rehearing denied November 18, 1914.

the same answer, and sets up anticipation, and, in view of the prior state of the art, that what complainant claims to have discovered is not the result of patentable invention, but of ordinary mechanical skill. The trial court found against defendants, and decreed that they be permanently enjoined from further infringing complainant's letters patent.

[1] The complainant's alleged invention comprises a plate or shield suitable for engraving or stamping thereon an initial or monogram, or such other device as may be desired, with longitudinal curvature suitable to conform it to the line of extension of the belt when placed around the body. The shield is constructed with lateral flanges extending inwardly, thus providing a groove longitudinally underneath the shield, through which the lap, or, as it may be called, the butt end, of the belt, may be drawn. Across the flanges at one end is provided a flat bar, and at the other a pin or bar upon which is pivotally mounted a contrivance consisting of a metallic tongue or plate, extending when in use towards the flat bar at the other end of the shield, which tongue is provided with a stud extending towards the shield, and, when closed, presses up or outwardly against it. The tongue is also curved at the end in the opposite direction from the stud and shield, so as to form a hook. The butt end of the belt is attached to the buckle by simply passing it in and through the groove under the pin upon which the tongue is pivoted and the flat bar at the other end of the shield. The belt being provided with holes appropriately spaced, the stud on the tongue is caused to register with one of the holes, and when the tongue is clasped up or outwardly against the shield the belt is secured or made fast, so that it will not move longitudinally. The other or free end of the belt is provided also with a metallic tongue, called in the patent a "spring tongue," containing a slot crosswise near the end; the tongue being attached or fastened to the belt by means of ears projecting from the face thereof and away from the plate or shield, provided with holes, which ears extend through the belt, and are fastened by a pin extended through the holes underneath the belt. The spring tongue is thereby made detachable from the belt. In application, the spring tongue, being so detachably attached to the free end of the belt, is passed between the flat crossbar and the extended butt end of the belt, until the slot in the spring tongue registers with the hook or the swinging tongue, and the two parts of the buckle are interlocked by the hook drawing into the slot, and thus the ultimate function of the buckle is accomplished. Spangler's claim is for:

"A clasp or buckle, comprising a shield or plate provided with a rearwardly disposed bar spaced therefrom, holding means for connecting the shield or plate with a strap or other device, interlocking elements, one of said interlocking elements being connected with said shield or plate rearwardly thereof, and holding means for connecting the other of said interlocking elements with a strap or other device; one of said interlocking elements consisting of a spring tongue adapted to be passed between said shield and said bar and being provided with an opening, and the other of said interlocking elements being formed for hook engagement with said spring tongue through said opening."

Logically, in the course of our investigation, we may determine whether there has been anticipation of the complainant's patent. Certain patents, six in number, were introduced at the trial for showing

the prior state of the art, all of which it is claimed anticipate the alleged invention of complainant. We may notice some of these patents briefly.

The first introduced, or the Busch patent (being for improvement in buckles), issued October 8, 1872, No. 132,051, is a crude affair, consisting simply of a shield underneath which at one end are attached two hooks, which are hooked into holes in the belt for holding purposes. In the center underneath is attached a crossbar pivoted on lugs, one on each side of the shield, suitable for hook engagement, the hook being attached to the other end of the belt, and thus the belt is interlocked. The shield serves in a measure only to mask the buckle fastening.

The Koopman patent, No. 544,858, issued August 20, 1895, consists of a belt plate to which one end of the belt is attached in any suitable manner. This plate is provided with a hook underneath, which engages a slot in what is termed an end piece attached to the other end of the belt, and thus the opposite ends of the belt are interlocked.

The Graves patent, No. 556,413, issued March 17, 1896, has a shield of small dimensions, with side projections extending inwardly, provided with holes in which is pivoted a metallic tongue, which has a stud extending, when engaging the belt, up or outwardly against the shield through holes in the belt. A duplex sliding loop is also provided, which slides in what are termed "guide eyes" underneath the belt. When the tongue is engaging the belt, one end of this loop is moved backwards, so as to pass over the end of the tongue, and thus the belt is held in place from movement longitudinally; the other end of the belt being permanently fastened with rivets to the shield.

The Mixer patent, No. 672,793, issued April 23, 1901, consists simply of a shield or plate bent on itself; the outer portion forming what is termed the "outer plate" and the inner the "base plate." The latter is described as an elongated strip of sheet metal, provided with a hook turning outward, which, when in position, is underneath the outer plate about the center. One end of the belt is attached to this device, and the other to a metallic plate, the end of which curves inwardly, forming a hook. The two ends of the belt are interlocked by means of these hooks coming into contact one with the other.

It is unnecessary to take special note of the two remaining patents, one of which was issued March 2, 1897, and the other July 2, 1878, except to observe that the latter patent has the swinging tongue with the stud on the under side, which engages the trace; the patent being for a trace buckle.

On an analysis of plaintiff's claim, it will be found to consist of:

First. A shield or plate.

Second. A rearwardly disposed bar spaced therefrom.

Third. Holding means for connecting the shield or plate with the strap.

Fourth. An interlocking element (one of two) connected with the shield or plate rearwardly thereof.

Fifth. Holding means for connecting the other of the interlocking elements with a strap; and

Sixth. The other of said interlocking elements, being a tongue having a spring quality.

The first of said interlocking elements has a lip or hook, and the second a slot, which provide the means for interlocking the ends of the belt. The third element, or the holding means, comprises the stud which engages the strap and holds it secure to the buckle. Considering the state of the art, it would seem that none of these elements are new. All had been in use, or the subjects of prior invention, in some form or other. But it is apparent that no such combination of the elements had ever been aggregated until the complainant produced his alleged invention, and in this consists the novelty, if novelty there be, in the contrivance.

[2] It has long since been settled that an aggregation and association of altogether old elements may constitute invention, if it escapes or rises above mere mechanical skill and produces utility of superior virtue to that previously attained. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177.

[3] It may happen that a simple change in construction is productive of a marked advancement in utility, and this has been accounted novelty appertaining to invention. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154. If this be invention, why may not the same thing be predicated of a combination of old elements which is productive of a like result? The proposition must receive an affirmative answer.

It is hardly probable that complainant's device, constructed and articulated as it is, is the result of mere mechanical suggestion. It is manifestly not a contrivance that the ordinary mechanic would devise in the application of known elements. Otherwise, why was it not struck upon before? In all the patents evolved prior in time, as the evidence shows, none has proven so useful as this one. While the others have seemingly fallen into almost entire disuse, it has rapidly advanced to the position of a good seller on the market, thus in actual utility displacing all others. The complainant pertinently states in his patent that his invention relates to—

"clasps or buckles, or similar adjustable connection and attachment devices; and it has for its object to provide improvements with relation thereto which will be superior in point of positiveness in operation, convenience in use and manipulation, facility in installation or connection and disconnection, with respect to working position, relative simplicity and inexpensiveness in construction, and general efficiency. The invention has for its particular object the provision of an improved clasp or buckle which will be more sightly in appearance and more conveniently manipulated in service than are devices of the same general character now customarily employed, and the use of which is attended by less injury to the belt or other device or object in connection with which it is employed."

We think, under the proofs, that the device has very substantially effectuated the object of the complainant thus delineated, and constitutes invention. Nor is it subject to the criticism that the combination is the result of mere mechanical skill.

It further appears that the defendant Bliss has acquired a patent of later date, being a patent for a buckle, No. 1,034,681, issued August 6, 1912, which in contrivance has a shield with the side flanges producing a boxlike appearance, of the same type as complainant's invention. It also has two flat crossbars reaching across underneath from one

flange to the other, located one at each end of the shield. Underneath the shield, outside of the flat bar at one end (the bar being called in the patent a keeper), is constructed a stud with kerfs on the sides near the top, or with a head, and the butt end of the belt, being provided with holes spaced in the usual way, is passed in from the opposite end of the shield, between it and both flat bars, and one of the holes registers with the stud. It is thus secured from longitudinal movement. To the other end of the belt is riveted a plate, containing a slot longitudinally, which slot converges in width toward the end furthest from its attachment with the belt. The interlocking process is accomplished by inserting the end of the plate between the keeper and the shield. The slot is caused to register with the stud, and when drawn back the diminished end of the slot is drawn into the kerfs or under the head on the stud, and is thus made fast when in use. It has been claimed in argument, although no such claim is made in the patent, that the plate containing the slot is a spring plate, and that it may be so considered.

The defendant Bliss has constructed other devices of similar pattern, one of which is practically the same, the other being provided with lugs extending from the flanges underneath, which are designed to, and do in practical application, take the place of the flat crossbars. These devices, complainant contends, infringe his patent. With this the defendants take issue.

The defendants have the advantage of the presumption arising, where two patents are issued for similar devices, that there is a substantial difference between them. Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973; Gillette Safety Razor Co. v. Durham Duplex Razor Co. (D. C.) 197 Fed. 574. That the two devices, the Spangler patent and the Bliss patent, are very similar, there can be no controversy. Indeed, they are so similar that we need consider only a few features where there can be a question as to their functional differences.

The stud extending from the plate or shield in the Bliss patent is without question a mechanical equivalent of the stud extending from the swinging tongue in the Spangler patent. They both perform the function of securing the butt end of the belt to the shield and preventing its movement longitudinally in substantially the same way. The expert witness for complainant affirms this, and those for the defendants do not controvert it.

As to the interlocking devices in the plaintiff's patent, these consist of a hook on the swinging tongue which engages a slot on the spring tongue. This takes place between the bars, or rather the flat bar and the bar upon which is pivotally mounted the tongue, attached across from the flanges of the shield. In the Bliss patent the devices consist of a stud attached to the shield underneath, with kerfs, or a head, and a plate attached to the loose end of the belt, containing a slot, different in shape, it is true, from the slot in plaintiff's device, but nevertheless a slot. The engagement is had by passing the slot over the stud, pressing it down and then drawing it back, so as to bring the converging part of the slot into correlation with the kerf or head. The two ends are thus locked. This takes place at a point outside of

the crossbars. But if it took place between the bars, there could be no substantial difference. That one of these engaging devices is a hook and the other a pin or stud, and one a slot extending crosswise of the spring tongue and the other a converging slot extending longitudinally with the plate or tongue, it seems to us, can make no material mechanical difference in the engagement. They perform the same function, for all practical purposes, in practically the same way. One of defendants' expert witnesses, among other things, says:

"As a matter of fact, I judge the kerfs on the studs in Exhibits E and F are for the same purpose as the hooked end of the plate, *10*, in the Spangler patent."

And the plaintiff's expert says:

"Considering simply the hook itself with the spring tongue of Exhibits A and C and the grooved lug and spring tongue of Exhibit E, I should say they are mechanically equivalent."

It is true in legal effect that a claim for a combination is not infringed if any one of the elements is omitted without a substitution of an equivalent (Union Paper Bag Mach. Co. v. Advance Bag Co., 194 Fed. 126, 138, 114 C. C. A. 204); but here we find, not only that the defendants have employed all the elements of the plaintiff's patent, but the same elements comprising the very essence of the interlocking devices, and that such devices not only perform the same function, but in all essential and material particulars in practically the same way. The real question is "whether what has been taken is the substance of the invention." Cimiotti Unhairing Co. v. American Unhairing Mach. Co., 115 Fed. 498, 504, 53 C. C. A. 230. And it is clear that, as respects the defendants' devices, they are in substance and effect the same as comprised by plaintiff's claim.

Another question remains, which is whether joint infringement has been shown. The bill alleges joint infringement by the three defendants. One of them, the Modern Sales Agency of America, suffered a decree to go against it pro confesso. As it pertains to this defendant, the only question remaining is whether the allegations of the bill are sufficient to support the decree. Masterson v. Howard, 18 Wall. 99, 21 L. Ed. 764.

In the record it appears that the plaintiff purchased on the market certain buckles, which were introduced in evidence, and heretofore referred to as Exhibits E and F. Whereupon the attorney for defendants admitted that these buckles were at one time manufactured and sold by the defendant Buckle Company, since October 18, 1910, and prior to the filing of the suit, but stated that they are not now being manufactured. Thereafter the Bliss patent, No. 1,034,681, was introduced; the patentee being the same person as Bliss, the defendant in the suit. It was stipulated by the parties that such letters patent were owned by the Buckle Company at the time that the buckles as represented by Exhibits E and F and other such buckles were manufactured and sold by the Buckle Company, and that Bliss made one or more buckles substantially as disclosed in said letters patent subsequent to the date of the issuance of the Spangler patent, and that since the issuance of such patent Bliss has been in the employ of or by con-

tract related with the Buckle Company in connection with making and selling such buckles. This record, we think, shows, prima facie at least, joint infringement by all the defendants.

The decree of the District Court will be affirmed.

DIAMOND PATENT CO. v. S. E. CARR CO.

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2376.

1. PATENTS (§ 81*)—ANTICIPATION — PRIOR USE — BURDEN OF PROOF TO ESTABLISH.

The burden rests upon the defendant in an infringement suit to establish the defense of prior use and consequent want of novelty in the patent, and because of the presumption of novelty arising from the issuance of the patent every reasonable doubt should be resolved against him.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

2. PATENTS (§ 75*)—ANTICIPATION—PRIOR USE—NATURE AND EXTENT OF USE.

Prior use, to invalidate a patent, must have been so far understood and practiced or persisted in as to have become an established fact, accessible to the public, and to have contributed definitely to the sum of knowledge.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92–97; Dec. Dig. § 75.*]

3. PATENTS (§ 328*)—VALIDITY—SHOWCASE.

The Weber patent, No. 801,944, for a showcase made of glass plates, the essential feature of which is the manner of joining the plates by means of a felt cushion placed between them and to which they are cemented, thereby making an elastic joint, *held* not anticipated by a prior use, nor invalid, because of insufficient description in the claims, nor because they in part describe a function.

4. PATENTS (§ 75*)—ANTICIPATION—"PRIOR USE"—IDENTITY OF ARTICLE.

A "prior use," to negative novelty and invalidate a patent, must have been of an article which was complete and capable of producing the result accomplished by the patented article, and not merely of one which by modification could be made to perform the same function.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92–97; Dec. Dig. § 75.*]

5. PATENTS (§ 167*)—CONSTRUCTION—RESORT TO SPECIFICATION.

While a claim of a patent may not be enlarged by the language used in the specification, it may be illustrated thereby, and the specification and drawings may be resorted to for the purpose of better understanding the meaning of the claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

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

Suit in equity by the Diamond Patent Company against the S. E. Carr Company. Decree for defendant, and complainant appeals. Reversed.

The appellant, as the assignee of letters patent No. 801,944, issued to Fred Weber, of date October 17, 1905, brought a suit against the appellee for an injunction against infringement and for an accounting. The appellee defended

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

on the ground that the patent was anticipated by the prior knowledge and use of one W. G. Whitcomb in Kansas City, Mo. The court below found upon the evidence that the defense was sustained, and thereupon dismissed the bill.

The patent is for a showcase to be used in exhibiting small commercial articles for sale. In the prior art there had been showcases made of wooden frames with glass plates fixed in grooves therein, and later showcases had been made of glass alone, the plates of which were held together by metal clips, attached at the several corners of the glass plates. These not having proved satisfactory, glue or paste was inserted along the edges of the plates, which, becoming hard, assisted in holding them in place. Other showcases were made of glass with the edges of the plates glued or pasted together, and with bolts or screws inserted through the glass plates at the corners, in lieu of metal clips. Later, showcases were made all of glass, by pasting or gluing the edges of the glass plates together without clips, bolts, or screws; but they were not satisfactory, for the reason that, as soon as the glue or paste dried, the joints became rigid, and, there being no vibration or yield therein, the plates were easily broken.

Weber conceived the idea of inserting a strip of elastic or vibrating material between the glass plates, in order to prevent breakage in moving the same, and breakage from the expansion or contraction caused by heat or cold. In his specifications he described his improvement as residing particularly in the means of fastening one glass surface to another, or to the woodwork forming a part of the case. The object of this, he said, was to do away with drilling holes through the glass, and to dispense with metallic or other fastening devices, and to provide for a certain amount of elasticity of the joint "whereby a cushion effect is produced." He continued: "If the parts were rigidly united, severe shocks received by the showcase would tend to shatter the plates or displace the parts; but in the present invention the cushioned joint aids in maintaining the union of the parts, affording, as it does, an elastic or resilient joint, which eases the strain at the actual union or contact faces of the plates, thereby also greatly softening the effects of shocks received by the case. * * * The cement is applied to the felt superficially, forming a skin, as it were, on both sides of the felt, so as not to permeate the same. By uniting with the felt it would form a hard, practically homogeneous substance, thus destroying the resiliency of the felt. The cement should be applied to the felt when quite thick, so it will not soak into the felt."

The claims are as follows:

"1. A structure comprising a plurality of glass plates, the edges of which are spaced from the adjacent plates, a felt cushion filling the space between the adjoining plates, the plates being cemented to the felt; each plate being adapted to freely vibrate in its natural plane of vibration, and prevented by the felt cushion from imparting its vibration to the adjacent plates.

"2. A structure comprising a plurality of glass plates, an unconfined edge of one plate nearly, but not quite, meeting another plate, also with unconfined adjacent edge, an elastic material filling the space thus existing between the nearest adjacent surfaces of the plates, said plates being attached to the elastic material, whereby the plates, by reason of their unconfined edges and the intervening elastic material, can each vibrate or move in any direction independently."

Scrivner & Montgomery, of San Francisco, Cal., for appellant.

Skuse & Morrill and S. H. Cutting, all of Spokane, Wash., for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). The evidence shows without contradiction that the Weber showcase met with immediate success, that the demand for it grew to such an extent that Weber could not personally meet it, and that for that reason

he transferred the patent to the appellant. Weber testified that he had no trouble in repairing any of his cases, no trouble in setting them up, and no trouble from breakage in shipping the same, and one of the officers of the appellant testified to a wide and extended sale of the Weber showcase, and the marked success of his corporation in making and selling and in licensing others to manufacture the same throughout the United States.

[1, 2] The appeal herein presents the single question whether the evidence introduced to prove prior use is in law sufficient to negative the novelty of the invention. Concerning the nature of the evidence required to establish the defense of prior use, it was said, in Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821:

"The invention or discovery, relied upon as a defense, must have been complete, and capable of producing the results sought to be accomplished, and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him."

In Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, the court reaffirmed the rule that the burden of proof is upon the defendants to establish the defense of prior use and consequent want of novelty. "For," said the court, "the grant of letters patent is prima facie evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. * * * Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that 'every reasonable doubt should be resolved against him.'" And in Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279, it was held that the prior use must be something more than an incidental or casual one. In Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504, it was held that the prior use must be so far understood and practiced or persisted in as to become an established fact, accessible to the public and contributing definitely to the sum of knowledge. Cases applying these rules are Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C.) 96 Fed. 344, Anthracite Separator Co. v. Pollock (C. C.) 175 Fed. 108, Ramsay v. Lynn (C. C.) 187 Fed. 218, and Ajax Metal Co. v. Brady Brass Co. (C. C.) 155 Fed. 409. Under the rule established by these decisions, we are required to view with caution and careful scrutiny evidence which is introduced to show a prior use that destroys the pecuniary value of a patent, which has met with commercial success and has been of value to the community.

[3] The showcases which are said to be evidence of prior use were manufactured in 1899 and 1900, in Kansas City, Mo., by W. G. Whitcomb, a cabinet maker, who made one lot of ten for the Cooper Drug Company of Joplin, Mo., and a lot of five for the Federmann Drug Company of Kansas City. Whitcomb testified that the Joplin cases had screws or bolts in the corners, and some of them had one also in the middle, and that those made for Federmann were substantially the same—that the glass plates in all those cases were fastened together with a preparation which he made himself. From his own evidence and the testimony of another witness, the "preparation" seems to have been similar to ordinary liquid glue, a product that could readily be poured from one receptacle to another. Whitcomb, who had thereto-

fore and since made ordinary showcases, testified that he did not like to make all-glass showcases, and that, if a customer wanted one, he would talk him out of it. He said: "My custom has been to advise people not to take them." The witness Jackson testified that, in a recent conversation with Whitcomb, the latter had told him that all-glass cemented showcases were no good. "He denounced the cases as being no good, on account of breakage that might occur in them, and the inaccessibility of the joints to be repaired." Whitcomb testified that the cases he made for the Cooper Drug Company and Federmann had felt joints, and that he used felt in the joints of these all-glass cemented cases "for the vibration of the case," and that he made some without the felt, simply stuck one plate of glass on the other, and found it was so solid any little jar would break it, and then he thought of the felt to give the elastic movement and make an elastic joint, and he testified that, while the joints in those cases are not hard and fixed, they appear to be solid, but, he added, "there must be some give to them or they would break."

But the evidence is not convincing that Whitcomb's idea in using the felt was to furnish an elastic cushion between the plates. It seems, rather, to indicate that his idea was to insert a porous medium between the plates, which, when it became saturated with glue, would present a more effective binding of the plates than could have been accomplished by glue or paste alone, and that the rubber strips which he employed in one or two instances must also have been used for the purpose of making a firmer joint, for it is common knowledge that such rubber soon becomes hard and loses its resiliency. He admitted that at first his glue permeated the felt, and he said:

"And then I got a felt that we had treated waterproof. I can't think what we called it. You can take any piece of cloth, and have the pieces sort of waterproofed, so as to keep your cement from soaking through."

But there is absolutely no evidence that in any of the showcases for the Cooper or the Federmann drug store was there any use of a waterproof felt. If, indeed, Whitcomb ever employed waterproof felt, it must have been at some subsequent experiment. In short, Whitcomb's all-glass showcases were not successful. He did not consider them successful, and he abandoned the idea of constructing them.

Mr. Federmann, who was called as a witness for the appellee, testified: "There is no elasticity in the joints at all; none that I know of." It is true that he further testified that whatever elasticity followed from the use of the felt in the joints between the glass existed in those showcases, and that any elasticity resulting from that method of construction existed in those cases. That was merely to state a truism. Its effect was not to show that there was elasticity in the joints, and it does not detract from the testimony of the witness that there was no elasticity in the joints. It may be conceded that, if there were any elasticity in joints in which the felt had been saturated by glue, Whitcomb secured it in the joints which he made, and which, as we have seen, were not satisfactory. To make such a joint was not to anticipate Weber's idea of using felt strips in combination with a

plastic cement on each side thereof, which was of such quality as to hold, but not to penetrate, the felt, and to leave it with all its natural elasticity as a cushion between the plates. It does not appear, therefore, that Whitcomb, in making his all-glass showcases, had in mind the idea which is at the basis of the Weber invention, an elastic medium between the plates.

It is not disputed that, when one of the officers of the appellant approached Whitcomb in 1906 with a view to giving him a license to manufacture the Weber showcases upon a royalty basis, Whitcomb, after examining the model, stated that he—

"did not think we would find it a good proposition, on account of the elasticity which we had in the joints, and he told me then and there that he had tried cemented showcases, but had found them unsatisfactory. In fact, he said they were so unsatisfactory he was going to discontinue the manufacture of them."

It thus appears that, before any litigation arose over the patent, Whitcomb specified as objectionable the very feature which in the Weber showcase has caused its success, and the absence of which in the cases made by Whitcomb undoubtedly caused their failure, for eight out of ten cases made by him for the Cooper Drug Company and two of those made for Federmann were broken, and the witness Holm, who repaired "four or five" of them, testified that they were put together with some kind of composition, which seemed to be a very hard substance after it dried, and "it made a hard, solid joint," and Jackson, who repaired two of them, testified that the joints were "solid and rigid."

The secretary of the appellant, who examined the showcases relied upon to prove prior use testified that they are—

"what I call solid joints all through, because the material used (I would call it glue) would permeate the felt and make a hard joint. Whatever material he used permeated the felt, and bolts were used as before described. Three distinct differences between the Federmann case and the Weber patent case are: The solid joints; the use of bolts, as above described; and the material used in the construction of the Federmann cases which (whatever it is) permeates the felt, making a solid jointed case, which was not the case in the patent. It was simply the process of putting these plates together with an elastic joint; that is the substance of the patent, as I understand it. The Joplin cases are the same composition as the Federmann, and my testimony with reference to the Federmann cases applies to the Joplin cases."

The evidence, as we view it, in the light of the decisions above quoted, fails to meet the heavy burden of proof imposed upon the defendant to show that Whitcomb constructed showcases which anticipated the Weber invention. It does not prove that Whitcomb conceived the idea of an elastic joint, or that, if he conceived it, he gave to the public the benefit thereof; for, if the idea was embodied in any of the showcases which he constructed, it was not a visible embodiment, or one that could be seen by a mechanic of ordinary intelligence, unless he examined it for that purpose. In Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C.) 96 Fed. 344, affirmed by the Circuit Court of Appeals, 101 Fed. 269, 41 C. C. A. 338, Judge Townsend said:

"I therefore understand the law on this subject to be that the mere secret practice of a process or the physical presence of a product or manufacture in

this country is insufficient as an anticipation, unless and until the public acquires, or has opportunity to acquire, therefrom such knowledge as would enable one skilled in the art to practice the invention. Such alleged anticipation, whether by foreign printed publication or physical presence in this country, must so embody the complete patented article, or be so substantially like it, that a specification could be based thereon."

[4] The novelty of an invention is not negatived by a prior useless process or thing, nor is anticipation made out by a device which might, with slight modification, be made to perform the same function. The invention must have been complete, and capable of producing the result. One should not be deprived of the results of a successful effort merely because some one else has come near it. Sayles v. Chicago & N. W. R. R. Co., 3 Biss. 52, Fed. Cas. No. 12,415. In the Barbed Wire Patent, 143 U. S. 275-284, 12 Sup. Ct. 443, 447 (36 L. Ed. 154), Mr. Justice Brown said:

"The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined that they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

It is contended that all of the first claim after the word "felt," and all of the second claim after the word "material," is invalid as being functional and not patentable, that a patent can cover only the concrete physical means employed to accomplish the result, and that the claims thereof, being self-imposed, are binding on the patentee, and all that it does not claim is abandoned to the public, and that the claims cannot be enlarged or extended in any particular by reference to the specifications, descriptions, or illustrations of the patent; and it is argued that the patent in the present case covers only the all-glass joints of the showcase, and does not include the character of the adhesive substance to be used. It is true that in the claims no specific mention is made of the nature of the adhesive substance that is used, but the claims do in effect say that the plates are so cemented to the felt that each plate is adapted to freely vibrate in its natural plane of vibration, "and prevented by the felt cushion from imparting this vibration to the adjacent plates." This result could not be obtained without the use of an adhesive cement that would not penetrate the cushion and destroy its elasticity, and the specifications plainly call for the use of such a cement. The appellee's contention that a patentee can claim nothing beyond the terms of his claim, and that he must be limited to the invention covered thereby, is well founded. Lehigh R. R. Co. v. Mellon, 104 U. S. 112, 26 L. Ed. 639; Yale Lock Co. v. Greenleaf, 117 U. S. 554, 6 Sup. Ct. 846, 29 L. Ed. 952; Harder v. United States Piling Co., 160 Fed. 463, 87 C. C. A. 447.

[5] But, while the claim may not be enlarged by the language used in the specifications it may be illustrated thereby, and the specifications and drawings may be resorted to for the purpose of better understand-

ing the meaning of the claim. Howe Machine Co. v. National Needle Co., 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963. In Unhairing Co. v. American Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100, the court said:

"In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim."

In Winans v. Denmead, 15 How. 329, 340 (14 L. Ed. 717), Mr. Justice Curtis said:

"Now, while it is undoubtedly true that the patentee may so restrict his claim as to cover less than what he invented, or may limit it to one particular form of machine, excluding all other forms, though they also embody his invention, yet such an interpretation should not be put upon his claim if it can fairly be construed otherwise, and this for two reasons: (1) Because the reasonable presumption is that, having a just right to cover and protect his whole invention, he intended to do so. * * * (2) Because specifications are to be construed liberally, in accordance with the design of the Constitution and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain to their own use, not anything which is matter of common right, but what they themselves have created."

In Seymour v. Osborne, 11 Wall. 516, 547 (20 L. Ed. 33), Mr. Justice Clifford said:

"Where the claim immediately follows the description of the invention, it may be construed in connection with the explanations contained in the specifications."

In 1900 Washer Co. v. Cramer, 169 Fed. 629, 633, 95 C. C. A. 157, 160, Judge Gray said:

"The combination or description of the standard washer, or of this Wearne tub, can be read, it is contended by defendants' counsel, into this first claim. This may be true, if we stick in the bark, by looking at the language of the claim, dissociated from the specifications; but no invention can be practically or fairly understood or explained, if such dissociation is absolutely adhered to. As we have already shown, the element described in the first claim, as 'means for actuating said lever,' must not be taken to be any means, such as impracticable hand power applied to the lever, but the efficient practical means described in the specifications. Reading the claim and the specifications together, the invention of the patentee was clearly such an application of mechanical power as would oscillate the tub with all the advantages afforded by the resiliency and retardation of the springs of the standard washer preserved."

In Century Electric Co. v. Westinghouse E. & Mfg. Co., 191 Fed. 350, 354, 112 C. C. A. 8, 12, Judge Sanborn, in applying the rule that the court should seek to ascertain from the terms of the patent, in the light of the circumstances, what was the intention of the contract between the government and the patentee, said:

"This intention should be deduced from the entire contract, and not from any part of it, or without any part of it, because they did not agree to it, or to any part of it, without every other part of it. The specification, which forms a part of the same application as the claims, must be read and interpreted with them, not for the purpose of limiting or contracting, or of expanding, the latter, but for the purpose of ascertaining from the entire agreement, of which each is a part, the actual intention of the parties, and that

intention, when ascertained, should prevail over the dry words and inapt expressions of the contract evidenced by the patent, its specification and claims."

In Smead Warming & Ventilating Co. v. Fuller & Warren Co. et al., 57 Fed. 626, 6 C. C. A. 481, Judge Shipman said:

"The construction to be given to his patent must correspond with the extent of his invention. The actual invention, if in conformity with the language of the claims, should control in the construction of patents. A strict construction should not be resorted to, if it becomes a limitation upon the actual invention, unless such construction is required by the claim."

We are of the opinion that, while the latter portion of the claims in the case at bar do, in a sense, describe a function, they also serve to describe the manner in which the plates are "cemented to the felt," as those words are used in the claims, and as shown by the specifications, and that by resorting to the specifications, for the light which they afford on that subject, we do not enlarge the claims, but construe them according to their intention, as authorized by the decisions above cited. No one familiar with the art, after reading the claims, and making the permissible reference to the specifications, could have any doubt as to what was the particular thing which the patentee claimed as new, and what was the relation of each part to the combination.

The decree is reversed, and the cause is remanded for further proceedings.

SPORTING GOODS SALES CO. v. HASKELL GOLF BALL CO.

(Circuit Court of Appeals, First Circuit. September 17, 1914. On Petition for Rehearing, November 11, 1914.)

No. 1059.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—GOLF BALL.

The Work and Haskell patent, No. 622,834, for a golf ball, the core of which is composed of rubber thread wound under tension, covers a ball not merely differing in degree from the old style gutta percha ball, but one substantially different in kind, which by reason of its specific difference in construction and greater resiliency has a much longer range of flight, and the patent discloses invention and is valid; also *held* infringed.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by the Haskell Golf Ball Company against the Sporting Goods Sales Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 210 Fed. 624.

Charles F. Perkins, of Boston, Mass. (Carroll L. Perkins, of Boston, Mass., on the brief), for appellant.

Frederick P. Fish, of Boston, Mass., and Charles Neave, of New York City (William G. McKnight, of Boston, Mass., on the brief), for appellee.

Before PUTNAM and BINGHAM, Circuit Judges, and BROWN, District Judge.

---

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

BROWN, District Judge. This is an appeal from a decree of the District Court finding valid and infringed by the appellant letters patent to Work and Haskell, No. 622,834, April 11, 1899. for a ball for use especially in the game of golf.

The claims are:

"1. A golf ball, comprising a core composed wholly or in part of rubber thread wound under high tension, and a gutta percha inclosing shell for the core, of such thickness as to give it the required rigidity, substantially as described.

"2. A golf ball, comprising a central core section of relatively nonelastic material, rubber thread wound thereon under tension, and an inclosing shell of gutta percha, of such thickness as to give it the required rigidity, substantially as described."

The solid gutta percha golf ball, which was in general and practically exclusive use for about half a century before it was displaced by a composite ball of the type described in the patent in suit, was well suited to the requirements of the game of golf. It was durable, and while it was of such rigidity that it could be made to run accurately over the putting green, thus answering one of the main requirements of the game, it was also capable of a considerable length of flight by reason of its resiliency. The composite ball is also sufficiently rigid for use in putting, but differs substantially from the solid ball in having a much longer flight under the same force. As the golf player seeks to obtain by certain strokes a maximum of distance, and as the composite ball enables the player, using the same force, to get a length of drive of which the old ball is incapable, the new ball soon displaced the solid gutta percha ball. According to the evidence the quantitative gain in distance was from 20 to 25 per cent., and this was a very substantial matter in a game in which the player seeks to cover a long course in the minimum number of strokes.

The problem of improving upon the gutta percha golf ball involved not merely the production of a ball of greater resiliency, but of a ball which, like the solid gutta percha ball, should be rigid and thus adapted for accuracy in putting, and also sufficiently durable for practical use, as well as more resilient and of longer flight.

According to the evidence of the appellant, the feature of superiority by which the new ball displaced the old was merely its longer flight. There is evidence to the effect that on the putting green the player accustomed to the old ball found the new ball more difficult to control, because under the light putting stroke, as well as under the heavier driving stroke, the ball ran farther than the old. The general adoption of the new ball by the players who had been accustomed to the old ball shows, however, that the advantage of longer flight overbalanced any disadvantages from greater liveliness on the putting green.

On the putting green there is, with either ball, no difficulty in applying an amount of force adequate to make the ball run to the hole. If in putting the new ball runs farther than the old, this is compensated for by using a little less force.

While the new ball doubtless required some modification of the mode of play of those who learned the game with the old ball, this

does not alter the fact that the new ball is well adapted to the requirements of all parts of the game. The player who has learned the game since the adoption of the new ball is not embarrassed by knowledge of the prior art of putting with the gutta percha ball, and the fact that the older players have universally adopted the new ball shows that, even if the new ball exhibits in all parts of the game a greater degree of resiliency than the old, it is still an efficient substitute for the old ball on all shots where there is with either ball no practical difficulty in applying an amount of force adequate for a short carry or run. When the force to be applied for the shot is rather a question of judgment than of physical ability, it might, perhaps, be said that the difference between the two balls is merely one of degree. We think, however, that the appellant's argument, that because on every shot the new ball exhibits qualities due to its greater resiliency the difference between the two balls simply amounts to a difference in degree, and not in mode of operation, is unsound.

The new ball is a projectile which, by reason of its specific differences of construction, has a much longer range of flight. Under the maximum force of the player this projectile will go much farther than any other. This quantitative gain in flight is a positive thing. It is a new result not obtainable with the older projectile. It results from new qualities of the ball itself. To obtain 20 or 25 yards more distance than with the old ball the player need only purchase the new ball, and need not change the strength of his stroke. The new result may possibly be due merely to the fact that the new ball is more resilient than the other; but this excess of resiliency is due to the new combination. In order to gain the extra distance the player utilizes qualities which are possessed by the new ball and not by the old ball.

As the new ball has within itself, so to speak, some 20 or 25 yards of distance not possessed by the old ball with respect to the driving stroke, it is substantially different in kind from the old ball.

Within the range of distance which the player can obtain with the gutta percha ball the difference is not so striking, for one ball can, with some changes in the force applied, be made to do what the other can do.

The new ball may be substituted for the old on all points of the game, but the converse is not true, since on the drive the old ball cannot be substituted for the new to obtain the same result.

We agree with the finding of the District Court that there is a class of strokes whereby the patented golf ball may be made to behave as if it had not that elasticity which it is capable of displaying under heavier strokes, and which, when so displayed, is greater (as is not disputed) than that of any previous golf ball.

If it be said that the greater resiliency of the new ball, or of its core, is evoked under the light strokes as well as under the heavier strokes, it may also be said that upon the putting green this greater resiliency is not used for the purpose of obtaining distance which the physical force of the player could not attain with the older ball, whereas in the driving strokes the resiliency or other qualities of the ball effects a result that otherwise was not within the physical power of

the player. In certain strokes he gets distance which he could not get with the old ball; in certain strokes he gets, with less expenditure of force, distance that he could get with the old ball; and in those strokes in which the player exerts but a slight amount of physical force, whether with the old or new ball, the new ball, like the old, may be made to putt steadily and accurately.

We find no error in the conclusion of the District Court that the patentees' core and shell in combination produce a new mode of operation, and that the patent is not void as disclosing no patentable invention.

The argument that the change from the former golf ball was obvious is of little force, in view of the lapse of half a century without the production of a ball having this special combination of elements. It does not seem on its face obvious that so large a gain in flight would result from combining a gutta percha shell and a core of rubber wound under high tension. The evidence from the defendant as to the difficulties of producing a thin shell of gutta percha that would withstand forcible blows, and of producing a rubber-wound core which should be a true sphere, tends to show that after the general conception of making a golf ball more resilient it was still necessary to determine what specific construction of core and of shell was necessary, and whether a practical composite ball could be made, having such gain of flight as was of substantial importance, and which in other respects could compare favorably with a homogeneous and acceptable golf ball.

We think it not safe to judge of the patentability of the ball by supposing it to be merely the embodiment of the general conception of giving greater resiliency by the use of rubber and thus making a livelier ball. The conception was much more specific than this, and comprehended a unitary structure that should not only be more resilient, but should meet the various requirements of the specific game for which the ball was devised.

The record discloses by prior patents and other evidence that a number of attempts were made by other inventors to improve golf balls. No one of these inventors hit upon the successful means of doing so that are disclosed in the patent in suit.

Upon the other questions in the case, including those of anticipation and infringement, we need add nothing to the careful opinion of the learned judge of the District Court.

The decree of the District Court is affirmed, and the case is remanded to that court for further proceedings in accordance with this opinion; and the appellee recovers costs in this court.

On Petition for Rehearing.

PER CURIAM. This petition for rehearing is in substance merely a renewal of contentions made at final hearing, fully examined and considered unsound.

The petitioner states:

"It would seem indisputable that the limitation of the claims called for specific thickness that must result in such degree of rigidity of the shell itself

that the ball is rendered substantially no more resilient than a solid ball on the usual strokes of the putting green."

We find in the patent no basis for such limitation of the claims, nor for the contention that the gutta percha shell must be of such thickness and so unyielding as to prevent a light stroke from evoking any of the elasticity of the rubber core; nor does the file wrapper disclose any sufficient reason for so limiting the claims.

We regard it as entirely immaterial that even on light strokes the new ball may exhibit somewhat greater resiliency than the old gutta percha ball.

By reason of the great resistance to deformation of shape, due both to the core of rubber thread wound under high tension and to the gutta percha shell, the patented ball remains rigid under moderate blows from a club, or from contact with the ground; and because it is then not deformed, or but very slightly deformed, it does not exhibit that quality of high resiliency which is evoked by a more powerful blow. Under a powerful blow the rigidity of both shell and core is overcome, the ball is greatly deformed in shape, and then exhibits that extraordinary degree of resiliency to which the patentees ascribe the long-driving qualities of the ball.

The defendant's contention that nonresiliency must be due to the thickness of the shell and resiliency to the core involves a fallacious division of a unitary structure, not justified by the specification nor by a fair construction of the description in the file wrapper, but contradicted by the specification, which very clearly states that both core and shell co-operate in preserving the rigidity of the ball. The ball has high rigidity in the sense of resistance to deformation, and is yet capable of very great deformation of shape under violent impact, as is indicated by the fact that after such impact the blackened face of a club exhibits a circle three-quarters of the diameter of the ball.

The patentees make no comparison between the action of the patented ball and of the gutta percha ball, except possibly such as may be implied in the statement, "Our golf ball has exceptionally high-driving qualities." The comparison is between the actions of the patented ball under impacts of different force.

The District Court correctly said:

"The shell of the patent is to be comparatively unyielding as regards the elastic core it incloses."

As the District Court found, and as we find, the defendant's shell meets this as well as the rest of the patentees' description of the shell.

The defense of noninfringement rests upon what we regard as an undue limitation of the claims. Upon what we regard as proper construction of the claims, we find them valid and infringed.

Petition for a rehearing denied.

BELSTEEL CO. et al. v. LORAIN STEEL CO.

(District Court, W. D. Pennsylvania. September 19, 1914.)

No. 25.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PORTABLE CROSS-OVER.

The Kerwin patent, No. 1,000,270, for a portable cross-over for temporarily connecting parallel street car tracks during repairs, etc, is void for anticipation and lack of invention, and the device is also of doubtful utility; also *held* not infringed, if conceded validity.

In Equity. Suit by the Belsteel Company and John Kerwin against the Lorain Steel Company. On final hearing. Decree for defendant.

Bakewell & Byrnes, of Pittsburgh, Pa., and Frank Parker Davis, of Chicago, Ill., for plaintiff.

J. E. Little, of Pittsburgh, Pa., for defendant.

ORR, District Judge. The bill in this case charges defendant with infringement of letters patent of the United States No. 1,000,270, issued to the plaintiff Kerwin and to one Robert Belknap on August 8, 1911, for a portable cross-over. The answer denies the validity of the patent for want of utility and invention and by reason of prior use and prior patents.

The title to the patent is in the plaintiffs in equal shares. The plaintiff corporation is a corporation of South Dakota. It is merely the licensing company. Neither of the plaintiffs manufacture the apparatus of the patent. A number of licenses have been granted, but up to the time of trial royalties had come but from two of the licensees.

The patentee in his specification gives a statement of the uses of cross-overs, an explanation of inconveniences in the use of ordinary cross-overs, and a declaration of his object in the following words:

"My invention relates particularly to portable cross-overs for use in repairing street railroad or other simlar tracks, where there are two or more parallel tracks used to accommodate the traffic in opposite directions. When repairs are to be made along such a line of tracks, it is customary to treat a comparatively short section of one track at a time, and for this purpose the traffic is customarily shunted around the section undergoing repairs, on the parallel track, which is used for the time being for traffic in both directions; temporary cross-overs being necessarily installed beyond each end of the portion of track which is out of commission to transfer the traffic to and from the adjoining track. It has been necessary heretofore to construct these temporary cross-overs in situ; the rails, frogs, and other necessary parts of the cross-over being conveyed to the place where it is to be located and there assembled. The disadvantage and inconvenience of this method of constructing cross-overs has long been recognized, and it has been proposed to avoid the same by so constructing the cross-overs that they may be in the main carried on a suitable car in an assembled condition. With this in view, the parts have been made as light and few as possible. But even so it has been found impracticable to handle and convey the cross-overs in this manner, so that to the best of my knowledge no such devices have ever gone into actual use.

"It is the object of my invention to construct a portable cross-over that may be conveyed from place to place without being knocked down or disassembled, and which may be readily handled by the means ordinarily at the disposal of those engaged in such repair work. With this object in view

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

I construct a cross-over of material which may be of the usual weight and strength, and which is preferably of the standard form employed where the cross-over is set up in situ. It is equipped, however, with suitable means whereby it may be hauled or slid on the rails of the track to be repaired; suitable traction means, such as electric or other motors or horses, being employed for that purpose."

The claims of the patent are as follows:

"1. A cross-over having pairs of longitudinal rails and cross-over rails rigidly connected together, means on the rails adapted to engage the permanent rails, the cross-over as a unitary structure being free to slide longitudinally upon the permanent rails.

"2. A portable cross-over having the usual longitudinal rails and cross-over rails, shoes upon the longitudinal rails adapted to engage and slide upon the rails of a permanent trackway, and tie rods connecting the rails of the cross-over formed with shoulders and reduced ends, the ends being slotted and provided with keys."

The elements of claim 1 need only be considered, because additional elements found in claim 2, to wit, the slotted tie rods, etc., are not used by either of the parties and are not involved in the controversy. The elements of claim 1 are: (a) Pairs of longitudinal rails; (b) pairs of cross-over rails; (c) rigid construction; and (d) means on the rails adapted to engage the permanent rails.

Reserving for further consideration the claim of freedom of movement on the permanent rails, the foregoing elements may be considered in few words. They are all found in each of the following United States patents: No. 72,185, to B. C. Galoin, dated December 17, 1867, for an improved railway switch; No. 73,071, to T. G. Beecher, dated January 7, 1868, for railway switch; No. 381,874 to A. V. Du Pont, dated April 24, 1888, for portable connecting switch; and No. 678,987, to H. C. Stiff, dated July 23, 1901, for portable connecting track. The mere examination of these patents is all that is necessary to reach that conclusion.

It is a fair conclusion from all the evidence that plaintiffs base their allegation of patentable novelty upon the capacity of their structure to slide. Their evidence and arguments were especially directed to the fact that their structure was one adapted to slide upon the permanent rails. While that is a fact the movement as contemplated by the patentee is limited to straight permanent tracks. The structure of the plaintiffs rests upon shoes, which are of such construction and bear such relation to the permanent track that a portion of the shoe fits into the groove of the permanent track. This prevents lateral movement of the rails of the cross-over with respect to the permanent tracks, and permits movement along the permanent tracks when sufficient force is applied. Shoes, however, possessing the same function, have been long used in the making of cross-overs.

The defendant company is successor of a corporation referred to the record as the Johnson Company. The defendant and its predecessors, for 26 years and upwards, have been making portable cross-overs under various patents, notably the Du Pont patent hereinabove mentioned. The early cross-overs were as light as possible, having due regard to the uses for which they were intended. Specially was it deemed desirable that the tracks of the cross-overs should not be ele-

vated above the surfaces of the streets to such a degree as to interfere with travel. To prevent their longitudinal movement as the cars entered thereon, they were clamped to the permanent rails or fastened to the bed of the roads. To prevent their lateral movement with respect to the permanent rails, many of the cross-overs rested upon and were riveted to pieces of metal, in the nature of shoes, whose sides projected downward on each side of the permanent rail, thus preventing the lateral movement. Some were made with pieces of metal, in the nature of shoes, having on one side extending downward a flange to engage one side of the permanent rails, and having an extension downward in or near the center of the lower part of the shoe to engage in the slot of the permanent rail, at least to such an extent as to operate in connection with the downward flange to prevent the lateral movement. It is a fair conclusion from the evidence that at no time was there a cross-over standardized with respect to its length, because of various widths between the permanent tracks upon which one might be used.

The defendant, as early as 1905, at least, made a cross-over, known in the case as the "Philadelphia cross-over," according to the needs of the Philadelphia Traction Company, as demanded by the engineers of that company. That cross-over was of very rigid construction, with much heavier rails than appear to have been earlier used. It had shoes on it similar in form to the Kerwin shoe, except that they were not so thick as the Kerwin shoe and the ends were not rounded. The fact must be found that that cross-over was adapted to slide, if the fastenings to the permanent rails were removed. Many of the cross-overs made prior to that time were adapted to slide when sufficient force was applied to them, as in one instance when crowbars were used, causing the cross-over to slide from place to place along a straight track as required.

There was introduced into the case a letter from the chief engineer of the Lorain Steel Company and drawings made by the Lorain Steel Company as in accordance with the requirement of the Indianapolis Traction Company for a cross-over to be made for the latter. This cross-over was never built, yet that letter and the drawings contemplated the use of fairly heavy T-rails and great rigidity of structure. These were not admitted as showing prior use, but as throwing light upon the state of the art to which the patent in suit related at their date in 1906.

The demand for heavy cross-overs of rigid construction is due to the increased weight of the cars which they are required to support. The use of T-rails and the numerous tie rods and bracings, as they appear in the plaintiffs' structure, cause the top of the structure when in use to be about 7½ inches above the level of the street in which it is used. Such an obstruction would seriously interfere with the travel on the street, and creates grave doubts of the utility of the plaintiffs' device. It is a matter of common knowledge that in many municipalities the streets are so narrow that, when one street railway track is being repaired, the street could not be used if there was an obstruction on the

other track to the height of 7½ inches, with its exposed rails and tie rods.

Looking at the plaintiffs' device in every aspect of the case, we are satisfied that there was no invention in making the cross-over strong and rigid, that the apparatus as designed to be used is of doubtful utility, and that all the elements of the claim in dispute are met together in the prior art. Further, the elements of the patent as combined do not perform a new function, for anything can be moved if it be strong enough to resist obstructions and sufficient force can be applied. The patent, therefore, is invalid.

A few words only are necessary with respect to the question of infringement. There was no evidence that the defendant ever did slide a cross-over. The cross-overs made by it, according to the admitted drawings, are not more adapted to slide than were the old cross-overs made by it. The shoes upon which the cross-over rests are not imitations of the shoe of the patent. They are of a different design. They have the same functions, however, as the old shoes of the defendant. The defendant could not be enjoined from sliding its old cross-overs resting upon the old shoes. Therefore it should not be enjoined from making the cross-over complained of, if purchasers from it see fit to make it slide.

It follows, therefore, that the patent is void, and that no infringement was proved, and therefore the bill must be dismissed, at plaintiffs' costs.

Let a decree be presented.

McCASKEY REGISTER CO. v. MANTZ.

(District Court, N. D. New York. October 31, 1914.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ACCOUNT-RECORDING APPLIANCES.

The McCaskey patent, No. 783,126, for account-recording appliances, discloses patentable novelty and invention, and is valid, but, in view of the prior art, is of very narrow scope, and with a narrow range of equivalents; as so construed, *held* not infringed.

2. PATENTS (§ 22*)—PATENTABILITY—"EQUIVALENT"—"SUBSTITUTE."

An "equivalent," in patent law, is not the same as a "substitute."

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. § 22.*

For other definitions, see Words and Phrases, First and Second Series, Equivalent.]

In Equity. Suit by the McCaskey Register Company against George L. Mantz for infringement of letters patent No. 783,126, for account-recording appliances, granted February 21, 1905, to Perry A. McCaskey. On final hearing. Decree for defendant.

Chas. B. Mason, of Utica, N. Y., Edw. R. Alexander, of Washington, D. C., and Harry Frease, of Canton, Ohio, for complainant.

Miner G. Norton, of Cleveland, Ohio, for defendant.

---

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

RAY, District Judge. The patent in suit, No. 783,126, to Perry A. McCaskey, relates to systems for keeping records of credit sales of merchandise and also the cash payments thereon, and was granted February 21, 1905, on application filed April 27, 1904. It has novelty and new features and great utility. Claims 12, 13, 15, and 22 are in issue here. Claims 2, 13, 15, and 22 have been the subject of former litigation in McCaskey Register Co. v. Divens (C. C.) 181 Fed. 171, affirmed 194 Fed. 967, 114 C. C. A. 603. It was held at circuit that the claims in issue there "must be limited to the new and *precise* devices as shown in the drawings and specification." The Circuit Court of Appeals (Third Circuit) on this subject said:

"From what has been said, it is obvious that the patent is a very narrow one, and that, if it is sustained, it must be narrowly construed, and practically confined to its exact disclosures. No broad construction is permissible, nor can the doctrine of equivalents be applied, without encountering the prior art and destroying the patent. Thus construed, the defendant has not infringed."

[1] It is seen that the validity of the patent and of the claims in issue, the same as here with one exception, were conceded by the Circuit Court of Appeals. There can be no serious question on this subject, and this court also finds the patent and all the claims in issue here valid. The real question is that of infringement, which incidentally, of course, involves that of construction. This art is in no sense a very old one, and it is far from crowded, so far as this record shows. Bill files and bill holders and receptacles for storing and preserving papers are, of course, very old; but they are not really of the prior art we are considering and to which the McCaskey patent in suit belongs. In patent of October 10, 1899, to Yorger and West for "store cabinet for sales accounts," it is said:

"Our invention relates to devices for the use of merchants for facilitating and simplifying business transactions connected with the selling of goods on a credit system; and it consists in a convenient cabinet, embodying new and novel elements in the construction thereof, whereby billing-forms are retained and on which the names of purchasers are entered in alphabetical order, together with the entries of their purchases at the moment of making the sale, and whereby the bill of any purchaser may be instantly referred to for making subsequent charges, or for summing up and rendering statement of account.

"Our invention consists, further, in the parts and combination and arrangement of parts embraced in the details of construction, as will be hereinafter described, and pointed out in the claims. In conducting a retail store, much detail work is required, with great possibilities of errors, in keeping the accounts of those to whom credit is given, entailing considerable expense in the keeping of account books, usually involving the multiplication of entries, all of which is a serious loss to the merchant, particularly in cases where the entries of sales may be inadvertently omitted in crowded hours.

"Our object is to provide a simple and convenient means whereby the ordinary billing-forms may be substituted for the usual system of books in making sales entries and rendering the transferring of accounts from book to book unnecessary, so that the original entries stand until liquidated. A further object is to provide equally convenient receptacles wherein the bills, as the sheets become filled up and accumulate, may be placed so as to be readily accessible when rendering accounts for settlement. These objects are fully attained in our invention, which is, furthermore, of utility in being portable, so that the accounts may be transferred, when desired, to a safe, and it is cheaply manufactured and durable and economical in use."

This was followed in November, 1900, by a patent to Braddock, No. 661,710, and patent to Huber, No. 708,230, in 1902, and this by a patent to McCaskey, No. 717,247, applied for September 19, 1902, and issued December 30, 1902, and that was followed by the patent in suit, and is, of course an improvement on his former device. Probably McCaskey's patent of 1902 taught him something, but it was his own invention. Whatever instruction it gave was from himself. It was, of course, in the prior art when he made his discovery and invention of 1904, the patent in suit. He could not have two patents for the same thing, but could have a later patent for an improvement, or for something discovered or invented in 1902, but not patented until 1904, provided it was not disclosed and abandoned to the public.

A mere reading of the claims and specification of the two McCaskey patents show clearly that the second is an advance on and an improvement over the first, and its patentability is presumed until the contrary is proved. The last is better than the first, and those who copy it and the improved features may be assumed to do so for the reason they, too, see some advantage in so doing, some advance over that which has gone before.

The claims in issue read as follows:

"12. Account-recording appliances, including a bill-holder frame, bill-holders mounted on the frame and having pairs of apertures therein, bill-clamps mounted oppositely on both sides of the bill-holders and having members extending through the apertures to opposite sides thereof, the bill-clamps on both sides of the bill-holders extending from the apertures in the same direction.

"13. Account-recording appliances, including pivoted bill-holders, bill-clamps mounted on the bill-holders, tab-holders attached to the bill-clamps near the free ends thereof, and index-tabs mounted on the tab-holders.

* * * * * * * * * *

"15. Account-recording appliances, including a bill-holder frame, bill-holders mounted on the frame and having pairs of apertures therein, bill-clamps mounted oppositely on both sides of the bill-holders and having members extending through the apertures to opposite sides thereof, and rubbing-strips on the bill-holders in pairs on opposing holders and co-operating one with another.

* * * * * * * * * *

"22. In account-recording appliances, the combination, with a plurality of pivoted bill-holders, of a plurality of bill-clamps mounted on the holders, tab-holders attached to the bill-clamps, and index-tabs attached to the tab-holders."

Claim 12 calls for, in combination, account-recording appliances, including:

(1) Bill-holder frame.

(2) Bill-holders mounted on the frame, and having pairs of apertures therein.

(3) Bill-clamps mounted oppositely on both sides of the bill-holders and having members extending through the apertures to opposite sides thereof; the bill-clamps on both sides of the bill-holders extending from the apertures in the same direction.

Claim 13 calls for, in combination, account-recording appliances, including:

(1) Pivoted bill-holders.

(2) Bill-clamps mounted on the bill-holders.

(3) Tab-holders attached to the bill-clamps near the free ends thereof.

(4) Index-tabs mounted on the tab-holders.

Claim 15 calls for, in combination, account-recording appliances, including:

(1) A bill-holder frame.

(2) Bill-holders mounted on the frame and having pairs of apertures therein.

(3) Bill-clamps mounted oppositely on both sides of the bill-holders and having members extending through the apertures to opposite sides thereof.

(4) Rubbing-strips on the bill-holders in pairs on opposing holders and co-operating one with another.

Claim 22 calls for, in account recording appliances:

(1) In combination with a plurality *of pivoted bill-holders,*

(2) A plurality of bill-clamps mounted on the holders, and

(3) Tab-holders attached to the bill-clamps, and

(4) Index-tabs attached to the tab-holders.

I agree that, to infringe, the defendant must use substantially one or more of these devices as described in the patent and that the range of equivalents is very limited. It cannot be said, in view of the prior art, that such a combination is new, except in a very limited sense, and in, we may say, minor matters.

As to claim 12, defendant insists that its device does not have any bill-holder frame, or anything in the place of it which answers to the bill-holder frame, of the patent in suit, and that therefore there is no infringement. In defendant's device the bills are held in a booklike form, and the leaves are connected to the back in the same manner that leaves in an ordinary book are held. In a sense the bill-holders are mounted on this back, as they are attached to it and held by it. Defendant's bill-holders are hinged or pivoted to the back of this booklike structure.

It is true that in the patent in suit, which calls for a bill-holder frame in claim 12, the frame is of special construction. I do not think the defendant's device has a bill-holder frame which, in view of the prior art, answers to the bill-holder frame of the patent in suit, or one which can be regarded as an allowable equivalent therefor. The patent says of the bill-holder frame:

"The bill-holder frame comprises a base *H* and two similarly formed upright ends, as *I*, attached to the base, the frame being removably seated in the case on the bottom thereof behind the ledge *G* and bearing against the back *k*. The frame ends are provided with metal cap plates *J J*, having each a number of arched caps *J'* formed integrally therewith, so that bearings *l* are provided, in which coiled springs *K* are seated. The frame ends are provided at their inner sides with locking pins *m*, and the springs have arms engaging the pins, the opposite ends of the springs having arms *p* having bends *q* and adapted when not in use to lie upon the caps *J'*. The back *k* is provided with a catch *r*, that is engaged by a latch *s*, that is connected to the base *H* by a pivot *t*, the latch having an upturned finger piece *u*. The frame also includes a pair of bearing plates *L L'*, attached to the outer sides of the frame ends, the plates having slots *v* in the upper edges thereof forming bearings for the bill-holder pivots. The bill-holder frame is provided with a yoke comprising a pair of arms *M* and *M'*, that are connected to the lower portions

of the frame ends at the outer sides thereof, by pivots *z*, the arms having at the free ends thereof an integral crossbar *N*, which is provided with a down-turned hook *w*."

Nothing like this is found in defendant's structure. The patent in suit is not a pioneer. I am of the opinion that defendant's structure does not infringe claim 12.

As to claim 13 there is quite a wide and a marked difference between the patent in suit and defendant's alleged infringing device. The patent calls for pivoted bill-holders. These defendant has. The claim then calls for bill-clamps mounted on the bill-holders, and tab-holders attached to these clamps and "near the free ends thereof"; also for index-tabs mounted on the tab-holders. These are essential and necessary elements in the combination. The defendant insists that its structure does not have either tab-holders or index-tabs, inasmuch as he uses a metal plate attached to the bill-clamp and which is not near the free end thereof, but near the middle thereof, and that on this metal plate letters or numbers are either printed or painted. Claim 13 calls for tab-holders attached to the bill-clamps, and the defendant has this metal plate, which is attached to the bill-clamp, but not near the free end thereof, as the patent says it must be. The patent then calls for index-tabs mounted on the tab-holders.

[2] Assuming that these metal plates are tab-holders, can we say that claim 13 is infringed when the defendant, instead of mounting index-tabs on the tab-holders, these metal plates, simply prints or paints letters or numbers thereon. The numbers or letters are painted on the plates or tab-holders, if we assume that the metal plates are tab-holders, and such index-tabs, letters, or numbers form an integral part of the tab-holders. In point of fact we have a tab-holder (metal plate) and no removable tabs at all, but letters, figures, or numbers painted on the plate. This may be the equivalent in utility of separate index-tabs mounted on the tab-holders. But is the paint or print of a number or a letter on a metal plate, which is a tab-holder, mounting an index-tab on the tab-holder? Does not the patent contemplate that the tab-holder is a separate and distinct thing, independent of the index-tab, but that in the combination the index-tab is to be attached to, in some manner, the tab-holder, or inserted therein? I think this true, as is plainly indicated in Figs. 9, 10, and especially 14, of the patent, and the specification says:

"Each bill-clamp is provided with a tab-holder *Q*, Fig. 14, having a tab *r*, containing index numbers running in regular order, and in some cases the names of customers may be written on the tabs beside the numbers, particularly when customers carry number pass books having detachable duplicate bills or invoices that may not contain the names of the customers."

I think the index-tab of the patent in suit is a separate and distinct thing from the tab-holder, and that, if the plate spoken of is a tab-holder in the sense of the patent, there is an absence of the index-tab of the patent, and I do not think that the piece of metal attached to the bill-clamps with a number or letter painted thereon is the equivalent of a tab-holder attached to the bill-clamp near the free end thereof and of an index-tab mounted on the tab-holders. It may in a way answer the

same purpose, but it leaves out one element of the claim. With a tab-holder attached to the bill-clamp, on which may be mounted and from which may be dismounted at will index-tabs containing the figures, numbers, or names, or both, we have the power to interchange the index-tabs, remove one, and substitute another by hand, while in defendant's structure, to accomplish such a purpose, it would be necessary by scraping or in some other mode to remove the letters, numbers, or name from the plate and then repaint with others. I think such devices as defendant's for such a purpose were very old, and that he has the right to use them without infringing the patent in suit. An equivalent is something different from a substitute.

In this connection it may be said that I am unable to discern any particular difference between claim 13 and claim 22. The language differs. I discern no difference between pivoted bill-holders and a plurality of pivoted bill-holders, and no difference between bill-clamps mounted on the bill-holders and a plurality of bill-clamps mounted on the holders, and tab-holders attached to the bill-clamps and index-tabs mounted on the tab-holders, and tab-holders attached to the bill-clamps and index-tabs attached to the tab-holders. The index-tabs in claim 13 are "mounted" on the tab-holders, while in claim 22 the index-tabs are attached to the tab-holders. Claim 22 also differs from claim 13, in that in claim 13 the tab-holders are "attached" to the bill-clamps near the free ends thereof, while in claim 22 nothing is said as to the location of the tab-holders on the bill-clamps. I regard this location of the bill-clamps as entirely immaterial. However, if "attached" in claim 22 means something different from "mounted" in claim 13, we may assume that the metal plate referred to is a tab-holder, and that painted or printed letters or numbers on the metal plate is attaching an index-tab to such tab-holder. It strikes me that this is a strained and an unnatural construction, and not warranted, and that infringement of claim 22 by defendant cannot be built up on such a theory. I find nothing in the specification that would warrant such a construction.

We have in the patent in suit several thin metal plates, or bill-holders, with apertures therein for holding bill-clamps, which in turn hold the bills, and these clamps are on both sides of the bill-holders, utilizing the same apertures in complainant's device for both. In complainant's device these bill-clamps have *tab-holders* mounted thereon or attached thereto and index-tabs mounted on the holders. Between the bill-holders and attached thereto we have rubbing-strips to prevent the bills and bill-clamps on one holder from coming in contact with those on the adjoining one. Those rubber strips are an old and a simple device for such a purpose. In combination, the advance on the prior art has, I think, and as said before, patentable novelty; but the range of allowable equivalents, in view of the prior art, is so limited, and the claims, in view of the specification, are so narrow, I am unable to find infringement. The metal plates or bill-holders in both complainant's and defendant's structures are pivoted in a way, but not in the same way, to a back. In the one case we have a frame back, with other parts particularly described; and in defendant's a back simply, to which the metal sheets or bill-holders are attached. I think it very

clear, in view of the language of complainant's patent and the prior art, that defendant does not have a frame on which the bill-holders are mounted; that is, a frame in the sense of the patent in suit. It must be kept in mind that this frame is not the case in which the whole structure in question is inclosed.

On the whole, I am unable to find infringement of either of the claims in issue. There will be a decree dismissing the bill, with costs.

WITHOFT v. ANDREWS.

SAME v. CUTTING.

(District Court, N. D. California, First Division. August 31, 1914.)

Nos. 15352, 15353.

BANKRUPTCY (§ 165*)—PREFERENCES—SECURITY—RECEIPT OF PREFERENCE.

Each of the defendants, directors of the bankrupt corporation, having advanced to it sums aggregating more than $5,000 each, and the company being in need of $1,000 more, one of the director's wives agreed to advance such additional sum on receiving a mortgage from the corporation, which it was agreed as a part of the same transaction should secure $3,500 of the amount advanced to each of the directors. To carry out this arrangement, the mortgage was executed by the corporation for $8,000 to the wife, and she gave a check to the corporation for $8,000, with the understanding that it should give to each of the defendants its check for $3,500, which should be immediately indorsed by defendants and delivered to her. *Held*, that such transaction did not constitute a receipt of $3,500 by each of the defendants, and hence such sum was not recoverable from them by the bankrupt's trustees as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

At Law. Separate actions by T. W. Withoft, as trustee in bankruptcy, etc., against Jesse S. Andrews and against H. C. Cutting. Judgments for defendants.

Mansfield & Newmark, of San Francisco, Cal., for plaintiff.
Wm. H. H. Hart, of San Francisco, Cal., for defendants.

DOOLING, District Judge. These are actions by a trustee in bankruptcy to recover from each defendant the sum of $3,500, alleged to have been received from the bankrupt as preferential payments. Much testimony was taken, which it is not necessary to review, in view of the fact that neither defendant, either in fact or in law, received the amount sued for, or any portion thereof. In this regard the facts are as follows:

Between February and July, 1910, the defendant Cutting, who was a director of the bankrupt corporation, advanced to it various sums, aggregating $5,500, and between April and July of the same year the defendant Andrews, also a director, advanced various sums, aggregating $5,225. On September 2d the company, being in need of $1,000 with which to pay interest upon an outstanding mortgage, Mrs. Andrews, wife of one of the defendants, agreed to lend this sum upon

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

another mortgage. It was also agreed, as part of the same transaction, that $3,500 of the amount advanced by each defendant should be included in this mortgage, for the purpose of securing to him the payment of that much of his claim against the company. This was done, and the mortgage to Mrs. Andrews was made for $8,000, instead of for $1,000, and she gave a check to the company for $8,000, with the understanding that the company should give to each defendant its check for $3,500, and that the checks should be immediately indorsed by the defendants and delivered to her. This arrangement was carried out. The delivery of her check to the company was immediately followed by the delivery of the company's check to each of the defendants, and the indorsement and transfer of the checks to her. The effect of this transaction was not the receipt of any money by the defendants, nor the payment of their claims, but the securing by the Andrews mortgage of their claims to the extent of $3,500 each. It was a roundabout and unnecessary method to pursue to accomplish this; but the method is not material, considering the purpose and effect of the transaction as a whole. Neither of the defendants has received anything from the mortgage, and probably never will. It would be unjust, therefore, to compel them to pay $3,500 each to the trustee, in addition to the amounts which they have already advanced to the bankrupt company.

Judgment will therefore be entered in their favor.

GROSSO v. BUTTE ELECTRIC RY. CO. et al.

(District Court, D. Montana. October 28, 1914.)

No. 176.

REMOVAL OF CAUSES (§ 30*)—GROUNDS—DIVERSITY OF CITIZENSHIP—DEFENDANTS—RESIDENT SERVANT.

Plaintiff brought suit against a foreign street railway company and two of its resident servants for injuries to plaintiff as a passenger, charging that the servants were respectively conductor and motorman of the car in which plaintiff was riding at the time of the injury. The names of the servants being unknown, they were designated as John Doe and Richard Roe, as permitted by the statutes of the state. *Held*, that since the status of the parties, whether nominal or otherwise, depends on their relation to the controversy, and not on their designation, and substantial relief having been asked against them, they could not be treated as mere nominal parties, though not served, and, they being of the same citizenship as plaintiff, the action could not be removed by the nonresident defendant.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 70; Dec. Dig. § 30.*]

At Law. Action by Margherit Grosso against the Butte Electric Railway Company and others. On motion to remand the cause to the state court. Granted.

Alex Levinski and Nolan & Donovan, all of Butte, Mont., for plaintiff.

Shelton & Furman, Peter Breen, and A. J. Verheyen, all of Butte, Mont., for defendant.

---

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

BOURQUIN, District Judge. On motion to remand. Defendants are a foreign street railway corporation and its servants, jointly against whom plaintiff brings this a passenger's action for personal injuries due to the servants' negligence. The servants are designated John Doe and Richard Roe, true names unknown, respectively conductor and motorman of the car wherein plaintiff was passenger. The corporation removed the case hither for diverse citizenship. Its contention is that the servants, being designated by fictitious names and not served with process prior to removal, are merely nominal or formal parties, who can be ignored in removal. To this it cites Parkinson v. Barr (C. C.) 105 Fed. 82, and Loop v. Winters' Estate (C. C.) 115 Fed. 366.

These cases so hold, but therein they are not supported by the authorities upon which they purport to rely, and have no foundation in principle. The statutes of this state authorize designation of defendants by fictitious names when their true names are unknown to the plaintiff. The status of parties, whether formal or otherwise, does not depend upon the names by which they are designated, but upon their relation to the controversy involved, its effect upon their interests, and whether judgment is sought against them. When, as here, the cause of action is against them, and substantial relief sought against them, they are real parties in interest. Here, though designated by fictitious names, their citizenship is vital on removal, and, not appearing herein, removal was unwarranted.

Remand ordered. Costs to plaintiff.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (four cases).

(District Court, S. D. New York. September 28, 1914.)

Nos. 2—9, 2—33, 2—149, and 3—37.

1. STREET RAILROADS (§ 49*)—LEASE—CONSTRUCTION.

A provision in a lease of a street railroad system, requiring the lessee, "upon the expiration or earlier termination of this lease (to) deliver up the said demised railroads and other property and all additions thereto in good order and repair," binds it, where it has replaced rails or other parts of the roadway with heavier rails or more expensive parts, to return the structure as thus improved in good order and repair, but, where it has not made such betterments before the termination of the lease, the obligation is merely to keep the existing type of structure in such condition.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

2. STREET RAILROADS (§ 49*)—LEASE—LIABILITY OF LESSEE—COVENANT TO RETURN PROPERTY IN GOOD ORDER AND REPAIR—"GOOD ORDER AND REPAIR."

Such lease having been terminated by the insolvency of the lessee and the appointment of receivers for both lessee and lessor, who operated the roads for the latter for four years or more, where there was evidence that, at the time of the receivership, a considerable portion of the lines needed new rails to place the roadway in good condition and repair, although, owing to the financial condition of the lessee, the old rails were not being replaced, the fact that the lines could be operated, and that

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

the rails were not at once replaced by the receivers, but the work was continued through three or four years as funds and conditions permitted. does not warrant a finding that the tracks and roadway were in "good order and repair," within the meaning of the lease, at the time of its termination, nor a limitation of the liability of the lessee thereunder to the cost of such replacements as were made within any fixed time after the receivership.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*

For other definitions, see Words and Phrases, First and Second Series, Good Order and Condition.]

3. STREET RAILROADS (§ 49*)—LEASE—COVENANT TO RETURN PROPERTY IN GOOD ORDER AND REPAIR.

Under a covenant, in a lease of street railroad property, to deliver up the same upon the expiration or earlier termination of the lease, with all additions thereto, in "good order and repair," the condition of the property at the time of the lease is immaterial in determining the liability of the lessee for breach of such covenant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

4. STREET RAILROADS (§ 49*)—LEASE—LIABILITY OF LESSEE.

In a lease of a street railroad system, which operated as an assignment of prior leases, under which the lessor held certain of the lines in the system, the lessee covenanted in effect to perform the conditions of the prior leases so long as its own lease continued in force. On the termination of the lease by the insolvency of the lessee and the appointment of receivers for both lessee and lessor, the receivers of the lessor surrendered such leased lines to the original lessors, who were subsequently awarded damages for breaches of their leases, which were made charges upon the estates of both their lessee and its assignee. *Held* that, as to such damages, the assignee was the principal debtor, and its lessor the surety, and that, on an accounting between them, the lessor was entitled to recover only so much as it should be required to pay to its own lessors.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

5. STREET RAILROADS (§ 49*)—LEASE—ACCOUNTING BETWEEN RECEIVERS OF LESSOR AND LESSEE.

Various items of claim and counterclaim considered and disposed of on the evidence on an accounting between the receivers of the lessor and the lessee of a street railroad company after the termination of the lease.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and others, with three other cases. In the matter of the claim of the Metropolitan Street Railway Company against the New York City Railway Company for breach of lease, and petition of the receiver of the New York City Railway Company against the receiver of the Metropolitan Street Railway Company for an accounting. On exceptions to reports of special master. Exceptions sustained in part.

The following is the opinion of the special master:

The items of damage for breaches of covenants in the Metropolitan-City lease are herein disposed of substantially in the order in which they have been presented in the briefs of counsel; the amount claimed in claimant's briefs being stated in parentheses.

(1) For failure to keep in the stipulated condition the track and roadway of the underground electric lines ($1,683,375.66); the special work in connec-

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

tion with such lines ($316,956.06) and the track and roadway of the horse car lines ($165,376) in the Metropolitan System on September 24, 1907.

Counsel for the respondent City receiver insists that these items must be dismissed, because there is no proof of the condition of the rails and special work connected therewith on February 14, 1902, when the covenants went into effect. The City Company, it is said, is liable only for the expense of putting the road in the shape it was in when it took the property over, as otherwise it might be compelled to turn over in 1907 a much better road than it received in 1902. There is no such proof, but the answer to this contention is to be found in the promise of the City Company, contained in the fifth paragraph of the lease, "upon the expiration or earlier termination of this lease (to) deliver up said demised railroads and other property and all additions thereto in good order and repair." Whatever the meaning may be of the ordinary covenant contained in the first paragraph that "the lessee shall at all times * * * keep in good working order, condition and repair at its own expense all of said demised lines of railroad," it is clear that, when the lease ended, it was intended by the parties that the properties, when turned back, should be in good order and repair. The condition when the lease was made is therefore immaterial. For the same reason I do not agree with the contention that the claimant can recover only the cost of putting in rails of the same character as were there at the time the lease was made and not rails of a heavier or more expensive type. One of the purposes of the lease was the betterment of properties demised, and it contains elaborate provisions for the raising and expenditure of large sums to that end, and, where that had been done, the obligation to turn bettered properties back in good order and condition accrued. Where it had not been done at the termination of the lease, however, I think that no such obligation did accrue, and that the installation of heavier and more expensive rails during the receivership than were there when it began, necessitated by the introduction of steel wheels, or of pay-as-you-enter cars, and like causes, is a betterment, and that the respondent is not chargeable with the excess cost, as the claimant is here seeking to charge him. Such actual expenditures as are hereinafter considered in these connections as suggesting proper allowances should be diminished by such excess, if any, in determining the damages.

I think it must be concluded from the testimony of the claimant's engineer of way that most, if not all, of the lines, owned or leased, in the Metropolitan System, on September 24 or October 1, 1907, were not in what could be described as good order and repair. If by no other fact, this inference would be suggested by the length of time the tracks had been down and in use on those dates. This does not mean, however, that the claimant, as of those dates, is entitled to brand new lines of tracks throughout the system, and that the respondent estate is to be assessed at the cost of installing such. If from the evidence a sum can be arrived at sufficient to put the road in a condition for safe operation for a reasonable time after surrender, that, it seems to me, is the full measure of respondent's liability for the breach on these dates and must be accepted rather than the cost of building new lines which in some instances at least is what the claimant's figures suggest. In connection with the electric lines, the sums claimed above mentioned represent the entire amounts expended by the Metropolitan receivers for track renewal, which includes repaving in the railroad area and for special work not only in the year following the receivership but in the years 1909 and 1910, and even in the year 1911, at the end of which they ceased to operate, as well. Claims respecting certain of the lines may be summarized for the purpose of illustrating the extremity of the contention. Thus of the above amounts claimed there were expended on the Eighth Avenue line $518,050 for track renewal and $15,103.23 for special work, but none of its rails was renewed until 1910, when $283,000 were spent; the balance of $234,000 odd being expended in 1911. When the work was completed, a new track, heavier and more expensive than was there in 1907, with a repavement of the railway area throughout the route from Canal street to the Harlem, had been laid good for from 10 to 12 years, and its cost, it is insisted, measures the liability of the City Company for the breach of its covenant, although the respondent receivers had operated the lines for two years and a half before renewing any of the rails. The claims made respecting the Madison Avenue and Broadway lines present

similar facts not less extreme when all the circumstances are considered. Thus in the Madison Avenue line $322,730 is claimed for track renewal and $64,061 for special work. Of this amount, track renewal, for which $168,016 were expended, was not begun until March 21, 1910, the balance being expended in 1908 between 42d and 72d streets on Madison avenue, and of this balance $94,961 was for the installation of track in November of 1908, necessitated by the introduction of the very heavy pay-as-you-enter cars not in use prior to the receivership, which track, as a letter of the receivers to the Public Service Commission shows, had not been marked for renewal earlier than the spring of 1909. When the whole work was completed, a new and heavier track had been installed and the street repaved substantially from the city hall to the Harlem. On the Broadway line for track renewal, the sum of $369,513 is claimed, and it represents the cost of renewing practically the whole line from Bowling Green to 50th street with new and heavier track. Of this work $35,440 was begun July 17, 1909, $240,609 on August 26, 1908, 11 months after the receivership began, and the balance in 1909 and 1910. Of lines leased and owned there were some 19 in the Metropolitan System, exclusive of the Second and Third Avenue and Central Park lines, which subsequently went out of it and are not in this connection considered, and on 16 of the 19, including the 3 described, track renewal or special work or both were done during the 4 years and odd of receiver's operation, no claim being made on the remaining 3, which were crosstown lines and are evidently regarded by claimant as in a condition which complied with the covenant. Respecting many of the 13 lines on which work was done, questions not unlike those summarized in connection with the 3 lines referred to are suggested by the facts, and it may be said of all of them that they present generally the question as to whether the cost of new and better track and special work distributed over 4½ years after the beginning of the receivership, when none of the work renewed had been marked for renewal when the receivership began, and where the lines had been operated during the whole period, suggests a just measure of the damages caused by any breach of the City Company's covenants that may have existed at the beginning of the receivership. I am of the opinion, based on the results of the cross and redirect examination of Mr. Dougan, that it does not, for reasons which I shall attempt to indicate briefly.

Both parties refer to the Second Avenue breach of lease proceeding against the Metropolitan, the claimant to the figure there adopted, based on the testimony of the same witness as to the estimated but not actual cost of putting the lines of that company in repair, and the respondent to the testimony itself. In considering that conclusion and testimony, the circumstances under which the testimony was given must be recalled. There this claimant's ox was in process of being gored, and Mr. Dougan's testimony was proffered in support of a figure very much less than the damage urged by claimant there, though more than a lesser figure urged by the Metropolitan receivers, based on emergency repairs made by the there claimant receiver, and it was adopted, as the memorandum shows, because the offer of the higher figure foreclosed them from insisting on the lower. The respondent here is not bound by that conclusion, and has every right to have the witness' testimony there considered in connection with the testimony here. Doing that, I am convinced from the cross and redirect examination of the witness that he has not intended to apply nor applied any different standard to the lines testified to in this proceeding from that applied by him to the Second Avenue line. Here, as there, he testified that the Second Avenue line was the worst in the system; that the special work on that line was good for a year anyhow, and that the worst part of the track (41st street to 65th street) on that line should be rerailed in 1910; that in 1907 the "joints were not pounded to such an extent that we would have thought of rerailing it, and that it was in fairly good operating condition" in September, 1907. This testimony respecting the worst line in the system suggests the viewpoint from which testimony respecting the other and better lines should be looked at, and it is not inconsistent with it. Thus Mr. Dougan in 1907 would not have thought of rerailing the Eighth Avenue line for two or three years; special causes and not the condition of the rails themselves on 6th and Madison avenues necessitated relaying important parts of these lines at the time the work was done; rails on the Broad-

way line, next to the Second Avenue, the worst in the system, had been down but seven years when renewed in 1909; those on Ninth and Lexington Avenue lines, while not in bad condition, were renewed because they were putting steel wheels with larger flanges on the cars; and so on. With reference to special work, he testifies that its life was about five years, and that such work, renewed in the second or third year of the receivership, did not indicate that it needed renewal in 1907; that special work renewed in October, 1908, had in 1907 at least a year of life in it; and that in the fall of 1907 he had looked over the special work marking for renewal all that had not a year's life in it.

Taking all the testimony into consideration, I think that the amount expended on work actually begun during the first year of the receivership (i. e., by October 1, 1908) in renewing electric track and special work diminished by the excess, if any, above noted may fairly be regarded as a full measure of such damage as had accrued on October 1, 1907, from failure to fully comply with these covenants. I am aware that claimant argues that as receivers' certificates were not issued until June of 1908, the proceeds of which furnished funds for renewals, and that as the engineering force at the command of the receivers necessitated a renewal section by section, thus spreading the work over two summers, such work not being done in winter, no inference can be drawn that work done later was not needed then. The difficulty is that his own witness on his redirect distinctly testified that he did not think that the renewal work done in 1909 and 1910 would have been done earlier if he had not had other work on hand, and that he would not have done it in 1908 if he had not been engaged in other rail renewal at that time.

I shall leave the figures representing the cost of work done for the report, as they can be checked up by the respective auditors in accordance with the principle indicated, but the amount of damage for failure to keep in good operation and repair the electric track construction and special work connected therewith should not exceed that figure, which, when ascertained, I shall adopt as fully measuring any damage that the Metropolitan Company had sustained on the date when the lease terminated by failure to observe these covenants.

The evidence contained in the record respecting the renewal of horse car tracks presents similar questions. The claimants figure of $165,376 is based on the testimony of the assistant engineer of way, but the later summary furnished by him amounts only to $148,302.77, and is intended to include all the amounts actually expended by the receivers during their four years and a half of operation. Of this amount some twenty thousand dollars were expended in the year 1908, and fifteen thousand odd in 1909, the balance approximating one hundred thirteen thousand, being much the greater part of the amount claimed, having been expended in 1910, 1911, and even in 1912. The expenditures represent, in part, the cost of substituting for "strap" rails very much heavier girder rails; but, as these were installed on ties instead of on stringers and ties, the cost was about the same, and the difference may be disregarded. Here, again, I think the amount expended on work begun during the first year of operation will fairly measure the liability of the City estate. It is a matter of common knowledge that the rehabilitation carried out by the receivers during their long period of operation was extensive and thorough, and that it resulted in putting the property, not only in good condition, but in a condition better than when the City lease was made and than it had been in before. The damages, as in the case of the electric track repairs, can be checked by the auditors for insertion in the report, and in the case of each overhead charges, based on the percentages accepted by the parties, as set forth in the exhibits, should be added.

(2) For failure to keep in the stipulated condition the rolling stock on hand on September 24, 1907 ($686,420.91).

Of this amount the respondent receiver concedes $93,372, being the amount actually expended in the rehabilitation of cars in the Stephenson shops, exclusive of those there rehabilitated which were delivered to the Second Avenue receiver. It is also conceded that the receivers actually rehabilitated 1,679 cars in addition in their own shops. The difference between the amount claimed and the conceded amount represents an estimated cost of this rehabilitation in receiver shops, and it is precisely because it is estimated and not capable of verification by his auditor from the book entries that the re-

spondent objects to it. It is, however, supported by the testimony of expert witnesses, having knowledge of the condition of the cars, that it represents, in their opinion, the reasonable cost of restoring the cars in good operating condition and is the same evidence given by the same witnesses on which a similar finding was reported to and adopted by the court in the Second Avenue breach of lease proceeding. It is also to be noted that it apparently suggests a figure not as large as that for the rehabilitation in the Stephenson shops, which respondent concedes. The apparent discrepancy in the figures given respecting rehabilitation of electrical equipments, which counsel notes, results, I think, from a mere transposition of items, and does not affect the total.

Subject to verification, I think the figures claimed should be reported under this head.

(3) For failure to replace electric cars and motors destroyed by fire ($1,199,495.39).

The covenant in the lease is that the lessee "will replace any part of the demised property, or of any additions thereto which may be destroyed by fire or other causes, and upon the expiration or earlier termination of the lease will deliver up said demised railroad and other property and all additions thereto in good order and repair."

There is no question as to the number of cars and motors destroyed, nor is there any as to the cost of replacing those burned by new ones; the figure claimed being such cost. The respondent contends, however, that under the language quoted the lessee is bound merely to make good the Metropolitan's loss, and that the value of the cars should be taken as of their dates of loss, or at the most as of the date the lease went into effect. I do not agree. The record contains no evidence, which it was respondent's duty to furnish, that cars and motors in good condition could have been obtained for any less figure than that demanded for new cars and motors, and the undertaking to replace is absolute. I think the figure suggested must be reported.

(4) Failure to keep the electric power plants, substations, and transmission lines (feeder ducts, cables, and channel rails) in good condition ($683,217.29).

The inquiry as to these items suggests a situation not unlike that presented by the claims for track renewal. The total amount is subdivided into (a) claim of $258,769.65 for damage to the 96th street power station on the East River; (b) substation renewal, $208,991.40; (c) $117,603.02 for channel rail renewal; and (d) renewal of feeder system, $30,508.98, to which items are added overhead charges.

The claimant's contentions here are somewhat more extreme than in the case of track renewal, for of work claimed for and included in the total nearly $160,000 in value has not been done at all. If the receivers, with the resources at their command, did not in their long period of operation find it necessary to do this work, it fairly suggests a doubt as to whether it was necessary to put this property in "good operating condition and repair" when the receivership began. Of the actual work done, that asked for under (a) includes only $84,629 done on work begun during the first year of the receivership; other items amounting to $138,062 having been begun in 1909, some of which were not finished until 1911, the remaining items not having been begun until 1910. Of the work claimed for under (b), $144,636 has not been done at all, and of that done and paid for only a small portion was begun in 1908. Of that done under (c), being the channel rail renewal, but $35,000 was done on work begun during the first year; $66,000 of the balance having been begun in 1910. As it resulted in installing rail, the life of which was eight or ten years, the injustice of charging it all to the City estate seems to me to be obvious. Similar facts are presented under (d) for the renewal of the feeders, the total amount claimed for which is $30,508.98, of which but $12,000 was spent in 1908.

Of the amount allowable under these four heads, I think that the portion expended for work begun during the first year should be the limit of liability, and such amount, increased by the overhead charges, will be reported.

(5) Renewal of lighting and telephone plants ($32,594.67).

Of this amount some $16,844.15 was expended for work begun during the first year of the receivership. There is some doubt as to whether this includes all the work begun during that time, but the correct amount can be

ascertained for insertion in the report, and will be taken as the measure of the liability in this connection.

Where any item has been considered and disposed of under one or another of the foregoing heads, it should be excluded from consideration in connection with repairs to buildings.

(6) Claim for failure to keep the tracks in buildings in the Metropolitan System in good condition ($301,651.54).

In the reply brief the claimant concedes that this amount should be reduced to $281,338.51. This amount, as reduced, is for damages for failure to repair "wooden" tracks in 13 buildings; the term "wooden" referring to pit and slotted electric tracks and horse car tracks laid on wooden ties and stringers, as distinguished from concrete construction. None of these "wooden" tracks, which was the construction in all of the buildings at its beginning and during all or the greater part of the existence of the lease, has ever been replaced by new wooden construction, the estimated cost of which, in all of them, suggest the figure demanded, although in 7 of the 13 buildings, some of which had been destroyed by fire, the receivers, during the period of operation, replaced the wooden with concrete construction in whole or in part. This wooden construction had been in each of the buildings at and prior to the making of the lease in some instances for many years. While the claimant is not under the lease limited to the cost of restoration to the condition in which these tracks were at the commencement of the lease which has been held to be immaterial, it is nevertheless true that the age of these tracks at the termination of the lease on October 1, 1907, is very material, for the tenant is bound to nothing more than to return them in good repair as old premises, where they were leased as such, which is a very different matter from being bound to return brand new tracks on new wooden substructure, which is what the claimant is demanding in each building. There is before me, however, no evidence of the cost of returning them in repair as old premises. Doubtless if, at the termination of the lease, the wooden structure and tracks were in such condition that they could not be repaired, the cost of replacing them would suggest the maximum damage, and might be recovered, but the evidence shows no such condition in any of the buildings. In six of them no repairs have been made at all, which is proof that on October 7, 1907, the tracks were not in a condition that could be described as nonusable, and, if they were in a condition requiring repairs, that condition and the cost of bettering it are not shown. In some of the seven buildings in which concrete construction has replaced wooden construction in whole or in part, as in the building at 32d street and 4th avenue, 54th street and 9th avenue, and at Lenox avenue and 146th street, the concrete construction was installed by the receivers as part of a general plan of reconstruction of the whole building; the record not suggesting the condition of the wooden tracks replaced. Indeed, the testimony of the claimants' expert is to my mind based on the fact that he regarded these wooden tracks as a "fire menace," and his estimate is largely, if not wholly, based on that theory, and not on the actual condition of the wooden construction, of which, in some instances at least, it seems clear that he had not personal knowledge. As matter of law, a covenant to repair or to return in good repair does not require the removal of a lawful wooden construction in otherwise good repair because it is a fire menace. The witness' testimony respecting the car house at Madison avenue and 86th street illustrates the difficulty of recommending findings which might support even a rude approximation to the damage actually suffered, if any. That building was burned down in the summer of 1907, yet the witness testifies, not only that the wooden tracks survived, but that those same wooden tracks, with some little patching up by the receivers, the extent and cost of which are not shown, are in use to-day. He nevertheless testifies to $10,463.27, the cost of replacing the structure and tracks, and not the cost of repairing them at all, and the claimant is asking that that figure be adopted in face of the facts that the tracks survived the termination of the lease and have been in constant use since—a period of many years. With reference to the tracks in all of the buildings, except those that had burned down, the only inference from the record is that they were usable, and while it may be true that, even as old premises, the evidence suggests that they may not have been in such

condition as the covenants required, it is yet true that it does not show what that condition was, and what the cost of repairing, as distinguished from replacing, would be likely to be. It seems to me to be quite impossible to suggest any figure as even a rude approach to such damage as may have been incurred respecting this item, although, under the rules of law applicable and on the record as made, it is clear that it could not have been very large. I think, in view of the nature and extent of the subject-matter, the difficulty of proof under the rule controlling, and the inferences to be drawn from undisputed facts, that such damage as there may have been, constituting, as it does, a minor item of a large unliquidated claim against an insolvent estate, must, on the evidence disclosed, be regarded as negligible.

(7) Claim for failure to keep buildings in the Metropolitan System in good condition ($1,375,931.43).

The buildings referred to are 20 in number. Of these 3 were burned just prior to the receivership, being the 86th street barn on the Madison Avenue line, for which $153,527 are claimed, the 146th street and Lenox avenue car house, for which $510,198 are claimed, and the office building on 49th street and 8th avenue, for which $132,113 are claimed; the total for the three being $845,832, or nearly 62 per cent. of the whole amount. As the City Company was bound to replace these, a reasonable approach to accuracy may be made in estimating loss, although the claims are, I think, in excess of the value of the buildings when destroyed. Of the 17 remaining buildings, 3 were rebuilt during the receivership, that at 32d street and Madison avenue, for which $282,421 are claimed, that at 54th street and 9th avenue, for which $79,382 are claimed, and that at 23d street and 11th avenue, for which $16,612 are claimed, a total of $378,415. These figures do not represent the cost of the new buildings, but are intended to be estimates of the cost of repairing the buildings replaced when the lease terminated on October 1, 1907, but on the evidence, so far as the 32d street and 54th street buildings are concerned, they are altogether excessive. The balance of the amount claimed for the remaining 14 buildings is only $151,674, and it is intended to represent the cost of repairing them in compliance with the covenants. It will not be profitable to attempt to summarize evidence respecting each of these buildings, and I shall simply indicate the amounts representing costs to repair as of October 1, 1907, which I shall report to the court.

Substations.			
Street—Front Nos. 13 and 17			$ 1,800
25th near Lexington Avenue			5,000
50th and Sixth Avenue			3,400
Power House.			
96th and 1st Avenue			5,300
Stables.			
10th and 11th, Avenue C			11,000
11th, Nos. 711–717			2,000
Offices.			
49th and 8th Avenue (west side)			115,000
49th and 8th Avenue (east side)			1,700
Storage House.			
152d and 8th Avenue			3,800
Car Houses.			
Street, 24th	—Avenue,	11th	7,500
86th		Madison	140,000
32d		4th	115,000
99th		Lexington	10,500
100th		Lexington	
54th		9th	40,000
50th		6th	28,000
50th		7th	15,000
50th		8th	10,000
146th		Lenox	450,000
23d		11th to 13th	10,000
Total			$975,000

(8) Claim for failure to pay taxes upon the property in the Metropolitan System, including lines owned and leased, but excluding leased lines, the leases of which were not adopted by the receivers ($3,009,588.82).

As a result of an interchange of briefs, counsel for claimant concedes the inclusion of an item of $154,622.09 for interest on special franchise taxes accrued prior to the making of the Metropolitan-City lease, for which the City Company is not liable, so that the amount claimed is reduced to $2,853,966.73. Of this amount the counsel for the City receiver concedes only $1,729,420.76. The claimant, relying on the Central Crosstown Case, 198 Fed. 756, 117 C. C. A. 503, and the Metropolitan Stockholders' Appeal, 198 Fed. 761, 117 C. C. A. 503, includes taxes accruing in the year 1907 after September 24th, with interest on all taxes down to December 10, 1907, being the date fixed by the court for the filing of claims. At the time the cases cited were decided by the Circuit Court of Appeals, the date of the termination of the lease had not been judicially determined, although that court did hold that operation by the City receivers had ceased on September 24, 1907. Since that time in the Second Avenue and Central Park breach of lease cases, the District Court has held that the lease terminated on October 1, 1907, and it did it on a record which suggested the question which the records before the higher court, as its opinion stated, in the cases cited, did not do. No claims accruing subsequent to that date under these later decisions of the District Court which have just been affirmed in this respect by the Circuit Court of Appeal are provable, so that the taxes for 1907, which did not accrue until October 7, 1907, are therefore disallowed, as is all interest on unpaid taxes after October 1, 1907. The interest accrued on taxes to October 1, 1907, which the respondent does not concede beyond September 24, 1907, should be calculated to the later date, October 1, 1907.

Of the other kinds of taxes disputed by the respondent, only those actually due and payable on October 1, 1907, are allowed, with the accrued interest to that date. Such of them as are conceded are, of course, allowed.

(9) Claim for failure to pay rentals and charges in the nature of rentals due to lines leased to the Metropolitan Company, exclusive of those lines, the leases of which were not adopted by the Metropolitan receivers ($1,787,492.34).

Of the above amount, only $660,229 was due on October 1, 1907; the balance becoming due at a later date. Under the rule applied under the preceding head respecting the taxes, the claim for this balance is disallowed. The $660,229 was paid by the receivers on September 30, 1907, and, as it became payable on the day the lease has been held to have terminated, it is allowed, as the law does not take account of fractions of a day.

Of the balance of the total amount claimed, $96,693.55 is for payments made under operating agreements for interest, but of this amount only $60,416.67 was due on October 1, 1907; the remainder maturing at a later date. Only this $60,416.67, therefore, is allowed.

The remainder of the amount claimed ($787.68) is for expenses in connection with the operation of leased lines. The Exhibit 75 refers to these items as not due on September 24, 1907, and as due prior to December 10, 1907. The accountant's testimony suggests the inference that they were not due on October 1, 1907, and they are therefore disallowed.

(10) Claim for the failure of the City Company to pay certain miscellaneous items ($90,617.07).

(a) Of this amount $55,497.78 is claimed for expenses incurred in connection with special franchise tax litigation. With the possible exception of an item of $5,250 for referees' fees incurred prior to October 1, 1907, which has been allowed in the inter-receivership accounting, and which the Metropolitan estate will receive in full, the charge is for services requested by, rendered to, and paid for by the receivers after October 1, 1907, the date when it has been held that the lease terminated. Counsel for claimant, in their brief, apparently think that the stipulation in the record, providing that, in the event that it is held that the City Company is chargeable with the expenses of settling any special franchise taxes, such expenses shall be apportioned to the taxes of each year, entitles them to this allowance. That stipulation, however, becomes effective only in the event that the City Company is held to be legally chargeable with such expenses, which I do not hold it to be. The whole amount is disallowed.

(b) The claim of $11,540 for clearing away the ruins of the fire of April 8, 1907. This claim the respondent concedes.

(c) The claim of $23,579 based upon the apparent overpayment to the City Company by the Degnon Contracting Company.

In the face of the objection of counsel, it is clear that this claim must be disallowed. It rests on nothing more than the inference drawn by the accountant from the fact that the City books show an excess payment from the Degnon Contracting Company in settlement of claims against it of $23,579.29, and that on the Metropolitan books appear entries showing an unliquidated charge against the same company of $28,404.69. The accountant frankly testifies that there is nothing to show what the payment was for, as to whether it was an overpayment to the City Company or was intended to cover the Metropolitan account, except an inference which might be drawn from the general condition of the account and the manner in which the correspondence (which is not in evidence) was carried, on which would indicate that the accounts were handled as one account by the City Company. He also says that there was no consistency in the billing, and that it was not the custom to bill all charges in favor of either company against the Degnon Company in the name of the City Company. In other words, that the Metropolitan Company is entitled to the excess is admittedly a guess.

(11) Claims for failure to comply with covenants of the City lease respecting property of Metropolitan lessor lines, which went out of the system during the receivership not heretofore considered as follows: That of the Second Avenue Company ($847,628.28), of the Central Park, North & East River Company ($670,730.36), and of the Fulton Street Company ($7,511.81).

These three items can be disposed of together, as one or the other of the two objections of the respondent receiver to the claim respecting the Second Avenue Company applies to the two other claims.

As to Second Avenue and Central Park properties, the parties have made a stipulation which may be summarized as follows: That with reference to the expenditures necessary to put them in good and working order, condition, and repair as of September 24, 1907, the testimony taken before me in the breach of lease proceedings by these original lessors against the Metropolitan and City estates, based on the covenants in the original leases from those companies to the Metropolitan as to the condition of the property of the Central Park on August 5, 1908, and of the Second Avenue on November 12, 1908, and of putting them in good repair as of those dates, shall be taken as describing such condition and cost as of September 24, 1907.

The Circuit Court of Appeals has just decided that the Metropolitan and City lease terminated as between the parties on October 1, 1907, and that the Central Park and Second Avenue leases to the Metropolitan terminated as between the parties at the end of the periods of their occupation by the Metropolitan receivers, to wit, on August 6, 1908, and November 12, 1908, respectively. The court has also decided that, by virtue of the Metropolitan-City lease, the City Company was the assignee of the Central Park and Second Avenue leases to the Metropolitan Company and liable as such to those lessors by privity of estate (it does not say by contract) for breaches of covenants running with the land.

The findings against the Metropolitan Company's estate in the Second Avenue proceeding referred to in the stipulation were as follows:

Track, roadway and electric equipment	$475,375 02
Rolling stock exclusive of motors	81,647 94
Special franchise taxes	290,603 32
	$847,626 28

The respondent's counsel objects to the allowance of the first two items, because the stipulated evidence does not show the damage to the property described at the date of the Metropolitan-City lease April 1, 1902, and because it does not apportion between the Metropolitan and City Companies such damage for their respective periods of operation under the Second Avenue lease. In spite of the earnestness with which the contention has been urged, I am not convinced that the City Company is not liable to the Metropolitan

for the full stipulated amount. It clearly covenants on the expiration or earlier termination of the lease that it will surrender the properties demised in good order and repair. The court has said that the lease terminated on October 1, 1907, and the parties have stipulated in effect that on that date these items were not in that condition, and that the figures named were needed to restore them to it. Nothing is said about restoring them to the condition they were in on April 1, 1902, nor as to apportioning damage. As the court, reversing what has been heretofore held below, has decided that the City Company is liable to the Second Avenue Company by reason of privity for breaches of covenants in the Second Avenue lease, it may or may not be that damages for such breaches are apportionable, and that the condition on April 1, 1902, is material in a proceeding by that company against the City Company for those damages, but the claim here is not for a breach of those covenants. These disputed items must, I think, be allowed. The franchise taxes should be allowed, with interest to October 1, 1907, and in the sum of $275,391.64.

I think the same answer must be made respecting, not only the track and roadway of the Central Park Company, but the horses, cars, and harness as well. The stipulation was, I suppose, intended to cover all items, not only the former, which is clear, but the latter as well.

The Fulton Street special franchise taxes are allowed as claimed; the interest to be calculated to October 1, 1907.

What has been written disposes of all items claimed for breaches of covenants in the Metropolitan-City lease urged by Metropolitan receivers, except those for damages to Third Avenue properties which have not been submitted and which will be separately reported on.

The total, when ascertained, it is conceded, is to be diminished by $1,326,887.45, being the amount of insurance collected for property destroyed by fire, for which damages have been allowed above.

It is contended by the replicant receiver, and was conceded by claimant, that the amount is to be reduced still further by some $2,000,000 (more or less) of the 5 per cent. improvement notes of the Metropolitan Company, duly issued and still unpaid, which were apportioned to the suit in equity as part of the proceeds of settlement divided between the two receiverships in accordance with the principles finally approved by the Circuit Court of Appeals in the so-called apportionment proceeding. 198 Fed. 725, 117 C. C. A. 503. Speaking for the court in that case, Judge Ward says of these notes so apportioned that they "may be proved by the receivers of the City Company against the estate of the Metropolitan Company." The replicant receiver here asserts the right to use them as a set-off in this proceeding, and in his reply brief the claimant receiver conceded that right. Counsel for the New York Railways Company, purchaser of the Metropolitan properties at the foreclosure sales, and a creditor by assignment and otherwise of the Metropolitan estates, subsequently filed a brief contesting this right of set-off, and the claimant receiver has withdrawn the concession. I think the Railways Company has a right to have this question passed upon, and shall dispose of it so that it may be before the court.

The contention of Railways Company is that, as these notes were received in 1910, long after the receivership of the Metropolitan began, as part of the settlement of claims due the City estate, the transaction must be regarded as a purchase by the debtor of an insolvent after the date of insolvency of a claim against the estate, which may not, as a matter of law, be used as an offset against the claim due the insolvent. This is unquestionably the law, but, if I understand the complicated facts aright, I think it may be said that the claim represented by these notes was outstanding in the City Company at the date of insolvency. Neither at that time nor subsequently had these notes had any inception. It must be remembered that under article 15 of the lease the City Company had, at the date of insolvency, a claim for capital expenditures against the Metropolitan Company about equal to the amount of these notes so apportioned, in excess of any payments it had received up to that time for such purposes under the agreements of May 22, 1907. The four notes of which those apportioned were a part had not passed under the

agreements of May 22, 1907, from the Interborough-Metropolitan to the Mercantile Trust Company, nor to innocent holders. If they had been where article 15 of the lease provided that they should be, they would have been with the City Company on the date of its insolvency, in which case, under the authorities cited by counsel, they would clearly have been available to defeat or reduce any claim then outstanding against the City estate in favor of the Metropolitan Company. I think, on the facts here suggested, that on the date of insolvency the City Company was the equitable owner of the notes, wherever the legal title may have been, and that the City Company is not limited to proving an independent claim against the Metropolitan estate and to an offset of distributive shares in the estates of the two insolvents, which, as the distributive share of Metropolitan creditors is likely to be much smaller than the distributive share of City Company creditors, would result in inequality.

The respondent is entitled to an additional credit for $638,821.78, being sums expended between May 27, 1907, and September 24, 1907, on buildings destroyed by fire.

As the item of $15,545.56 is to be allowed in the inter-receivership accounting, it is not allowed here.

After this case was submitted by the receivers, the Farmers' Loan & Trust Company, as substituted trustee under the Metropolitan refunding mortgage, which was made subsequent to the Metropolitan-City lease and subject to that lease, filed a brief with a twofold purpose; one being to obtain a ruling that it alone is entitled to all items of recovery herein against the City estate in favor of the Metropolitan estate, based on covenants running with the land, the other being to re-enforce the demands of the claimant receiver and to answer contentions of the replicant. In this latter aspect the brief has been carefully considered in connection with the items of damage heretofore passed on, but I think, as to the other question, that it should not be passed on here and now. Counsel for claimant and for the Guaranty Trust Company, trustee under the prior General and Collateral Trust Mortgage which covers much of the property mortgaged to Farmers' Loan, urge that parties interested in the final disposition of items are not before the court in this proceeding. In any event, I doubt, after examining the orders of reference, whether an opinion on this matter has been asked. I therefore decline to pass on it.

A proposed report in accordance with the foregoing to be submitted and a copy served on respondent on June 10th. Exceptions and amendments thereto to be served on or before June 15th. Hearing thereon on June 15th, at 2 p. m.

Claim of Metropolitan Street Railway Against New York City Railway Company.

LACOMBE, Circuit Judge. This is a claim for damages resulting from breaches of covenants in the Metropolitan-City lease of February 14, 1902. The items of claim will be considered in the order in which they were taken up by the special master, and this opinion will avoid, as far as possible, any restatement of the relations of the parties as set forth in the special master's opinion; both opinions must be read together for a full understanding of the controversy.

[1] 1. The first item of damage arises from the failure of the City Company, lessee, to keep the track and roadway of the underground electric lines, still in the Metropolitan System, and special work in connection with said lines in a proper condition of repair. The controlling clause of the lease is contained in the fifth paragraph. It reads:

"Upon the expiration or earlier termination of this lease (to) deliver up the said demised railroads and other property and all additions thereto in good order and repair."

The special master held that this meant what it said, viz., that, when the properties were turned back by coming into the hands of the receivers, they should be in good order and repair; also that, in cases where heavier or more expensive rails had been substituted for rails in use when the lease was executed, it was the structure thus improved which was to be delivered up in good order and repair; also that, where such a betterment had not taken place before the termination of the lease, the obligation was merely to keep the existing type of structure in such condition. This construction of the lease is fully concurred in.

[2] The sum claimed is $2,000,531.72, being the total amount expended by the receivers in putting these several tracks and roadways in the condition of good order and repair which the lease provided for by renewing the same. Counsel for claimant states that, out of a total of over 119 miles, the amount claimed relates to 51.43 miles only; as to the remaining miles of track and roadway no contention is made that renewal was required. The special master held that upon 16.25 miles only should there be any allowance for money actually spent to put the same in good order and repair. These figures are given in claimant's brief, and, as their accuracy is not challenged in respondent's brief, they are accepted. The money actually expended by receivers for this purpose may be thus distributed:

September 24, 1907, to October 1, 1908	$ 684,351 90
October 1, 1908, to September 30, 1909	288,924 40
October 1, 1909, to September 30, 1910	669,877 61
October 1, 1910, to December 31, 1911	241,935 63
	$2,000,531 72

The total amount allowed by the special master is $684,351.90.

When receivers took over the road on September 24, 1907, it was generally understood that the tracks and roadway of very many of the lines which made up the system were in a most deplorable condition; financial exigencies had handicapped the lessee for a long time; everything in the way of expenditure that could be staved off had been passed by, and in consequence there had been great deterioration. Whether reports as to existing conditions came from within or without, from old employés, or special technical men retained to investigate, or from inspectors of the Public Service Commission, or from reporters and correspondents vociferous in the newspapers, they were at least unanimous, to the effect that very much was required to put the system as a whole in a decent condition to render proper service to the public. The receivers were grievously harassed with the appreciation that they were confronted with a situation which called for the immediate expenditure of millions and had but a few thousands available. To one, whose recollection of the experiences of that time is still vivid, the proposition that on September 24, 1907, the track and roadway of the underground electric lines embraced in this claim could, by the expenditure of only $684,351.90, be put in "good order and repair" comes as quite a severe shock.

The conclusion of the special master is, of course, predicated on the actual record before him, and that record must be turned to in order to test the accuracy of his conclusion. Substantially the entire record

is comprised in the testimony of a single witness, Mr. William T. Dougan, now engineer of maintenance of way of the New York Railways Company, who for 11 years was either in charge of electric underground construction for the Metropolitan and City Companies or was their engineer of maintenance of way. This witness testified in the Second Avenue breach of lease proceeding, and there impressed both the special master and this court with the fullness of his knowledge and the fairness of his statements. Countless references to the testimony of this witness are found in the briefs of both sides, but these references have been disregarded, and the court has made a careful and exhaustive study of his whole testimony. The result has been to confirm the court's original impression and to convince it that on September 24, 1907, very little of these 51.43 miles of track was in good order and repair; portions of it had outlived the normal expectancy of its life, about 10 years, except where wear and tear is exceptionally heavy; the rest was practically on the last lap, presenting a condition over which cars might be run, but uneconomically for the company and to the discomfort of the passenger, very much below the first-class condition in which a road properly cared for should be maintained.

That the special master reached the conclusion that all that was needed to put the tracks and roadway of these lines in good condition was the money expended during the first year of receivership, a sum looked upon at the time as "first aid to the injured," or, as the special master aptly expressed it in the Second Avenue case, "emergency repairs," seems to have resulted from giving undue weight to certain considerations which were advanced in opposition to the claim. As to all, or nearly all, of these lines, the witness at one place or another in his testimony said that in September, 1907, the line had not been "marked for renewal," or that at that time he would not have "thought of rerailing it for two or three years yet," or something to the same effect. It may be noted, however, that of these very same lines the same witness said that they were not in good order and repair; that there were a "great many low joints," "number of broken rails," "quite corrugated rails," the "tramrail needed renewing," the "pavement was in bad condition." There is no real discrepancy between these statements.

The witness was the engineer of maintenance of way of the lessee, who made inspections every fall and designated the portions of track and surface which should be renewed (in place of makeshift repairs) in the ensuing spring and summer. But naturally he knew perfectly well the policy of his employer, which was to get the very last day of life possible out of every rail and avoid the heavy expense of a renewal, where cars could still be run. Of course cars could be run when tramrails and pavement were in bad condition, so long as the slot rail remained in good shape. It is noticeable that, in nearly every line about which the witness testifies to bad condition of tram and pavement, he says, "The slot rail was all right; there is no claim for that." Quite possibly with a good slot rail cars could be run over the trams even until the latter were reduced to the traditional "two streaks of rust." They were not so bad as that, but the testimony seems, to me at least, conclusively to establish the proposition that in all these lines there was such an amount of low joints, etc., that the running of cars

over them resulted in constant breaking of trucks and other car damage, not to speak of the discomfort of the passengers who were jolted over a road not in first-class order and repair. The expense of repairing the cars, which were run under such conditions, would be much less than the heavy cost of renewal of tracks and pavement, and therefore, the company, financially embarrassed, would, as a matter of policy, discourage renewals—a policy which all its employés would thoroughly understand. I find no significance, therefore, in the statements of the witness that he would not have marked these portions of the road for renewal in September, 1907, nor in the further circumstance that cars were in fact run on them for two or three years after September, 1907.

Nor is there any weight in the circumstance that some of them were not renewed by receivers until two or three or four years after they took possession. It must be remembered that it was not financially possible to do more than emergency work until they could issue and sell the $3,500,000 of receivers' certificates, more than eight months after their appointment. Claimant also argues that:

"With the engineering force at their command, the receivers could economically renew the rails only by taking up the lines section by section and spreading the renewal work over a period of two summers (it cannot be done in winter), which would bring it to 1910."

But there was another more important reason for doing the work in sections. The renewal of tracks and pavement in a street of this city is always the cause of much discomfort, not only to the passengers in the cars, but also to all traffic in the street and to the abutting owners as well. The usual cycle of events is: First, a host of complaints from all quarters as to the condition of the road, and then, as soon as work of renewal is begun, a similar host of complaints as to piling paving blocks, structural iron, etc., on the sidewalks, interference with access by vehicle to the houses on the line, interference with traffic, etc. Two or three lines in different parts of the city might be put under renewal at the same time, but if the receivers, with unlimited money at their command, had undertaken to renew these 51 miles all at the same time, the result would have been a vexatious and intolerable nuisance. No one with any decent regard for the convenience of the public would have undertaken to do the work in that way.

In this total claim there are items of expense resulting from an improvement in the renewal, beyond any improvement up to that time installed by the lessee; also in portions of the line there may have been a brief period of good life in parts of the old structure. These items may properly be eliminated from the claim. It would seem to be a great waste of time and money to dig these items out of the claim. It is time that the various questions involved in these receiverships were brought to a close, by compromise if not otherwise. From an examination of the records and the careful analysis of the figures given in the briefs, I am satisfied that 15 per cent. of the amount of the claim is a very liberal allowance for these items. The conclusion of the special master is therefore modified by awarding claimant for this part of the claim $1,700,451.97.

2. For reasons sufficiently set forth supra, the item claimed for failure to keep the track and roadway of the horse car lines still in the Metropolitan System in good order and repair, $165,376, is allowed to the extent of 85 per cent., viz., $139,569.60.

3. The next items claimed are for failure to keep the electric power plants, substations and transmission lines, lighting and telephone plants in good order and repair.

As to the channel rail, the witness (Armstrong) testifies very specifically as to its condition in September, 1907, worn down to great thinness with holes in places, liable to buckle and to catch the shoe of the car plow. As to the feeder system generally he states that what was done was necessary to be done at that time to put it in good working order, condition, and repair. As to the other items, he does not go into details as to their condition, but the fair interpretation of his testimony is that the various things that were done were done because existing conditions required the doing of them. The special master evidently so construed it, because he allowed claims under all of the five subheads, but reduced the totals by the application of the rule that only what was spent by receivers in their first year's operation should be allowed. There can be little doubt that the state of general dilapidation into which the whole outfit had been allowed to fall was to be found here, as elsewhere, when receivers took possession. Necessarily some parts had to be kept up, as the slot rails were, to allow the cars to be run at all.

I do not see why the City Company is not liable under its covenant for the $15,000 required to put the coal conveyor in proper condition, although, instead of thus treating the old conveyor, they built an entirely new and more efficient one at a cost of $60,000. The same rule should apply to the Front street substation, which was abandoned; the money which would otherwise have gone into its reconstruction being (with a very much larger sum in addition) expended in building a substation to take its place and do its work, in a different but equally convenient and efficient place. The claim is allowed, but in the hope that a compromise discount may save further controversy over these branches, which involve much testimony and the classification of an infinite amount of detail figures, 15 per cent. may be taken off, as in the case of items 1 and 2, supra. Counsel may figure out the totals and agree as to necessary amendments to the findings.

4. The special master's opinion, findings, and conclusions as to damages for failure to keep the rolling stock in repair are fully concurred in.

5. Failure to keep the tracks in buildings in good condition.

[3] Thirteen buildings are referred to in the testimony. Many of these buildings and the tracks in them were old and presumably already more or less patched up in 1902. But that circumstance is immaterial; the lessee took the premises in the condition in which it found them, but it covenanted that when the lease terminated, whether in 999 years or in 5, they should be in good order or repair. These tracks consisted of rails and appurtenances laid on timber structures—a method considered to be good engineering when they were built, perhaps so considered even so late as 1902. When the receivers rebuilt

them, however, that type was condemned by engineers and its building forbidden by the city of New York on account of risk of fire. Therefore a new type with concrete substructure was substituted. For the increased cost of such improved type, no claim is made. The witness (Potter) expressly states, several times, that his estimate is for rebuilding with timber, not with concrete, also that his estimate for replacing the wooden track provides for the same weight of rail and special work as was there when the track was put in, and does not call for heavier weight of rail. If the evidence establishes as to the tracks in any of these buildings that mere patching up would not put them in the covenanted condition, the witness' estimate, which is nowhere contradicted, should be allowed. There is no affirmative testimony that they could have been repaired without renewing, or what would be the cost of so doing; the contention is that rebuilding alone would put them in good order and repair. As to some of them, the testimony is not sufficiently specific to warrant this conclusion. I cannot concur, however, in the conclusion of the special master that the rebuilding was in all cases rendered necessary only in order to eliminate the fire risk resulting from timber construction. The testimony as to the building (a) at 4th avenue and 32d street shows that the track was in very poor operating condition. The timbers were old and worn, patched in many places. The slot was rough and out of line, endangering the plows. It was carried on what might be called a patchwork set of posts from the cellar floors, which were old and settled, throwing the car out of line and surface. Joints were spread and uneven and very rough, so that frequently the cars went off the track. To put it in original condition required all new timbers, as the wood was old and rotten, new rails, and new bolts. As to (b) the building at 11th avenue and 24th street, the condition was slightly different from the 4th avenue and 32d street car house, because the track was built on the ground floor. The land was originally the shore of the North river, low and damp. The timbers were old and rotted. The whole structure was in very poor condition. As to (c) the building at 8th avenue and 50th street, the tracks were in very poor operating condition, rough, out of line, and dangerous (besides being subject to fires). They had been patched up in numerous places and were pretty far gone, had outlived their usefulness. As to (d) building at Lexington avenue and 99th street, the track, all timber construction, was rotted at many places and unsafe for operating. As to (e) the building at 6th avenue and 50th street, all that is testified to as to existing conditions is that the tracks were in much poorer condition than the building itself. The timbers had become a little oil-soaked, and the greatest objection to them was the danger from fire. As the special master allowed only $28,000 for repairs to the building, which allowance is not excepted to, the testimony does not seem to warrant a conclusion that the tracks could not have been repaired without rebuilding. As to the building (f) at 100th street and Lexington avenue, the track was a very awkward and dangerous platform built on heavy posts, braced and cross-braced, and a network of timbers dangerous, dirty, and inflammable, half worn out five years before. Inasmuch as the witness says of the track on the second floor of the same building that he made no allowance for it in his estimate,

"for the reason that it was still in good operating condition, except for lack of power," it is a reasonable inference that the condition of the lower track was such as to require renewal, irrespective of any fire risk. As to the building (g) at 8th avenue and 152d street, which had lain idle and uncared for for years, the wooden ties and stringers rotted and the rails were therefore very much out of line and surface.

As to items (a), (b), (c), (d), (f), and (g) the estimate of Potter will be allowed; as to item (e) above and all the other tracks in buildings, the conclusions of the special master are affirmed.

6. Damages for failure to replace cars and motors destroyed by fire. The opinion of the special master is concurred in and his conclusions affirmed.

7. Damages for failure to keep buildings in good condition; the same disposition.

8. For rentals and charges in the nature of rentals, including taxes, the conclusions of the special master allowing only such as accrued on October 1, 1907, is affirmed. The later decisions of the Court of Appeals seem to require such a disposition of them.

9. Miscellaneous items (expenses in connection with franchise tax litigation, clearing away ruins of a fire, alleged overpayment to Degnon Company) are similarly disposed of by affirmance.

[4] 10. Claims for failure to comply with covenants of the City lease respecting property of Metropolitan lessor lines which went out of the system during receivership. Of these the Second Avenue line is a type. This line was leased to the Metropolitan before the whole system was leased to the City Company. The Court of Appeals has held that by these two leases the relations established were: Lessor, Second Avenue Company; lessee, Metropolitan; assignee, City Company. That court also held that the lessor was entitled to judgment in the amount of nearly $850,000 against both lessee and assignee, and could collect the amount out of either or both. Under such circumstances, the assignee is primarily liable to the lessor, and the lessee is surety for the discharge of the assignee's obligation. If both defendants were solvent, and the lessor collected the judgment from the assignee, that would end the matter; if it collected the $850,000 from the lessee (the surety), the latter could recover over against the assignee; if it collected $425,000 out of each, the lessee could recover the $425,000 which it thus paid from the assignee. In other words, the surety would recover from the assignee only what the lessor had taken from it. It is thought that the insolvency of both lessee and assignee does not alter the situation. Out of the estate of the assignee, the lessor will collect what it can. Of the balance still due, it will collect what it can out of the estate of the lessee. For the amount thus taken from the estate of the surety, such estate will have a claim against the estate of the principal. It is suggested that a contrary ruling was made in the decisions of this court and the Court of Appeals touching a judgment obtained by the city of New York against the Central Park Company for paving. Apparently such ruling was made by affirming findings and conclusions of the special master, but the point was not discussed in the opinions; the amount involved was quite small; and it is thought now that the true rule is the one above set forth. Although

the amount be not "certain," it may be mathematically made certain. The claims in this item are allowed at the amounts which the estate of Metropolitan will pay to lessors on final settlement. In all other respects the findings on these items are affirmed.

11. The special master's allowance of $63,821.78, as a set-off, being the amount expended by the City Company prior to September 24, 1907, in restoring buildings destroyed by fire, is overruled. The allowance of the Metropolitan's claim on such buildings is only for restoring them from the condition they were in on that date. The expenditure of the sum named has reduced the amount of the claim. To allow the same sum as a set-off would be a double payment.

12. I fully concur in the special master's opinion, findings, and conclusion as to set-off of the improvement notes of the Metropolitan Company. Also in his disposition of the application for a ruling as to the rights of the Farmers' Loan & Trust Company to receive or share in the proceeds of the present claim.

Inter-Receivership Accounting.

On exceptions to report of special master in the matter of petition of the receiver of City Railway Company for an accounting by the receiver of Metropolitan Street Railway Company for cash and other property.

LACOMBE, Circuit Judge. As the decision of this application is of interest only to parties interested, who are already familiar with the details of the situation, this court will merely indicate briefly the disposition made of the various objections to the report, which have been argued here.

1. As to the two items of scrap (conclusions of law Nos. 6 and 7 in the report), the master's conclusion as to the first item is affirmed. The property that was sold, scrap from a demolished building belonging to the Metropolitan, belonged also to the Metropolitan. Destruction of the building did not divest the title. When the City Company sold the scrap, it sold property of the Metropolitan and should account to the owner for the proceeds. As to No. 7, the copper wire scrap recovered from the ruins of the car barn at 146th street and Lenox avenue, which was destroyed by fire. It is thought that the mere circumstance that the lease required the lessee (City Company) to rebuild in the event of destruction by fire would not divest the title to what was left of the res. The lessee did not restore the building. Receivers expended a large sum of money in doing so. I am not sufficiently familiar with the details of construction to concede the contention that this wire was personal property of the City Company, not a fixture and not a part of the building. There is no testimony that the wire belongs to the City Company. It may well be assumed, in the absence of proof, that it was an essential part of the structure, necessary to its operation as a car barn, and installed there when the Metropolitan originally constructed the building. There seems to be no sound distinction between these two varieties of scrap. Conclusion 7 of the report is reversed.

2. As to payments made to receivers by the so-called "controlled companies," conclusions 9, 10, and 11 of the report.

(A) The Forty-Second Street Company made three payments to receivers:

September 25, 1907	$125,000
November 29, 1907	19,694
January 17, 1908	25,000
	$169,694

The special master allowed the claim of the City Company for this full amount.

The payment of September 25, 1907, was made without any specific directions as to the application of it by the debtor, merely "on account." At this time the receivers had inter alia three things to do: To collect moneys due to the City Company, to collect moneys due to the Metropolitan Company, and to run all the roads in the system, including the controlled roads. To keep the controlled roads running called for continual advances to them of materials, labor, and power; without such advances a controlled road was at any time likely to cease rendering service to the public. At this time receivers were in great straits for money with which to provide such advances, and it was right and proper for them to apply any money, which came to them from a controlled road, without designation by the debtor of its application, to their reimbursement for materials, etc., which they, as operating receivers, had furnished in order to keep such controlled road in public service. Indeed, it might well be held that it was their duty to make such application. Had they at the time made an entry in the books to the effect that they appropriated this payment by a company, which was debtor both to themselves as operating receivers and also to the estate of the City Company in their hands as receivers, to the latter's estate, a very strong argument might be advanced for disregarding such appropriation of payment, as being one which they should not have made. However, that argument need not now be considered, so far as the evidence shows no such appropriation to any debt due the estate of the City Company was made at the time, it was merely credited on the cash book to the open account of receivers with the Forty-Second Company. That being so, no subsequent bookkeeping, alteration of entries, or filing of claims would change the situation.

It is not intended, however, to apply this reasoning to anything, except existing indebtedness, although in the past the controlled company had sometimes paid in advance for materials, power, etc., to be thereafter furnished. So much, therefore, of this $125,000 as represents indebtedness for materials, power, etc., advanced by the operating receivers from their appointment to the date of payment, should not be allowed to the City Company. For the balance only the special master's conclusion is affirmed.

The payment of January 27, 1908, $25,000, to "Joline and Robinson, receivers of New York City Railway Company." The special master interprets this phrase as an instruction by the debtor to appropriate the money, otherwise than in payment of obligations due direct to the receivers. This gives undue weight to the word "City," which is of no

more significance than the word "receivers." "Receivers of the New York City Company" was the usual short and convenient title by which the receivers were identified. No one at that time was particular, in speech or writing, to set forth the dual capacity in which, from the outset, the court indicated they should act. Whatever they were called, they acted as receivers of the estates of both companies and as operating receivers as well. If, at the time this payment was made, the Forty-Second Street Company owed receivers as much as $25,000 for materials, labor, and power, the allowance of any part of this item to the City Company is reversed. If it owed less, the conclusion will be modified accordingly.

The payment of November 29, 1907, was made by the debtor expressly for payment of accrued interest on the notes held by the City Company. As to that $19,694.40, the conclusion in the report is affirmed.

(B) In accordance with the views above expressed, the special master's allowance to the City Company of the $6,530.67 paid by the Dry Dock Company is allowed.

(C) And the allowances of the payments of $55,000 by Union Railway Company are disallowed.

3. As to the allowance to the City Company of the $14,901 collected from the Bridge Operating Company, the conclusion should be reversed, if it were shown by competent proof that such sum was included in the settlement of April 30, 1907, between the Metropolitan and City Companies. But the proof is not persuasive, except as to $500 of it. Conclusion No. 8 of the report is therefore affirmed, except as to such $500.

4. The reduction of the item (conclusion No. 15) for payments to employés from $127,980.10 to $120,980.10 is reversed. The items making up the difference, salaries, physician's fees as witnesses, etc., while not technically "pay roll" payments, come fairly within the sound discretion, which in cases such as this, involving many complications, must be accorded to receivers.

Some of the items originally discussed in the briefs have since been disposed of by mutual concessions. As to all the others, the conclusions of the special master are affirmed.

TETI et al. v. CONSOLIDATED COAL CO. OF MARYLAND. TOMAINO et al. v. SAME.

(District Court, N. D. New York. October 13, 1914.)

1. DEATH (§ 36*)—VENUE OF ACTION—LOCAL OR TRANSITORY ACTION.

Actions for death are transitory and not local, and may be brought and maintained wherever the defendant is found.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 51; Dec. Dig. § 36.*]

2. CORPORATIONS (§ 666*)—FOREIGN CORPORATIONS—RIGHT TO SUE—PLACE—"FOUND."

A Maryland corporation operating coal mines in Pennsylvania and authorized to do business in New York is "found" either in Maryland, Penn-

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

sylvania, or New York, within the rule that a transitory action may be maintained wherever the defendant is found.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2601, 2602; Dec. Dig. § 666.*

For other definitions, see Words and Phrases, First and Second Series, Find.]

3. DEATH (§ 8*)—ACTION—PERSONS ENTITLED TO SUE—WHAT LAW GOVERNS.
Where an action for death was brought in New York against a Maryland corporation authorized to do business in New York, for a death occurring in Pennsylvania, whether the action should be brought in the name of the parties entitled to the recovery or in the name of decedent's personal representatives was a matter of procedure to be regulated by the New York law.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.*]

4. DEATH (§ 31*)—WRONGFUL DEATH—PERSONS ENTITLED TO SUE—PERSONAL REPRESENTATIVES—BENEFICIARIES.
Act Pa. April 15, 1851 (P. L. 674) § 19, creates a right of action for wrongful death, and provides that the widow of deceased, or if there be no widow, the personal representative, may maintain an action therefor, and Act April 26, 1855 (P. L. 309) § 1, declares that the damages shall be recovered for the benefit of the husband, widow, children, or parents of deceased and no others, and shall be distributed to them as personalty in case of intestacy. New York by statute creates a similar right of action, but provides for the maintenance thereof by the decedent's personal representatives for the benefit of those entitled to the recovery. *Held*, that where a servant was wrongfully killed in Pennsylvania and left him surviving a widow and child, an action for their benefit was properly brought in New York by decedent's administrators, but where another decedent killed in the same accident left no widow or children, but a mother and father who were entitled to the benefit of the recovery, if any, an action for his death in New York must be brought by them, and could not be maintained by his administrator.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37–46, 48; Dec. Dig. § 31.*]

5. TREATIES (§§ 6, 13*)—ABROGATION—ENFORCEMENT.
A treaty between the United States and a foreign country is the law of the land, which Congress alone can abrogate, and the courts of the United States must respect and enforce it.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. §§ 6, 13–15; Dec. Dig. §§ 6, 13.*]

6. ALIENS (§ 16*)—ITALIAN TREATY—CONSTRUCTION.
Italian Treaty of Commerce and Navigation, Feb. 26, 1871, 17 Stat. 845, as amended July 3, 1913, art. 1, 38 Stat. ——, provides that the citizens of the contracting parties shall receive the most constant security and protection granted by any state which establishes a civil responsibility for injuries or for death caused by negligence or fault, and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of the relatives or heirs, and shall enjoy in that respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter. *Held*, that such treaty did not confer on an alien Italian plaintiff, when bringing an action in New York, greater or different rights of procedure and form of remedy than those accorded to residents and citizens of that state.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 61–66; Dec. Dig. § 16.*]

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

At Law. Actions by Joseph Teti and Joseph Tomaino, as administrators, etc., of Antonio Teti, deceased, and by Joseph Tomaino and Joseph Teti, as administrators of Joseph Dastoli, deceased, against the Consolidated Coal Company of Maryland. On demurrer by defendant in each case to the plaintiff's complaint. Demurrer overruled in the Teti Case and sustained in the Dastoli Case.

Anthony S. De Santis, of Utica, N. Y., for plaintiffs.
Davies, Auerbach & Cornell, of New York City, for defendant.

RAY, District Judge. Under the allegations of the complaint Joseph Dastoli, plaintiff's intestate in the second of the above entitled actions, died intestate in the village of Jenner, Somerset county, state of Pennsylvania, on the 14th day of October, 1913, and left him surviving a father, Salvatore Dastoli, and his mother, Carmela Dastoli, both of whom reside in the Kingdom of Italy, and no wife or children. It is not stated where the deceased resided at the time of his death, or whether or not he was an alien. It is not stated that the father and mother are aliens. March 27, 1913, the plaintiffs, Tomaino and Teti, were duly appointed administrators of the estate of said Joseph Dastoli by the surrogate of the county of Oneida, state of New York, but whether jurisdiction arose from his having and leaving personal property in Oneida county, N. Y., or from his being a resident in that county at the time of his death, does not appear. The defendant is a corporation organized and existing under and by virtue of the laws of the state of Maryland, and was operating coal mines in various states, particularly the state of Pensylvania, and was authorized to do business in the state of New York. On the 14th day of October, 1913, Joseph Dastoli was in the employ of the defendant in its mines as a miner in said county of Somerset, state of Pennsylvania, and through the neglect and carelessness of defendant the mine collapsed, and said Dastoli was instantly killed. The negligence is set out in detail. Damages are alleged and claimed in the sum of $25,000, and the complaint alleges as follows:

"And this action is brought for the sole benefit of the aforesaid next of kin who by the aforesaid wrongful acts of defendant's plaintiff has sustained damages in the sum of $25,000."

The laws of the state of Pennsylvania are set out in full so far as applicable here, and the material parts thereof and an allegation of the complaint read as follows:

"Tenth. That the laws of Pennsylvania giving a cause for action for injuries causing death, are viz.:

" 'Wherever death shall be occasioned by unlawful violence or negligence and no suit for damages be brought by the party injured during his lifetime, the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned.' P. L. 1851, p. 674, § 19.

" 'The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children, or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that, without liability to creditors.' P. L. 1855, p. 309, § 1.

" 'The declaration shall state who are the parties entitled in such action;

the action shall be brought within one year after the death.' P. L. 1855, as last above.

"That the statutes enumerated and mentioned in this paragraph were, by an act of the Legislature of Pennsylvania of 1911 (page 678), relating to death by negligence and wrongful acts, modified and amended, thereby permitting a nonresident alien next of kin to bring, and maintain an action to recover damages for the negligent killing of an individual in the same mode and in the same manner as a citizen and resident of Pennsylvania can and could do in such a case."

The demurrer to the complaint is "that it appears on the face thereof that the complaint does not state facts sufficient to constitute a cause of action." In the action first above entitled, which we may call the Teti case, the deceased left a widow and child. The ground urged is that, as under the statutes and decisions of the state of Pennsylvania the recovery, if any, and the right of recovery, if any, is given to the "parents of the deceased," in the Dastoli case they alone can sue or maintain the action; that the administrators appointed in the state of New York cannot maintain it or recover; that no cause of action in their favor or in favor of the estate they represent is stated; that they cannot make themselves trustees for any such purpose. On the other hand, the contention of the plaintiffs is and must be that, as here in the state of New York we have a similar statute giving a cause of action in such a case for the benefit of the father and mother when there is no widow or children, etc., and providing that the action must be brought in the name of and by the administrator for the benefit of such persons entitled, in a suit brought here to enforce the right of action and recovery given by the Pennsylvania statute to the father and mother residing in Italy, the New York procedure may be and should be followed, and the suit brought and prosecuted by the administrators appointed in the state of New York; that who shall bring and prosecute the action is a matter of procedure.

The Pennsylvania statute is not very clear as to who is to bring or prosecute the action. In Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439, the action was to recover, under the statute of New Jersey, damages for death caused by the negligence of the defendant, and which statute is similar to that of New York. The action was brought in the state court of the state of New York and removed into the United States Circuit Court. I take it the deceased was a resident of the state of New York; at any rate letters of administration were taken out by the widow in that state. The accident and death occurred in New Jersey. Section 2 of the New Jersey act of March 3, 1848 (P. L. p. 151) provides "that every such action shall be brought by and in the names of the personal representatives of such deceased person." The claim was that the action could be brought and maintained by an administrator appointed by the proper probate court in the state of New Jersey only. The court held this point not well taken; that the action could be brought and could be maintained by an administrator appointed in the state where the action was commenced.

In Stewart as Administrator, etc., v. Baltimore & Ohio R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, the action was brought and prosecuted in the District of Columbia to recover damages for death

caused by negligence given by a statute of the state of Maryland, and which negligence and death occurred in the state of Maryland. Casey, the deceased, left a widow, but no descendant or parent. The Maryland statute provides:

"Every such action shall be for the benefit of the wife * * * *and shall be brought by and in the name of the state of Maryland*, for the use of the person entitled to damages," etc.

[1, 2] The District of Columbia had a statute providing for recovery in case of death caused by negligence in the district, but provided "that the action *shall be brought in the name of the personal representatives of the deceased.*" Code 1878, art. 67, subd. 15, § 2. The Supreme Court of the United States reversed the Court of Appeals of the District, which held that the plaintiff, as administrator, could not recover under the District statute, as the District statute only authorized recovery in case of injury received in the District, and could not recover under the Maryland statute because of the form of remedy; actions must be brought by and in the name of the state of Maryland. This case has been cited and approved more than 40 times, both in the Supreme Court of the United States and elsewhere, although not on the particular point raised here. However, there has been no criticism of the holding that the procedure of the state where the action is brought is to govern. There are cases holding that where these actions to recover for death by wrongful act are brought by the wrong party, as by a widow entitled to share in the recovery or to have the whole recovery, and she sues when the action should be brought by the administrator, there may be an administrator appointed and an amendment allowed; that no new action is required. So if the action is by the widow as administratrix when it should be by her individually, there may be an amendment; that such action in allowing amendments does not change the cause of action, etc. In the Teti case the contention is that the widow alone can bring and maintain the action for herself and the benefit of the child. Here, as the widow and child of Teti (one case) and the father and mother of Dastoli (the other case) reside in Italy, it may be they cannot sue or maintain an action in the state of New York on the causes of action alleged, and hence, if the amendments suggested are made, this court would be without jurisdiction. It has been repeatedly held, however, that these actions are transitory and not local, and that they may be brought and maintained wherever the defendant is found. The defendant is a Maryland corporation, not a Pennsylvania corporation, and is also authorized to do business in the state of New York, and hence is "found" either in Maryland, Pennsylvania or New York.

In Haughey v. Pittsburg Ry. Co., 210 Pa. 367, 59 Atl. 1112, the Supreme Court of the state of Pennsylvania, with these statutes of that state under consideration, held:

"The general maxim of the common law is, 'Actio personalis moritur cum persona,' and therefore no action would lie for negligence resulting in death. But this was changed by the Legislature of this state, and by the nineteenth section of the act of April 15, 1851 (P. L. 674) it is provided that 'whenever death shall be occasioned by unlawful violence or negligence, and no suit for

damages be brought by the party injured, during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.' By this legislation, therefore, a right of action for death occasioned by 'unlawful violence or negligence' was given to the widow of the deceased, and, if he had no widow, to his personal representatives. This was the law of the state until the passage of the act of April 26, 1855 (P. L. 309) in the first section of which it is provided that 'the persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relatives; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy.' The effect of this statute was to deprive the personal representative of a right of action in such cases and to vest it in the husband, widow, children or parents of the deceased. If there is a husband or widow, and children surviving, the action must be in the name of the husband or widow alone. The children should not be joined as plaintiffs in the action. The sum recovered, however, does not belong solely to the plaintiff in the action, but, as provided by the statute, shall go to the relatives of the deceased in the proportion they would take the personal estate in case of intestacy. In order that the record may disclose who the beneficiaries are, it is provided in the second section of the act of 1855, that 'the declaration shall state who are the parties entitled in such action.'

"It will be observed, therefore, that the foregoing legislation permits a recovery of damages for death caused by negligence, and designates the person who shall bring the action, the proportion in which the damages recovered shall be paid, and provides that the statement shall set forth the parties entitled as distributees of the fund recovered in the action. In the case in hand, the procedure pointed out by the statute was disregarded. The widow and the two children by their next friend were joined as coplaintiffs. The action should have been brought in the name of Mary A. Haughey as plaintiff, and, it should have been averred in the statement that she and the two children were the parties entitled to the damages recovered in the action. The children should not have been joined with the widow as plaintiffs. There is no authority whatever for bringing the action in their joint names or for the children joining in the action by a next friend. The whole procedure was irregular and in disregard of the provisions of the statute, and the court below would doubtless have so declared had its attention been called to the matter.

"Mary A. Haughey being the proper plaintiff in the action, the judgment of nonsuit must be regarded as having been entered against her, and she was the proper party to have the judgment reviewed on appeal. This, as we have seen, she did, and the judgment has been reversed and another trial will be had."

[3] In the Teti case it is evident that under this holding of the Pennsylvania Supreme Court the widow would maintain the action for the benefit of herself and the child, the recovery, if any, to be divided between them. In the Dastoli case the father and mother would maintain it in their own right on a cause of action given directly to them for their own benefit and vested in them. Then by what right or authority can the administrators of Dastoli, the deceased, bring or maintain that action? If the administrators may bring and maintain the action, it must be for the reason that in our New York procedure, under our statute giving and preserving a cause of action to parents for causing the death of their son by wrongful act, the action must be brought by and in the name of the administrator duly appointed in New York for the benefit of those entitled to the recovery; that it is a matter of procedure in such cases, and in all such cases prosecuted in New York, and that the presence of the party entitled to the recovery is not essential in any such case where

it is sought to enforce the statute of another state which gives a right of recovery in case of death by wrongful act to any one, and that the words of the statute of such other state giving the right of action as to who shall bring the action and as to the person entitled to the benefit of the recovery are immaterial so far as the form of the action is concerned. In short the contention is that in these cases brought in New York the procedure of New York as to bringing the action may be or should be followed. It is the general rule that procedure and remedy are regulated by the law of the forum. 2 Rawle's Bouvier, 870; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; Stewart v. Baltimore & Ohio R. Co., supra. This is so declared in Slater v. Mexican National R. R. Co., 194 U. S. 132, 24 Sup. Ct. 581, 48 L. Ed. 900.

In the Dastoli case if the father and mother of the deceased had gone into the state of Maryland, the home and actual domicile of the defendant corporation, and brought action against it, basing their right to recover, as they must have, on the Pennsylvania statute, where the negligence resulting in instantaneous death occurred, would they have been required to bring the action in the name of the state of Maryland? In other words, as the action is transitory and may be brought and prosecuted in any state where the defendant is found, should it be brought by this father and mother in their own names in the state of Pennsylvania, in the name of the state of Maryland if brought in that state, the home of the defendant corporation, and by and in the name of the administrators of the estate of the deceased if commenced in the state of New York, where defendant is doing business and found? I think the Stewart Case, supra, holds just that as to the Teti case, or that the action *may be* so brought in the various jurisdictions mentioned, but that the case is no authority for bringing the action in the Dastoli case in the name of the administrators where both the right to bring and prosecute the action and the right to the recovery the beneficial interest in the recovery are given directly to the father and mother. In the Teti case, while in Pennsylvania the right to sue and recover is given to the widow, it is given to her in a representative capacity. Wooden v. W. N. Y. & P. R. R. Co., 126 N. Y. 10, 16, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803. The recovery, if any, does not belong to her but to her and the child. True, she is entitled to a part of the recovery, but even that part in her hands as plaintiff, mixed with the other part belonging to the child, is held by her as quasi trustee until a proper division or distribution is made.

[4] Dividing this class of actions (actions to recover damages for death by wrongful act) into two subclasses as to remedy—(1) those where the right to maintain the action is given directly to the one entitled in his or her own right to the recovery when had, and (2) those where the right to maintain the action is given to a representative and the recovery itself, when had, is given to certain named persons—the Dastoli case belongs to the first class and the Teti case to the second class mentioned, and the Stewart Case covers the second class of cases mentioned and not the first. In the one class of actions (like the Dastoli action) there is no necessity for a trustee or repre-

sentative, while in the other class there is, and the distinction is recognized in the statute itself. The mother (widow) in the one case sues for herself *and child* or children, while in the other each parent sues for himself or herself. In the one class of cases where the parents of the deceased are entitled to the whole recovery, there can be but two actions, while in the other class where there may be a widow and many children, there might be many actions required if the action could not be maintained by a representative. The policy of the law in the state of New York is that in these death cases whether there be a mother and minor children or only a father or mother surviving, or both, one person entitled to the recovery or several, there shall be only one action, the recovery, if any, to be divided between the widow (if any) and next of kin, or whoever may be entitled thereto. It was a policy adopted not merely for the protection and benefit of the claimants but the state itself. Numerous suits at law, where one will suffice, are an unnecessary expense to the state as well as the parties, as the running of courts is expensive to the state. Pennsylvania may establish her procedure, Maryland hers, and New York hers, and when by comity we allow a party or parties to enforce his or their rights of action against a person or corporation found here, which arose under a statute of some other state, it is very clear that we may prescribe the form of procedure for enforcing that right, including the designation of the person or persons or representative who shall enforce it, or in whose name the right shall be enforced. Prior to July, 1913, there had been laws enacted and interpreted which denied the widow and next of kin of Italians, citizens of Italy, who had come into the United States and lived and worked here, the benefit of the laws giving a right of action in case of death by the negligence of their employers. July 3, 1913, article 3 of the Treaty of Commerce and Navigation, of February 26, 1871 (17 Stat. 845), was amended, and such amendment became effective by ratifications exchanged at Washington July 3, 1913, and proclaimed the same day. The amended section or article of that treaty reads as follows:

"Article I.

"It is agreed between the high contracting parties that the first paragraph of article III of the Treaty of Commerce and Navigation of February 26, 1871, between the United States and Italy shall be replaced by the following provision:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

[5, 6] This treaty is the supreme law of the land, which Congress alone may abrogate, and the courts of the United States must respect and enforce it. What is the meaning of the words—

"including *that form of protection granted by any state* * * * which establishes a civil responsibility for injuries or for death caused by negligence

or fault and gives to relatives or heirs of the injured party a right of action, which right *shall not be restricted* on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter"?

If an alien widow or an alien widow and child of a citizen of Italy who was killed by negligence in Pennsylvania comes to New York and finds the wrongdoer there, suit may be brought in that form granted or given by the laws of New York to one of its own citizens *in such a case*. If, then, the New York laws, statutes and decisions, read together, make it necessary that a resident and citizen of New York, as against such foreign corporation guilty of the negligent act in Pennsylvania and which caused death there, *must sue* in his or her own name, the alien referred to may follow that procedure. But is such alien confined to such procedure? May not he or she proceed under the New York procedure as prescribed in its statute in similar cases where the cause of action arises in New York and under its statutes? I do not think the treaty referred to was intended to give to the alien plaintiff, when bringing action in New York, greater or different rights of procedure and form of remedy than are accorded to the residents and citizens of that state. If this be so, and the father or mother, residing in New York, of a person killed by wrongful act in the state of Pennsylvania—the wrongful act of a Maryland corporation doing business there—when bringing suit against such corporation in New York, it being found there, must under the laws of New York (statutes and decisions) bring the action in his or her own name, it would seem that the alien must follow the same procedure or form of remedy. This would give the alien coming into New York and prosecuting his action precisely the same rights and remedies which the state of New York accords to its own citizens. If this be so, then an amendment setting up the fact, if it be a fact, that the father and mother of Dastoli are citizens of Italy would not help the plaintiffs in that case.

In Wooden v. W. N. Y. & P. R. R. Co., 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803, the defendant was a corporation of the state of New York, but did business in operating its railroad, in part, in the state of Pennsylvania, where the negligence occurred and plaintiff's intestate was killed. He left a widow and three children, and the widow brought action in her own name for the benefit of herself and the children in New York state against the defendant corporation to enforce the liability created by the Pennsylvania statute. On demurrer the Court of Appeals held and said (126 N. Y. 16, 26 N. E. 1051, 13 L. R. A. 458, 22 Am. St. Rep. 803):

"But it must not be forgotten that the cause of action sued upon is the cause of action given by the lex loci and vindicated here and in our tribunals upon principles of comity." Leonard v. Columbia Steam Nav. Co., 84 N. Y. 53, 38 Am. Rep. 491.

That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. The court also held that the

action was *properly* brought in the name of the widow, but also *remarked* that it must be so brought. Under this holding of the highest court of the state of New York that the action when brought by the widow is brought by her because the cause of action is given to her and to her as trustee for the children, coupled with the decision of the Supreme Court of the United States in the Stewart Case, supra, it would seem plain that in the federal courts the Teti case can be maintained in the name of and by the administrators as trustees for the widow and children, but it emphasizes the fact that when the right of action is given directly to the parents of the deceased in their own behalf as well as the recovery, they alone can sue to enforce the right. Under the authority of the Stewart Case the action can be brought and maintained in the state where defendant is found and by the representatives residing there and authorized to sue in similar cases arising in such state where the right of action is given by the laws of the state where the negligence and death occurred to a representative or trustee of the persons entitled and such representative sues for their benefit. Such is the Teti case. The Court of Appeals in New York has not *decided* that in such a case the administrators appointed here *cannot* maintain the action. The point was not up or decided in the Wooden Case. It was only decided that the action was properly brought by the widow. The case of Johnson v. Phœnix Bridge Co., 197 N. Y. 316, 90 N. E. 953, is quite in point here. The statute of Canada gives a right of action in case of death by wrongful act or negligence, directly to the "consort and ascendant and descendant and relations of the deceased." The deceased, a resident of New York, was killed in Canada, and in New York the widow was appointed administratrix and as such administratrix brought action in New York, based on the Canadian statute. Under that statute the action must be commenced within a year. After the expiration of the year a motion was made to strike out the words "as administratrix," etc. The motion was granted as to the widow, and she was allowed to proceed in her individual capacity, but leave to bring in as parties the "ascendant and descendant relations" was denied on the ground the cause of action in their favor had become barred by the lapse of more than one year. Stone as administrator of Stone, Deceased, v. Groton Bridge & Mfg. Co., 77 Hun (N. Y.) 99, 28 N. Y. Supp. 446, has been cited. That case is directly opposed and contrary to Stewart v. Baltimore & Ohio R. R. Co., supra. In Strait v. Yazoo & M. V. R. Co. et al., 209 Fed. 157, 126 C. C. A. 105, the cause of action for the decedent's wrongful death arose in the state of Mississippi, where by statute a cause of action is preserved to the decedent's mother, brothers, and sisters, which the case says (209 Fed. page 160, 126 C. C. A. 108), "was, in Mississippi, enforceable by the mother." Laws Miss. 1908, § 721, p. 184. If so, then the mother would represent in the action both herself and the brothers and sisters. The policy of the law there is one action for the benefit of all. The action was brought to enforce this cause of action in the state of Tennessee by the mother of the deceased. In Tennessee (where there is a similar statute giving a right of action in case of death

caused by negligence) it is provided in the statute, as in New York, that it shall be brought by and in the name of the decedent's personal representatives. However, the mother brought the action in Tennessee. The mother was not suing in her own right and for her own benefit wholly, but for the benefit of herself and the brothers and sisters, as, in fact, trustee. The point was raised that this action in Tennessee should have been brought in the name of the administrators duly appointed. The Circuit Court of Appeals (Sixth Circuit), instead of holding that the action in Tennessee to enforce the Mississippi statute must be brought by the one to whom the right to prosecute the action in Mississippi for the benefit of all was given, to wit, the mother, held (209 Fed. page 160, 126 C. C. A. 108):

"True, if the right of action had arisen in Tennessee, the suit, in view of the beneficiaries, would have been maintainable in that state only through a personal representative of the deceased; but since the administrator's relation to the beneficiaries, like that of the mother in the present instance, would have been simply that of a trustee, such a difference in parties plaintiff is of no consequence. Cincinnati, H. & D. R. Co. v. Thiebaud, 114 Fed. 918, 924, 52 C. C. A. 538 (C. C. A. 6th Cir.)"

It is apparent that the court was of the opinion that the case would have been more properly brought in the state of Tennessee, in the name of the administrators, but that as the mother suing in Tennessee was suing as trustee in fact, it was *immaterial* that the administrators, who would have sued as statutory trustees, did not bring the action. That court was of the opinion, evidently, that if less attention should be paid by courts to mere form and ceremony in protecting and enforcing the rights of persons and more to the preservation of the substantial rights of the litigants, better and more speedy justice would be done. It is of course true that no administrator should be permitted to bring and prosecute an action for the benefit of others unless authorized so to do by the law of his creation, or by some statute having control of the matter in dispute. But it is by comity alone (and the treaty referred to and the transitory nature of the action) New York permits the enforcement in New York of the cause of action given by the statutes of the state of Pennsylvania in these death cases. The policy of New York is that such causes of action shall be brought and prosecuted by executors or administrators for the benefit of all entitled to the recovery. The policy is one action and one trial. It is opposed to the policy of New York to have the expense of several trials; it might be an action by each of several brothers and sisters, when there are several, or an action by each of a large number of children, all depending on the law of the state giving the right of recovery in case of death by wrongful act. It seems to this court the better and more sensible doctrine and holding that when under and by the statute of another state giving or preserving a right of action to the widow or children, or parents, or other next of kin, in case of death by wrongful act, such statute provides that suit shall be commenced and prosecuted by one of the number, or by administrators, for the benefit of all, that in New York its statutory form of representation shall, or, at least, may be followed when the action to enforce the statute is brought in that state. Clearly a recovery by the admin-

istrators in the Teti case in New York would bar an action by the widow for the benefit of herself and children in this and all other jurisdictions. This is clearly the doctrine of the Stewart Case, supra. No one will claim that, in that case, after recovery by the administrators in the District of Columbia there could have been a recovery in a suit brought in the name of the state of Maryland to recover damages for the death of the decedent. I do not find the cases quite harmonious, and think the right of these administrators in the Teti case to maintain the action, in view of some of the cases, somewhat doubtful if strict and technical rules are applied. In the Dastoli case, where the right of action is preserved to the parents by the statute of Pennsylvania and the right to bring and prosecute the action, as well as the recovery, are given to them directly, I see no well-grounded reasoning which will sustain an action in New York brought by the administrators. There is a distinction between acts constituting negligence at common law and acts constituting negligence by virtue of some statute; that is, the doing or nondoing of certain acts is declared actionable by the statute when they did not constitute negligence at common law and a cause of action is conferred upon the widow and next of kin. In such cases the statute does not preserve to the widow or next of kin, as the case may be, a cause of action existing in favor of the decedent at common law had he survived. Where a cause of action is given by statute for acts done or omitted and causing death, which acts do not constitute negligence at common law, and hence there is no cause of action in the injured party when he survives, and the same act which creates or gives the cause of action prescribes who shall bring it, well may it be that no other person can in any jurisdiction, even when such statute provides for an action by an administrator or widow for the benefit of herself and children.

The Pennsylvania statute hereinbefore quoted has recently been considered by the Supreme Court of that state in Centofanti v. Pennsylvania R. R. Co., 244 Pa. 255, 90 Atl. 558. The court there holds as it has done heretofore that:

"Section 19 of the act of April 15, 1851 (P. L. 669), providing that when 'death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased * * * may maintain an action for and recover damages for the death thus occasioned, creates a new cause of action unknown to the common law, and the cause of action contemplated by the statute is the tort which produces death, and not the death caused by the tort. A suit for damages for the death of a person is transitory, and may be maintained in any jurisdiction where the writ can be served, but it must be brought under the statute of the state where the cause of action arose. In such case where the acts of negligence occur in Pennsylvania and the death occurs in New Jersey, the action is properly brought by the widow under the Pennsylvania statute."

In this case the accident occurred and the injuries were received in the state of Pennsylvania, but the deceased was removed to a hospital at Trenton, N. J., where he died from his injuries the same day. The action was brought in Pennsylvania by the widow in her own right and on behalf of her minor children to recover damages.

It was contended that as the deceased died in New Jersey, the action should have been brought under the New Jersey and not the Pennsylvania statute. New Jersey has a statute similar to that of Pennsylvania, which provides that the action, where death is caused by wrongful act, shall be brought in the name of the administrator or personal representative. The court went on to hold, and rightly, of course, that the wrongful act or negligence of the defendant and consequent injuries is the basis of the recovery, and not the death, while of course death must follow in order to create a cause of action in the widow for herself and children. The court said: "The cause of action under this section is not the death of the party, but the unlawful violence or negligence that caused it." There would be no cause of action in the widow for the benefit of herself and children unless death ensued. In such case there is of course no cause of action in the party injured by the negligent acts, as he is dead. Had he lived he would have had a cause of action for the negligence. The court was arriving at the conclusion that the cause of action arose in the state of Pennsylvania, where the negligent acts were committed, and not in New Jersey, where the death occurred. The court was also arriving at the conclusion under its former decisions that the cause was properly brought by the widow in her own behalf and in behalf of her children, and not by the administrators of the deceased. It is very clear that the cause of action arose in Pennsylvania, and that the action was properly brought by the widow in behalf of herself and children, as the statute had formerly been construed in that way by the same court. It is equally clear that the statute of Pennsylvania gave the cause of action. There would have been no justification whatever for bringing the action in the name of the administrators of the deceased under the Pennsylvania statute, unless it should have been held that a cause of action arose both in the state of Pennsylvania, where the negligent acts were committed, and in the state of New Jersey, where the resultant death occurred, and that the right of action given by the New Jersey statute may be enforced in Pennsylvania. This is but a reiteration of the case formerly cited so far as same is applicable here.

In Maryland the action is brought in the name of the state of Maryland for the benefit of those entitled. In the District of Columbia the action is brought by the administrators for the benefit of those entitled. The action is brought by these plaintiffs, respectively, for the benefit of those entitled to the recovery. The Maryland statute may be enforced in the District of Columbia by action brought by the administrators appointed in the District of Columbia. In Pennsylvania the action is brought by the widow for the benefit of herself and children. In New York the action is brought by the administrators for the benefit of the widow and children. In both Pennsylvania and New York the action is not brought in the name of the ones entitled to the recovery, but by others for them. This being so, how under the Stewart Case, the authority of which has never been questioned, can it be that the action in the Teti case cannot be maintained by the administrators appointed in New York, where the action is brought and the Pennsylvania statute is sought to be enforced. Un-

doubtedly the courts in Maryland have held and will hold that actions under the Maryland statute must be prosecuted in the name of the state of Maryland, as the courts in Pennsylvania have held that under its statute the action must be brought in the name of the widow for the benefit of herself and children.

In Pritchard v. Norton, 106 U. S. at page 130, 1 Sup. Ct. 106, 27 L. Ed. 104, the court said:

"Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and determinable by the law of the forum."

In Hollenbach v. Elmore & Hamilton Contracting Co. (C. C.) 174 Fed. 845, 850, this court considered the Stewart Case. In this case Hollenbach was killed in Maryland by negligence. He was a resident of the state of New York, and an administrator was appointed in New York. Action was brought in the name of the administrator to recover damages for the death. It was based on the statute of Maryland, but not brought in the name of that state. This court held there that the action was properly brought in the name of the administrator.

In United States Fidelity Co. v. Kenyon, 204 U. S. 349, at page 356, 27 Sup. Ct. 381, 383 (51 L. Ed. 516), the court said:

"Stewart v. Balt. & Ohio R. R. Co. was an action against a railroad company by an administrator to recover damages for the benefit of a widow whose husband's death was alleged to have been caused by the negligence of the defendant company. In the course of the discussion of the controlling questions in that case the court observed in passing that 'for purposes of jurisdiction in the federal courts regard is had to the real rather than to the nominal party,' and that even in an action of tort 'the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought.'"

My conclusions are that in the Dastoli case the demurrer is well taken and must be sustained, and that in the Teti case the demurrer is not well taken, and that same must be overruled.

There will be orders and judgments accordingly, but without costs in either case.

Ex parte LAM PUI.

(District Court, E. D. North Carolina. October 26, 1914.)

1. ALIENS (§ 32*)—DEPORTATION OF CHINESE—FAIRNESS OF TRIAL.

On the application of an immigration inspector, made upon his alleged personal knowledge, stating that a Chinese person, in possession of a certificate of admission describing him as a student, was engaged as a laundryman, the Secretary of Labor issued a warrant, to which the application was not attached, directing the inspector to take such person into custody, and charging that he was unlawfully within the United States, in that he entered in violation of "the Chinese exclusion laws (section 21 of the act of February 20, 1907" [U. S. Comp. St. 1913, § 4270]). There was, however, no proof of any violation of the Immigration Act of February 20, 1907, and the warrant of deportation was sought to be sustained on the ground that such person obtained his certificate of admission by falsely representing that he was a student. Upon his arrest he was taken into a room, the door to which was during a part of the time

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

locked, and examined under oath. After having been examined, he was asked if he wished to be represented by counsel, and promptly availed himself of this privilege. *Held* that, in view of the impossibility of such person or his counsel ascertaining from the warrant with what violation of law he was charged, and in view of the delay in permitting him to obtain counsel, he was not accorded the fair and impartial hearing guaranteed to all persons whose liberty is involved.

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

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

The immigration authorities may deport a Chinaman unlawfully in this country under Immigration Act Feb. 20, 1907, § 21, authorizing the Secretary of Commerce and Labor, when satisfied that an alien has been found in the United States in violation of that act, or is subject to deportation under that act or any law of the United States, to cause such alien to be arrested and deported, as well as under the deportation provisions of the Chinese exclusion laws; but if they proceed in the arbitrary and summary manner authorized by the immigration law, they must proceed strictly in conformity with its provisions.

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

3. ALIENS (§ 28*)—DEPORTATION OF CHINESE—GROUNDS.

A Chinese person, procuring a certificate of admission by means of which he enters the United States by false and fraudulent representations, is unlawfully within the United States, in violation of the Chinese Exclusion Act, and may be deported.

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

4. ALIENS (§ 32*)—DEPORTATION OF CHINESE—REVIEW BY HABEAS CORPUS.

The finding of the Secretary of Labor in a deportation proceeding is final and conclusive, when the proceeding is fairly conducted and the finding is sustained by evidence; but the court on habeas corpus, though it may not weigh the evidence, may determine whether, when tested by well-settled principles, there was evidence giving the Secretary jurisdiction to order the deportation.

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

5. HABEAS CORPUS (§§ 4, 27*)—SCOPE OF INQUIRY—JURISDICTION.

The writ of habeas corpus may not be used as a writ of error; but when the petitioner challenges the jurisdiction of the court or tribunal by whose mandate he is deprived of his liberty, he may do so by habeas corpus, since, if there be no jurisdiction vested in such tribunal to deprive him of his liberty, the mandate upon which the ministerial officer acts is null and void, and the petitioner is unlawfully restrained of his liberty.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 4, 22; Dec. Dig. §§ 4, 27.*]

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

A Chinese person, in possession of a certificate of admission duly viséed when sought to be deported on the ground that such certificate was obtained by false representations, though not entitled to demand the constitutional guaranties accorded to citizens, is entitled to a fair hearing as near as may be in accordance with the elementary rules of procedure obtaining in all nations having organized government, securing the liberty of its own citizens and those of other nations within its borders by invitation or permission.

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

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

7. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PROCEEDINGS TO DEPORT—EVIDENCE.

When it is sought to deport a Chinese person admitted to the United States upon a certificate of admission duly viséed, it must be shown by evidence, and not merely by suspicious circumstances or conjecture, that he obtained such certificate by means of fraudulent representations.

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

8. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PROCEEDINGS TO DEPORT—EVIDENCE.

In a proceeding to deport a Chinese person who entered the United States upon a certificate of admission issued to him as a student, on the ground that he was a laborer and obtained such certificate by false representations, evidence *held* insufficient to sustain the charge.

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

9. EVIDENCE (§ 584*)—NATURE—SUSPICION OR CONJECTURE.

Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied; and mere suspicion, conjecture, or speculation is not evidence, and cannot be made the basis for a finding of fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2424, 2426, 2427; Dec. Dig. § 584.*

For other definitions, see Words and Phrases, First and Second Series, Evidence.]

Petition for writ of habeas corpus by Lam Pui, an alien Chinese in the custody of W. R. Morton, and held for deportation, upon warrant of Hon. W. B. Wilson, Secretary of Labor. Petitioner discharged.

J. H. Ralston, of Washington, D. C., and Thos. W. Davis, of Wilmington, N. C., for petitioners.

Francis D. Winston, U. S. Dist. Atty., of Windsor, N. C., for respondent.

CONNOR, District Judge. [1] The record discloses that on December 27, 1913, upon the application of W. R. Morton, inspector of immigration for North Carolina, Hon. W. B. Wilson, Secretary of Labor, issued his warrant directing said inspector to take petitioner into his custody, charging that he was "unlawfully within the United States, in that he entered in violation of a law thereof, to wit, the Chinese exclusion laws (section 21 of the act of February 20, 1907.)" The inspector was directed to grant petitioner a hearing, to enable him to show cause why he should not be deported in conformity with law, and that, pending further proceedings, he be admitted to bail in the sum of $1,000.

W. R. Morton, inspector, took petitioner into his custody and examined him, the original stenographic notes of which he transmitted to the Secretary of Labor. The Secretary, on April 1, 1914, issued his warrant reciting that, from proofs submitted to him, after due hearing before Inspector W. R. Morton, he had become satisfied that petitioner had been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, to wit:

"That the said alien is unlawfully within the United States, in that he has been found therein in violation of the Chinese exclusion laws, and is, therefore, subject to deportation under the provisions of section 21 of the above-mentioned act."

The inspector is directed "to return the said alien to the country whence he came." Pursuant to this warrant W. R. Morton, inspector, took petitioner into his custody for the purpose of deporting him.

On April 13, 1914, a writ of habeas corpus was issued by the judge of the District Court of the United States, directed to the said W. R. Morton, commanding him to produce the body of petitioner before him, to the end that the cause of his detention be inquired into, etc. The respondent made return to the writ, setting forth the proceedings herein recited, and averring that, in obedience to said warrant, it was his purpose to deport petitioner. He moved the judge to dismiss the writ and remand the petitioner to his custody. Petitioner resisted said motion and moved that he be discharged. He assigned, as grounds to sustain his motion:

(1) That he had not had a fair and impartial trial before the inspector in charge of immigration, or the Department of Labor and Commerce, for that the said petitioner, when arrested by W. R. Morton, inspector in charge of immigration, was by him taken to the grand jury room in the United States courthouse, the door to which was part of the time locked, and was there examined and catechised by the said W. R. Morton, and refused to be permitted to consult with counsel until after examination by the said W. R. Morton was completed to his satisfaction, after which he was permitted to consult counsel.

(2) That the Secretary of Labor was without authority or jurisdiction to issue said warrant, or direct the deportation of petitioner, for that no evidence or proof to sustain the charge made in the original warrant, or the finding in the order of deportation, had been submitted to the said Secretary, and without such proof the said proceeding and warrant were void and of no legal effect.

Before proceeding to the consideration of the merits of petitioner's motion for his discharge, it is proper to note the fact that there was in the mind of the draughtsman of the warrant for deportation some confusion of thought. The allegation made against the petitioner, and found by the Secretary of Labor to be true, as the basis for his order, is that:

"He is unlawfully within the United States in violation of a law thereof, to wit, the Chinese exclusion laws (section 21 of the act of February 20, 1907)," and "that the said alien is unlawfully within the United States, in that he has been found therein in violation of the Chinese exclusion laws, and is, therefore, subject to deportation, under the provisions of section 21 of the above-mentioned act."

The examination taken by the inspector, being the "proofs" upon which the "findings" of the Secretary are based, fails to disclose a violation of any of the provisions or prohibitions of the act of February 20, 1907, being the Immigration Act. Section 21 of that act contains no prohibition of entry or right to remain in the United States, but confers upon the Secretary of Labor authority—

"upon being satisfied that an alien has been found in the United States, in violation of this act, or that an alien is subject to deportation under the pro-

visions of this act, or any other law of the United States, to cause such alien to be taken into custody and returned to the country whence he came."

The proceeding instituted by W. R. Morton, inspector, and upon which the order for deportation is based, began with the statement of the inspector to the Secretary of Labor, being his application for a warrant of arrest, bearing date December 26, 1913, in which he says:

"When this Chinaman arrived at San Francisco, Cal., he was in possession of a section 6 certificate, describing him as a student, destined to Oakland, California. Judging from the date of his arrival in this country and the length of time he has been at Wilmington, N. C., where he now resides, his departure for Wilmington must have been immediately after his admission, showing that the Oakland, California, destination was fictitious. He is engaged as a laundryman, and has been for the past two years, at the Sam Lee laundry, 126 Market street, Wilmington, N. C. He is in possession of certificate of identity No. 5619."

Upon this statement, petitioner was rightfully in the United States, unless, as suggested by the inspector, he obtained his certificate, which, it is conceded, had been properly viséed, by making a fraudulent representation in respect to his status as a student. It is manifest, therefore, that in no aspect of the case was he in the United States in violation of the provisions of the act of February 20, 1907. It thus appears that the petitioner was not informed by the terms of the warrant wherein he had violated the Chinese Exclusion Act. It would seem that, in a proceeding the result of which is fraught with such serious results to the alien, it would be a reasonable requirement that petitioner should, by the terms of the warrant, be informed of the character of the charge against him.

[2] The real purpose of the proceeding is to invalidate the certificate upon which he was admitted into the United States. It is conceded that the language of section 21 of the act of February 20, 1907, confers upon the Secretary of Commerce power upon being satisfied that petitioner was subject to deportation under "any law of the United States," and this, of course, includes the Chinese exclusion laws. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. As is well said by Judge Foster, in United States v. Redfern (D. C.) 210 Fed. 548:

"While no doubt the immigration authorities may deport a Chinaman unlawfully in the country under the general immigration act, as well as under the provisions of the Chinese exclusion laws, if they elect to proceed in the arbitrary and summary manner authorized by the former, they at least ought to proceed strictly in conformity with its provisions."

Without any disposition to take a technical or narrow view of the record, although the liberty and rights of a citizen of a friendly power, with whom our government has entered into treaty relations, the terms of which are clear, is involved, it is worthy of note that the language of the warrant of deportation is far from clear. It does not show under what law, or upon what facts, the Secretary bases his conclusion. He says that:

"From the proofs submitted to me, after due hearing before Inspector in Charge W. R. Morton, held at Wilmington, N. C., I have become satisfied that

the alien, Lam Pui, who landed at San Francisco, Cal., ex S. S. Korea, on the 8th day of September, 1911, has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, to wit: That the said alien is unlawfully within the United States in violation of the Chinese exclusion laws, and therefore subject to deportation under the provisions of section 21 of the above-mentioned act."

There is not a scintilla of evidence that the petitioner has committed any of the acts prohibited by Act Feb. 20, 1907, § 2. It is further conceded that he has "a section 6 certificate duly viséed." The questions, therefore, are whether petitioner was given a fair hearing, and whether there is any evidence in this record that he obtained his certificate by falsely representing himself to be a student, whereas he was, in truth, a laborer and entered in violation of the Chinese exclusion laws. That this is respondent's contention appears from his return to the writ of habeas corpus. He says repeatedly in his return that said "certificate was fraudulently obtained"—"that it was obtained upon a false and fraudulent statement and concealment of the real purpose of the alien in coming to the United States."

[3] It is conceded that, if it be proven that petitioner procured a certificate of admission by false and fraudulent representations, he may be deported. He is unlawfully within the United States in violation of the Chinese Exclusion Act. United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204; United States v. Lim Yuen (D. C.) 211 Fed. 1001.

[4] Assuming that, although the warrant is rather obscurely phrased, the Secretary of Labor has so found upon the proofs submitted to him, the question arises whether such finding is final and not open to review upon a writ of habeas corpus. It is settled beyond controversy that such finding is final and conclusive when the proceeding is fairly conducted and sustained by "evidence." In Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, it is said:

"In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute."

See Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967.

It is contended by petitioner that the examination had by the inspector at Wilmington, N. C., was unfair, and that it utterly fails to disclose any evidence that he was a laborer at that time, or that he procured his certificate of admission by false or fraudulent representations. These questions, he insists, can be raised upon the return to a writ of habeas corpus—that it is the only remedy open to him. Redfern v. Halpert, 186 Fed. 150, 108 C. C. A. 262, and many other cases.

[5] It is well settled, by numerous decisions of the Supreme Court, that the writ may not be used as a writ of error. When, however, the petitioner challenges the jurisdiction of the court or the tribunal by whose mandate he is deprived of his liberty and is held in custody, he may do so upon the return to the writ of habeas corpus. If there be no jurisdiction, no power vested in the tribunal, or officer to deprive

him of his liberty, the mandate upon which the ministerial officer acts is utterly null and void, and petitioner is unlawfully restrained of his liberty. United States v. Tsuji, 199 Fed. 750, 118 C. C. A. 188.

[6] The question is discussed, the authorities cited, and the line of demarcation between those cases in which the writ of habeas corpus may, and those in which it may not, be resorted to, in Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849. Petitioner insists that the statute confers jurisdiction upon the Secretary of Labor to deport only "when he is satisfied that an alien has been found in the United States in violation of this act, or that he is subject to deportation under the provisions of this act, or of any law of the United States"; that this power may not be exercised arbitrarily and without evidence, meaning thereby proof of the fact upon which the order of deportation is founded. That such is the construction put upon the statute by the Secretary is shown by the rules adopted and promulgated for its administration and enforcement. Attention is called to rule 22, which requires officers to make thorough investigation of all cases of which they have information, and to report the same to the immigrant officials, etc. By subdivision 2 of this rule the officer is required to make application for a warrant, stating the facts bringing the alien within the provisions of the statute, and requiring that the proofs of such facts be the best that can be obtained.

While a statute conferring power to summarily hear and determine rights of person or property, and make final orders affecting such rights, will be so construed as to effectuate the purpose of the legislative department of the government, in respect to its administration, those methods of procedure which experience has demonstrated to be necessary for the protection of such rights against oppressive and arbitrary conduct will be enforced. The courts will not weaken the efficiency of the legislation, or the power conferred upon the administrative officer; but they will not sacrifice substantial and essential rights to summary procedure. This principle is especially applicable when human liberty is involved. While the petitioner is not entitled to demand the constitutional guaranties accorded to our citizens of birth and adoption, he is entitled, by virtue of the certificate issued and passed upon by the lawful authorities, under the supreme law of the land—the treaty between this republic and China—to demand that he be accorded a fair hearing, as near as may be in accordance with elementary rules of procedure obtaining in all nations having organized government, securing the liberty of its own citizens and those of other nations within its borders by invitation or permission.

Such has been the uniform holding of the federal courts. In Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888, the alien had been admitted as a student holding a certificate, as does the petitioner. The District Court adopted the finding of the Commissioner of Immigration that he had obtained the certificate by false representations. Upon appeal the judgment was reversed. Mr. Justice Day said:

"When this young man entered a port of the United States in July, 1899, he presented such a certificate (as the law required) duly issued and viséed by the consular representative of the United States. Upon application for

admission this certificate is prima facie evidence of the facts set forth therein. * * * This certificate is the method which the two countries contracted in the treaty should establish a right of admission of students and others of the excepted class into the United States, and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence, and may not have the effect of a judicial determination, yet, being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate. In this record we find no competent testimony which would overcome such legal effect of the certificate, and the plaintiff * * * was * * * wrongfully ordered to be deported."

In Hanges v. Whitfield (D. C.) 209 Fed. 675, upon the return to a writ of habeas corpus, petitioner being in custody under a warrant directing his deportation, Reed, District Judge, said:

"The court will not in proceedings of this character consider the testimony or the weight thereof, if properly and fairly taken, to determine whether or not it is sufficient to warrant the deportation of an alien. That would be for the proper immigration officials to determine. But the court may, and it is its duty to, consider the manner of procuring the testimony, its competency and legal admissibility against the petitioners, and determine whether or not they have had a fair and impartial hearing or trial."

This ruling is abundantly sustained by the words of Mr. Justice Holmes in Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 58 L. Ed. 369, and other cases cited in the opinion.

In United States v. Redfern (D. C.) 210 Fed. 548, Foster, District Judge, says:

"Congress has, indeed, vested the immigration officers with enormous power, subject to no check save their own consciences; but in granting them discretion to arrest and deport any person charged with being an alien and unlawfully in the country, I cannot believe that it was ever intended that they could do so arbitrarily, and without some evidence upon which to base their decision."

In United States v. Quan Wah (D. C.) 214 Fed. 462, Chatfield, District Judge, says:

"Nor can the fact that the burden of proof to show right to be in the United States is thrown upon the Chinaman necessitate his further showing that the action of the authorities who decided he had the right to enter was correct, unless the evidence shows that his entry was fraudulently obtained. * * * The decision of his right to enter was presumptively correct, and unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient."

See, also, United States v. Lou Chu (D. C.) 214 Fed. 463.

[7] Those decisions establish the principle, so just and consistent with conceptions of American jurisprudence, that, before an alien admitted to the United States as a member of the exempt class can be deported, it must be shown by evidence, not merely suspicious circumstances or conjecture, that he has obtained such admission by means of fraudulent representations. Any other rule would be violative of elementary conceptions of justice and fair dealing. In the light of the language used by the courts, the validity of the return to the

writ must be examined, not for the purpose of weighing or estimating the value of the evidence, but of ascertaining whether, when tested by well-settled principles, the examination had by the inspector constituted evidence upon which the Secretary of Labor had jurisdiction to order the deportation.

[8] It appears, from the examination, that the inspector found petitioner in a laundry, 126 Market street, Wilmington, N. C. He arrested him, and, together with the government interpreter and stenographer, took him into the grand jury room of the United States courthouse, the door to which was a part of the time locked, and proceeded to subject him to an examination under oath. The stenographer's notes are attached to the return to the writ. It appears from the answers of petitioner: That he is 18 years of age, unmarried; father and mother living in China. Neither of them have been in United States. His uncle resides at Oakland, Cal. Petitioner, upon being admitted at San Francisco, went to Oakland, and remained there four or five months; has been in Wilmington "not quite two years," at laundry of Lem Thung, friend of his father. Is attending private school of Mrs. Shaw, 211 Walnut street, Wilmington, N. C.; about one year. The first year he did nothing; stayed in the laundry. Studies second reader and Bible, sometimes. Father in the grocery business in China. Had $500 when he came to this country. Showed immigration officer check for that amount and $20 in gold; gave check to his uncle. He cashed it, and petitioner brought money to Wilmington; check issued by bank in Hong Kong. Has $300 or $400 now. Lem Thung keeps it for him. Can read a little English; spells "a number of words given him by inspector." He answered the following questions:

"How long have you been working for Lem Thung?" "I don't work there; I just stay there." "Do you remember seeing me in that laundry a month or about that time ago?" "I remember a person went in there, but I cannot recognize you." "When I was there you helped me on my overcoat?" "Yes; I remember helping you on your overcoat." "That day you were working in the laundry?" "No; I just stay there. I was killing a chicken, and helped cook a little." "I didn't see you killing chickens; you were handling laundry." "I am not working there; I am attending private school at 211 Walnut street. * * * Then, nobody in town has seen you do any laundry work?" "They may have seen me in there, but I do not think they have seen me work there." "Do you know how to run those machines, then?" "No." "Did you ever wrap up bundles of collars and put tickets on them?" "Sometimes I do. In the summer I help them out a little and wrap up bundles." "What were you doing in that laundry when I came this morning? You were stripped down to your working clothes." "I was helping Lem Thung because he was sick. I had some collars in my hand." "When Lem Thung is sick, and you help him out, what does he give you for the work?" "Nothing." "Does he give you your board?" "I offered him board, but he does not want to take it."

At this stage of the examination the inspector says:

"You have been arrested under a deportation warrant. Do you wish to be represented by counsel?" A. "Yes." (Here the alien is accorded opportunity to retain counsel, which he does. Attorneys Davis & Davis, who appear is his behalf, are advised as to the procedure for submitting a brief and for the conduct of deportment warrants generally.)

The record states that petitioner had certificate of identity No. 5619 in name of Lam Pui, alleged student. It appears that Mr. Davis, coun-

sel for petitioner, after being advised as to his rights, filed affidavits of several persons who corroborated petitioner's statement. Thereafter they were cross-examined by the inspector, when they fully corroborated petitioner's statement. Just why the inspector failed to inform petitioner, before subjecting him to the examination, of his right to have, and an opportunity to procure, counsel, is not easy to understand. Such conduct is so utterly at variance with the course pursued by all judicial officers, both state and federal, that it arrests the attention and jars the conception of fair procedure. It may be that the form in which a number of the questions were framed, involving a charge based upon the alleged personal knowledge of the inspector, and calling for exculpation by the petitioner, throws some light upon the mental attitude of the inspector. This suspicion is strengthened by reference to the fact that the application for the warrant is based, not upon affidavits or statements of others, but upon the alleged personal knowledge of the inspector. He states in the application as his opinion that "it seems more probable that his landing was fraudulent and surreptitious." That petitioner would have retained counsel before the examination was had, if informed of his right to do so, is shown by his prompt acceptance of the privilege when accorded to him. I concur in the opinion of Judge Reed in Hanges v. Whitfield, supra, that the examination—

"must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them. * * * The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact. * * * It is contended in behalf of the inspector that he is authorized under rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of immigration officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, except upon legal evidence, which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them."

Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety, demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representatives in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors.

I venture to think that there was no necessity for the procedure adopted in this case. Petitioner was one of less than a half dozen Chinamen in a city of 30,000 inhabitants, a very large majority of whom were American citizens. There is no suggestion that there was any concealment by petitioner of his residence, or manner of life, or occupation. It would seem that if, pursuing the occupation of a laborer for two years in Wilmington, it would not have been difficult to have found some person who had seen him doing so. Inquisitorial methods of fixing guilt upon persons do not commend themselves to the minds of American lawyers or laymen. They are contrary to the genius of our institutions. Not a single person, other than the inspector, is produced who says that he saw petitioner laboring in the laundry. Those who are produced by petitioner, including the lady who was teaching him, sustain and corroborate his denial. It is worthy of note that, in his sworn return to the writ, the inspector says that petitioner was present at the hearing—

"in person, and as well was represented by counsel; his attorney, Thos. W. Davis, Esq., being personally present at said hearing, and who represented him now on this proceeding."

This is not that frank, full, and complete statement which the court is entitled to expect from an officer exercising a quasi judicial function. I am clearly of the opinion that the petitioner was not accorded the fair and impartial hearing which our laws guarantee to all persons whose liberty is involved. This is especially true in regard to a citizen of another country, holding a certificate of admission which the Supreme Court says "ought to be entitled to some weight," and not to be set aside for fraud "unless there is some competent evidence to overcome the legal effect of such certificate."

Eliminating the statement of the inspector, improperly inserted in the examination by which it is sought under the guise of a question to establish a fact, is there anything approaching the dignity of evidence of the charge so vaguely made in the warrant? It is manifest that, except as explained by the inspector dehors the warrant, neither the petitioner nor his counsel, when permitted under instructions of the inspector to appear, could have ascertained with what violation of law petitioner was charged. There is a painful obscurity in the entire procedure, except the application for the warrant, which was not attached to it. It must be kept in view that the petitioner is not to be deported because, after being permitted to enter as a student, he has been found laboring in a laundry. This does not constitute a deportable violation of the law. United States v. Lim Yuen (D. C.) 211 Fed. 1001, and cases cited. The charge is that he procured the certificate by false and fraudulent representation. No one swears that he did so; no one testifies that he made any statement which was false. It is conceded that the charge may be established by reasonable and fair inferences to be drawn from evidence.

Petitioner, 18 years of age, comes to this country with $500. He lands at San Francisco and goes to Oakland, Cal., where he resides with his kinsman four or five months, and comes to Wilmington, where Lem Thung, "a bosom friend of my father," resides. During the first

year he does nothing. Thereafter he goes to school, giving the name and residence of the teacher. He spells the words put to him by the inspector. Accepting his statement as true, and it is not denied by any one, he helped the inspector put on his overcoat one time. He killed a chicken and "helped cook a little." "In the summer he helps them out a little and wraps up bundles;" helped Lem Thung "because he was sick; had some collars in my hand"; helped him "sometimes when sick, but not always." If this constitutes evidence, proof of the charge, it is conceded that its weight is for the Secretary of Labor, and the court will not undertake to estimate its value or the finality of its probative force. In Harlan v. McGourin, supra, Mr. Justice Day, quoting the language used in Hyde v. Shine, 199 U. S. 84, 25 Sup. Ct. 764, 50 L. Ed. 90, "In the federal courts * * * it is well settled that upon habeas corpus the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his [petitioner's] discharge," says:

"In so stating, the learned justice * * * was but affirming the rule well established under section 1014 that there must be some testimony before the Commissioner to support the accusation in order to lay the basis for an order of removal; otherwise, the accused could be discharged upon habeas corpus, although the court could not weigh the evidence when the record shows that some evidence was taken."

In United States v. Williams, 200 Fed. 538, 118 C. C. A. 632 (C. C. A., 2d Circuit) Judge Noyes wrote the opinion for the court. Judges Coxe and Ward, thinking that their views upon this point were not expressed clearly, concurring, said:

"The opinion does not, however, make entirely clear our views upon a single point. We think that some evidence must be presented to justify a judgment of deportation and that conclusions of law must have some facts upon which to rest. The immigrant may, in a sense, have a fair hearing, although the conclusions drawn by the executive officers be wholly unsupported by proof."

[9] Text-writers and judges have undertaken to define the word "evidence," as applicable to judicial investigation, with more or less success. Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

"Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied." Draft, Code.

It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of courts. In People v. Van Zile, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

"Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact."

Judge Caldwell, in Boyd v. Glucklich, 116 Fed. 131, 53 C. C. A. 451, well says:

"The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass."

It may be that, upon a full, fair, hearing, in which petitioner has the benefit of counsel, and all of his rights secured to him, the government will be able to establish the charge made against him. I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

The petitioner is entitled to be discharged from custody. An order to that effect will be drawn.

Ex parte LAM FUK TAK.

(District Court, E. D. North Carolina. October 26, 1914.)

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

In a proceeding to deport a Chinese person, who entered the United States upon a certificate of admission issued to him as a merchant, on the ground that the certificate was obtained by false representations, evidence *held* insufficient to sustain this charge.

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

2. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PROCEEDINGS TO DEPORT—EVIDENCE.

In a proceeding to deport a Chinese person, it was manifestly improper for the immigration inspector, who had such person in his custody, charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement that such person was found engaged in laundry work, without offering himself as a witness in the regular way, and his statement could not support a warrant of deportation.

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

Application by Lam Fuk Tak for a writ of habeas corpus. Petitioner discharged.

J. H. Ralston, of Washington, D. C., and Thos. W. Davis, of Washington, N. C., for petitioner.

Francis D. Winston, U. S. Dist. Atty., of Windsor, N. C., for respondent.

CONNOR, District Judge. [1, 2] The procedure in this case was, in all respects, the same as in the Matter of Lam Pui, 217 Fed. 456. The writ of habeas corpus was issued for both petitioners, and heard at the same time. The facts found in the matter of Lam Pui are applicable to petitioner, except in respect to the examination. Petitioner held certificate of identity No. 13574. He was admitted at San Francisco, as a merchant. From his examination, there being no other tes-

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

timony before the Secretary, it appears that petitioner is 30 years of age, married, has two children, had at time of arrest been in United States not quite two months, and brought with him $1,000 in gold, of which he now has $800; has been in Wilmington one month; stays with Lem Thung, 126 Market street. When in China, he was in the feather fan business; also in grocery business. His father was the sole owner of store. He died, and petitioner inherited the business. He sold out the feather fan business; had three partners. Lem Thung is a distant cousin. The sole evidence of his present occupation is found in the answers to the following questions:

"Do you remember seeing me in the Market Street Laundry about a month ago? Yes. How long have you been working there? I am not working there. I am only stopping there, looking for some kind of business. When I saw you there a month ago, and you were working there, you were helping Lem Thung, because he was sick; is that the idea? You mean to tell me that, since you have been in that laundry, you have never done a tap of work of any kind? Except sometimes I take up laundry and put it in the right place. What were you doing in that laundry when I saw you a month ago? Nothing. Does Lem Thung charge you for board down there? No."

At this point the inspector puts in the record:

"On the occasion of a visit to that laundry by the inspector in charge, on or about December 20, 1913, this Chinaman was found engaged in laundry work there—126 Market street."

He is then asked whether he can read and write Chinese, and answers that he can. He is, at this time, told that he has been arrested upon a warrant in deportation proceedings, and asked if he wishes counsel, to which he responds, "Yes."

The same proceeding was had in the case of Lam Pui.

It would seem unnecessary to pursue this investigation. Petitioner, a merchant in China, comes here and is admitted as a merchant, bringing $1,000 in gold, two months since; has been in Wilmington about one month. Except for the statement inserted in the record, not under oath, and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.

The statement of the inspector must be stricken out and disregarded. The fact that it is inserted in the record tends strongly to show that petitioner was not given a fair hearing. Eliminating this statement, there is no evidence upon which the order of deportation can be sustained.

Let the petitioner be discharged.

In re SUPRENANT.

(District Court, N. D. New York. October 21, 1914.)

1. PARTNERSHIP (§ 237*)—DISSOLUTION—SALE OF INTEREST TO CONTINUING PARTNER—EFFECT.

Where one of two partners sells his entire interest in the property of the firm to the other partner, the latter takes an absolute title to the property, subject to no lien in favor of partnership creditors, and though they may have equities as against individual creditors of the partners, they cannot enforce them except through proceedings to wind up the firm and distribute its assets.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 489, 490, 493, 494; Dec. Dig. § 237.*]

2. PARTNERSHIP (§ 264*)—DISSOLUTION—SALE OF INTEREST TO ONE PARTNER.

A sale by one of two partners of his entire interest in the firm property to the remaining partner, dissolves the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 608, 614, 617; Dec. Dig. § 264.*]

3. PARTNERSHIP (§ 279*)—DISSOLUTION OF FIRM—RIGHTS OF FIRM CREDITORS.

Where a firm is dissolved by a sale by one partner of his entire interest in the firm property to the other partner, such dissolution does not affect the liability of the partners to firm creditors, except so far as they may be released for a consideration.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 636, 637; Dec. Dig. § 279.*]

4. BANKRUPTCY (§ 196*)—PARTNERSHIP—DISSOLUTION OF FIRM—PARTNERSHIP CREDITORS—SALE OF PROPERTY—CUSTODY OF BANKRUPTCY COURT—INTERFERENCE.

Where a firm was dissolved by a sale of the interest of one of the partners to the other more than four months before the latter became a bankrupt, and in the meantime firm creditors secured judgments against the firm, they were not entitled to enforce executions against the property which had previously belonged to the firm, and which had passed into the custody of the bankruptcy court, but were bound to enforce their rights and equities in the bankruptcy proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. § 196.*]

In Bankruptcy. In the matter of F. Rae Suprenant, bankrupt.

Motion by trustee in bankruptcy to continue an injunction granted on order to show cause restraining the sheriff and certain judgment creditors of Moody and Suprenant from selling on execution or interfering with certain personal property formerly owned by the firm or copartnership of Moody & Suprenant, but which property came into the sole possession of Suprenant as alleged owner more than four months prior to the filing of the petition in bankruptcy against Suprenant, by the purchase thereof by Suprenant, he paying a sum in cash and assuming the payment of all the firm debts and liabilities and thereafter continuing the business in his own name. All the facts will appear in the opinion. Motion granted.

Henry W. Williams, of Glens Falls, N. Y., for trustee.

Chambers & Finn, of Glens Falls, N. Y., for judgment creditors.

RAY, District Judge. From about March 10, 1913, C. W. Moody and F. Rae Suprenant (Suprenant being the above-named bankrupt),

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

were copartners doing business under the firm name of Moody & Suprenant. More than four months prior to the filing of the petition in bankruptcy by Suprenant he bought out the entire interest of Moody in the firm's property, his sole partner in the business, and thereafter continued the business openly in his own name, having gone into sole and exclusive possession of all the firm's property, and treating it as his own. As part of the consideration Suprenant assumed and agreed to pay all the firm's debts and liabilities. In continuing this business in his own name he purchased goods to replenish the stock, some for cash, some on credit, and some was partly paid for in cash and credit given for the balance. He paid something on the old debts of the firm pursuant to his agreement that he would pay all. No judgment or judgments existed against the firm at the time of this sale and transfer. On the 4th day of September, 1914, the voluntary petition in bankruptcy of Suprenant was filed and adjudication made. A receiver was appointed on the 8th day of September, 1914. On the 25th day of September, 1914, the trustee herein duly qualified. First the receiver and then the trustee succeeding went into the possession of all the property in Suprenant's possession, including that in question. About April 30, 1914, certain firm creditors sued on their claim, and at some later time, not stated, obtained judgments against Moody and Suprenant on debts owing by the firm at the time of such sale, and September 2, 1914, executions were issued and a levy made by the sheriff, it is claimed, on the property of Moody and Suprenant. No petition in bankruptcy has been filed against the firm or copartnership, or Moody. Other judgments have been obtained against the partners of the firm on firm debts.

It is claimed by these judgment and execution creditors of the former firm or copartnership of Moody & Suprenant that, notwithstanding the said sale of Moody to Suprenant, the property which the copartnership owned at the time of such sale remains the property of the firm, and is subject to levy and sale on execution against the members of that firm notwithstanding the bankruptcy of Suprenant and the appointment of a receiver and trustee in the bankrupcy proceedings against him, and that such property does not pass to the trustee of Suprenant. Whether or not, after a sale of the property and its conversion into money in the pending bankruptcy proceedings, the firm creditors will, in equity, be entitled to the proceeds of the property found and identified as firm property at the time of the sale to Suprenant in satisfaction, so far as it will go, of their claims, is not now up or before the court. The question is, notwithstanding any equity or equitable claim or lien (if any) which these firm creditors have, shall the property remain in custodia legis, where it now is—that is, in the possession of the court in bankruptcy for purposes of administration and distribution—or may these judgment and execution creditors of the firm of Moody & Suprenant hold it on execution and sell same as property owned by the firm and not by Suprenant? This, of course, involves the question whether or not the title of the property passed to Suprenant on the sale by Moody to him. If the title did pass to Suprenant it passed to the trustee, even if subject to

some equity which may be enforced, and is lawfully in custodia legis, and this court may enjoin any levy on and sale thereof, and it may be sold by the trustee. The judgments created no lien until execution issued and levy made, and all judgments were docketed within four months of the bankruptcy of Suprenant.

In the state of New York and many other jurisdictions it seems to be the well-settled law, in the absence of fraud making the sale or transfer voidable, one of two partners may sell or relinquish to the other all his interest in the partnership property, such other agreeing to pay the firm debts, and that in such case the purchasing partner acquires the same ownership and dominion of the property as if it had ever been his own separate property, and that, the sale being made in good faith, the title vests in the purchasing partner as his own private estate, free from any lien or equity in favor of partnership creditors. This assumes, of course, that the law had not at the time of such transfer taken the partnership property into its custody for purposes of administration and distribution. This is true even if the purchasing partner turns out to be insolvent at the time of buying out the other partner, and this seems to be the rule as well laid down by the Supreme Court of the United States. Partnership creditors have no lien on partnership assets growing out of the partnership, at least until the property passes into custodia legis and is being administered and a lien is declared. Prior to that time partnership creditors may have an equity to have the partnership property applied to the payment of partnership debts, but this equity of the creditors of the partnership is a derivative one. It is not held or enforceable in their own right. It is derived from the right of the partners to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. So long as the partnership exists and the partners are in a situation to enforce this right, the creditors may appeal to the courts, or either partner may, but when there are two partners and the one has sold out to the other, the purchasing partner taking the property as his own individual property, the creditors are in no situation or condition to enforce the right or equity referred to.

The leading case in New York on this subject is Dimon, Receiver, etc., v. Hazard, 32 N. Y. 65, where it is held:

"Where one of two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner acquires the same dominion as if it had ever been his own separate property. The assignment being made in good faith, the title vests in the assignee as his own private estate, free from any lien or equity in favor of partnership creditors. Such assignee may lawfully transfer such property in payment of his individual debts."

This case is cited, approved, and followed in Stanton, as Receiver, etc., v. Westover et al., 101 N. Y. 265, 267, 4 N. E. 529, where it was held one of two partners, on retiring from the business, transferred to his copartner his interest in the firm property, each agreeing to pay one-half of its debts. The firm was solvent, but the remaining partner was in fact insolvent at the time. This, however, was not known to him or the retiring partner, and the transfer was made in good faith. In an

action wherein creditors of the firm claimed a preference over the individual creditors of the remaining partner, held that by the transfer the title vested in the remaining partner as his own private estate; that he acquired the same dominion over it as if it had always been his own separate property, free from any lien or equity on the part of partnership creditors, and that transfers by him of the property in payment of individual debts were lawful. And as to this case, see 10 N. Y. Annotated Digest, p. 814.

This is stated to be the law in Parsons on Partnership (4th Ed.) note 1 to section 248, on pages 330, 331. It is there said:

"Where one partner transfers the assets to his copartner a question arises of a different sort. There is in that case an intention to pass the property from the firm to the purchasing partner. Both parties acting together have power to convey firm property of any kind; and here therefore the legal title passes. The firm creditors have no more right to complain than the creditors of any debtor who has conveyed away his property; they can complain, that is, only when the conveyance is a fraud upon creditors. In the ordinary case, therefore, the firm creditors have no right to complain, and no claim upon the property transferred. Schleicher v. Walker, 28 Fla. 680, 10 South. 33; Stanton v. Westover, 101 N. Y. 265, 4 N. E. 529. And the same thing is true if the transfer is not to one of the partners, but to an individual creditor of a partner, or to a third party, provided all the partners assent."

Dimon v. Hazard, supra, is cited and followed also in Crane v. Roosa, 40 Hun, 458; Cory v. Long, 32 N. Y. Super. Ct. 497; Durfee v. Bump, 3 N. Y. Supp. 507,[1] and is applied in Crook v. Rindskopf, 105 N. Y. 482, 484, 488, 12 N. E. 174. See, also, 30 Cyc. 545, etc.

In Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472, the court held:

"A mere general creditor of a firm, having no execution or attachment, has no lien whatever upon its personal assets. While firm creditors are entitled to a preference over creditors of the individual members of the firm in the payment of their debts out of the assets of the firm in course of liquidation, their equity is not held or enforceable in their own right, but is a derivative one, practically a subrogation to the equity of each individual partner to have the firm assets applied primarily to the payment of its debts; and, where no such equity exists in favor of any member of the firm, the firm creditors have none. Where, therefore, judgment is recovered against all the members of a firm upon a joint obligation, not an indebtedness of the firm, the firm property may be levied upon and sold on execution issued on the judgment; and after such sale no rights, legal or equitable, in such property are left to the firm creditors, but the purchaser acquires full title although the firm be insolvent."

In the course of its opinion in this last-cited case (105 N. Y., at page 18, 12 N. E. at page 172), the court said:

"But one of two partners may transfer all of his interest in the partnership property to his copartner, and the purchasing partner will be vested with the absolute title to the corpus of all of the partnership property, as if it had always belonged to him. Stanton v. Westover, 101 N. Y. 265 [4 N. E. 529]. And all the members of a firm may sell the partnership property, even if wholly insolvent, to a purchaser in good faith, and thus convey, free from the claim of firm creditors, a good title to the firm property. Instead of selling for cash they may transfer firm property to pay a firm debt. And they may transfer the firm property to pay a joint debt for which they are

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 51 Hun, 637.

jointly liable outside of the business of the firm, and the joint creditor will obtain a good title to the firm property. Therefore, while firm property will not pass under successive sales upon executions issued against the individual partners, we can see no reason to doubt that such property will pass under a sale upon a joint execution against all the partners, issued upon a judgment recovered for any joint debt whatever."

In Case v. Beauregard, 99 U. S. 119, 25 L. Ed. 370, the court held:

"A member of a firm assigned and transferred in good faith his interest in the partnership property in payment of a just debt for which he was solely liable. The creditor took possession of it and sold it to A., who, by an act of sale, in which the other member of the firm united, transferred it for a valuable consideration to B. The firm and the members of it were insolvent. C., claiming to be a simple-contract creditor of the firm, then filed his bill to subject the property to the payment of his debt. Held, that C. had no specific lien on the property, and, there being no trust which a court of equity can enforce, the bill cannot be sustained."

In the course of its opinion the court said:

"No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. Rice v. Barnard et al., 20 Vt. 479 [50 Am. Dec. 54]; Appeal of the York County Bank, 32 Pa. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets, *as a partner*, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.

"It is indispensable, however, to such relief, when the creditors are, as in the present case, simple-contract creditors, that the partnership property should be within the control of the court, and *in the course of administration, brought there by the bankruptcy of the firm*, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust than can be enforced until the property has passed in custodia legis. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless."

In Fitzpatrick v. Flannagan, 106 U. S. 648, at page 654, 1 Sup. Ct. 369, at page 374 (27 L. Ed. 211), the court said:

"The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself, in the language of

this court in Case v. Beauregard, 99 U. S. 119, 125 [25 L. Ed. 370], 'retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.'

"It follows from this view that, even though the partnership of Rummel & Son was not dissolved, Rummel had the right, with the consent of Cutler, to appropriate the property to the payment of his individual debt to Huiskamp Bros., because the plaintiff, at the time the mortgage was made by Rummel to Huiskamp Bros., had no specific lien upon the property, and there was no trust impressed upon it at that time which could be enforced by the plaintiff. It was only necessary that the disposition of the property should have been bona fide on the part of both parties, and without any intent to hinder or delay the plaintiff. Howe v. Lawrence, 9 Cush. (Mass.) 553 [57 Am. Dec. 68], and cases there cited; Locke v. Lewis, 124 Mass. 1 [26 Am. Rep. 631]."

This is quoted and approved in Huiskamp v. Moline Wagon Co., 121 U. S. 310, 323, 324, 7 Sup. Ct. 899, 905 (30 L. Ed. 971), in which case the court held:

"One partner may, with the consent of his copartner, apply the partnership property to the payment of his individual debt, as against a creditor of the partnership, who has acquired no lien on the property.

"Where such payment is claimed to be lawful on the ground that the property so applied has become the individual property of the partner making the payment, no creditor of the partnership acquires any right in respect of the property by the fact that he does not know of the transfer of the property to such partner, so long as he has no lien on the property, and it is applied in good faith by such partner to pay his individual debt."

[1-4] Scores of other cases might be cited, but this is sufficient to show that when one of two partners sells out his entire interest in the property of the firm to the remaining or other partner, such purchasing partner takes the absolute title as though the property had always been his, and subject to *no lien* in favor of partnership creditors. Partnership creditors may have some equities as against the individual creditors, but to what extent, if any, it is not necessary or proper now to decide. A reference has been ordered to get at all the facts. The title to this property passed to Suprenant over four months prior to his bankruptcy. By such sale by the one partner to the other only partner the partnership was dissolved. Parsons on Partnership (4th Ed.) § 391. The liability of both Moody and Suprenant to the firm creditors remained, however, except it may be as to some who for a consideration or in some way released Moody. All this property in question consequently came into the possession and custody of this court as a part of the individual estate of Suprenant, charged, it may be (no decision on that question is made), with equities in favor of the firm creditors. But if so, the firm creditors cannot interfere with such property, or levy upon or sell it or enforce any levy made within the four months preceding the bankruptcy of Suprenant. They cannot enforce any equitable right they may have in any such way, as their judgments were obtained within four months of bankruptcy, or since, and the property is in custodia legis, and rightfully so, subject to any equitable rights firm creditors may have and which this court has full power as a court of equity to enforce and protect.

The same doctrine as to the law above stated is reiterated by the Circuit Court of Appeals, Eighth Circuit, Sargent v. Blake, 160 Fed. 57,

87 C. C. A. 213, 20 Am. Bankr. Rep. 115, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58. The court there held:

"Until partnership property is placed in the custody of the law by some suit or act which invokes the interposition of a court to administer it, partners, with the consent of each, have the right and the power to convert it into individual property, to apply it to the payment of individual debts in preference to the debts of the partnership, or to make any other disposition of it in good faith which does not constitute a voidable preference. Insolvency does not destroy or diminish this right of disposition. The right of the creditors of a partnership to be paid out of the partnership property in preference to the individual creditors does not attach until an application is made to some court for the administration of the partnership property, nor then unless some partner has at that time that right, for the preferential equity of the partners is the mere right to enforce the right of the partners to compel such a preference. Before the partnership property is placed in custodia legis it is not held in trust for the *partnership creditors*, and they have no lien upon it.

"When all the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors of the partnership within the meaning of section 67e of the Bankruptcy Act of 1898, and it is not void or voidable where the creditor paid has no reasonable cause to believe that a preference was intended thereby. The covenant of an insolvent partner to assume and pay the debts of an insolvent partnership is a valuable consideration sufficient to support a conveyance of an interest in the partnership property.

"The assumption of payment of partnership debts by one partner in consideration of an absolute conveyance of the partnership property to him by the other creates no trust in and fastens no lien upon the property thus conveyed in favor of the partnership creditors prior to any request for the interposition of a court to administer the partnership property."

In Re Kolber (D. C.) 193 Fed. 281, the court held:

"In the absence of fraud, and a showing as to insolvency of a firm when it was dissolved, the assets validly vested in the succeeding member as an individual, entitling him to an allowance of an exemption in bankruptcy proceedings brought against him 14 days later."

In that case one Myers and one Kolber were sole copartners. Fourteen days before the petition in bankruptcy was filed against Kolber all the assets of the firm were transferred in good faith to Kolber, who assumed payment of all the partnership liabilities. Kolber continued the business for only 14 days, but it was held that the title to the assets so sold to him was vested in him, and that he was entitled to his exemption thereout as against firm creditors.

In Re Telfer, 184 Fed. 224, 106 C. C. A. 366, it was held (C. C. A., Sixth Circuit) that the bankruptcy act does not "work a change of the established rule fixing the substantive rights of creditors, respectively, of the partnership and of its individual members."

In re Filmar, 177 Fed. 170, 100 C. C. A. 632, does not affect the real question here involved, as it does not concern the title of Filmar to the property, but bears on the equities of the firm creditors when such property falls into the court of bankruptcy and is being administered, a question expressly reserved in the case before the court.

Whatever the equities of these firm creditors may be (if any) to have the proceeds of the property that came to Suprenant by his purchase

from Moody applied first to the payment of their claims and judgments, those must be settled and adjusted by the court having possession of the property with power to reduce it to money and distribute. The title was in Suprenant at the time the judgments were obtained and execution issued and levied, and at the time the petition in bankruptcy was filed and, on adjudication, passed to the trustee. It was not subject to any valid levy and sale on execution which could stand against the bankruptcy proceedings. Bankruptcy Act, § 67f;† Collier on Bankruptcy (10th Ed.) p. 964. The result is that the temporary injunction granted with the order to show cause must be made permanent, and the property will be sold in due course by the trustee who, so far as he can, will keep account of the proceeds of the sale of property which came from the partnership assets, to the end that no rights may be lost or prejudiced. The sheriff and all partnership creditors will be enjoined from interfering with, levying upon, or selling any of the property of Suprenant, including that which he obtained from the firm and which were formerly firm assets.

There will be an order accordingly.

UNITED STATES v. TWO CASES OF CHLORO-NAPTHOLEUM DISINFECTANT.

(District Court, D. Maryland. June 22, 1914.)

1. DRUGGISTS (§ 11*)—INSECTICIDE—MISBRANDING—FRAUDULENT INTENT.
   Absence of a fraudulent intent on the part of a shipper is no defense to proceedings for misbranding, in violation of the Insecticide Act (U. S. Comp. St. 1913, § 8765).
   [Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. § 11.*]

2. EVIDENCE (§ 363*)—TEXT-BOOKS—ADMISSIBILITY.
   Where an insecticide, sold under the name "chloro-naptholeum," was claimed to be misbranded, and the government sought to show that chlornapthol was a recognized chemical product, standard chemical books, produced from the library of the Department of Agriculture, were admissible, not as evidence of the opinions of the text-writers, but to show the state of the art or of the world's knowledge on the subject.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1516–1519; Dec. Dig. § 363.*]

3. DRUGGISTS (§ 11*)—INSECTICIDE—LABELS.
   A word used on a label of an insecticide or other drug does not become purely arbitrary until it has lost its descriptive significance, both to the specialist in the subject and to the general public, so that, where common words are put on labels, they will be held to have been used in their popular meaning rather than that which they may have acquired among manufacturers and dealers.
   [Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. § 11.*]

4. DRUGGISTS (§ 11*)—INSECTICIDE—MISBRANDING—CHLORO-NAPTHOLEUM.
   Insecticide Act April 26, 1910, c. 191, 36 Stat. 331 (U. S. Comp. St. 1913, § 8765), provides that an article shall be deemed misbranded if it be labeled or branded so as to deceive or mislead the purchaser. Claimant had manufactured and for many years had sold an insecticide labeled "chloro-

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

† Act July 1, 1898, c. 541 (Comp. St. 1913, § 9651).

naptholeum," which, however, did not contain as an essential ingredient chlorine or chlor-napthol. Chlorine, however, was shown to be a valuable disinfectant, and had been recognized as such since the close of the eighteenth century; and napthol is also well known as a powerful germicide, and as early as 1881 the name "chlor-napthol" had been given to a definite chemical compound. *Held* that, since the name, as applied to claimant's product, would be likely to deceive those having knowledge of chlorine and chlor-napthol, and their chemical character and attributes, claimant's substance was misbranded, though the word used by it had by long use, to the large majority of people, become associated with claimant's product.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. § 11.*]

5. DRUGGISTS (§ 11*)—INSECTICIDES—"MISBRAND."

Under the Insecticide Act (U. S. Comp. St. Supp. 1911, p. 1372), goods are misbranded, if they bear any statement which will deceive or mislead purchasers who are of normal capacity and who use that capacity in a common-sense way.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 10; Dec. Dig. § 11.*

For other definitions, see Words and Phrases, Second Series, Misbrand.]

Libel by the United States against Two Cases of Chloro-Naptholeum Disinfectant. Verdict for the United States. Motion for new trial denied.

John Philip Hill, U. S. Atty., and J. Craig McLanahan, Asst. U. S. Atty., both of Baltimore, Md.

Julius Wyman and Richard E. Preece, both of Baltimore, Md., and Stroock & Stroock, of New York City, for defendant.

ROSE, District Judge. This case arises out of a seizure under the tenth section of the Insecticide Act. The packages proceeded against were labeled "Chloro-Naptholeum." The libel says that such label constituted a misbranding. It charges that the words used conveyed, and were intended to convey, the meaning and impression that the article contained as an essential ingredient chlorine or chlor-napthol. Claimant admits that it did not.

[1] The allegation that the words were intended to convey a false meaning is immaterial. Absence of fraudulent intent on the part of the shipper is not a defense to proceedings under the Food and Drugs or Insecticide Acts. United States v. Thirty-Six Bottles of London Dry Gin, 210 Fed. 271, 127 C. C. A. 119. There was a jury trial. It turned out, however, that the facts were not in dispute. The interstate shipment was admitted. The government put on the stand a number of expert witnesses of high qualification, among them, some of the most distinquished authorities on pharmacology, preventive medicine, and hygiene. They testified that chlorine was a valuable disinfectant. It had been recognized as such as far back as the close of the eighteenth century. It is now extensively used in purifying the water supplies of urban communities. Napthol is also a well-known and powerful germicide. As early as 1881 the name chlor-napthol had been given to a definite chemical compound. To chemists the name was descriptive. It conveyed to them a clear idea of the essential composition of the

product to which it was applied. Some years later the claimant's predecessors adopted "Chloro-Naptholeum" as the name for their disinfectant. The testimony showed that chlor-napthol is a powerful germicide. It is not hard to make, but except for laboratory purposes it is seldom made. The chemical witnesses all said that to them the name "chloro-naptholeum" indicated that the product so called contained chlorine or chlor-napthol as an essential ingredient, and that they so supposed until they learned otherwise. It was nevertheless admitted that claimant's disinfectant was reliable, valuable, and largely used. No attempt was made to controvert any of the testimony offered on behalf of the government. Claimant put witnesses on the stand to prove that the ordinary purchaser knows nothing about chlor-napthol. They testified that the people who bought chloro-naptholeum attached no significance to the name. They asked for it, because they had used it before, or had heard of somebody else who had. While there was no great volume of such evidence, the government made no effort to dispute it.

The issue, therefore, became almost entirely one of law. No facts were in controversy. The jury, indeed, had the right to disbelieve any part of the testimony which did not seem to them credible. No reason was apparent, nor was any suggested, why the truthfulness of any of it should be questioned. There was no attempt to discredit the veracity or the knowledge of any of the witnesses. No request for an instructed verdict was, however, made. The case accordingly went to the jury. Their verdict was for the government. The claimant moved for a new trial on various grounds. At the hearing they resolved themselves into the contention that incompetent evidence had been admitted and that erroneous instructions had been given to the jury. Little need be said as to the rulings as to testimony, or as to any of the criticisms of the charge, except those going to the fundamental proposition of law involved.

At the argument it was stated that claimant had some months before the trial adopted a new name for its goods. It wanted to resume the use of the old so soon as its right to do so could be clearly established. What it and the government, therefore, both wish, is a final decision upon the merits. To prolong the litigation over technical questions would do harm to everybody. It does not appear, however, that on such questions any error was made.

[2] The government sought to show that chlor-napthol was, as early as 1881, a recognized chemical product, and that at various dates before and since certain specific things were known to chemists. For that purpose it produced from the library of the Department of Agriculture various books published here and abroad. It proved that they were standard works on the subjects to which they related. Their title pages were offered in evidence to establish the dates and places of their respective publications. The claimant objected to their admission, on the ground that their publication had not been properly proved. They were admitted. No question arose as to the admissibility of the opinions of text-writers. The books were not offered for such purpose. They were let in, as in patent cases, to show what at a particular time was the state of the art or of the world's knowledge. For such pur-

poses they are clearly admissible. 4 Chamberlayne, Modern Law of Evidence, § 2755.

Proceedings in these cases are expressly assimilated to those in admiralty. Under the liberal rules of that forum, sufficient prima facie proof of the date of the publication of the books in question was given.

It was urged that the court in its charge to the jury had too freely assumed that testimony which was uncontradicted was true. At the close of the charge claimant was given an opportunity to call attention to any errors which it supposed had been made. It specified the respects in which it thought the court had taken for granted things which it was entitled to question. The jury were then distinctly told that all such issues were for them, and that theirs was the responsibility for the decision thereon.

[3] In substance the jury were instructed that a word does not become purely arbitrary until it has lost its descriptive significance both to the specialist in the subject and to the general public. In this circuit it has already been determined that, where words in every day use are put upon labels, they will be held to have been used in their popular meaning rather than that which they have acquired among manufacturers and dealers. Libby, McNeill & Libby v. United States, 210 Fed. 148, 127 C. C. A. 14.

[4] In the case at bar the words in controversy were not in everyday use. Only a few people accurately knew their meaning. Nevertheless they had a definite and precise one. That is now what it was at and before claimant's predecessors by accident or design adopted the phrase, or what appears to be an obvious variant thereof, as the name of their product. Moreover the very thing to which it properly belonged could be used, and in some respects at least was well adapted for use, for the very purposes for which claimant's goods were offered for sale. Claimant says, conceding all this, its wares have by that name been on the market for about 30 years. Those who know of the words only in connection with its product are at least 100 times as numerous as those who ever knew what their real meaning was and is.

It contends that in law their only present significance is what it has given to them. By usage and common acceptation they have come to mean, not the definite, known chemical compound, but the disinfectant made up by it according to its secret proprietary formula. The fact that as it uses the words they would still mislead and deceive chemists and other persons familiar with chemical terminology is in its view immaterial. The question is so important that I have felt that more thought should be given to it than was possible in the hurry and rush of a jury trial.

Claimant relies upon such cases as United States v. 40 Barrels of Coca-Cola (D. C.) 191 Fed. 431. In so doing it loses sight of the fact that those cases were decided as they were largely, if not solely, because the names which the government attacked were in the opinion of the court protected by the first proviso of the eighth section of the Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 771 [U. S. Comp. St. 1913, § 8724]) which reads:

"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 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."

The Insecticide Act was not passed until nearly four years after the Food and Drugs Act had gone upon the statute book. Various questions under the former had been raised before the latter was enacted. A comparison of the text of the two shows that the draftsman of the Insecticide Act took the Food and Drugs Act as his model. The larger part of it he copied verbatim. Where he did not it was obviously because he had a definite purpose in departing from it. United States v. 30 Dozen Packages Roach Food (D. C.) 202 Fed. 271. A word here or there might have been left out or altered as the result of a clerical mistake. Changes of another sort are clearly significant. The first proviso of the eighth section of the Food and Drugs Act is not to be found in the Insecticide Act, nor is there any substitute for it. Its exclusion could not have been accidental. It must have been intended. Congress clearly did not wish the administration and enforcement of the younger act to be embarrassed by any of the controversies of which the proviso in the older had been so fruitful a mother.

Claimant cites many trade-mark and unfair competition cases to show that words originally descriptive may by long and exclusive use in connection with one dealer's goods acquire a secondary meaning. Iron-Ox Remedy Co. v. Co-operative Wholesale Society, Ltd., 24 Patent & Trade-Mark Cases, 425. That is so. In all or nearly all of such cases, certainly in those which are in this respect best considered, there was evidence that the second comer wanted to use the words in controversy so that he might the more readily pass off his goods as those of the first. By so doing he proved to demonstration that in his belief those words had come to imply to the public that the goods upon which they appeared were of the plaintiff's production or selection. He at least was estopped to say otherwise. Under such circumstances the courts, to illustrate by the facts of a leading case, care little whether both the so-called camel's hair beltings or only one or neither contained any camel's hair, or, if it did, how much. Reddaway v. Banham, Law Reports (1896) Appeal Cases, 199. It is perfectly true that, if in any such case it appears that the plaintiff has been himself perpetrating a fraud upon the public, no assistance will be given him against one who has simply improved on his teaching. Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706.

It would be unsafe, however, to infer that in every such case in which relief has been given the plaintiff the court would have held him guiltless as against a proceeding instituted by the public under such an act as this. It is quite possible that there may be cases in which the courts will act at the instance of the official representatives of the people when they would stop their ears to the thou alsos of a detected cheat. Such speculations may or may not be far afield. It

is more to the purpose that a plaintiff in trade-mark or unfair competition cases will seldom or never be denied relief on the ground that he is deceiving the public, unless the intent on his part so to do is demonstrated by his acts. Good faith is not a sufficient defense against a proceeding like this.

Under this and analogous acts the federal government and the several states do not require the producer, the dealer, or the shipper to tell anything about his goods. There are exceptions to this rule, but there are not many. In most respects he may be as silent or as loquacious as he pleases. All that the law demands is that, if he speaks, he shall tell the truth. He is under no obligation to tell the whole truth. He is bound to tell nothing but the truth. The trouble is that words are not always tools of precision. They may mean one thing in one connection or at one period and something else at another. Some words may be used to convey almost directly opposite meanings. "Let" may mean either "to permit" or "to prevent." A word such as "admire" may signify one thing in one century and quite a different thing in another.

Claimant says that it has given the words it uses the only meaning they have to the purchasing public; that no matter what they once meant, no matter what they now mean to chemists and learned men, they mean its goods and nothing else to the people. It says that the purchasers know that the name is not descriptive. Is that true? Most of those who buy it or use it may not know what its name describes. It does not necessarily follow that they know it is not intended to describe anything. They or many of them may very naturally suppose that it does describe something, although what that something is they may not know accurately or at all. Once in a while some of them may become curious, and may ask some one who is more or less well posted on chemical subjects. He tells them what the words imply as to the composition of the article. Thereafter the label misleads and deceives them, if it did not before.

As I pointed out to the jury, if the claimant is right in the law for which it contends, there are products, which may be lawfully shipped into one neighborhood, while it would be against the law to send them into another. A name or a term, the meaning of which is accurately known in one community, may be without significance in another. If the rightful name of one thing may be applied by a dealer to something else, which he sells for a purpose for which the genuine article would be useful, all sorts of complications may arise. When he first used the title, the real thing, although known to chemists, may have been very little used. After he had long employed the phrase, some one found out how to make the genuine thing cheaply. It proved to be singularly efficient for the very purposes for which he had been selling his. Newspapers and magazines began to talk about it and to describe its properties. The further use of its name for his product would obviously from every standpoint be highly deceptive. It always did deceive those who knew of the genuine thing. That it did not at first do much harm was due solely to the fact that there were few who did know.

The claimant contends that it violates no law because that which deceives the best informed does not deceive the ignorant, and because on this particular subject the ignorant are in a great majority. As a matter of fact it is utterly impossible for any court or for any jury to tell how much of the knowledge that the few have disseminates itself through the mass of the population in a more or less inaccurate guise. Chlorine has recently been extensively used by municipalities and other public bodies as a germicide. Its properties have thus been brought to public attention. The world is now reading much about the transmission of disease by bacteria, microbes, and insects. More and more people are becoming interested in the chemicals which are useful in destroying them. Among these napthols are included.

[5] The act says an insecticide is misbranded if it bears any statement, design, or device regarding such article or the ingredients or substances contained therein which is false or misleading in any particular. The undisputed evidence in this case is that if the words "Chloro-Naptholeum" are to be understood in the sense they have to those people to whom they have any meaning at all, they are false and misleading. The act goes on to say that for its purposes an insecticide shall be deemed to be misbranded if, among other things, it be labeled or branded so as to deceive the purchaser.

In this case the libel has alleged that the purchaser would be so deceived or misled. The case has consequently been tried on that issue. It is at least doubtful whether the broad definition first given is limited by the subsequent specifications of various things which are to be deemed misbranding.

In the Food and Drugs Act, from which both the more embracing language and this specification are literally copied, it is not, for the particulars are preceded with the statement that "for the purposes of this act an article shall *also* be deemed to be misbranded" etc. The same phraseology is found in the Insecticide Act, except that the word "also" is omitted. An examination of the contents of that section does not suggest that such omission could have been made for the purpose of affecting the construction to be put upon it. The question is, perhaps, more interesting than important. Doubtless an article is not misbranded, even within the first definition, unless the statement is false and misleading in a particular which will deceive a purchaser. The whole object of perhaps all of these laws is to prevent the deception of purchasers.

Claimant assumes, however, that it has the right to deceive some purchasers provided it does not deceive many. The language of the act does not suggest such an interpretation. If it did, some curious results would follow. Take the case of an article which has commanded a large sale. Nevertheless some persons would not buy it. They had an idea that it contained a particular constituent which they regarded as dangerous. There were not many people who thought so. The great body of the consumers never even so much as heard of the thing which the small minority dreaded. The majority never gave a thought or care as to whether it was or was not present. The manufacturer of the goods adds to his label the statement that it does not

contain this particular ingredient. If the statement is untrue in fact, there can be no question that the goods are misbranded. It will be immaterial that 9 out of 10 or 99 out of 100 of those who buy the article pay no attention whatever to it and are not in the slightest degree interested as to whether it is or is not accurate. Goods are misbranded if they bear any statement which will deceive or mislead any purchasers who are of normal capacity and who use that capacity in a common sense way. Whether there be many or few so deceived is not material. Whether an article is or is not misbranded does not depend upon the guess court or jury can make as to the relative number of purchasers who would vote "yes" or "no" if a referendum were possible as to whether they had or had not been deceived.

Claimant points out that for many years it has sold large quantities of its product under this particular name. It has done no harm to anybody. It asks why it should be compelled to incur all the trouble and expense of familiarizing the purchasing public with a new name for the old thing. There is no doubt that to do so will be both costly and inconvenient. Nevertheless it must be borne in mind that in the long run the honest manufacturer, as claimant doubtless is, is the one principally interested in the strict, and in even the rigid, enforcement of laws of this character. The more candid all his competitors are required to be, the better for him. Standards impossible of unvarying application will work to his injury. He cannot afford to say anything about his goods which is not in every reasonable sense, and from the standpoint of every well-informed person, true. If he is a law-abiding man, he does not want to take the chance of doing something which may be held to be illegal. He is always likely to have competitors who are perfectly willing to.

The motion for a new trial is denied.

THOMPSON v. DUEHAY, Superintendent of Prisons of Department of Justice, et al.

(District Court, W. D. Washington, S. D. October 31, 1914.)

No. 1659.

1. PRISONS (§ 15*)—PAROLES—STATUTORY PROVISIONS—"TOTAL OF THE TERM OR TERMS."

Under Act June 25, 1910, c. 387, § 1, 36 Stat. 819 (U. S. Comp. St. 1913, § 10535), providing that every prisoner convicted of any offense against the United States and confined in any United States penitentiary or prison for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of the institution, and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole, and section 10 (section 10544), providing that nothing therein contained shall impair the power of the President to grant a pardon or commutation, or impair or revoke any good time allowance, where sentences to four years' imprisonment on each of two counts, to run consecutively, were commuted by the President to run concurrently, the prisoner was eligible for parole when he had served one-third of the four-year period covered by the concurrent

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

sentences, since the "total of the term or terms" means the total time actually to be served, and the commutation in effect wipes out the judgment and writes a new sentence, and, moreover, any other construction would deny full effect to the action of the President.

[Ed. Note.—For other cases, see Prisons, Cent. Dig. § 26; Dec. Dig. § 15.*]

2. PARDON (§ 4*)—COMMUTATION OF SENTENCES—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The President's power to commute sentences is conferred upon him by the Constitution, and cannot be affected by legislative action, or impaired or undermined in any particular.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4–6½; Dec. Dig. § 4.*]

Application for a writ of mandamus by Fred H. Thompson against F. H. Duehay, Superintendent of Prisons of the Department of Justice, and others. Writ granted.

Fred H. Thompson, of Los Angeles, Cal., and J. J. Sullivan, of Seattle, Wash., for petitioner.

Clay Allen, U. S. Atty., of Seattle, Wash., and Geo. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for respondents.

CUSHMAN, District Judge. This matter is before the court, after evidence taken, upon petitioner's complaint and respondents' answer to the petition of relator for a writ of mandamus directing respondents, as the board of parole of McNeil Island Penitentiary, to receive the application of petitioner for parole and to give him a hearing thereon.

[1] Petitioner was convicted upon an indictment in two counts and sentenced to four years' imprisonment on each count—the sentences to run consecutively, not concurrently; that is, the second sentence to commence at the expiration of the first. The President of the United States has commuted these sentences "to run concurrently." The parole act provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States, and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of such institution, and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided."

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

Sections 1 and 10; 36 Stat. pp. 819 and 821; Fed. Stat. Ann. Supp. 1912, vol. 1, pp. 304 and 306.

Petitioner sought to file with the board of parole, and have considered, his petition for parole, offered under the rules adopted regulating hearings by the board. Petitioner sought parole at the expiration of one-third of the four-year period covered by these concurrent sentences, but was denied the right to file such application, and denied a hearing thereon; the Attorney General, for the board, advising him:

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

"Please inform the prisoner that the department does not agree with his conclusion that he is eligible to parole when he has served one-third of the commuted sentence. It is the view of the department that he must serve one-third of his original sentence of eight years."

The respondents' claim is that the application for parole is premature; that the board will not exercise its discretion and consider the application for that reason. The act above quoted provides that:

"Every prisoner * * * who has *served* one-third of the *total* of the term or terms for which he was sentenced may be released on parole."

Does "one-third of the total term or terms" mean that, for the purpose of the parole law, the sentence imposed is unaffected by the commutation—although such commuted sentence supersedes, alters, changes, and substitutes the new term for that imposed by the original sentence for every other purpose—in determining the time at which the parole law can be invoked? Such a construction is too narrow. The good time law provides:

"That each prisoner * * * shall be entitled to a deduction from the term of his sentence to be estimated as follows: * * * Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon a sentence of not less than five years and less than ten years, eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated." Act June 21, c. 1140, 32 Stat. 397 (U. S. Comp. St. 1913, § 10532); Fed. Stat. Ann. vol. 6, pp. 40 and 41.

Upon the argument it was stated without question that, in applying the good time law, upon commutation of a sentence, the good time is calculated as from the beginning on the length of term of the sentence as commuted, and not upon the sentence as originally imposed. This practice would, certainly, be more consonant with reason than that now contended for under the parole law. No difference in the language of the two acts appears to show a different intent in this regard. The language of the act is:

"Who has served one-third of the total term or terms for which he was sentenced."

By the sentences imposed by the court, the two four-year terms were to run consecutively. These sentences were commuted "to run concurrently"; that is, to run together, the time served running together, upon both sentences. If this be so, the petitioner has served one-third of the total terms for which he was sentenced. To decree otherwise is to impair the power of the President to grant a commutation of sentence.

As one judgment is entirely wiped out and another substituted for it upon a new trial or appeal, which substituted judgment is complete and entire in and of itself, and for all purposes the only judgment given effect, so does the commutation, in effect, write a new sentence—the only sentence that remains effective from the beginning. To deny this is to hold that the President did not, in reality, commute the sentence

as imposed; that he only partly commuted it, only commuted it for certain purposes; that is to say, that, notwithstanding the decree of commutation, for one purpose the sentences do not, and shall not, run concurrently.

The parole law deals with substance, and not form, and the "total of the term or terms" of sentence means the total of the time actually to be served. If such were not the fact, in the case of sentences on three or more counts running concurrently, the parole law would have no effect, in spite of the fact that it provides that "every prisoner * * * may be released on parole."

If the President by his commutation finds that relief afforded by parole is not adequate, it would be more reasonable to contend that a commutation superseded the right of parole, and that no parole would be allowed, than to contend for a modification of the right of parole as to the time when it could be invoked. By section 10, above quoted, while the President's power to commute is fully recognized, no intent or purpose is shown but that the parole law is fully subject, in its operation, thereto. No intention is shown in the law that the advantages of the parole law and commutation are only to be allowed in the alternative.

By this contention, that particular feature of the sentence which was modified by the commutation is qualified so as to give to the commuted sentence a different effect than is given to a sentence originally imposed to run concurrently by the court. There is no more reason to suppose that a sentence of imprisonment is imposed without regard to the possibility of commutation than that it is pronounced without consideration of the opportunity afforded the prisoner to earn good time or parole.

[2] The President's power to commute is conferred upon him by the Constitution, and cannot be affected by legislative action, or impaired or undermined in any particular. However, whether a pardon or commutation be considered as the execution of justice in mercy, or as an act of grace, it is the substitution of something better for that which was. Then how can it be said, in effect, that that which is right should give way to that which is relatively wrong?

The prisoner has served one-third of the total sentences imposed. To argue otherwise is to attribute to the act of Congress an intent to deny full effect to the action of the Executive—a thing not to be presumed, in the absence of language conclusively showing such purpose, and of doubtful effect, even if intended. Ex parte Garland, 4 Wall, 333, 380, 18 L. Ed. 366; Ex parte William Wells, 18 How. 307, 15 L. Ed. 421; United States v. Wilson, 7 Pet. 150, 8 L. Ed. 640.

The writ of mandamus will issue, unless, within 10 days, an appeal is taken.

In re KINNANE CO.

(District Court, S. D. Ohio, W. D. September 15, 1914.)

No. 5387.

1. BANKRUPTCY (§ 386*)—OBJECTIONS TO COMPOSITION—BURDEN OF PROOF.
The consideration tendered by a bankrupt in composition should be substantially equivalent to what his estate would pay if fully administered in bankruptcy; but to defeat confirmation of a composition, on the ground that the estate will pay more, the objecting creditors have the burden of proving that fact.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. § 386.*]

2. BANKRUPTCY (§ 380*)—COMPOSITION—NOTICE OF APPLICATION.
All creditors must be notified of a proposed composition, whether or not they have proved their claims, and must be honestly advised of the true condition of the debtor's affairs.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 577; Dec. Dig. § 380.*]

3. BANKRUPTCY (§ 379*) — COMPOSITION — SUBSTITUTED OFFER — NOTICE TO CREDITORS.
Where, after a composition has been offered to creditors, a new amended offer is made, the court is without authority to confirm it, until it has been again submitted in the same manner as an original offer, and all creditors have had an opportunity to accept or reject it.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 576; Dec. Dig. § 379.*]

4. BANKRUPTCY (§ 375*)—COMPOSITION.
Where there is a fatal defect in the proceedings relating to an offer of composition, and a majority of the creditors, representing the greater part of the bankrupt's indebtedness, are apparently willing to accept the offer made, the court will reject such offer, but may permit the bankrupt to make a new offer, if the bankrupt desires so to do.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 578–585; Dec. Dig. § 375.*]

5. BANKRUPTCY (§ 242*)—EXAMINATION OF BANKRUPT.
Although the Bankruptcy Act gives latitude in the examination of a bankrupt, it does not otherwise abrogate the rule as to the examination and cross-examination of witnesses which prevails in the federal courts.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 399–401; Dec. Dig. § 242.*]

In Bankruptcy. In the matter of the Kinnane Company, bankrupt. On application to confirm composition. Denied.

Kramer & Bettman, of Cincinnati, Ohio, for bankrupt.

Watson, Stouffer, Davis & Gearheart, of Columbus, Ohio, Saul S. Myers, of New York City, Simon Fleischmann, of Buffalo, N. Y., and Floyd A. Johnston and Stafford & Arthur, all of Springfield, Ohio, for creditors opposed to confirmation of composition.

Rosenberg, Levis & Ball, of New York City, for creditors favoring confirmation of composition.

SATER, District Judge. After the petition had been filed against the Kinnane Company (hereinafter called the company) asking that it be adjudged a bankrupt, the company, which is engaged in conducting

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

a department store, desiring to effect a composition with its creditors, was duly examined as required by law, after which it submitted to its several creditors an offer of 40 per cent. in cash and 5 per cent. in short-time notes. It was the owner of real estate of the value of $100,000, which was incumbered by a mortgage of $65,000, and also by mechanics' liens aggregating several thousand dollars. To obtain a portion of the cash necessary to make the composition and also to possess itself of a working capital, it arranged with certain creditor banks to give them a mortgage on its real estate, subject to the above-mentioned liens, for $46,000. After a majority of the creditors in number and amount had accepted the terms of the proposed composition and before the court was required to confirm or reject it, certain nonassenting creditors interposed objections to its confirmation. The referee was directed to hear the evidence on the objections thus made and to report to the court his recommendation. At the commencement of the hearing before the referee, for reasons satisfactory to itself, the company changed its offer by proposing to give, in addition to the 45 per cent. previously offered, a noninterest-bearing third mortgage on its real estate to a trustee for the benefit of its creditors for the sum of $25,000, if paid within three years, and for $27,000, if paid within five years. The new proposal, except as thus promulgated, was not submitted to the creditors, the number of which is quite large. A majority as to number and amount of indebtedness was represented at the meeting by counsel, who, in so far as they were able so to do, accepted such offer, but apparently not in writing. Such counsel stated that they held powers of attorney from their respective clients. Some of the creditors were not present or represented at the meeting and had no knowledge of the new offer. The objecting creditors still protesting against the composition, the hearing on their objections proceeded. A great volume of evidence was taken and the referee recommended the confirmation of the changed offer; such offer being the only one now before the court for consideration.

That the bankrupt proposes to pay a portion of the sum offered in composition by the execution and delivery of its promissory notes does not invalidate the composition. Loveland, Bankr. (4th Ed.) 1264, 1265.

[1] The consideration tendered by a bankrupt should be substantially equivalent to what his estate would pay, were it fully administered in bankruptcy. In deciding whether the composition should be approved or rejected, the sum offered should be compared with what the creditors would receive through the trustee, and not with what the debtor might be able to pay them. In the absence of fraud and concealment, the question for the court is not whether the debtor might have offered more, but whether his estate will pay more in bankruptcy. The contention that the estate will pay more will not avail, unless that fact is established by the objecting creditors. Loveland, Bankr. 1263, 1264; Adler v. Jones, 109 Fed. 967, 48 C. C. A. 761 (C. C. A. 6); Re Whipple, Fed. Cas. No. 17,513; Re Welles, Fed. Cas. No. 17,377; Black, Bankr. § 653; Collier, Bankr. (10th Ed.) 293, 294.

[2] When a composition is proposed, all the creditors must have no-

tice of the proposal, whether they have proved their claims at the time of the offer or not; the composition must be offered and sufficiently explained to all alike and they must have reasonable opportunity to consider it. They must be fully and honestly advised of the true condition of the debtor's affairs, so they can act intelligently and understandingly, in view of the facts and with a knowledge of their rights in the premises. Unless these conditions were met by the company, the composition must fail, for the provisions of the Bankruptcy Act prescribing the requisites of a composition are to be strictly construed as against those who seek by such means to deprive dissenting creditors of their right to have the debtor's property administered and distributed in the ordinary course of bankruptcy proceedings. Black, Bankr. § 649; Re Greenebaum, Fed. Cas. No. 5,769; Re Keiler, Fed. Cas. No. 7,648; Re Rider (D. C.) 96 Fed. 808; Adler v. Jones, supra.

Under the Bankruptcy Act of 1867 (14 Stat. 517, c. 176), as amended in 1874 (18 Stat. 178, c. 390), a composition once agreed upon could be varied or added to, but a proceeding similar to that resulting from the first offer of composition was necessary. Collier, Bankr. (10th Ed.) 287. Re Reiman, Fed. Cas. No. 11,673, affords an illustration in which the court, on account of a defect in the composition proceedings, permitted a resubmission of the offer to the creditors for their action. In Re Whipple, Fed. Cas. No. 17,513, the composition was refused because the proposal was insufficient; but subsequently the debtor was permitted to make a better offer, which was accepted, although the practice was against the second offer, unless good reason was shown therefor. See, also, Loveland, Bankr. p. 1259, and Re Haskell, Fed. Cas. No. 6,192.

[3] In the instant case, a proposed composition, clear in its provisions, was submitted by the company and accepted by a majority of its creditors in number and amount. But it is the company's changed offer concerning which the evidence was taken and which the court is asked to confirm. There is no provision in the present Bankruptcy Act relating to amended or substituted offers of composition, nor have I been able to find, nor has my attention been directed to, any case arising under such act which presents a situation akin to that under consideration. Counsel for assenting creditors stated in argument that the creditors who accepted the original offer accepted through such counsel the new or amended offer; but there is not before me the written acceptance of any of such creditors, or any of the powers of attorney under which counsel claimed to have acted, nor has the proposition now made ever been submitted to any or all of the creditors in the manner imposed by statute when an original proposition of composition is made. It is not claimed that creditors who were not present at the hearing in person or by counsel had knowledge of the new offer. Two statements of the company's assets and liabilities were, moreover, sent to creditors. The first was based on the representations of the company's manager. It was deceptive in that it exaggerated the assets. He either did not know, or else incorrectly gave, the condition of the company's affairs. He may have been misled somewhat by the company's inaccurately kept books and the information given

him by the bookkeeper; but he must have known, it would seem, that the assets were exaggerated. The later statement issued by the creditors' committee on July 8th was also misleading in that it minimized the assets. The merchandise at that time must have been worth more than the represented value of $48,000, which was in fact the estimate of what it would bring at auction sale. Its market value was not given. There was also an equity of value in the real estate over and above the mortgage and the mechanics' liens; but this later statement recited that it was doubtful whether there was any such equity. Each creditor that proved his claim became a party to the bankruptcy proceeding with all that that condition implies. Collier, Bankr. 749. In view of the rule announced in the Rider Case, supra, the rights of dissenting creditors and in fact of all the creditors ought to be and are as high as those of a defendant in an action at law or in equity who is confronted with an amended pleading. An amended pleading is a new pleading, superseding the original. An amendment to a petition or an amended bill authorizes the defendant to answer and to put in an entirely new defense, even if it be contradictory to his former answer, and he may plead, answer, or otherwise proceed as in case of an original petition or bill, no matter what may have been the state of the pleadings before the amendment was made. 1 Ency. Pl. & Pr. 490, 491. The amended offer was a new offer, and, like an amended pleading, superseded that first tendered. It is for each creditor to say for himself, in the light of all the facts which had developed at the time the new offer was made, whether he would accept it or not. It is not within the province of the court to determine that question for him. The new proposition of composition should have been submitted to the several creditors in the orderly manner prescribed by law. The court may not assume that the requisite number of creditors, representing the requisite statutory indebtedness, would have accepted the new offer. They might have done so, or they might, perchance, on learning of the misleading character of both statements submitted to them regarding the company's assets, have concluded that they had not been fairly treated; that they did not wish to continue the business relations which the acceptance of notes and a mortgage implies; that in view of the company's present difficulties, following so closely after the adjustment made by it about two years ago with its then existing creditors, it had not conducted and will not conduct its business wisely; and that the speedy termination which the Bankruptcy Act permits of all relations with the company was preferable.

[4] The proposition originally made having heretofore been superseded and the one now before the court never having been properly submitted, the court is without power to confirm it; but as the defect in the proceedings pertains to the submission only, and as a majority in number, representing the greater part of the company's indebtedness, is apparently willing to accept the new offer, there is seemingly no valid reason why the bankrupt, if it so desires, may not yet submit to the creditors such terms of composition as it may deem proper to make. A further reason for rejecting the proposed composition is that the true status of the company's affairs has not been exhibited to the creditors. On account of the conflict in evidence as to the value of the company's

assets, the court will appoint appraisers of its own selection to make an inventory and appraisement of all of the company's property and effects, a summary of which must be laid before each and every creditor along with the offer of composition, if one be made.

[5] The record is needlessly voluminous. Inquiry was conducted in different instances as to irrelevant and uncontroverted matters. Although the Bankruptcy Act gives latitude in the examination of the bankrupt, it does not otherwise abrogate the orderly method of procedure in the examination and cross-examination of witnesses which prevails in the federal courts. Cross-examination, as in the case of Bettman, went far beyond anything suggested in his direct examination. It should have been conducted as directed by General Order No. 22 (89 Fed. x, 32 C. C. A. xxv), in conformity with the mode existing in courts of law. The rule as stated in Montgomery v. Ætna Life Ins. Co., 97 Fed. 913, 38 C. C. A. 553 (C. C. A. 6), and McKnight v. U. S., 122 Fed. 926, 928, 61 C. C. A. 112 (C. C. A. 6), is still in force as regards the examination of the usual witness. Counsel should have refrained from, and the referee should have warned against, improper procedure and the needless incumbering of the record, although the referee could not, it seems, exclude the evidence elicited. Loveland, Bankr. 1163. Thirty per cent. of the costs incurred in the hearing will be paid by the objectors.

The proposed composition is rejected and an order may be taken accordingly.

In re MALSCHICK et al.

(District Court, E. D. Pennsylvania. October 29, 1914.)

No. 3915.

1. BANKRUPTCY (§ 414*)—DISCHARGE—APPLICATION—HEARING—EVIDENCE.
   On an application for a bankrupt's discharge, his testimony given in his general examination is admissible against him, so far as material, as admissions.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720–722; Dec. Dig. § 414.*]

2. EVIDENCE (§ 249*)—ADMISSIONS AND REPRESENTATIONS OF PARTNER.
   On the general ground of agency, admissions and representations of a partner, made in the ordinary course of the firm's business concerning its affairs, are admissible against his copartners; but admissions made after dissolution of the firm are incompetent.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 965–975; Dec. Dig. § 249.*]

3. BANKRUPTCY (§ 413*)—DISCHARGE—OBJECTIONS—NATURE OF PROCEEDING—NEW "ACTION."
   Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute, and constitute a new suit or "action," the hearing of which is in effect a trial in equity.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712–718, 725, 727; Dec. Dig. § 413.*
   For other definitions, see Words and Phrases, First and Second Series, Action.]

---

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

4. BANKRUPTCY (§ 414*)—APPLICATION FOR DISCHARGE—PARTNERSHIP—EVIDENCE—"COURSE OF THE FIRM'S BUSINESS."

A partnership having been dissolved by bankruptcy proceedings against it, the examination of the bankrupts in such proceedings was not a matter occurring in the "course of the firm's business"; and hence the evidence of each bankrupt, taken in the general course of bankruptcy proceedings, was admissible only against him in a subsequent proceeding to obtain his discharge.

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

In Bankruptcy. In the matter of bankruptcy proceedings of Nathan Malschick and another, trading as Malschick & Levin. On exceptions to report of special master recommending dismissal of the bankrupts' application for discharge. Case re-referred to referee for further proceedings.

Henry N. Wessel and Wessel & Aarons, all of Philadelphia, Pa., for bankrupts.

Julius C. Levi and Levi & Mandel, all of Philadelphia, Pa., for objecting trustee.

THOMPSON, District Judge. The first and second exceptions of the bankrupts are as follows: (1) The learned referee erred in admitting in evidence testimony of the bankrupts given upon their general examination in these proceedings. (2) The learned referee erred in deciding that "the evidence of one partner could be used against another partner."

The referee thus reported what occurred at the first meeting held in pursuance of the order of reference:

"Counsel for the trustee offered the record of the testimony taken in the case, which he afterwards qualified, upon objection on behalf of the bankrupts, to the testimony only of the bankrupts. Counsel for the bankrupts again objected, claiming that the testimony of each bankrupt could only be used against that bankrupt. The referee held that in this partnership matter the evidence of any bankrupt was admissible against any other bankrupt, but only upon the specifications or specification against that bankrupt."

[1] The question thus raised may well be considered before passing upon the referee's findings and recommendations. The testimony of any bankrupt given in the general examination is not objectionable against him in this proceeding, so far as it is material to the issues. It comes within the general rule as to admissions. Shaffer v. Koblegard Co. (C. C. A., 4th Circuit) 183 Fed. 71, 105 C. C. A. 363.

[2] And upon the general ground of agency admissions and representations of a partner are receivable against his copartners, when made in the ordinary course of the firm's business concerning its affairs. 30 Cyc. 590; Little v. Fairchild, 10 Pa. Super. Ct. 211, affirmed in 195 Pa. 614, 46 Atl. 133; Little v. Clarke, 36 Pa. 114. But it is not so as to admissions made after dissolution of the partnership. Bell v. Morrison, 1 Pet. 351, 7 L. Ed. 174; Wilson v. Waugh, 101 Pa. 233.

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

[3] The hearing upon an application for discharge in bankruptcy is in effect a trial in equity. Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute, and easily fall within any accepted definition of a suit or action. In re Guilbert (D. C.) 154 Fed. 676; Collier on Bankruptcy (10th Ed.) 331.

[4] The testimony of the bankrupts, taken under the general examination, was therefore in a suit or proceeding separate from the dispute arising upon the petition for discharge and the objections thereto. It is apparent that the examination of the bankrupts was not a matter occurring in the course of the firm's business, as the partnership had been dissolved by bankruptcy. Cochran v. Perry, 8 Watts & S. (Pa.) 266; Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124; McKelvy's Appeal, 72 Pa. 409; 30 Cyc. 654(c).

In order to sustain the trustee's objections to the discharge of any bankrupt, the burden was upon him to prove the facts set out in the several specifications of objection as against that bankrupt. For instance, the first specification, which is sustained by the referee, charges swearing falsely in testifying before the referee in bankruptcy. In order to prove that Abraham Malschick testified falsely, the referee received evidence of what Nathan Malschick and David Levin testified in their several examinations before the referee. Each bankrupt had been called before the referee in the original proceedings for examination as to his property and assets and those of the firm. By what rule of evidence can the present issue against Abraham Malschick be sustained by proving statements made by Nathan Malschick and David Levin in the former proceeding? Surety the statement of the testimony of some one else in that proceeding is not evidence against him in the ascertainment of the question whether he then told the truth.

I am of the opinion that the referee was in error in holding that the evidence of each bankrupt in the former proceeding was admissible against each of the other bankrupts in the present proceeding, and that the testimony of each bankrupt should have been admitted only against himself. In arriving at this conclusion, however, I do not conclude that the specifications should be dismissed and the referee's recommendations overruled. The case will be referred back to the referee, to consider separately the testimony of each bankrupt as against that bankrupt alone, and make further report to the court, with his recommendations, after such further consideration.

An order may be entered accordingly.

In re SCHWEITZER.

(District Court, E. D. Pennsylvania. October 29, 1914.)

No. 4933.

1. BANKRUPTCY (§ 207*)—LIENS—SUBROGATION—"PREVENTED."

The word "prevented," as used in Bankr. Act July 1, 1898, c. 541, § 67b, 30 Stat. 564 (U. S. Comp. St. 1913, § 9651), providing that, whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee shall be subrogated to and may enforce the rights of the creditor for the benefit of the estate, means "prevented" by bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 207.*

For other definitions, see Words and Phrases, First and Second Series, Prevent.]

2. BANKRUPTCY (§ 207*)—LIENS—CONDITIONAL SALES—EXECUTION LEVY—ENFORCEMENT BY TRUSTEE.

Where a conditional sale of a horse to a bankrupt was invalid as against his creditors, and the horse was in the bankrupt's possession when an execution against the bankrupt was delivered to the sheriff for levy, from which time it constituted a lien on all the bankrupt's personal property, such lien, having been vacated by the bankruptcy proceedings, passed to the trustee and was enforceable for the benefit of the estate, as provided by Bankr. Act, § 67b.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 207.*]

In Bankruptcy. In the matter of bankruptcy proceedings of David Z. Schweitzer. On petition to review a referee's order requiring the surrender of certain property to the bankrupt's trustee. Affirmed.

William Rick, of Reading, Pa., for trustee.

Charles H. Tyson, of Reading, Pa., for claimant.

THOMPSON, District Judge. On December 26, 1913, the referee entered the following order:

"The petition of the trustee for an order on Amos Hertzler to turn over a horse as the property of the bankrupt estate having come on for hearing this day, present the trustee and his counsel and the respondent and his counsel, all parties being heard, and it appearing to the referee that an order should be entered as prayed for, therefore: It is ordered that Amos Hertzler, within ten days from date, turn over to Henry Peifer, trustee, a certain horse in his possession to the value of $190, or in default thereof its said value."

The question comes before the court upon a certificate for review, based upon the petition of Amos Hertzler, the respondent mentioned in the foregoing order. The salient facts are sufficiently set out in the referee's opinion, which is as follows:

"The facts in this case are simple enough. The bankrupt bought a horse from Hertzler under a conditional sale contract by which Hertzler retained title to the horse until paid for. Before the horse was paid for one Chas. Geiger obtained a judgment against the bankrupt, and, issuing execution, placed the writ in the sheriff's hands on September 29, 1913. The horse was then in the bankrupt's possession. A levy was made on October 1, 1913. On the day of the levy the horse was not on the premises, and was not levied

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

upon. The next day Hertzler got possession of him and took him away. On October 7th Schweitzer was adjudged bankrupt and a trustee was later appointed; proceedings on the writ in the sheriff's hands having meanwhile been stayed.

"In Pennsylvania, a writ of fi. fa. binds the personal property of the defendant from the time of its delivery to the sheriff. Lewis v. Smith, 2 Serg. & R. 142; Ulrich v. Dreyer, 2 Watts, 303. The bankruptcy law (section 67b) provides that a trustee shall be subrogated to and may enforce the rights of a creditor who has obtained a lien upon property of the debtor, who afterwards becomes a bankrupt. In other words, the lien is not necessarily dissolved, but passes to the trustee for the benefit of all the creditors, wiping out the rights of persons who, like Hertzler in this case, claim title to the property levied on under conditional sale contracts. This construction of the law was clearly upheld in Reardon v. Rock Island Plow Co., 168 Fed. 654, 94 C. C. A. 118, affirmed by the United States Supreme Court in Rock Island Plow Co. v. Reardon, 27 Am. Bankr. Rep. 492, 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231.

"Under these principles, the horse in question was subject to Geiger's levy, as against which Hertzler's rights vanished. The trustee upon his appointment became subrogated to Geiger's rights, for the benefit of all creditors. As Hertzler had no power to remove the horse after Geiger's levy, he can have no footing now on which to stand as against the trustee's petition. He is in unlawful possession of property belonging to the bankrupt estate, and must be ordered to turn it over."

[1] The situation thus arising is clearly within the following provision of the Bankruptcy Act (section 67b):

"Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

The word "prevented," as used in this subsection, means prevented by the bankruptcy proceedings. In re Doran (C. C. A., 6th Cir.) 18 Am. Bankr. Rep. 760, 154 Fed. 467, 83 C. C. A. 265.

[2] In the present case by the contract of conditional sale it was attempted to create a lien upon the horse in favor of Hertzler. The possession of the horse remaining in Schweitzer, the bankrupt, the condition was void as against creditors. The creditor, Geiger, therefore, having obtained a lien from the time of placing his writ of execution in the sheriff's hands, was prevented by the intervention of bankruptcy proceedings and a restraining order between the time of the issuing of the writ and the return day from enforcing his right under the writ to complete his lien by levy. Braden's Estate, 165 Pa. 184, 30 Atl. 746; Samuel v. Knight et al., 9 Pa. Super. Ct. 352.

The application of section 67b is obvious. The order of the referee is therefore affirmed.

BENNER LINE v. PENDLETON et al.

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

No. 283.

1. SHIPPING (§ 53*) — CHARTER — LOSS OF CARGO — SUIT BY CHARTERER AS BAILEE AGAINST OWNER.

Where the charterer of a vessel held itself out to the public as a common carrier, advertised for and solicited cargoes, fixed the freight rates, received and discharged the cargoes, and provided its own bills of lading in its own name, although they were signed by the master as customary, the charterer, and not the owner, was the bailee of the cargoes, and as such bailee entitled to maintain a suit in its own name against the shipowner for loss of a cargo through the unseaworthiness of the vessel.

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

2. SHIPPING (§ 121*)—CARRIAGE OF GOODS—WARRANTY OF SEAWORTHINESS OF VESSEL.

A shipowner either expressly or impliedly warrants his ship to be seaworthy and fit for the cargo and particular service for which she is engaged at the commencement of the voyage, and such warranty is an absolute undertaking, and covers latent defects not ordinarily susceptible of detection, as well as those which are discernible by inspection.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 449–451, 466; Dec. Dig. § 121.*

Implied warranty of seaworthiness, see notes to The Carib Prince, 15 C. C. A. 388; Neilson v. Coal Cement & Supply Co., 60 C. C. A. 179.]

3. SHIPPING (§ 132*)—LOSS OF CARGO—UNSEAWORTHINESS OF VESSEL.

The loss of cargo by the sinking of a schooner on a voyage from New York to Porto Rico *held*, on the evidence, due to the unseaworthiness of the vessel at the commencement of the voyage, where, although she was examined and pronounced seaworthy by experts before sailing, she began to leak seriously when only three days out, without having encountered any unusually bad weather, and her pumps proved to be so badly out of repair as to be practically useless.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

4. SHIPPING (§ 137*)—LIABILITY FOR LOSS OF CARGO—HARTER ACT.

Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1913, § 8031), which exempts a shipowner from liability for loss of cargo in certain specified cases, does not relieve him from the duty of furnishing a seaworthy vessel at the beginning of the voyage, nor affect his liability for loss of the cargo arising from unseaworthiness.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 137.*

Statutory exemptions of shipowner from liability, see notes to Nord-Deutscher Lloyd v. Insurance Co. of North America, 49 C. C. A. 11; Raeli v. New York & T. S. S. Co., 83 C. C. A. 294.]

5. SHIPPING (§ 137*) — LIMITATION OF LIABILITY — PERSONAL CONTRACTS OF SHIPOWNER.

A charter party, warranting the vessel to be seaworthy and in every way fitted for the voyage, signed by a firm as agents for the particular vessel, of which one of the partners was managing owner, was his personal contract, and he cannot limit his liability for loss of the cargo through the unseaworthiness of the vessel, under Rev. St. § 4283 (U. S. Comp. St. 1913, § 8021), or Act June 26, 1884, c. 121, § 18, 23 Stat. 57 (U. S. Comp. St. 1913, § 8028), which apply only to risks arising from

the conduct of, or contracts made by, others than the owner, and imputed to him from the necessities of commerce.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. § 137.*]

6. CONTRACTS (§ 1*)—"PERSONAL CONTRACT."

A "personal contract" is a contract made by the person or corporation to be bound, as distinguished from one imputed to such person or corporation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, Personal Contract.]

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

This cause comes here on appeal from a final decree of the United States District Court for the Southern District of New York finding that the libelant is entitled to recover from the respondent Fields S. Pendleton nine-sixteenths of the amount of its damages, but that the said Fields S. Pendleton is entitled to limit his liability to his interest in the schooner Edith Olcott and her freight, and dismissing the libel as to the said Pendleton, which decree was entered on November 29, 1913.

The libelant is a corporation organized under the laws of the state of New Jersey and engaged in business as a carrier between the port of New York and ports in Porto Rico. The respondents are copartners engaged in business as ship brokers in the city of New York, borough of Manhattan, state of New York. They were the managing owners of the schooner Edith Olcott; the respondent Fields S. Pendleton owning in his own right nine-sixteenths of the vessel.

On July 7, 1910, the respondents chartered the vessel to the libelant for a voyage from New York to San Juan, Porto Rico. On August 6th the King Edgar, seeing the Olcott's signals of distress, came alongside and took the vessel in tow when in latitude 37.3 degrees N., longitude 65.3 degrees W., under an agreement to tow her to New York for $15,000. But on August 7th the tow rope parted and the vessel was abandoned, at 6 a. m., in a sinking condition; the water in her hold having then reached a depth of 13½ feet and gaining steadily despite all efforts to prevent it.

The charter party was signed in the name of Pendleton Bros., and the suit was brought against Pendleton Bros. and against Fields S. Pendleton individually. It having developed at the trial, however, that neither the firm of Pendleton Bros. nor the respondent Edwin S. Pendleton owned any share in the vessel or had any interest in the transaction except as agents, it was conceded by the libelant at the close of the trial, that recovery could be had only against the respondent Fields S. Pendleton, who was the managing owner of the vessel, and who hereafter will be referred to as the respondent.

For opinion below, see 210 Fed. 67.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellant.

Henry W. Goodrich, of New York City, for appellee.

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

ROGERS, Circuit Judge (after stating the facts as above). This libel is filed by the libelant as bailee of a cargo of general merchan-

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

dise laden on board the schooner Edith Olcott, which was lost at sea with her entire cargo on August 7, 1910. The value of the cargo amounted to $40,000, and to recover this sum the suit is brought. The theory of the suit is that the respondent failed to furnish a seaworthy vessel at the beginning of the voyage. The respondent denied the allegations as to the unseaworthiness of the schooner and alleged that due diligence was exercised to make the vessel in all respects seaworthy and properly manned, equipped, and supplied. And further answering the respondent stated that if it in any way appeared that the vessel was not seaworthy at the commencement of the voyage or thereafter that such unseaworthiness was without his privity or knowledge, and under the laws of the United States relating to limitation of liability on the part of vessel owners he is relieved of all liability growing out of the loss of said schooner, "and if any liability on the part of this respondent does exist, it is limited to his proportionate part of said schooner as hereinbefore stated."

[1] It was urged in the argument that libelant has no capacity to sue as a bailee for the loss of the goods. The contention was that the shipowner was the bailee of the cargo and not the libelant. The libelant held itself out to the public as a common carrier; it advertised for and solicited cargoes; it provided a dock to which the cargo was delivered; it chartered the vessel by which the cargo was to be carried, and employed the stevedores who put the cargo on board the ship; it fixed the freight rates and received the freight upon the shipments; and it provided its own form of bill of lading, which was in its own name, and not in the name of the ship, or in the name of the respondent, and it was signed at its office by the master or agents of the vessel. There is nothing out of the ordinary in that it was signed by the master of the vessel, that being the usual practice. No goods could be put on board the vessel except by virtue of a prior contract of affreightment with the libelant. The shippers knew only the Benner Line and contracted with the Benner Line, which took all the profits of the enterprise. The shippers or owners of the merchandise took no part in the selection of the ship by which the goods were carried. It is impossible to say under the circumstances of the case that the ship rather than the libelant was the carrier and that the libelant is without right to sue as bailee of the cargo. If the libelant was the carrier, and of that we have no doubt, then there can be no question but that the action can be maintained. In The Beaconsfield, 158 U. S. 303, 307, 15 Sup. Ct. 860, 861, 39 L. Ed. 993 (1895), the Supreme Court, speaking through Mr. Justice Brown said:

"It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried."

And see The New York (D. C.) 93 Fed. 495 (1899). In that case the charterer used the barge for the transportation of goods for third persons between New York and New London. The cargo was injured by water which reached it by leaking through the upper seams of the vessel. The court held that the charterer as carrier was so far the

representative of the owner of the cargo that he was entitled to sue in his own name for the injury done the cargo.

Of course no question can be raised as to the right of a bailee to maintain any proper action to recover for a breach of contract in connection with the bailed property during the existence of the bailment.

[2] There can be no question but that it is the duty of the shipowner to provide a ship which is fit and competent for the cargo and particular service for which she is engaged. The carrier either expressly or impliedly warrants the seaworthiness of the vessel at the commencement of the voyage. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. And this warranty that the vessel is fit at the beginning of the voyage is an absolute undertaking, which is not dependent on the owner's knowledge or ignorance that the ship is in fit condition to undergo the perils of the sea. The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644. The warranty covers latent defects, not ordinarily susceptible of detection, as well as those which are known or discoverable by inspection. In The Edwin I. Morrison, 153 U. S. 199, 210, 14 Sup. Ct. 823, 825, 38 L. Ed. 688 (1894), the Supreme Court adopted the language used by Mr. Justice Gray in the Circuit Court in which he said:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy. * * * The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence."

And in The Caledonia, 157 U. S. 124, 130, 15 Sup. Ct. 537, 540, 39 L. Ed. 644 (1895), the above doctrine is reaffirmed and Mr. Chief Justice Fuller said:

"The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage, we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view. In our opinion the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects."

It may be conceded in the case at bar that the respondent thought that the Edith Olcott was in a seaworthy condition at the time she started on her voyage to Porto Rico. The respondent, before the vessel started on her voyage, instructed the most competent captain in his employ to put the boat in dry dock and have her put in seaworthy condition to go in the Gulf of Mexico to stay for 8 or 10 months. The man had been employed by the respondent's concern for more than 40 years, and the matter was turned over to him because, as respondent testified, there was no man in the country in his opinion who was more competent. "He is the only master," he testified, "that never cost us a dollar; he is the only man I know of that has had that success." That this man was a thoroughly competent man seems to be

admitted. But neither the good intentions of the respondent nor the competency of this captain can save the respondent from liability if notwithstanding what was done the vessel was not in reality in a seaworthy condition when this voyage was commenced.

To constitute seaworthiness the hull must be so tight, staunch, and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo.

[3] The Edith Olcott was a four-masted wooden schooner of some 985 tons burden. She was 192.4 feet in length, 42.4 feet in breadth, and 18.4 feet in depth below the main deck. She was about 20 years old, having been built in 1890. The vessel was considered in insurance circles as good a risk as the usual vessel of her age. One of the experts who examined her before she started on this voyage reported that she was in "the pink of condition." Witnesses who inspected her testified that they found her seams and butts in first-class order, as were her rigging, decks, waterways, and chain plates, and that she was "in first-class condition," "one of the finest vessels" the witness had ever seen, and "fit to go around Cape Horn in."

The superintendent of the Dry Dock Company testified as to repairs made on the vessel in July and December, 1909, and in January and July, 1910. It appears that she was on the dock in July, 1910, and an an examination was made of her bottom and seams. The witness was asked whether at that time she was tight, staunch, and strong, and he answered, "I should say she was," but admitted he was testifying from a more or less general impression. The inspector of the American Bureau of Shipping, whose business it was to inspect vessels for the purpose of underwriting, testified that the vessel was "first-class," and that she was thoroughly examined for reclassification in 1905 and was given an A-1 rating for six years—a rating which would have expired in June, 1911, one year after the loss of the vessel occurred. He stated that the Edith Olcott was "exceptionally well built, exceptionally well cared for, and an exceptionally good vessel at the time she was lost," and that she was incapable of receiving any higher classification than was given her in his bureau. The evidence given by other inspectors was of similar import.

Now we pass to inquire what happened. She left New York for Porto Rico on Sunday, July 31, 1910. All went well until Wednesday, when it was discovered she had about 4 feet of water in the hold. The amount of water gradually increased until Saturday, when it had increased to 13 feet and she had to be abandoned with her cargo and became a total loss.

By way of explanation of the cause of the leak, the suggestion has been made that the vessel must have struck some submerged object on the night between August 2d and 3d. No suggestion to this effect was made until nearly three years after the disaster. The engineer of the Olcott testified that he felt some sort of a slight shock about 12 o'clock on Tuesday night, August 2d; that he did not think anything had happened, and that he turned in to bed; that he never mentioned it to any one, except that when the mate came around he said to him, "What struck her?" and got the reply, "Nothing as I know

of." It could not have been much of a shock, for neither the captain, nor mate, nor any one else on the vessel noticed it. No mention of any shock is found in the protest drawn up in the respondent's office and verified by the officers and crew of the Edith Olcott, and the answer contains no allusion to it.

When the testimony was taken a witness of wide experience at sea was asked whether in his opinion it was possible that a vessel could hit an obstruction with force enough to damage her, assuming that she is a seaworthy vessel, and cause her to leak, without its being noticed by persons on board who were awake. He answered that it was not. This testimony seems to us most credible. It is true that one of the respondent's witnesses, also a man of experience and character, testified that he thought the vessel must have struck a submerged wreck or something of that kind. He stated he had been on a vessel which struck a concealed obstruction which caused the vessel to leak, and that he had no knowledge at the time that the ship had struck it. But in that case the fact that the vessel had struck the obstruction was not discovered until the vessel had arrived at her destination and been discharged of her cargo. It is quite credible that a vessel might strike an obstruction and cause a slight leak without attracting attention at the time. But it is difficult to believe that a staunch and seaworthy vessel could meet with an obstruction serious enough to send her to the bottom without its being noticed by those whose business it is to keep watch over all that happens.

There is, too, another reason for thinking that the trouble was not occasioned by an obstruction striking the bottom of the ship. In this case the schooner started to leak, and when the weather got worse the leak got worse, and when the weather got better the leak also got better. A collision striking a vessel below the water line would not produce results of that kind. On the contrary, a leak so produced would be continuous, or else grow worse all the time. The account the witnesses give of this leak is the story of a vessel whose seams have opened, and not of one having a hole opened in her bottom. The protest filed on August 10th stated that on August 3d the leak was discovered, and:

"After working pumps one hour, sounded again, and found leak increasing. Latter part, wind and sea still increasing in force."

And on August 4th:

"8 A. M. Wind and sea the same. Vessel laboring and straining and shipping considerable water. Leak still beyond control of the pumps. Sounded pumps, and found eight feet of water in hold. Steam pumps kept going continually. Noon. Wind and sea moderating somewhat. Steam pumps holding water in control at eight feet for the remainder of this day."

And on August 5th:

"Wind and sea more moderate. Running before the wind and sea. Sounding pumps every hour, finding water still at eight feet. Steam pumps continually working. 8 P. M. Heavy squall from southwest, causing sea to rise rapidly. Vessel laboring heavily and shipping immense quantities of water. Leak increasing on pumps."

And on August 6th:

"10 P. M. Vessel plunging into head sea, shipping large quantities of water, and settling forward. Steam pumps going constantly. Sounded, and found water gaining. Midnight. Wind and sea still increasing. Sounded, and found ten feet of water in vessel. Vessel would not answer helm, was continually under water, and settling. Engine room and cabin flooded."

And on August 7th the weather was "serious" and the amount of water was "thirteen and one-half feet," and the vessel was abandoned.

While it may be possible that this vessel struck a submerged object without the knowledge of those on board, and that such a collision occasioned a loss, we think the possibility of such an occurrence is too remote to be made the basis of a judicial finding. The vessel had been on a voyage from Baltimore to Jacksonville, Fla., with a cargo of railroad iron, which is considered one of the hardest, if not the hardest, cargo than can be put into a vessel. She brought back a cargo of yellow pine ties. The voyage on which she carried the railroad iron was the last preceding the one on which she was lost. It was not unlikely that that voyage seriously weakened her and strained her seams, so that the heavy weather she encountered caused the seams to open and the ship to leak. While the weather was heavy, there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to stand the strain. The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage.

This brings us to a consideration of the vessel's pumping equipment. The testimony shows that she was provided with more pumps than most vessels. There were two large steam pumps and two hand pumps. One of the steam pumps—a six or seven inch wrecking pump—was in the engine room in the well deck forward, and was operated by a cogwheel on the shaft of the winch. The other steam pump, known as the "messenger pump," was situated on the main deck aft of the engine room, and was operated by a messenger chain, which ran from the shaft of the winch out through the side of the engine room. The messenger pump was a double pump, and had a capacity about equal to that of the wrecking pump. There was a fifth pump, but it was not designed for taking water out of the hold. It was a small circulating pump designed for running water through the condenser and for washing down decks, and is not to be regarded as part of the vessel's regular equipment for pumping water out of the ship. It is undisputed that within an hour after the wrecking pump was started some of the cogs were stripped from the wheel, rendering it thereafter impossible to make use of it. The port hand pump was tried, but with a result so unsatisfactory that it was decided to try the starboard hand pump. But after using it an hour and a half the men were unable to move it. Orders were given to hoist it out, and after this was done it was lashed down on the deck and never used again; the reason assigned for so doing being that it had been bent while being hauled out. Then the port hand pump was used again for something over an hour, when it had to be abandoned, and no effort was made again to use either of the

hand pumps. There was testimony tending to show that when the starboard hand pump was hauled out the suction pipe was found to have been rusted through. While the messenger pump was used, the testimony shows it did not work at anything like its full capacity. It was evidently in poor condition; one witness stating that, when he observed it, it was discharging "a mere dribble of water." The statement of some of the witnesses was to the effect that, had even one pump, either hand or steam, been in an efficient condition, the schooner could have made port without any assistance whatever.

There was testimony to show that the pumps were in good order before the vessel sailed. But over against this testimony stands the fact that three of these pumps broke down one after the other when an attempt was made to use them for the very purpose for which they were provided, and that the fourth pump did not respond effectually when it was put into operation. The court below thought the inference was irresistible that the pumps which failed were not fit to use when the ship began its voyage. That inference seems justified, and, if justified, the conclusion is unavoidable that the ship was not seaworthy in this respect, also, when she started on the voyage. One of the witnesses, a seaman on the King Edgar, which took the Olcott in tow, testified that he made an examination of the pumps and found them "in a rusty condition; the pipes were corroded, and if you put your hand against them they were liable to fall away and break." That refers to the hand pumps. The steam pumps "were in a condition that they would not suck; one which was working was in a bad condition, owing to the gipsy chain having no connecting links, and it was in a very poor state; it would not have lasted if we had tried to tow her back to New York." He also said:

"I saw one pump working; the others would not work at all, owing to the pipes having holes in them. They would not suck. The pumps had been out of condition, for a good time, a very long time, I should say; they were corroded with rust."

Much of the testimony concerning the condition of the pumps is unworthy of credence, as coming from persons characterized very properly by the court below as "obviously a venal and dishonest lot," who offered their testimony against the respondent after they had offered their testimony in his favor for money and been refused. But it may be said of the pumps, irrespective of all such testimony, res ipsa loquitur—the thing speaks for itself. The pumps were not in condition to be used. Three of the pumps broke down, as soon as the emergency arose when they were needed, and there is no satisfactory explanation forthcoming telling why they broke down. We are forced to the conclusion, therefore, that as respects both her hull and her pumps the vessel was not seaworthy when she began her voyage.

[4] This being the case, the question arises whether the respondent, being liable upon the principles of the maritime law, can claim the benefit of the Harter Act. The Congress of the United States has passed from time to time various statutes limiting in greater or less degree the absolute liability of carriers by water. The most important of all these statutes is the act of February 13, 1893 (27 U. S. St. at L. 445,

c. 105, U. S. Comp. St. 1901, p. 2946), which is known as the Harter Act. That act in section 3 provides as follows:

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

This act has no application to the facts of this case. The Edith Olcott was not lost because of any fault in navigation or from dangers of the sea within the meaning of that expression in maritime law. There is no evidence tending to show any negligence, fault, or error on the part of the ship's officers or crew after the voyage began. The fault was not a "fault or error in navigation or management of the vessel."

The Harter Act in the section cited above does not relieve the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage, or affect his liability for the loss of the cargo arising from unseaworthiness. The trend of judicial decision has been to construe the Harter Act strictly. The law on this subject has been correctly stated as follows:

"The greatest amount of litigation under the act has centered around the third section. This section does not release the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage or affect his liability for damages to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy." 36 Cyc. 282.

[5] Congress has also passed acts limiting a shipowner's liability to the value of the vessel and the freight earned. The most important of these statutes was passed March 3, 1851, and which has been amended from time to time; the most important of the amendments being those of June 26, 1884, and June 19, 1886. The act of Congress provides for limiting the liability of the owner of the vessel for the loss of goods shipped, so that it shall not exceed the amount or value of the interest of such owner in such vessel and her freight then pending. Revised Statutes (2d Ed.) 1878, § 4283; 23 U. S. St. at L. 57, c. 121, § 18 (U. S. Comp. St. 1901, p. 2945); 24 U. S. St. at L. 80, c. 421, § 4 (U. S. Comp. St. 1901, p. 2945).

The act of March, 1851, enacted:

"That liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

And the act of June 26, 1884, enacted that:

"The individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners."

The two acts have been regarded as being in pari materia and therefore have been construed as parts of one entire scheme.

The respondent insists that, if he is liable for the loss of the cargo on the Edith Olcott, he is entitled to limit his liability under this legislation; the loss having been incurred without his "privity or knowledge." But the libelant claims that the respondent cannot have the benefit of the act as it was not intended to apply to personal contracts.

This court decided in The Loyal, 204 Fed. 930, 123 C. C. A. 252 (1913), that a shipowner is not entitled to a limitation of liability for a breach of his personal contract. We held in that case that where a lighterage company contracted to do all the lighterage for an importer for a fixed term, which contract carried by implication a warranty that the lighters furnished should be seaworthy but because of the unseaworthiness of one salvage services were incurred to save the cargo, the company was not entitled to limit its liability for such expense. In announcing the principle we did in the above case we followed the decision made by the Sixth Circuit in Great Lakes Towing Co. v. Mill Transfer Co., 155 Fed. 11, 16, 83 C. C. A. 607, 612, 22 L. R. A. (N. S.) 769 (1907). In that case the court said:

"The purpose of Congress was, as we think, to relieve the shipowner from the consequences of those extraordinary risks which were imposed without limitation by the law of the admiralty as that law had been interpreted in this country. And by extraordinary risks we mean those risks arising from the conduct of, and contracts made by, those who are beyond the personal supervision and control of the owner and yet have legal authority to bind him to answer for their conduct or contracts; or, to express the thought in another way, that the liabilities intended by this legislation were those peculiar to him as a shipowner and had been imputed to him because of his relation to the ship, and not those liabilities, whether for torts or from contracts, which spring from his own personal conduct or stipulation. It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made about anything else and would be enforced in the courts in common-law actions. It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs or be given such an immunity as to make his stipulations of uncertain value."

The question therefore arises whether the contract of the respondent is a personal contract. The court below thought that it was not. The District Judge said:

"The charter party signed by Pendleton Bros. was a charter party of the particular schooner Edith Olcott. Pendleton Bros., in signing that charter party, acted as the agents of the owners. The agreement was the owners' agreement chartering the schooner, and was an agreement made in the conduct of the schooner. Under such circumstances, in my opinion, the charter

party cannot be regarded as the mere personal contract of Pendleton Bros. It was the ordinary case of a charter party binding the vessel."

The learned District Judge thought the case at bar distinguishable from the case of The Loyal and from the Great Lakes Towing Co Case, in that in those cases the contracts did not specify any particular vessel, by which in the one case the lightering was to be done and in the other by which the towing was to be done. We find no such distinction laid down in any of the authorities. It seems to us that the distinction which the courts have drawn relates to the manner in which the contract is made, rather than to the character of the contract itself. The rule which has been established is that the shipowner may limit his liability as to contracts or obligations entered into by others on his behalf, or imputed to him by law; but he may not limit his liability upon contracts which he personally makes or upon obligations which he personally assumes. If the particular contract is made by the shipowner in person, it is a matter of no consequence, so far as the question now under consideration is concerned, whether it relates to and binds a particular vessel or not.

[6] By a "personal contract" we understand to be meant a contract made by the person or corporation to be bound as distinguished from one imputed to such person or corporation. In Great Lakes Towing Co. v. Mill Transportation Co., supra, the court said:

"The contracts of the manager are the actual contracts of the owner, and are not of the same character as the contracts of the master made on a voyage or in foreign ports, and which are imputed to the owner from the necessities of commerce. The acts of the managing agent within the sphere of authority are as much the acts of the owner as if done by the owner himself. Only upon this theory could a corporation make what, for the purpose of making a distinction, is called a personal contract; that is to say, one which the owner himself or itself has made."

The argument has been advanced that the contract herein involved is in no way the personal contract of the respondent, and that no accident of signature either to the charter party or the bill of lading can make it a personal contract. It is said that it is such a contract as is incident to the ownership of vessels. But this is a case where the managing owner of a vessel personally negotiated and signed the contract, charter party, which contained a provision that the vessel should be "tight, staunch, strong, and in every way fitted" for the voyage. It purported to be made between the libelants and Pendleton Bros., agents of the schooner Edith Olcott, and was signed, "Pendleton Brothers, Benner Line." As the respondent, the principal owner of the vessel, personally signed it as his own agent, he bound himself. The fact that it was the ordinary case of a charter party binding the ship does not prevent its being the personal contract of Pendleton Bros.

The decree of the court below limiting the liability of the respondent Fields S. Pendleton to his interest in the schooner Edith Olcott and her freight pending for the voyage mentioned in the pleadings, and separately dismissing the libel as against the said Fields S. Pendleton, must to that extent be reversed, with costs. The amount due on the claim of the appellant will be ascertained, and such further proceedings had as the rules and practice of the court require.

SPENCER v. READ et al.

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

No. 4100.

1. EVIDENCE (§ 253*)—ADMISSIONS OF CONSPIRATORS—STATEMENTS MADE AFTER END OF CONSPIRACY.

Where a conspiracy is charged, acts of one of the alleged conspirators, done while the conspiracy is pending, and in furtherance of its object, are deemed the acts of all, and may be shown in evidence against all, but after the conspiracy has come to an end, either through success or failure, admissions of one conspirator, by way of narration of past facts, are not admissible against others.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994–1002; Dec. Dig. § 253.*]

2. APPEAL AND ERROR (§ 970*) — TRIAL (§ 60*) — REVIEW — DISCRETION OF COURT—ORDER OF PROOF.

Declarations of alleged conspirators may be admitted before the conspiracy is sufficiently shown, the plaintiff undertaking to furnish such proof later, but this rests in the discretion of the trial court, and its ruling in admitting or excluding such testimony will not ordinarily be disturbed by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849–3851; Dec. Dig. § 970;* Trial, Cent. Dig. §§ 141–145; Dec. Dig. § 60.*]

3. EVIDENCE (§ 220*)—ADMISSIONS—FAILURE TO DENY STATEMENTS MADE IN NEWSPAPER ARTICLE.

A newspaper article containing statements concerning the acts of a party is not admissible in evidence against him merely because, when called to his attention, he did not deny the statements.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771–785; Dec. Dig. § 220.*]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action at law by E. R. Spencer, as trustee in bankruptcy of the Swanson Manufacturing Company, against Elbert A. Read, E. H. Mitchell, and Earl Sheets. Judgment for defendants, and plaintiff brings error. Affirmed.

This action was commenced December 29, 1911, in the United States District Court for the Southern District of Iowa, by the plaintiff, a citizen of Illinois, as trustee in bankruptcy of the Swanson Manufacturing Company, an Illinois corporation, against the defendants, Elbert A. Read, E. H. Mitchell, and Earl Sheets, citizens of the state of Iowa, to recover of said defendants $72,346.68, as the value of certain property alleged to have been wrongfully and fraudulently taken by them from the assets of said corporation in January, 1911. The trial resulted in a directed verdict and judgment for the defendants at the close of plaintiff's testimony, and the plaintiff brings error. The parties will be referred to as they were designated in the court below, the plaintiff in error as plaintiff, and the defendants in error as defendants.

D. W. Higbee, of Creston, Iowa (Lester H. Strawn, of Ottowa, Ill., on the brief), for plaintiff in error.

W. E. Mitchell, of Sidney, Iowa (Tinley, Mitchell & Pryor, of Council Bluffs, Iowa, and Ferguson & Barnes, of Shenandoah, on the brief), for defendants in error.

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

REED, District Judge (after stating the facts as above). The petition is quite lengthy, but alleges in substance that the plaintiff is the duly appointed trustee in bankruptcy of the Swanson Manufacturing Company, a corporation organized in November, 1910, under the laws of Illinois, for the manufacture of farm implements, located at the city of Marseilles, in that state, which corporation was adjudged bankrupt by the United States District Court for the Northern District of Illinois July 25, 1911, and the plaintiff duly appointed by that court as trustee in bankruptcy of its estate, and authorized to prosecute this action; that Herman S. Swanson (who is named in the petition as one of the defendants, but has not been served with summons and has not appeared in the action) was the principal owner of the stock of that corporation, owning $244,470 of its capital stock of $250,000; that Swanson, prior to the organization of said corporation, was the principal owner of the stock, and manager of the Swanson Manufacturing Company, a corporation organized under the laws of Iowa for the manufacture of farm implements, and located at Shenandoah, in Page county, that state (these corporations, being of the same name, will for convenience be referred to as the Iowa corporation and the Illinois corporation, respectively); that the Iowa corporation had become largely indebted to various parties in or near Shenandoah, Iowa, including the defendants Elbert A. Read, E. H. Mitchell, and Earl Sheets; that many citizens of the city of Marseilles, Ill., and others were desirous that the Illinois corporation should be permanently located at that city, and, for the purpose of encouraging such location, agreed to take at their face value a large amount of the bonds of said corporation, provided it should have, in addition to its property in Marseilles, $50,000 in cash, paid in as part of its capital stock; that the officers of said corporation had represented to said citizens that one John Hoss, a resident of Moline, Ill., was about to take stock in said corporation and to pay in cash the sum of $50,000 therefor, to be and remain a part of the capital stock of such corporation; that some time in January, 1911, said citizens of Marseilles and others had collected and paid into the First National Bank of that city about $40,000, to be used in paying for bonds to be issued by the Illinois corporation to be secured by a trust deed upon its property; that said John Hoss failed to pay in said sum of $50,000 for stock of said corporation, and for that reason the citizens of Marseilles and others declined to accept and pay for the bonds of said corporation; that the defendants, well knowing the premises, combined together to defraud and injure the said citizens of Marseilles and other creditors of said Illinois corporation, and agreed that they would obtain the said investment in the bonds of said corporation by citizens

of Marseilles and others, and thereafter wrongfully and unlawfully deprive said corporation of its capital and property and cause said corporation to become bankrupt; that, in pursuance of said conspiracy, the directors of said corporation secretly, fraudulently, and without notice to their creditors passed a resolution that said Illinois corporation should assume the indebtedness of the Iowa corporation, which said assumption of indebtedness was wholly without consideration and made solely for the purpose of robbing, cheating, and defrauding the creditors of the said Illinois corporation; that the defendants, in further pursuance of said conspiracy, deposited money to the amount of $25,000 to the credit of said Illinois corporation, falsely pretending that the same was paid in by said John Hoss according to the original representations made by the officers and directors of said corporation; that thereupon the said citizens of Marseilles and other creditors of said Illinois corporation purchased the bonds of said company and paid into said company the sum of $54,500, believing that said money would be used in the general business of said Illinois corporation; that said John Hoss wholly failed to pay in said sum of $50,000 for stock in said corporation, and the defendants then and there falsely misrepresented to the creditors of said corporation that he had so paid in said sum; that the defendant Elbert A. Read, in pursuance of said conspiracy, paid in the sum of $25,000, falsely pretending that the same came from the said John Hoss, and so informed the said citizens of Marseilles and other creditors, for the purpose of inducing them to buy said bonds, for the purpose of wrongfully obtaining money for the purchase of the bonds of said Illinois corporation; that the said Elbert A. Read and other defendants, with the consent and connivance of said Herman S. Swanson, and in pursuance of the conspiracy aforesaid, immediately and wrongfully took away said sum of $25,000 on January 27, 1911, and said sum was not in fact added to the capital and property of said corporation, but was wrongfully and fraudulently withdrawn from the capital and assets of said corporation by the defendants on said January 27, 1911, in pursuance of said conspiracy; that on the same day the defendants fraudulently took from the capital and assets of said corporation the further sum of $41,610.49 out of the moneys paid in for the bonds of said corporation, in pursuance of said conspiracy, for the pretended purpose of paying debts of the Iowa corporation, in which the defendants were personally interested; that afterwards, on January 31, 1911, said defendants, in pursuance of said conspiracy, wrongfully and fraudulently withdrew from the capital of the Illinois corporation the further sum of $5,736.19; that, by reason of and in pursuance of said conspiracy, said defendants have wrongfully, unlawfully, secretly, and without consideration taken from the capital and assets of said Illinois corporation the total sum of $72,346.68, for which sum judgment is asked against the defendants.

The answer of the defendants Elbert A. Read, E. H. Mitchell, and Earl Sheets is also quite lengthy. It will be best understood by stating briefly the ultimate facts alleged, without following the order thereof. As amended, it admits that the Swanson Manufacturing Company of Illinois was organized under the laws of that state in November, 1910, by Herman S. Swanson and certain citizens of Illinois; that it was ad-

judged bankrupt and the plaintiff duly appointed its trustee in bankruptcy in July, 1911, as alleged in the petition; that said Herman S. Swanson was, prior to its organization, a stockholder in and manager of the Swanson Manufacturing Company, a corporation organized under the laws of Iowa, and located at Shenandoah, in that state; and alleges that it was engaged in the manufacture and sale of farm implements and other implements and machinery at that place; that its capital stock was $65,000, $35,000 of which was preferred and $30,000 common stock; that the defendant Sheets owned 2 shares of the preferred stock, and the defendant Mitchell 40 shares, and the defendant Read held 5 shares of the preferred stock for another party; that other than this they had no interest in said corporation and were not and are not creditors thereof; that said Herman S. Swanson was president and manager of said corporation, and some time in the fall of 1910, at a meeting of its board of directors, informed said corporation that he desired to change its location to Marseilles, Ill., if an adjustment of its affairs at Shenandoah could be satisfactorily arranged; that subsequently the said Swanson, together with citizens of Marseilles, Ill., organized the Illinois corporation under the laws of that state; that at a legal meeting of the stockholders of the Iowa corporation, consisting of more than a majority thereof, these defendants were appointed by its stockholders a committee to adjust its affairs with the Illinois corporation; that, prior and subsequent to the organization of the Illinois corporation, it was contemplated that that corporation would purchase the property, real and personal, of the Iowa corporation; that after its organization, and for the purpose of accomplishing that purpose, the stockholders and directors of the Illinois corporation authorized and empowered said Herman S. Swanson (who was one of said officers) to negotiate for and purchase from the Iowa corporation all of its said property for the Illinois corporation; that thereafter, and on December 15, 1910, said Swanson, acting for and on behalf of the Illinois corporation, entered into a written agreement with these defendants, acting for and on behalf of the Iowa corporation, whereby the Illinois corporation agreed to purchase, and these defendants, acting for and on behalf of the Iowa corporation, agreed to sell, to the Illinois corporation all of its property, real and personal, at and for the sum of $47,392.68 (and certain debts of the Iowa corporation), to be settled and paid for on or before January 5, 1911; that said agreement was duly approved by both corporations, and said amounts were in fact paid to these defendants January 28, 1911, for the property of the Iowa corporation and for the benefit of its stockholders, which property had been previously conveyed to the Illinois corporation, and such conveyance placed in escrow with the First National Bank of Marseilles, Ill., until the purchase price was paid, a copy of which contract is attached to the answer as Exhibit A and made part thereof. The defendants deny all allegations of fraud, conspiracy, or other wrongdoings upon their part alleged in the petition, and deny all matters not specifically admitted. Many other matters are alleged, but they are mainly matters of evidence only and need not now be more specifically stated.

There was no reply by the plaintiff to this answer.

The plaintiff's testimony tends to show that in November, 1910,

there was a public meeting of citizens of Marseilles, Ill., held in that city, at which a committee of three of its citizens was appointed to solicit funds to induce the Swanson Manufacturing Company to locate in Marseilles; that members of this committee, together with Herman S. Swanson, called upon people they thought would subscribe or contribute to this purpose, and a subscription blank was circulated by them, a condition of which is:

"This subscription is contingent upon fifty thousand ($50,000.00) dollars in cash being added and paid into said company, in addition to the present property and assets of the said Swanson Manufacturing Company."

Mr. Tummel, of the soliciting committee, testified that Mr. Herman S. Swanson went around with the committee soliciting subscriptions, and said that they would employ about 125 men to start out; that they had plenty of capital; that Mr. Hoss was to put in $50,000 in cash and establish a credit of $100,000, which would give them plenty of money to do business with; that the committee was called to the First National Bank of Marseilles to meet Mr. Swanson and John Hoss. Hoss and Swanson both stated to us there what they intended to do. Hoss said he was going to put in $50,000 of his own money and establish a credit of $100,000. He was going to finance it, and he knew it was going to be a good thing. Mr. Swanson made similar statements when he was with the committee soliciting signatures to the subscription agreement. The testimony of the other committeemen is substantially the same.

The testimony further tends to show that a number of persons subscribed and paid for bonds of the Illinois corporation upon the strength of these statements and the condition of the subscription blank; but there is no evidence that either of the defendants, Read, Sheets, or Mitchell, participated in the solicitation of subscriptions or had anything to do with the organization of the Illinois corporation or its location at Marseilles, or made any statements as to what Hoss was to do, other than the alleged declarations of Swanson, hereinafter mentioned.

There was also testimony that a committee of citizens of Marseilles was appointed in November, 1910, to go to Shenandoah and investigate the Iowa corporation and the value of its property; that this committee reported in substance, among other things, that it found the Swanson Manufacturing Company was an active concern, needing more capital, a better location, and better financial facilities, hence the necessity for removal from Shenandoah; that the company stood well at home, and its product and business were well spoken of elsewhere by people well posted on business of the kind transacted; that the value of the personal property at Shenandoah was:

Machinery to be removed to Marseilles	$18,000 00
Shenandoah plant, which is a good property and said to be worth	30,000 00
Patterns, office furniture, and fixtures to be removed	15,033 81
Raw material	35,000 00

Mrs. Flora Bender, a witness on behalf of plaintiff, testified: That she worked for the Swanson Manufacturing Company of Shenandoah as stenographer and for H. S. Swanson from November, 1908, until

they moved to Marseilles in January, 1911; that she did a little work for the Swanson Manufacturing Company of Illinois under the direction of C. A. Brown, the auditor; that she left Marseilles July 8, 1911; that Mr. Swanson had private files aside from the files of the company. After identifying some correspondence that she wrote for Swanson while acting as stenographer, she testified:

"I remember the Iowa committee composed of Messrs. Read, Sheets, and Mitchell coming to Marseilles in the latter part of January, 1911. As I understood it, they made settlement with the Swanson Manufacturing Company for the stockholders of the Iowa corporation. I think they, or some of them, had been at Marseilles a day or two before that. I remember of Elbert Read coming back. I learned from the talk in the office at that time that they had been to Moline. When they returned, a settlement was made. There was present Read, Mitchell, Sheets, and, I believe, Fulton, of Marysville, Kan., and also Swanson. They were in the office of the company, most of the time in Swanson's room. I wrote the receipt that the committee signed. Exhibit C is the receipt, which reads as follows:

"Marseilles, Illinois, January 27, 1911.

"We, the undersigned committee, representing the preferred stockholders of the Swanson Manufacturing Company of Shenandoah, Iowa, hereby acknowledge receipt of one check for $~~21,610.49~~ 46,610.49 and one check of $20,000.00 to apply as follows:

Preferred stock	$18,943 50
First Nat. Bank, Shenandoah, Iowa	12,500 00
Green Bay Lbr. Co., " "	978 74
Hanson Lbr. Co., " "	952 36
First Nat. Bank, Council Bluffs, Iowa	9,881 39
To cover interest	300 00
Total	$43,555 99

"[Signed] E. H. Mitchell.
"Earl Sheets.
"E. A. Read,
"By Earl Sheets."

She then identified checks of the Swanson Manufacturing Company of Marseilles, in the handwriting of Mr. Bender (her husband), signed in the name of the company, by H. S. Swanson, as president, in favor of E. A. Read, Earl Sheets, and E. H. Mitchell, as follows:

Exhibit D, check dated January 27, 1911, amount $46,610 49
Exhibit E, check dated January 27, 1911, amount 20,000 00

"There was no check that I know of for $21,610.49, as stated in the receipt originally."

Exhibit F is check dated January 31, 1911, in favor of First National Bank of Council Bluffs, Iowa, for $1,873.75.

All of the foregoing checks were drawn on the First National Bank of Marseilles, Ill., and were paid to the payees. The witness continued:

"I am pretty sure Mr. Read was familiar with the financial condition of the Swanson Manufacturing Company of Shenandoah the latter part of 1910. He always seemed to be very anxious to have their note taken care of. As I remember, he used to have Swanson sign his own name on the back of the notes. Q. Did H. S. Swanson explain to you and Mr. A. C. Bender the discrepancy of $25,000 between the receipt that has been offered in evidence here and the checks? (Objected to by the defendants.) By the Court: You know,

and I know, and every lawyer knows, that declarations such as this are not competent, but courts will admit them, because, regardless of that, the professional statement of counsel is that they will connect up. Do you make this statement that you will? Mr. Strawn: I think we have done so already. The Court: Oh, well, if you do not, you are wasting your time, and I will have to take it all away from the jury. (Objection overruled. Defendants except.) A. We had a conversation with Mr. Swanson one day, about noon, in the office regarding the discrepancy of $25,000 on the books which Mr. Brown, the auditor, did not know to what account we must charge it. Mr. Swanson said he guessed * * * he might just as well tell Mr. Bender what he knew about it, because Mr. Brown was a man that would find it out anyway. And he told us that this money (this $25,000) was a plan suggested by Elbert Read; that he loaned Mr. Hoss this $25,000 to be deposited in the First National Bank of Marseilles, Ill., until the news went out that John Hoss had put up the $50,000, and that the bondholders in Marseilles would then pay in their money, as they refused to pay it in until John Hoss had put up the $50,000, and that this money was left in the bank but a few hours, and the news went out, and then they began to pay in their money. I said to Mr. Swanson, 'Do you think that was exactly fair to the Marseilles people?' or something of that kind. And he says: 'Well, that is not the question, whether it is fair or not. That was the only thing to do, and they saw, unless the money was forthcoming in some manner, the deal would fall through with. So he had to put it up in some way.'" Mr. Mitchell: I move to strike that out. The Court: It will remain in on this statement of counsel that they will connect these three defendants with that. (Overruled.) The Court: Mr. Strawn, let us end this once and for all. When do you say that these defendants brought that money back here to Iowa? Mr. Strawn: They brought it back in three bunches at three different times. The Court: When? Mr. Strawn: January 31st. The Court: Now, I understand that the last money was brought back to Iowa on January 31, 1911. (The Court now rules that anything said either orally or in writing subsequent to January 31, 1911, by any person other than one of these three defendants is excluded from the case and will be excluded as offered hereafter.)"

A. C. Bender (husband of Mrs. Bender) testified:

"I went with the Swanson Manufacturing Company in the latter part of 1910. I was general office man. I could not say in round numbers how much they were owing. I went to Marseilles with the company. My work was on the books. I left Marseilles about the middle of July. The Mr. Brown spoken of in the evidence was an auditor in the employ of the New York Audit Company of Chicago. I remember E. A. Read, Earl Sheets, and E. H. Mitchell coming to Marseilles in January, 1911. I do not remember how long they were there. They came, went away, and came back again. I remember the day that they had some sort of settlement in the office. Swanson told me to draw these checks Exhibits D and E, one for $46,610.49 and the other for $20,000. When Mr. Brown and I were working on the books, we could not make the entry properly. When crediting the First National Bank of Marseilles with the $25,000, we could not find what account to charge it to. We debited it to John Hoss. Just why we did it I cannot explain. When these checks were given, the three committeemen, Read, Mitchell, and Sheets, were present. When the receipt was given, Sheets and Mitchell were present, but Read had left."

There is some further testimony as to the contents of the books.

Mrs. Bender was recalled for further cross-examination and testified as follows:

"By the Court: Mrs. Bender, I want to ask a question or two before you proceed: You testified yesterday afternoon to a conversation with Mr. Swanson in the presence of your husband, as to what Mr. Swanson said; a part of the testimony being: 'He said, "Well, I might as well tell you, because Mr. Brown is a man that will find this out."' When did this conversation take place? A. I would not be safe in saying, but it was shortly after the settle-

ment and when Mr. Brown was there trying to make the entry on the books. It was after the checks were issued. The Court: That is all."

There is some other evidence not necessary to be noticed in the view we take of the case.

At the close of the plaintiff's testimony the defendants moved for a directed verdict in their favor upon the following grounds: (1) That the petition does not state a cause of action. (2) That the allegations of the petition are not supported by any evidence. (3) That the evidence shows that the petition was insufficient for the reason that it seeks to recover certain moneys which it is alleged were paid to the Swanson Manufacturing Company of Shenandoah, Iowa, and preferred stockholders of said company, and certain creditors of said company, and that it does not tender back to these defendants any of the property which the Swanson Manufacturing Company of Marseilles, Ill., received from the Swanson Manufacturing Company of Shenandoah, Iowa, and that the plaintiff, as trustee, stands in the shoes of the Swanson Manufacturing Company of Illinois. (4) That the Illinois Company has appropriated to its own use a large amount of property received from the Shenandoah corporation and all of the assets of said corporation, and has failed and neglected to surrender back or tender back any of the assets of said corporation, which they received as a consideration for parting with the money now sought to be recovered. (5) That the evidence fails to show any fraud, misrepresentations, or conspiracy upon the part of these defendants, or any of them, in procuring a contract of settlement between these two companies.

This motion was sustained, and judgment entered for the defendants, to which the plaintiff excepted and assigns as error that the court erred: (1) In sustaining the objections of the defendants to the questions propounded to the witness by plaintiff as to the actions and conduct of Herman S. Swanson in regard to the alleged conspiracy done and performed after January 31, 1911. (2) In permitting defendants to introduce evidence tending to show that the Swanson Manufacturing Company of Illinois had received notes of John Hoss to the amount of $40,000. (3) In taking from the consideration of the jury the testimony of Mrs. Bender with reference to conversations, which she either took part in or heard between H. S. Swanson and her husband with reference to what Mr. Swanson said by way of explanation, wherein Swanson said that he might as well tell that Mr. Brown would get onto it anyway; the same being with reference to the conduct of the defendants Read, Mitchell, and Sheets in obtaining money from the Swanson Manufacturing Company of Illinois on and prior to January 31, 1911. (4) In sustaining the objection of defendants to the introduction of Exhibit K, being a newspaper called the Morris Herald, and particularly the article therein contained headed "Get Rich Quick," etc.; the same forming the subject of conversation between the witness Mr. Fishbaugh and the defendant E. H. Mitchell. (5) In sustaining the motion to direct a verdict for the defendants. (6) In holding that the plaintiff, as trustee in bankruptcy of the Illinois corporation, only stands in the shoes of that corporation.

[1] The first and third assignments of error challenge the correctness of the ruling of the court in excluding the testimony of the witnesses Flora Bender and her husband, A. C. Bender, as to the declarations of Herman S. Swanson, made some time after the issuance of the checks by him as president of the Illinois corporation to the defendants. The plaintiff's cause of action, as alleged in the petition, is grounded upon an alleged conspiracy between the defendants, Read, Sheets, and Mitchell, and Herman S. Swanson, to fraudulently induce citizens of Marseilles (not named in the petition) to pay their several subscriptions for bonds of the Illinois corporation, to the end that the defendants, with the connivance and consent of Swanson, might wrongfully and fraudulently withdraw from the treasury of the Illinois corporation the money, or a part of it, paid by such citizens for the bonds subscribed by them to pay for the property and certain debts of the Iowa corporation.

It is undoubtedly true that, in all cases where a conspiracy is shown, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and may be shown in evidence against all. But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, either by success or by failure of the enterprise, the admissions of one conspirator by way of narration of past facts are not admissible in evidence against the others. 1 Greenl. Ev. § 184a (16th Ed.); Logan v. United States, 144 U. S. 263, 309, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. United States, 150 U. S. 93, 98, 14 Sup. Ct. 37, 37 L. Ed. 1010; Kansas City Star v. Carlisle, 108 Fed. 344, 361, 47 C. C. A. 384.

There is no substantial evidence, either direct or circumstantial, of any agreement or arrangement whatever between Swanson and the defendants, or either of them, to obtain money or property fraudulently from the Illinois corporation. The most that can be said of the evidence is that there are some circumstances tending to show that the defendants, or some of them, loaned to Hoss $25,000, upon his note for that amount to enable him to pay in part his subscription to the capital stock of the Illinois corporation, which sum was shortly after withdrawn upon the transfer of such note to the corporation. In the absence of direct evidence of an unlawful conspiracy, a wide latitude is allowed in admitting circumstantial evidence to prove its existence, and that was permitted by the trial court in this case.

[2] Declarations of the alleged conspirators may be admitted before the conspiracy is sufficiently shown, the plaintiff undertaking to furnish such proof later; but this rests in the discretion of the trial court, and its ruling in admitting or excluding such testimony will not ordinarily be disturbed by an appellate court. Kansas City Star v. Carlisle, 108 Fed. 344, 361, 47 C. C. A. 384, above. Swanson for some reason was not served with summons in this case, though named in the petition as a defendant, and is not therefore a party to the suit, nor was he called as a witness. The declarations of Swanson, testified to by Mrs. Bender, were made some time after the alleged con-

spiracy had come to an end by the receipt of these checks from the Illinois corporation. There was no error, therefore, in excluding the testimony of Mrs. Bender and her husband as to the alleged declarations of Swanson. If a conspiracy was to be proven against these defendants, it must be by testimony introduced in the usual way, so as to afford them an opportunity to cross-examine the witness or witnesses by whom such conspiracy is sought to be established. It could not rightly be established by statements of others directly admitting such conspiracy, or from which it might be inferred after it had ended.

The second assignment of error challenges the correctness of the ruling admitting testimony tending to show that the Illinois corporation had received notes of $40,000, or some other amount, from John Hoss. This testimony was developed upon cross-examination of plaintiff's witness as to the contents or entries upon the books of the Illinois corporation. There was no reversible error in permitting such cross-examination.

[3] Complaint is next made of the exclusion of an article published in the Morris Herald of August 11, 1911 (a newspaper published at Morris, Ill.). To understand the merits of this complaint, it is necessary to state, in addition to the testimony already stated, that there was offered in evidence by the plaintiff a clipping from this issue of the newspaper mentioned, entitled "Get Rich Quick Deal, Marseilles People Stung by High Finance, Swanson Deal." This clipping is an attempt at "a humorous write-up" of what purports to be the efforts of citizens of Marseilles to secure the location at that place of the Swanson Manufacturing Company in lieu of some manufacturing plant recently removed from Marseilles to Moline, Ill., and the subsequent bankruptcy of the Swanson concern, and the resulting loss to the Marseilles citizens. A witness testified that he had a copy of this paper of August 11th at his place of business in Shenandoah some time in the fall of 1911, and, as the defendant Mitchell was passing one day, called to him and said, "I did not know you were such a scoundrel or bad man as this," and showed him the article; that Mitchell read it aloud in his presence and the presence of some others and laughed and said, "That is about the way we got the money; that he had had many difficult transactions in which it was difficult to get money; that this was difficult, and that the credit belonged, not to him, but to Read; that without Read's method they would never have succeeded in getting this money." He did not deny in my presence any of these statements in the transactions. At best this clipping would be admissible against Mitchell only as an admission of the truth of the facts stated therein, because he did not, upon reading the article, deny them; but he says the credit for securing the money belonged to Read, not to him, and surely the clipping is not admissible against Read. Nor is it admissible as against Mitchell, for one is not called upon to deny the truth of matters appearing in the public press concerning him, to which his attention may be called, under the circumstances shown in this case, to avoid personal responsibility for such matters. There is no merit in this assignment of error.

It is also urged that the court erred in holding that the plaintiff, as trustee in bankruptcy of the Illinois corporation, stands in the shoes of that corporation and succeeded only to its rights as against these defendants; the contention being that the trustee, under section 70e of the Bankruptcy Act (Comp. St. 1913, § 9654), succeeds to the rights of any creditor of the corporation, and may recover against the defendants to the same extent that any creditor of the corporation might have recovered against them. Admitting, without deciding, this to be so, it suffices to say that, under the testimony adduced by the plaintiff, no creditor of the bankrupt corporation could have recovered against these defendants upon the grounds alleged in the plaintiff's petition.

Finally it is urged that there was error in directing the verdict for the defendants. It must suffice to say of this assignment that we have carefully considered the entire evidence in behalf of the plaintiff, and are of the opinion that, if a verdict was returned thereon for the plaintiff, it would have been the duty of the court to set it aside for want of sufficient support in the evidence. It was therefore the duty of the court to direct a verdict for the defendants and to render judgment thereon for costs against the plaintiff.

The judgment is affirmed.

SPOKANE & I. E. R. CO. v. CAMPBELL.

(Circuit Court of Appeals, Ninth Circuit. October 19, 1914.)

No. 2366.

1. MASTER AND SERVANT (§ 111*)—INJURIES TO SERVANT—RAILROADS—REGULATION—SAFETY APPLIANCE ACT—"LOCOMOTIVE ENGINE"—"ENGINEER."
Safety Appliance Act (Act Cong. March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1913, §§ 8605–8612]), requires common carriers engaged in interstate commerce by railroad to equip their "locomotive engines" with power driving-wheel brakes, so that the "engineer" may control the speed without requiring brakemen to use the hand brakes for that purpose. By Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. 1913, §§ 8613–8615), such requirement was extended to all trains, locomotives, tenders, cars, and similar vehicles on any railroad engaged in interstate commerce. *Held*, that while the words "locomotive engines" and "engineer" as used in such act were primarily intended to refer to a steam-propelled engine, and to the operator thereof, respectively, such words were sufficiently broad to include an electric motor and the motorman, and that the act was therefore applicable to electric motors used to haul trains engaged in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215–217, 255; Dec. Dig. § 111.*

For other definitions, see Words and Phrases, First and Second Series, Engineer, Locomotive.]

2. TRIAL (§ 359*)—SPECIAL VERDICT—REQUISITES.
Where the entire controversy is dependent on a special verdict, it will prevail only when it finds all the facts essential to a determination of every material issue in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 857–860, 875, 877, 878; Dec. Dig. § 359.*]

---

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

3. COURTS (§ 352*) — FEDERAL COURTS — RULES OF DECISION — LOCAL LAW — SPECIAL VERDICT.

Since the local law with reference to submitting special findings with a general verdict does not control the federal courts with respect to the mode in which causes are required to be submitted to a jury, such courts are not bound by the rules obtaining in the local courts for interpreting such verdict; the general rule being that the court, in determining what judgment shall be entered on a special verdict, will not look to the evidence, nor beyond the pleadings and the judge's record.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926–932; Dec. Dig. § 352.*

Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

4. MASTER AND SERVANT (§ 297*)—INJURIES TO SERVANT—ACTIONS—GENERAL AND SPECIAL VERDICT—CONSTRUCTION—EFFECT.

In an action for injuries to an interurban motorman, engaged in interstate commerce, in a collision between his train and a regular train moving in the opposite direction, on a single track, the jury found a general verdict for plaintiff, a special verdict that plaintiff before starting on his run received a written train order directing him to meet a "special" moving in the opposite direction at A., and special findings that the air brakes on plaintiff's train failed immediately before the collision, and that plaintiff left his starting point in violation of orders, before the regular train arrived, which was the proximate cause of the accident. *Held*, that such latter finding was a mere conclusion of law and not a finding of fact, and since the element of proximate cause, where concurrent acts of the employer and employé contribute to cause the injury, is eliminated by the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657–8665]), and especially where the contributing act of the employer is in derogation of a duty imposed by the Safety Appliance Act, defendant was not entitled to a judgment on the special verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195–1198; Dec. Dig. § 297.*]

5. APPEAL AND ERROR (§ 977*)—NEW TRIAL (§ 6*)—QUESTIONS REVIEWABLE —DISCRETION OF COURT.

The grant or refusal of a new trial in the federal courts rests in the sound discretion of the trial court, and the result cannot be made the subject of reversal on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977;* New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by Edgar E. Campbell against the Spokane & Inland Empire Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 188 Fed. 516.

On the afternoon of the 31st day of July, 1909, at about 4:30 o'clock, the defendant in error, plaintiff below, he being the motorman, started with his train of three cars—the motor car and two trailers—out of Cœur d'Alene over the electric line for Spokane. When he had proceeded a short distance from Cœur d'Alene, a mile and a half or two miles, he ran into another train coming in the opposite direction, whereby he was injured, and a number of passengers on his train lost their lives, while others were more or less injured. The train he was running was a special, known as No. 5, and he testifies that

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

he received written orders for running it, also oral orders from the conductor, and that he moved out on the line in pursuance of such orders; that when he had gotten out on the road some distance and observed the approaching train, he set the air brakes, which held for a short time only, then let go, supposedly by the escape of the air, and he thereby lost control of his train, and was unable to stop it or further check its speed. As a consequence he ran into the train coming from the other way, the latter train, however, having been brought to a stop before the collision. In this testimony plaintiff has corroboration.

According to the rules of the company, which were in evidence, a special train is expected to keep out of the way of the regular trains; that is to say, the special must take note of the schedule running time of all regular trains, and be on sidings at the stations where and when the regulars will pass, so as to allow a free track to the regulars. Specials are run on orders from the dispatcher with reference to another special, and the motorman is expected to make the passing stations as directed.

The defendant's testimony tends to show: That plaintiff, together with the conductor, was given and received a running order for No. 5 before leaving Cœur d'Alene station, directing No. 5 to meet No. 4 at Alan station, which order was in the following language: "Motor 5 will run Spl CD Alene to Spokane meet Spl 4 East at Alan." And, further, that the train was equipped with air brakes and other equipment for controlling and stopping the train, and that these had been properly and recently tested for determining their efficiency, and found to be in good order.

The cause having been tried before a jury, the following special and general verdicts were returned:

"Verdict.

"We, the jury in the above-entitled cause, find for the plaintiff, and fix the amount of his damages at the sum of $7,500.00 (seventy-five hundred dollars)."

"Special Verdict.

"Did the plaintiff Campbell receive, before leaving Cœur d'Alene, train order No. 53, reading as follows: 'Train Order No. 53. From Spokane 7—31—1909. To Motor 5 at C. D. Alene Station: Motor 5 will run Spl. C. D. Alene to Spokane meet special 4 east at Alan.' Yes."

"Special Finding I.

"Q. Were the air brakes on Campbell's train immediately before the collision insufficient to enable Campbell to control the speed of the train? A. Yes."

"Special Finding II.

"If you find that plaintiff left Cœur d'Alene in violation of his orders, then answer this question: Was that leaving in violation of his orders the proximate cause of the accident? Yes."

Motion was interposed for judgment in favor of defendant on the special findings, notwithstanding the general verdict, which was denied. Later a petition for a new trial was also denied, and judgment rendered for plaintiff. Error is prosecuted from this judgment.

Graves, Kizer & Graves, of Spokane, Wash., for plaintiff in error.

Belden & Losey, of Spokane, Wash., and H. Lowndes Maury, of Butte, Mont. (Henry R. Newton, of Spokane, Wash., of counsel), for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). Three questions are urged upon our attention: First, whether the

Safety Appliance Act of Congress has application to interstate electric railroads, it being contended that the defendant was not bound to equip its motors with air brakes; second, whether the trial court should have allowed the motion for judgment non obstante; and, third, whether the motion for new trial should have been granted.

[1] Section 1 of the Safety Appliance Act of Congress, March 2, 1893, requires common carriers engaged in interstate commerce by railroad to equip their locomotive engines with power driving-wheel brakes and appliances for operating the train-brake system, and to equip a sufficient number of cars in the train with power or train brakes so that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for the purpose. 27 Stat. 531. By an amendment of this statute (Act March 2, 1903, 32 Stat. 943) the provisions and requirements thereof relating to train brakes, automatic couplers, etc., are made to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles.

There can be no doubt that when the primary act was passed, electrically propelled trains were not within the legislative mind, and where "locomotive engine" occurs reference was had to a steam-propelled engine. And likewise when "engineer" is spoken of, it had relation to a person in charge of a steam-propelled locomotive. But this does not signify that other locomotive or motor engines, and that persons driving other motor cars, may not come within the scope and intendment of the act. The purpose of the Legislature was to provide, among other things, for a more efficient and effective way of handling trains in interstate commerce, so that the speed and movement of the train might be regulated and controlled, and, when desired and in cases of emergency, readily brought to a stop, all from the engine and by the one person in charge of it, thereby to lessen the danger to employés and the public incident to the operation of railroads.

The electric railroad has since come into very general use, with its driving engines called motors, and its employés in charge of the engines are called motormen or enginemen. These railroads, notwithstanding, are common carriers of property and persons, the same as steam railroads, and have employés and come into relation with the public in the same way, the only essential difference being that electricity has taken the place of steam as a propelling agency or force, with differently contrived engines, suited to the harnessing of the propelling agency to the use desired, so that the broad purpose of the Legislature applies as completely to the one kind of railroad as to the other. In a narrower sense, a locomotive engine is spoken of as an engine propelled by steam; but when the statute, as the amendment does, extends the provisions of the act to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles, it broadens the significance so as, without question, to include motors electrically propelled, used upon railroads engaged in interstate commerce. So, also, the original act, with its amend-

ment, includes the operators of such engines, whether called engineers or motormen. We think the statute is broad enough to require that electrically propelled engines and trains engaged in interstate commerce, as well as steam-propelled engines and trains, shall be equipped with air brakes for their efficient operation and control.

The next question may be more clearly resolved by understanding what were the issues presented to the jury for their verdict. The complaint, so far as it is pertinent to the inquiry, alleges:

"(4) That plaintiff on said date aforesaid was directed by the agents, officers, and employés of said defendant to take his said train No. 5, and to proceed from said town of Cœur d'Alene to the city of Spokane, and that plaintiff was given orders, directing him to meet and pass regular train No. 20 at the town of Alan; that when rounding a curve and nearing the station of Gibbs, state of Idaho, which is a point between Cœur d'Alene City, Idaho, and the town of Alan, this plaintiff saw a train coming from the opposite direction and running on the same track upon which said plaintiff's train was running, which said train plaintiff is now informed and believes was Regular Train No. 20.

"(5) That upon the coming into view of said train No. 20, plaintiff used all due diligence to bring his motor upon said train No. 5 to a stop and standstill; that he duly applied the air brakes upon said motor, but, owing to the defective condition of said air brakes, which said condition was wholly unknown to plaintiff, said brakes wholly failed and refused to act, and plaintiff's said train continued to rush forward at a tremendous rate of speed and a collision occurred, plaintiff's said train colliding with said train No. 20, and which said collision caused the injuries hereinafter complained of.

"(6) That said accident and collision was directly due to the wrongful and negligent acts of the plaintiff's said superiors in the giving of said wrongful orders, and in their failure to furnish this plaintiff with a motor and train supplied with proper air brakes in working condition.

"(7) That this plaintiff, after observing said train No. 20 upon the track, had plenty of time to have stopped his said train and prevented said collision if said air brakes had been in good condition and in proper working order."

These allegations were denied, and the defendant for further answer alleges:

"That on said July 31st plaintiff was acting as motorman upon a special train referred to and described in the orders of defendant as motor 5. That under the rules and regulations of such company such special train had no rights over the regular trains operating under the time-table of defendant, and was obliged to keep out of the way of such regular trains; that such special train had no right to go out upon the road when a regular train was due, unless it had telegraphic orders from defendant's train dispatcher in Spokane ordering it to do so; that upon said date plaintiff, in charge as motorman of the special train aforesaid, was standing in defendant's yards at Cœur d'Alene ready to start upon a run to Spokane as soon as there should arrive at Cœur d'Alene one of defendant's regular trains, known on its time-table as No. 20, which was then due; that defendant, knowing that No. 20 was then due, and that he had no right to leave Cœur d'Alene until it had come in, received telegraphic orders from the dispatcher at Spokane to meet another special train at the town of Alan, and that when handing him such orders the conductor of plaintiff's train told him he might run farther down in the yards and wait there until No. 20 came in; that plaintiff started his train under such orders, but instead of stopping at the point in the yards where he had been directed to stop, continued on his way towards Spokane, passing out of the Cœur d'Alene yards and out on the line to Spokane, and at the station of Gibbs, a distance of about 1½ miles from Cœur d'Alene, his train came in collision with No. 20 on a straight track; that No. 20 was in full view of plaintiff's train for a distance of more than 800 feet before the col-

lision occurred, and the motorman of No. 20, seeing plaintiff's train approaching, came to a full stop; that plaintiff could, if he had seen No. 20, have brought his train to a stop within a distance of 150 to 200 feet, and that the collision between the two trains was caused solely and entirely by plaintiff's disobedience of the rules, regulations, and orders of the company, and by his reckless conduct in failing to pay heed to his surroundings, and to keep a lookout upon the track ahead of him so as to observe No. 20 and bring his train to a stop, as he might have done had he have looked ahead of him at all."

The issues thus presented were whether the plaintiff was directed by defendant to proceed with train No. 5, which was special, out of Cœur d'Alene, and to meet regular train No. 20 at the town of Alan; whether the defendant failed to furnish the plaintiff with a motor and train supplied with proper air brakes in working condition; whether plaintiff used due diligence to bring his motor upon train No. 5 to a stop by application of the air brakes upon the motor; and whether, by reason of the defective condition of said air brakes, plaintiff was unable to stop his train in time to prevent collision. And, as presented by the answer, whether, under the rules and regulations of the defendant company in the operation of its train, the plaintiff operating a special was required to keep out of the way of regular trains; whether plaintiff received orders from defendant to meet another special train at Alan, and was directed by the conductor to run farther out in the yards, and there to wait until train No. 20 arrived in; and whether, in disobedience to these orders, he continued on his way, thus bringing on the collision.

[2] A special verdict, where the entire controversy is dependent upon it, should necessarily find all the facts essential to a determination of the issues of the case. In those jurisdictions where both a special and general verdict may be taken, the special verdict will prevail over the general, and this is perhaps the general rule. But this can only be so where the special verdict has been found respecting every material issue; otherwise the court could not be in a position to deduce the conclusions of law necessary to a decision of the case.

[3] It is strongly urged that the federal courts will adopt the local practice with respect to the taking of special and general verdicts and the local rules and procedure for construing the same in determining their potency and effect. It has been distinctly held that the local law with respect to submitting special findings along with a general verdict does not control the federal courts in respect to the mode in which causes shall be submitted to the jury. Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Mutual Accident Association v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; Toledo, St. L. & W. R. Co. v. Reardon, 159 Fed. 366, 86 C. C. A. 366. This being so, it is a logical consequence that the federal courts will not be bound by the rules obtaining in local courts for interpreting such verdicts. The general rule with respect to this subject is that the court, in determining what judgment shall be entered upon a special verdict, will not look to the evidence nor beyond the pleadings and the judge's record. Mayor, etc., of Borough of Seabright v. New Jersey Cent., 72 N. J. Law, 8, 60 Atl. 64. As said in Daube v. Philadelphia & R. Coal & Iron Co., 77 Fed. 713, 715, 23 C. C. A. 420, 422:

"In determining the force of a special verdict or finding, only the facts found, unmodified by the statements of counsel or by reference to the evidence, can be considered."

The rule covering almost the exact controversy here is very well stated in Conwell v. Tri-City Ry. Co., 135 Iowa, 190, 191 (112 N. W. 546, 547), a code state, as follows:

"On a motion for judgment as against a general verdict based on special findings, every issue raised by the pleadings and not eliminated by the instructions will be presumed to have been found for the party in whose favor the general verdict is returned, and it will be presumed that such findings are supported by sufficient evidence; but the special findings cannot be added to or supported by the evidence, and must be given effect only so far as they necessarily negative the findings which might otherwise be assumed in support of the general verdict."

See, also, Farmers' Sav. Bank v. Forbes, 151 Iowa, 627, 132 N. W. 59; Drake v. Justice Gold Min. Co., 32 Colo. 259, 75 Pac. 912.

[4] With this understanding of the law, we are to determine, without reference to the testimony in the case, whether from the special findings the court is able, as a matter of law, to conclude how the case should be decided, notwithstanding the general verdict. In this relation, we are also to consider the effect of the Employers' Liability Act upon the issues tendered for solution at the trial. This act provides, among other things, that in case of injury or death to an employé, contributing negligence on the part of the employé shall not bar a recovery, but that the damages shall be diminished in proportion to the amount of negligence attributable to such employé, and, further, that no such employé shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of the employés contributed to the injury or death of such employé. 35 Stat. 66. The effect of this statute is to eliminate the element of proximate cause, where concurring acts of the employer and employé contribute as a cause for the injury or death of the employé, especially where the contributing act of the employer was in derogation of a duty imposed under the act for the safety of the employé. This is judicially declared in Grand Trunk Western Ry. Co. v. Lindsay, 201 Fed. 836, 844, 120 C. C. A. 166, 174, where the court said:

"If, under the Employers' Liability Act, plaintiff's negligence, contributing with defendant's negligence to the production of the injury, does not defeat the cause of action, but only lessens the damages, and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence. For his act was the same act, by whatever name it be called. It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

To the same effect is Louisville & N. R. Co. v. Wene, 202 Fed. 887, 121 C. C. A. 245.

Now, turning to the special findings, the jury first found that the plaintiff received the train order No. 53. Then they found that the air brakes on plaintiff's train immediately before the collision were in-

sufficient to enable him to control the speed of the train. These findings, construed in the light of the pleadings, show that both the plaintiff and defendant were guilty of negligence, and the acts were concurring, leading to the plaintiff's injury. But this does not relieve the defendant, for, under the liability statute, the defendant acted in derogation of a statute enacted for the safety of the employé. In view of this condition, the holding of the trial court is especially pertinent as follows:

"A collision does not of necessity result from disobedience of orders on the part of an employé, and if the employé who has been guilty of such disobedience is unable to avoid an impending collision because of defective equipment furnished by the master, it surely cannot be said that the defective equipment in no wise contributed to the accident. If it did contribute, a liability exists under the act in question" (the Employers' Liability Act).

The third special finding that the plaintiff's leaving Cœur d'Alene in violation of his orders was the proximate cause of the accident was a mere conclusion of law, and not a finding of fact. The purpose of a special finding is to find the fact, so that the court may deduce the legal conclusions and thus determine the controversy.

Further than this, the jury did not specially find as to all the material issues pertinent to the inquiry under the pleadings.

We think there can be no question that the general verdict should prevail.

[5] As it relates to the motion for a new trial and the action of the trial court respecting the same, it is the established rule in courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court, and the result cannot be made the subject of reversal upon a writ of error. Newcomb v. Wood, 97 U. S. 581, 583, 24 L. Ed. 1085; Copper River & N. W. Ry. Co. v. Reeder, 211 Fed. 280, 127 C. C. A. 648.

The judgment will be affirmed.

CHICAGO, ST. P., M. & O. RY. CO. v. KROLOFF.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4098.

(Syllabus by the Court.)

1. APPEAL AND ERROR (§§ 1031, 1062*)—PREJUDICIAL ERROR—REFUSAL TO WITHDRAW CHARGE—PRESUMPTION OF PREJUDICE.

A refusal by the court to grant a specific request to withdraw from the jury at the close of the trial one of several charges of negligence on which the plaintiff is seeking to recover is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice, and the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038–4046, 4212–4218; Dec. Dig. §§ 1031, 1062.*]

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

2. TRIAL (§ 145*)—DIRECTION OF VERDICT—EVIDENCE.

It is the duty of the trial court at the close of the evidence, at the request of counsel, to direct the finding of the jury upon each issue of fact upon which the evidence is undisputed, or so clearly preponderant, or of such a conclusive character that the court would be bound in the exercise of a sound judicial discretion to set aside a contrary finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 328, 341; Dec. Dig. § 145.*]

3. RAILROADS (§ 383*)—RAILROAD YARDS—DUTY OF PEDESTRIAN.

"No one, whether passenger, licensee, or trespasser, can frequent or walk over a private railroad yard covered by many tracks employed constantly for a variety of purposes like through travel, switching, breaking up, and making up trains, without scrupulously * * * exercising the utmost * * * vigilance in looking out for approaching engines and trains." Hart v. Northern Pacific Ry. Co., 196 Fed. 180, 185, 116 C. C. A. 12, 17. It is his duty to look and listen. If he cannot see or hear that no engines or cars are approaching, it is his duty to stop until he can. If smoke or steam obscure his vision, or noise his hearing, it is his duty to keep off the track until they so disappear that he can be sure that he will incur no danger by entering upon or crossing it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1305–1310; Dec. Dig. § 383.*]

4. MASTER AND SERVANT (§ 137*)—INJURY TO RAILROAD EMPLOYÉ—RAILROAD YARD—NEGLIGENCE.

It is not a lack of ordinary care for a railroad company to fail, in its private railroad yard in constant and active use, over which its employés have been and are in the habit of crossing to and from their work, not in crowds, but thinly scattered, to place or maintain a man for the purpose of warning employés of its approach, notifying the engineer of their proximity, and turning an angle cock to stop it, upon a switch engine which is working in the yard, with its bell ringing, its headlight burning, and its engineer and fireman watching for the employés and handling the engine as the rule of the company requires them to do.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

In Error to the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Action by Maurice Kroloff, administrator of the estate of Joseph Brotsky, deceased, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

George W. Peterson, of St. Paul, Minn. (Sargent, Strong & Struble, of Sioux City, Iowa, on the brief), for plaintiff in error.

Arnold L. Fribourg, of Sioux City, Iowa (Henderson & Fribourg, of Sioux City, Iowa, on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. A judgment for $6,000 for alleged negligence causing death is assailed here. The railroad company, the defendant below, complains that the trial court did not withdraw from the jury the charges of the defendant's negligence and that it did not instruct the jury that the evidence conclusively proved that Joseph Brotsky contributed to his own injury. These facts were admitted or conclusively proved: Brotsky was killed by his collision

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

with a switch engine of the defendant, which was backing north on the defendant's north-bound main track in its yards at Sioux City at about 6 a. m., on October 16, 1912. At the place of the accident the track was free from obstructions to the vision, other than smoke and steam from the engines, for more than 1,000 feet to the south. There was a headlight on the north end of the switch engine, which was burning, and the bell of the engine was ringing. The railroad yards of the defendant extend north and south at Sioux City for 2 or 3 miles, and it was in a busy part of these yards, and within 4 or 5 blocks south of its roundhouse, oilhouse, and coal chute that this accident happened. The north-bound main track of the defendant extends through these yards from south of Seventh street to Twenty-Second street. Adjoining this track on the west lies the defendant's south-bound main track, and east of its north-bound main track and nearly parallel to it extends the main track of the Illinois Central Railroad Company. There are public crossings of these tracks at Seventh street, Eleventh street, and Nineteenth street, but none between these streets. The accident occurred between Thirteenth street and Fourteenth street, where there was no public crossing, but many of the employés of the defendant, and among them Mr. Brotsky, who worked for the defendant on the west, and lived on the east, side of these tracks, had been accustomed to cross them near the place of the accident in going to and from their work. Brotsky was going to his work. He was last seen alive walking north in the railroad yard between Eleventh and Fourteenth streets. At the time and place where the accident occurred the hostler was backing an engine down the south-bound main track of the defendant, and with it was pulling another engine. The more southerly engine had its cylinder cocks open and was blowing steam, and it passed the north-bound switch engine at about the time and place of the accident. The only light on the south end of the south-bound engine was a red light in a lantern. It had a headlight shining north. The engineer of the switch engine was on the west side of his engine, with his head and shoulders out the window; the fireman was on the east side of the engine looking north; the hostler, driving the south-bound engine, was on the east side of his engine, watching the tracks to the south of him. They were all watching for pedestrians and obstructions, but none of them saw Mr. Brotsky. After the accident some of his remains and his lunch were found along and near the west rail of the north-bound track at the place where the engines passed each other, and some of them were found on the west front and rear drivers and on the brake rigging of the north-bound engine, but none on the trucks of the tender which preceded it, or on the north footboard, strongly indicating that he collided with the engine on its west side at the time the south-bound engine passed it blowing steam from its cylinder cocks. The crew of the switch or north-bound engine consisted of the engineer, the fireman, the foreman, and two helpers. It was the duty of the engineer and fireman to look out for pedestrians and to use reasonable care to avoid collision with them. There was no evidence that this was the duty of the other three members of the crew, when, as in the case in hand, the engine was making a long movement, a mile or a mile and a half in

length, from one yard or part of a yard to another. Their duties were to turn switches, make couplings, and handle cars, and at the time of the accident these three men were riding on the south footboard.

[1] The charges of negligence which the court submitted to the jury were: (1) Omission to ring the bell; (2) omission to sound the whistle; (3) omission to maintain a sufficient headlight; (4) omission to have the foreman or one of his helpers on the north footboard to look out for and warn pedestrians, and to turn the angle cock and stop the engine. The defendant not only requested the court below to instruct the jury to return a verdict for the defendant on the ground that none of these charges was sustained by substantial evidence, but it made specific requests that the court withdraw each of these charges, and excepted to its refusal of each request, so that, if there was no substantial evidence to sustain any one of these charges, the judgment must be reversed, because, although there was sufficient evidence to sustain other charges, it may be that it was on that very charge that the jury based its verdict. A refusal by the court to grant a specific request to withdraw from the jury one of several specific charges of negligence on which the plaintiff is seeking to recover is fatal error, if there is no substantial evidence to sustain that charge, although there may be evidence to sustain others, because the presumption is that error produces prejudice, and the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict. Wilmington Mining Co. v. Fulton, 205 U. S. 60, 79, 27 Sup. Ct. 412, 51 L. Ed. 708; Deserant v. Cerillos Coal R. R. Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 522, 526, 72 C. C. A. 580, 584, 4 L. R. A. (N. S.) 181, 5 Ann. Cas. 515; Armour & Co. v. Russell, 144 Fed. 614, 615, 75 C. C. A. 416, 417, 6 L. R. A. (N. S.) 602; Stevens v. Citizens' Gas & Electric Co., 132 Iowa, 597, 109 N. W. 1090.

[3, 4] It may be well to recall certain incontrovertible physical facts and established rules of law before entering upon the discussion of the evidence. This accident happened as the day was dawning, when it was neither dark night nor bright day. An artificial light in darkness or half darkness is visible at a long distance by one far from it, when one behind or near it can see a dark object by means of its rays but a short distance; and this is as true of a small or low artificial light as of a brilliant one. The light of a lantern as well as that of an automobile may be seen by one miles from it, while those behind or near it can see dark objects by means of its rays but a few feet. Again, an artificial light in steam and smoke illumines the steam and smoke, so that one can see and know that there is a light, when one at or behind the light cannot see through the steam or smoke and distinguish objects much nearer; so that the opportunity of Brotsky to see the headlight, and know it was approaching, was much better than the opportunity of the engineer or fireman to see him. It was the duty of the engineer and fireman to use reasonable care to see and to prevent injury to pedestrians that might be in the yards of the company, in the light of their knowledge that the workmen were accustomed to

pass through them to and from their labor. But it was not their duty to insure their safety, or in case the steam or smoke became so dense that they could not see whether or not there was any one on or near the track to stop their engine, or to go or send forward to ascertain the fact. The yard was the private property of the railroad company, and it had the right to operate it with reasonable care. On the other hand, the exercise of a greater vigilance to watch for and protect himself is the duty of one who enters or crosses the private yard of a railroad company, which has the right of way over and through it for its powerful locomotives and heavy trains. As Judge Adams said in Hart v. Northern Pacific Ry. Co., 196 Fed. 180, 185, 116 C. C. A. 12, 17, these are among propositions of well established law:

"(a) That a railroad track in active use is per se a warning of danger, and that any one is thereby admonished that a train is liable to pass over it any time. (b) That no one, whether passenger, licensee, or trespasser, can approach a railroad track so near as to be hit by a passing train without first both looking and listening to ascertain whether a train is approaching which might injure him. And a fortiori (c) that no one, whether passenger, licensee, or trespasser, can frequent or walk over a private railroad yard covered by many tracks, employed constantly for a variety of purposes, like through travel, switching, breaking up and making up trains, without scrupulously observing the precaution just alluded to, and otherwise exercising the utmost degree of vigilance in looking out for approaching engines and trains. Kansas City, Ft. S. & M. R. Co. v. Cook, 66 Fed. 115, 13 C. C. A. 364 [28 L. R. A. 181]; Garlich v. Northern Pacific Ry. Co., 131 Fed. 837, 67 C. C. A. 237; Chicago, Rock Island & Pac. Ry. Co. v. Baldwin, 164 Fed. 826, 90 C. C. A. 630. Great is his peril, and proportionately great should be his effort to protect himself therefrom. Patton v. Texas & Pacific Ry. Co., 179 U. S. 658 [21 Sup. Ct. 275, 45 L. Ed. 361]."

If at the time Mr. Brotsky approached the track his vision was obscured by steam or smoke, or his hearing by the noise of the southbound engines, so that he could not see or hear whether or not an engine was approaching from the south, it was his duty to keep off the track until the steam, smoke, and noise, which were but temporary, disappeared, so that he could be sure none was coming upon him. Chicago & Northwestern Ry. Co. v. Andrews, 130 Fed. 65, 73, 64 C. C. A. 399, and cases there cited. Thus it appears that the primary and greater duty was on the deceased to watch for the danger and protect himself against it, and not on the railway company; and the law is indisputable that if his failure to discharge that duty contributed to his injury the administrator of his estate cannot recover.

[2] And it was the duty of the trial court at the close of the evidence, at the request of counsel, to direct the finding by the jury upon each issue of fact upon which the evidence was undisputed, or so clearly preponderant, or of such a conclusive character, that the court would be bound, in the exercise of a sound judicial discretion, to set aside a contrary finding. Canadian Northern Ry. Co. v. Senske, 201 Fed. 637, 644, 120 C. C. A. 65, 72; Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Union Pacific R. R. Co. v. McDonald, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434; Delaware, Lackawanna & Western R. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

Let us now examine the testimony in the light of these facts and rules of law. Kohen, a workman, testified that he met Brotsky in the yard on the morning of the accident at or near Eleventh street and saw the north-bound engine, that he was near enough to hear the bell if it was ringing, that if it was ringing he did not hear it, and that he did not remember whether it was ringing or not. Monroe, the fireman, testified that he rang the bell when he went north over Eleventh street, that he thought he continued to ring it all the time until he passed Fourteenth street, that he put in a fire before he reached Eleventh street, and, after he crossed it, he put on the injector, that when he was putting in two or three scoops of coal the bell would not ring, that the bell would not stop more than an instant at a time any way. Donaldson, one of the switchmen on the south end of the switch engine, a witness for the plaintiff, testified that the bell was ringing at Eleventh street, and that he did not remember whether or not it was ringing north of that point. Brannaman, the engineer on the switch engine, testified that the bell was ringing at and north of Eleventh street. Schroeder, the foreman, who was on the south footboard of the switch engine, testified that the bell was ringing; and Mummert, the hostler, who was sitting in the cab on the east side of the south-bound engine as it passed the switch engine, testified that its bell was ringing and that he saw it moving. This was all the material evidence on this subject. The legal presumption was that the fireman did his duty and rang the bell. The testimony of two witnesses, who had no duty regarding the ringing and no occasion to note it, that they did not remember whether it was ringing or not, furnishes no substantial evidence to sustain a finding that it was not rung, in the face of the legal presumption and the positive testimony of four witnesses, whose duties required them to know the fact, that it was rung, and the charge of negligence in failing to ring the bell should have been withdrawn from the jury. There was no substantial evidence to sustain it.

The statutes of Iowa require the whistle to be sounded 60 rods before a road crossing is reached, but provide that the sounding of the whistle may be omitted at street crossings within the limits of cities or towns, unless required by ordinance or resolution of the council thereof. Code Iowa 1897, § 2072. The place of the accident was within the limits of a city, the record contains no proof of any ordinance or resolution, the bell was rung, there was no duty to sound the whistle, and the failure to sound it was not actionable negligence.

The plaintiff alleged that it had long been the practice and custom of the defendant, in moving its switch engines in its yards and over the place where it struck Mr. Brotsky, to place a man or men on the approaching end of such engines to keep a lookout for and to warn him and other employés of the approach of such engines, and to warn those operating such engines of the proximity of persons on the tracks, and that the defendant failed to do so. No witness came to say that there had ever been any custom or practice to place a man or men on the approaching end of the switch engines at the place of the accident, or elsewhere in the yards, to keep a lookout for and warn em-

ployés of the approach of the engines, or to notify engineers of the proximity of persons in the yards. On the other hand, there was positive and uncontradicted testimony that there was no such custom. The evidence, in the most favorable view of it for the plaintiff, went no farther than to tend to show that the foreman and the two switchmen, when actively engaged in turning switches and handling cars during short movements, ordinarily rode on the footboard of the engine, from which it was most convenient for them to do their work, whether this was the footboard on the advancing or on the retreating end of the engine, that they had often ridden on the footboard of the advancing end at the place of the accident, that either footboard was a proper place for them, but that in long movements—and the movement the engine was making at the time of the accident was a long movement—they usually rode on the retreating end of the engine. There was also evidence that there was an angle cock within reach of a man on the north footboard of the engine and tender, by turning which the air could be so manipulated as to stop the engine, and the plaintiff insisted that it was negligence not to have a man on that footboard to turn this angle cock.

But the limit of the plaintiff's duty was to exercise ordinary care in moving its switch engine through its yards, and the burden was on the plaintiff to prove that it failed to use that degree of care. The best test of ordinary care is that care that ordinarily prudent and careful railroad operators commonly use under similar circumstances, and in the absence of evidence of that care it is such care as ordinarily prudent and careful persons would use under like circumstances. Moreover, the legal presumption is, in the absence of countervailing evidence, or of indisputable negligence, that the degree of care the defendant exercised was such as a prudent and careful person would exercise under like circumstances. No witness came to say that prudent railroad companies ordinarily placed a man on the advancing ends of their switch engines to look out for and warn pedestrians passing through their yards under such circumstances as this case discloses, or that prudent operators would do so. There was no testimony that prudent operators would, or that operators ever had, in like circumstances, placed a man on the approaching end of a switch engine to turn the angle cock and stop the engine, or to notify the engineer of the proximity of persons on the track. And the failure to do these things certainly was not clear or indisputable negligence. The employés who passed through the yard at the place of the accident did not come in crowds, but thinly scattered, and the primary duty was on them to protect themselves. The evidence on this question goes no farther than to tend to show that a man on the approaching end of the footboard could have seen a pedestrian on the tracks better than the engineer, and could by turning the angle cock have stopped the engine quicker, and this evidence was squarely contradicted. Admitting it to be true, however, it only proves that there was an extraordinary and unusual degree of care, that the company could have exercised, which might have prevented the accident. There is no proof, and no evidence from which a lawful inference may be deduced, that the

placing of a man on the footboard of the approaching engine, under the circumstances of this case, to warn employés of its approach, to notify the engineer of its presence, or to turn the angle cock, fell within the limits of ordinary care. The testimony was that the purpose and use of the angle cock was to open the air to the car behind the engine when one was there, and again to shut it off. There was no evidence that it was placed there to stop the engine, or that it was ever used for that purpose, although it could be used to effect that result.

The rule of the company placed the duty of looking out for pedestrians, warning them, and stopping and handling the engine, on the engineer and the fireman, and imposed no duty of that kind on the foremen or switchmen, during such a movement as resulted in this accident. The engineer, the fireman, and other witnesses testified that the engineer and fireman faithfully discharged their duty, and there was no witness to the contrary. The bell was rung; the headlight was burning. This watchfulness and these warnings constituted the exercise of ordinary care, and there was no substantial evidence that the failure to keep a man on the footboard of the approaching engine to look out for pedestrians, to warn them, to signal the engineer of their presence, or to stop the engine, constituted any failure of that degree of care, and for that reason these charges should have been withdrawn from the jury.

It was alleged and denied that the headlight was burning low, and that the failure to maintain a more brilliant light was negligence, which caused the accident; and it is specified as error that this issue was submitted to the jury. Donaldson, the switchman called by the plaintiff, testified that the atmosphere was steamy; that in the condition at the time of the accident the headlight of the north-bound engine would light 12 or 15 feet ahead of the tender, but that it could be seen farther by a man on the track; that the headlights were low; and as follows: "Q. What do you mean by that Mr. Donaldson? A. Well, the oil generally burns low at that time, and the wicks are short, as a general rule;" and on cross-examination that during the course of the night the oil in the headlight would be consumed to some extent, that he did not know the amount of oil in the lamp of the headlight at the time of the accident, nor the amount in it when it was lighted the evening before, that his duties as switchman did not require him to inspect the light or give any attention to it, that he did not at the time of the accident, or within a few minutes after, inspect the headlight, and that he was not able to state of his own knowledge its condition at the time of the accident. The only effect of this testimony was that headlights generally consume oil during the night and burn low in the morning; but he did not know the condition of the headlight in question at the time of the accident, and this testimony may be laid aside as immaterial, and yet it was all the evidence that the headlight was not maintained with ordinary care. On the other hand, Enochsen testified that the object of a headlight on the tender was as a monitor for the men working in the yards, that as ordinarily burning it would light track 60 feet, that the engineer could see farther with a high light than with a low light, but that the latter would be visible to one in the yards about as far as the former. Brannaman, the engineer, who used and

was interested in the light, testified that it was particularly good, but that it would not penetrate steam. Monroe, the fireman, testified that he always took particular pains with the headlights on this engine, and that there was no better headlight in the yards than the one on its tender. Schroeder, the foreman, testified that he noticed the headlight after the accident, and it was burning good; and Mummert, the hostler, testified that when he was at the oilhouse, which is several hundred feet north of the place of the accident, and the switch engine was at or below Eleventh street, he saw this headlight as the engine was coming north. There was no substantial evidence here that the defendant was guilty of any lack of ordinary care in the maintenance of this headlight, and the jury should have been instructed to return a verdict for the defendant.

Let the judgment be reversed, and the case be remanded to the court below, with instructions to grant a new trial.

WESTERN UNION TELEGRAPH CO. et al. v. POSTAL TELEGRAPH CO.

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

No. 2399.

1. CONTRACTS (§ 116*)—COMBINATIONS PROHIBITED—CONTRACT GRANTING EXCLUSIVE USE OF RIGHT OF WAY TO TELEGRAPH COMPANY—VALIDITY.

   A contract by a railroad company, giving a telegraph company the exclusive right to maintain a telegraph line upon its right of way, is contrary to public policy and void.

   [Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542–552; Dec. Dig. § 116.*]

2. INJUNCTION (§ 5*)—NATURE AND FORM OF REMEDY—MANDATORY INJUNCTION.

   An "injunction" is a writ framed according to the circumstances of the case, and a court of equity is not always limited to the restraint of a contemplated or threatened action, but may require affirmative action, where the circumstances of the case demand it.

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

   For other definitions, see Words and Phrases, First and Second Series, Injunction.]

3. INJUNCTION (§ 57*)—NATURE AND FORM OF REMEDY—MANDATORY INJUNCTION.

   Where a railroad company and a telegraph company had agreed on a contract giving the latter the right to construct and maintain its line on the railroad company's right of way, and its execution was prevented only by the objection of another telegraph company, which claimed exclusive use of the right of way under an illegal contract, it was within the power of a court of equity to require the execution of such contract by a mandatory injunction.

   [Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111–113, 130; Dec. Dig. § 57.*]

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

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

Suit in equity by the Postal Telegraph Company against the Western Union Telegraph Company and the Southern Pacific Company. Decree for complainant, and defendants appeal. Affirmed.

The case is fairly stated by counsel for the appellants. The original bill was filed August 25, 1911, and alleged, among other things, that the defendant Southern Pacific Company owns a leasehold interest in the railroad right of way of the Oregon & California Railroad Company from Eugene, in Lane county, Or., to New Era, in Clackamas county, a distance of 103 miles, upon part of which right of way the complainant maintains its telegraph line; that the Pacific Postal Telegraph-Cable Company, the predecessor in interest of the complainant, and which corporation had fully accepted the provisions of the Post Roads Act of Congress (Act July 24, 1866, c. 230, 14 Stat. 221 [Comp. St. 1913, § 10072]), constructed a telegraph line along said right of way more than 24 years prior to the commencement of the suit; that between New Era and Eugene the greater number of poles of the said telegraph line are not upon the railroad right of way, but upon adjoining land, and in some places where the poles are upon land adjoining the cross-arms and wires overhang the railroad right of way; that the complainant's predecessor in interest, the Pacific Postal Telegraph-Cable Company, erected the said poles and strung the wires thereon without permission or license from the Southern Pacific Company or the Oregon & California Railroad Company, and for more than 24 years maintained open, notorious, peaceable, adverse, continuous, and uninterrupted possession thereof; that the defendant Southern Pacific Company leased the said right of way from the Oregon & California Railroad Company, subject to the rights of the complainant and the burden of its telegraph line upon the said right of way; that the Oregon & California Railroad Company was one of the land grant railroad companies; that the complainant's telegraph line does not interfere with the operation of the railroad, and that the part of the right of way occupied by the complainant is not needed for railroad purposes, and that the complainant will not attach its wires or fixtures to the defendant Southern Pacific Company's bridges, trestles, buildings, or structures; that the complainant has accepted the provisions of the act of Congress of July 24, 1866, authorizing it to construct its line of telegraph over and along the military and post roads of the United States, and therefore has the right to maintain its telegraph line on the right of way of the defendant railroad company; that owing to the wear and tear of the elements, and in order to properly handle the business intrusted to the complainant by the public and the United States government, it is imperative that the complainant's telegraph line be at once repaired and reconstructed; that although the defendant railroad company's assistant general manager has informed the complainant's agent that it would prevent complainant, by force and violence, if need be, from repairing and reconstructing the said telegraph line, nevertheless the complainant, on or about July 25, 1911, commenced the repairing and reconstructing of the said line in a careful manner, and so as not to interfere with the operation of the railroad, planting new poles in identically the same portions of ground occupied by the old and worn poles, but that the defendant, on July 28, 1911, sawed off 90 of the new cross-arms and greatly damaged complainant's lines, and threatens to prevent any further repairing or reconstruction of its said line, with force and violence—the prayer of the bill being for an injunction restraining the defendant railroad from interfering with the repair, reconstruction, and maintenance of the complainant's telegraph lines on the railroad right of way between New Era and Eugene.

The defendant railroad company by its answer denied the alleged open, notorious, peaceable, adverse, continuous, and uninterrupted possession by the complainant of its telegraph line, and denied that the latter does not interfere with the operation of the defendant's railroad. As an affirmative defense the railroad company alleged that in November, 1886, while its predecessor, the Oregon & California Railroad Company, was in the hands of a receiver of the United States Circuit Court, the Pacific Postal Telegraph-Cable Company, the complainant's predecessor in interest, presented a petition to that court asking that it be allowed to place its poles, cross-arms, and wires upon the right of way of the said railroad, upon condition that it should allow

the same to remain upon said railroad right of way for such time as the receiver should be in possession of the said road, and that an order was made by the court granting the prayer of that petition on the 18th day of September, 1886, copies of which petition and order are set forth in the answer; that such occupancy as the complainant and its predecessor have and have had on said right of way was taken under the permission so granted, and that at the close of the receivership the poles and overhanging cross-arms of the complainant's predecessor were allowed to remain by permission and sufferance of the defendant railroad company on the right of way between New Era and Eugene; that in the five years then last past the use of the entire right of way of the defendant railroad company for railroad purposes has become necessary, particularly on account of the installation of a block signal system, and for that reason it has become necessary to revoke the permission granted to complainant's predecessor.

For a second affirmative defense the defendant railroad set up the proceedings in a suit commenced in the year 1907 by the Pacific Postal Telegraph-Cable Company against the Oregon & California Railroad Company and the Southern Pacific Company, its tenant, for the purpose of appropriating the right of way of those companies from the city of Portland, Or., to the state line between the states of California and Oregon, for a telegraph line to be constructed and maintained by the complainant, the complaint in that suit alleging that the damages to be sustained by the defendants by reason of such appropriation would be $2,100, but on a trial being had the jury assessed such damages at $66,000, which sum the telegraph company refused to pay; and it is alleged as a part of the second affirmative defense set up in the answer in the present suit that the judgment in that suit constituted an adjudication of all the matters and things at issue in the case at bar.

The case being at issue, the taking of testimony was commenced, pending which negotiations were entered into by the respective parties looking to an amicable settlement of their differences, to which end a contract was prepared on behalf of the Southern Pacific Company and submitted to the Postal Company, which latter company suggested certain modifications, resulting in an agreement between the two companies. The contract, however, was never signed, because of the fact that the defendant Western Union Telegraph Company declined to give its assent to the execution thereof by the Southern Pacific Company, and subsequently the Western Union Company took over the defense of the suit. Thereupon the complainant filed a supplemental bill, in which were recited the facts of the filing of the original bill and answer thereto and the unsuccessful attempt of the complainant and the Southern Pacific Company to adjust their differences, annexing to the supplemental bill a copy of the said alleged agreement unexecuted.

The supplemental bill alleged the existence of a contract between the Southern Pacific Company and the Western Union Telegraph Company, by the terms of which the latter company claimed the right to prevent the settlement of this suit, a copy of which the complainant has been unable to obtain, and alleged, upon its information and belief, that the same is in violation of a certain act of Congress of August 7, 1888 (25 Stat. 382, c. 772 [Comp. St. 1913, § 10080]). The supplemental bill further alleged that, in addition to owning and maintaining a telegraph line between Eugene and New Era, in Oregon, the complainant had also for more than 20 years maintained a telegraph line along the railroad company's right of way between Portland and Myrtle Creek, and between Myrtle Creek and Ashland, in that state, and that the right to maintain all of this was included in the negotiations referred to, and by its prayer the complainant asked that the Western Union Telegraph Company be required to set forth its contract with the Southern Pacific Company, and that the contract between the complainant and the said Southern Pacific Company be made the basis of a decree to be entered, adjudicating the rights of all of the parties to the suit.

Both the Southern Pacific Company and the Western Union Telegraph Company demurred to the supplemental bill, which demurrer being overruled, the Western Union Telegraph Company filed an answer thereto, in which, among other things, it admitted that there is a contract between the Southern Pacific Company and the Western Union Telegraph Company by and through which

the Western Union Company "claims certain rights and privileges regarding the use of the right of way of the railway of the Southern Pacific Company in the supplemental bill set forth, but denies that this defendant claims the right to prevent the settlement of this action, except so far as any proposed settlement may injuriously affect any rights of this defendant; that it claims the right to object to or prevent such or any settlement as will or may involve or interfere with or injuriously affect its own rights. To any other settlement made between the Southern Pacific Company and the complainant this defendant claims no right to object, unless its approval of such proposed settlement is made a condition upon which the Southern Pacific Company undertakes to execute such agreement, in which case this defendant claims that it may withhold its assent and thereby prevent the execution of said agreement, whether this defendant has any interest in or is to be affected by such agreement or not," and further that the proposed agreement was laid before the defendant Western Union Telegraph Company by the Southern Pacific Company for its consideration, and that the Western Union Telegraph Company exercising its option in the premises, declined to approve the proposed agreement, and took over the defense of the present suit.

As an affirmative defense the Western Union Telegraph Company set up the making of an agreement on the 1st day of April, 1871, between it and the Oregon & California Railroad Company, under the terms of which it agreed to construct, maintain, and operate the telegraph line required by Act Cong. July 25, 1866, c. 242, 14 Stat. 239, and the construction and maintenance of such telegraph line pursuant to the terms of that agreement are alleged; that on October 1, 1901, the Southern Pacific Company, lessee of the Oregon & California Railroad Company, and the Western Union Telegraph Company, entered into an agreement which is set up in the answer, and which is the agreement sought to be disclosed by the supplemental bill, and under which it is alleged the Western Union Telegraph Company has continued to hold possession of the said right of way for telegraph purposes and has performed all of the requirements of the act of Congress of July 25, 1866, and met all demands of the railroad and of the United States. That contract provides for the ownership, construction, reconstruction, and maintenance of a telegraph line by the Western Union Telegraph Company along the right of way of the Southern Pacific Company, for a stated compensation to be paid by the Western Union Company, and other considerations, and, among various other matters, contains this clause:

"Section 9. Exclusive Right of Way. The Pacific Company, so far as it legally may, hereby grants and assures to the Telegraph Company the exclusive right of way along and under the lines and lands and bridges of the railroads, and any branches or extensions thereof covered by this agreement, for the construction, maintenance, and operation of lines of poles and wires and underground or other lines for commercial or public telegraph and public telephone uses or business, with the right to construct, at the Telegraph Company's own cost and expense, from time to time, such additional wires and lines of poles and wires as the Telegraph Company may require; the lines to be located on the railroad right of way, lands, and bridges in such manner as the Pacific Company may designate. The Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth, and other obstructions which may interfere with the construction and maintenance of the lines and wires provided for hereunder: Provided always that, in protecting and defending the exclusive grant referred to in the foregoing paragraph hereof, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any other companies owning the railroads in respect to which this contract is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges, and legal expenses incurred therein or thereby. And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgments or decrees which may be obtained against the Railroad Company in respect to any of the matters in this section mentioned."

The complainant having filed its replication, further testimony was taken, and, the cause being concluded and submitted to the court, a decree was entered, by the terms of which the contract between the Western Union Tele-

graph Company and the Southern Pacific Company above referred to, "in so far as the said Western Union Telegraph Company is by said contract granted the exclusive right and privilege of occupying the right of way of the Southern Pacific Company for maintaining telegraph lines," is declared to be contrary to public policy, void, and of no effect, and further decreeing that the Southern Pacific Company is "authorized, permitted, directed, and commanded to conclude that certain agreement with the complainant, Postal Telegraph Company, mentioned in the pleadings in this case, which is in words and figures as follows, to wit," setting forth the written agreement, and enjoining the Western Union Telegraph Company, its officers, servants, agents, employés, and counsel, from interfering with the execution of the said contract.

The assignments of error are in effect that the trial court erred in overruling the demurrer of the Western Union Telegraph Company to the supplemental bill, in declaring that the contract between the Western Union Telegraph Company and the Southern Pacific Company, mentioned in the supplemental bill and set out in the answer thereto of the Western Union Telegraph Company, "in so far as the Western Union Telegraph Company is by said contract granted the exclusive right and privilege of occupying the right of way of the Southern Pacific Company for maintaining telegraph lines, is contrary to public policy, nugatory, and void, and of no effect whatever," in "authorizing, permitting, directing, and commanding the defendant Southern Pacific Company to conclude that certain agreement with the complainant Postal Telegraph Company, attached to and made a part of the supplemental complaint," in enjoining the Western Union Telegraph Company from interfering with the execution of that contract, in not dismissing the supplemental bill on the ground that the court was without jurisdiction to compel the Western Union Telegraph Company to give its assent to the execution of the contract between complainant and the Southern Pacific Company, and on the ground that the Southern Pacific Company had the right to make the execution of its agreement with the Postal Telegraph Company dependent upon the assent thereto of the Western Union Telegraph Company, and in not adjudging that the Southern Pacific Company had the right to make the execution of its contract with the Postal Telegraph Company dependent upon the assent thereto of the Western Union Telegraph Company, and, such assent being shown to have been withheld, in not dismissing the supplemental bill.

W. D. Fenton, James E. Fenton, Ben C. Dey, and Kenneth L. Fenton, all of Portland, Or., for appellant Southern Pacific Co.

Dolph, Mallory, Simon & Gearin and Hall S. Lusk, all of Portland, Or., for appellant Western Union Tel. Co.

F. V. Holman and A. A. Hampson, both of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] We are of the opinion that the court below was clearly right in holding the attempted grant by the Southern Pacific Company to the Western Union Telegraph Company of the exclusive right for the construction, maintenance, and operation of a telegraph line upon the railroad company's right of way void and of no effect. A similar question came before the Circuit Court for the Southern District of California in 1894, in the cases of Mercantile Trust Co. v. Atlantic & Pacific Railroad Co. (C. C.) 63 Fed. 513, and Mercantile Trust Co. v. Atlantic & Pacific Railroad Co. (C. C.) 63 Fed. 910. The railroad company there undertaking to make a like exclusive grant to the Western Union Telegraph Company was created under the act of Congress of July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad

and telegraph line from the states of Missouri and Arkansas to the Pacific coast" (14 Stat. 292, c. 276), and in addition to contending that the attempted exclusive grant was valid, the Western Union Telegraph Company further contended that the Atlantic & Pacific Railroad Company could lawfully withhold from the Postal Telegraph Company all facilities for the transportation of its poles, wires, etc. In disposing of those contentions the writer there said, among other things:

"The Atlantic & Pacific Railroad Company was thus created, and made a great highway of communication, with the declared object of promoting the public interest and welfare. There is not a syllable in the act indicating that it was intended by Congress to be used as an instrument for the building up or fostering of any monopoly of any character, or that it should be permitted to do any act inconsistent with the objects for which it was created. If it may lawfully withhold facilities for the transportation of material and supplies for the erection of a line or lines of telegraph which may come into competition with some other line, no reason is perceived why it may not also withhold facilities for the transportation of any other kind of freight in the interest of some one or more favored persons or corporations. The Atlantic & Pacific Railroad Company is a common carrier, and common carriage must be kept open to all alike, under like circumstances and conditions. What the considerations were that induced the Atlantic & Pacific Company to make the stipulation in question is immaterial. Its purpose plainly was to prevent competition. In the present age of progress the telegraph is as essential to the needs and comforts of the public as the railroads themselves. 'Telegraphs,' said Mr. Wharton in a note to the case of W. U. Telegraph Co. v. Burlington & S. Ry. Co. [C. C.] 11 Fed. 12, 'are now essential to business, and as such are to be kept open to competition (unless the Legislature should otherwise determine), in the same way that common carriage is to be kept open to competition. An agreement to give a particular line of carriers monopoly in a state would not (without legislative aid) be enforced, nor should a contract to give a monopoly to a particular telegraph company.' The Atlantic & Pacific Railroad Company, being a common carrier, is bound to afford every telegraph company, as well as every other company or person, equal transportation facilities under like circumstances and conditions; and its agreement to withhold from any other company or person than the Western Union Telegraph Company such facilities is, in my opinion, at variance with the declared purposes for which that company was created, against public policy, in restraint of trade, and void."

To the same effect are Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708, and United States v. Union Pacific Railroad Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319.

The attempted exclusive grant to the Western Union Company by the Southern Pacific Company of the right of way in question for telegraph purposes being void, it was and is no legitimate concern of the former how many similar rights the Southern Pacific Company should grant to others, so long as the Western Union Company's right to the existence and maintenance of its own line is unaffected. In the absence of a valid exclusive grant to that company, there is nothing in the record tending to show that its line was or could be in any way affected by the agreement made between the Southern Pacific Railroad Company and the Postal Telegraph Company, with which agreement the Western Union Company therefore had nothing whatever to do.

[2, 3] The willingness of the Southern Pacific Company, but for the objections interposed by the Western Union Telegraph Company, to execute in writing the agreement made between it and the Postal Tele-

graph Company, sufficiently appears from the record, and we are of the opinion that the court below was not in error in decreeing that the defendant railroad company execute the contract. Jeremy, in his Equity Jurisdiction, says:

"An injunction is a writ framed *according to the circumstances of the case, commanding* an act which the court regards as essential to justice, or *restraining* an act which it considers contrary to equity and good conscience."

The purpose of the case of In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, was to compel certain railroad companies to afford reasonable and equal facilities for the interchange of traffic, where it was alleged that they and their employés—

"had given out and threatened that they would refuse to receive from complainant cars billed over its road for transportation by complainant to their destination, for the reason that the complainant had employed as locomotive engineers in its service men who were not members of the Brotherhood of Locomotive Engineers, 'an irresponsible voluntary association,' and that the locomotive engineers in the employ of the defendant companies had refused to handle cars to be interchanged with the complainant's road, notwithstanding that they continued to afford the other railroad companies full and free facilities for the interchange of traffic, while refusing to transact such business with the complainant, thereby illegally discriminating against it."

In the course of its opinion the Supreme Court said, among other things:

"Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it. Robinson v. Lord Byron, 1 Bro. C. C. 588; Hervey v. Smith, 1 Kay & Johns. 389; Beadel v. Perry, L. R. 3 Eq. 465; Whitecar v. Michenor, 37 N. J. Eq. 6; Broome v. New York & New Jersey Telephone Co., 42 N. J. Eq. 141 [7 Atl. 851]."

In the case of Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improvement Co. (C. C.) 86 Fed. 528, Judge Morrow held, among other things, that where sufficient grounds exist a court of equity has the power to and will issue, on a preliminary examination, a restraining order, though mandatory in effect and requiring affirmative action, saying, among other things, at page 533:

"It is contended that the injunction, although preventive in form, was mandatory in effect; its execution resulting in a change in the status of the parties. This contention assumes that the court will recognize the respondent as asserting, at the time the bill was filed, a claim of possession to the property under a color of right to such possession, and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction. Pom. Eq. Jur. (2d Ed.) § 378."

The judgment is affirmed.

UNION PAC. R. CO. v. BOARD OF COM'RS OF WELD COUNTY, COLO., et al.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4136.

1. TAXATION (§ 535*)—REFUND OF ILLEGAL TAX—CONSTRUCTION OF STATUTE —"FOUND TO BE ERRONEOUS OR ILLEGAL."

Rev. St. Colo. § 5750, which provides that, "in all cases where any person shall pay any tax * * * that shall thereafter be 'found to be erroneous or illegal,' * * * the board of county commissioners shall refund the same without abatement or discount to the taxpayer," relates to a finding by a court in a judicial proceeding, and not to any action of administrative boards, and is not repealed or affected by Laws Colo. 1913, p. 528, § 5, providing that no abatement, rebate, or refund of taxes shall be allowed by the county commissioners until their recommendation therefor shall be submitted to and approved by the state tax commission, which statute relates only to action taken by the commissioners in their administrative capacity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 991–995, 1012, 1015; Dec. Dig. § 535.*]

2. TAXATION (§ 545*)—CONSTRUCTION OF STATUTES—PROSPECTIVE OPERATION OF REPEALING STATUTES.

As a rule statutes relating to taxation should be given a prospective operation only, and unless otherwise expressly provided statutes in force at the time a tax is levied continue in force for its collection, notwithstanding their amendment or repeal.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1018; Dec. Dig. § 545.*]

3. TAXATION (§ 608*)—REMEDY FOR WRONGFUL ENFORCEMENT OF TAX—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

Rev. St. Colo. § 5750, giving an action at law against the county for the recovery of sums paid on account of invalid taxes, provides a plain, speedy, and adequate remedy, which in general excludes the jurisdiction of equity to enjoin collection of a tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

4. TAXATION (§ 608*)—REMEDY FOR WRONGFUL ENFORCEMENT—EQUITY JURISDICTION.

Fraud of taxing officers in the assessment of property is not alone ground of equitable jurisdiction to restrain the collection of the tax, if there is an adequate remedy at law provided by statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

5. TAXATION (§ 608*)—FEDERAL COURTS—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

A federal court of equity, which by Rev. St. § 723 (Comp. St. 1913, § 1244), is denied jurisdiction where complainant has a plain, adequate, and complete remedy at law, is not given jurisdiction by the fact that complainant has without right instituted such a suit and proceeded until the court can give him a more speedy and complete remedy therein than he could obtain by resorting to a new action at law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

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

Suit in equity by the Union Pacific Railroad Company against the Board of County Commissioners of the County of Weld, State of Colorado, and others. Decree for defendants, and complainant appeals. Affirmed.

C. C. Dorsey, of Denver, Colo. (N. H. Loomis, of Omaha, Neb., and Gerald Hughes and E. I. Thayer, both of Denver, Colo., on the brief), for appellant.

Charles F. Tew, of Greeley, Colo. (Walter E. Bliss, of Greeley, Colo., on the brief), for appellees.

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

AMIDON, District Judge. This is a suit by the Union Pacific Railroad Company against the commissioners of Weld county, Colo., and its tax-collecting officers, to restrain the collection of state, county, and municipal taxes levied for the year 1912. The complaint charges, in substance, that the property of the railroad company was assessed at one-third of its actual value, while all other property was assessed at not to exceed one-fifth of its value. It is also charged that some classes of property which should properly have been assessed for purposes of taxation were wholly omitted by the assessors. These discriminations are alleged to have been systematic and deliberate. Application was made to the trial court for a temporary injunction. This was heard upon bill, answer, and affidavits, and a large volume of oral testimony, and was denied. The present appeal is brought to review that order.

[1] The trial court based its decision upon section 5750 of the Revised Statutes of Colorado, which reads as follows:

"In all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

Following the decision of the Supreme Court in Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288, the trial court held that this statute affords a complete and exclusive remedy for the wrongs here complained of. The appeal raises two questions: (1) Has the statute been repealed as to the tax levy of 1912? (2) If the statute applies to the taxes of 1912, does it afford an adequate remedy?

Plaintiff claims that section 5750 above quoted was repealed by section 5 of chapter 134 of the Session Laws of 1913, which reads as follows:

"No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being first given to the assessor; and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado tax commission their findings, giving the amount of such abatement, rebate or refund, and their reasons therefor, and such abatement, rebate or refund, shall be-

come effective upon the indorsement thereon of the approval of the Colorado tax commission; and in case the said Colorado tax commission shall disapprove the recommendations of the county commissioners, they shall indorse their disapproval thereon and return it to the county commissioners with a statement of their reasons therefor, and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado tax commission."

In our judgment this statute has nothing to do with the subject embraced in section 5750. It is confined wholly to the administrative functions of county commissioners. By numerous statutes of Colorado, those bodies are vested with power to revise tax proceedings, and, if assessments or taxes are found to be illegal, to abate or refund the same. See sections 5691 and 5641 of the Revised Statutes; section 13, subdivisions 1, 5, and 7, and section 14 of chapter 216 of the Session Laws of 1911. It is also probable that county commissioners, by virtue of their general control over the fiscal affairs of counties, would be vested with power to abate or refund taxes found by them to be illegal. There are numerous provisions in the statutes of the state which give color to such an authority. Section 5 of chapter 134 of the Laws of 1913, above quoted, is intended to place this power of county commissioners under the supervision of the Colorado tax commission. It simply forbids county commissioners to abate or refund taxes as the result of their own investigation and judgment without the consent of the state commission. It is not intended to take away their duty to pay any judgment recovered in court against the county under section 5750. The right created by that section is not dependent upon any action of county commissioners or other taxing agencies. It is quite plain that such bodies, exercising their administrative power to relieve against erroneous or illegal taxes, would, if they found any tax to be erroneous or illegal, grant relief themselves, and in such a case there would be no occasion to resort to the courts under section 5750. The phrase in that section, "shall thereafter be found to be erroneous or illegal," relates to a finding by a court in a judicial proceeding, and not to the action of administrative boards. To be sure, a taxpayer feeling aggrieved by the assessment of his property, or the levying of a tax, would be bound to seek redress by application to administrative boards clothed with power to grant him relief, before resorting to the courts; but the door to the court is not confined to an appeal from such administrative bodies. Any taxpayer aggrieved by taxing authorities, having exhausted the steps pointed out by statute to obtain relief from such bodies, may then pay the illegal exaction, and institute an independent action under section 5750 to recover any payment which he claims to be erroneous or illegal within the provisions of that section. It seems to us plain, therefore, that section 5 above quoted was not intended as a repeal of section 5750.

[2] But if such had been its purpose it would not affect the tax levy for 1912. By section 5666 of the Revised Statutes of Colorado, the tax list and warrant for its collection must be delivered to the county treasurer not later than January 1st following the year for which the tax is levied. By section 5675 no demand by the treasurer

is necessary, but it is made the duty of every person against whom a tax is levied to pay one-half of the same on or before the last day of February, and the remaining half on or before the last day of July of the year following the one in which the tax is levied. Under these statutes the tax for 1912 was complete on the 1st day of January, 1913. The rights and duties of the public and of taxpayers were fixed at that time. This being the case, the remedies which the law then afforded ought to follow the tax until it is collected. The statute of which section 5 above quoted is a part was not approved until May 1, 1913, five months after the tax of 1912 became complete. It should be given a prospective operation only. That is the cardinal rule of construction, which cannot be departed from except in obedience to the express language of the statute. Union Pacific R. R. Co. v. Laramie Stock Co., 231 U. S. 190, 34 Sup. Ct. 101, 58 L. Ed. 179. The statute here involved contains no language of that import. As a rule, statutes relating to taxation are thus construed. Lewis' Sutherland on Statutory Construction, § 645; Matter of Miller, 110 N. Y. 216;[1] American Investment Co. v. Thayer, 7 S. D. 72, 63 N. W. 233; Hall v. Perry, 72 Mich. 202, 40 N. W. 324. Statutes in force at the time a tax is levied continue in force for its collection, notwithstanding their amendment or repeal. City of Indianapolis v. Morris, 25 Ind. App. 409, 58 N. E. 510; Leonard v. Indianapolis, 9 Ind. App. 262, 36 N. E. 725; Oakland v. Whipple, 44 Cal. 303; Smith v. Kelly, 24 Or. 464, 33 Pac. 642; Smith v. Humphrey, 20 Mich. 398; Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574; Cooley on Taxation (3d Ed.) p. 499. Section 6298 of the Colorado Statutes supports this view. It provides that the repeal, revision, or amendment of any statute shall not have the effect to release, extinguish, or modify, in whole or in part, any penalty, forfeiture or *liability*, civil or criminal, which shall have been incurred under such statute. The liability of the county to refund any tax found to be illegal was a part of the levy of 1912. It was a right which the taxpayer had with respect to the tax, as well as a liability of the county, and was not taken away or impaired by the subsequent revision contained in the act of 1913. In our judgment, therefore, the remedy granted by section 5750 was open to the plaintiff.

[3] Is the remedy given by section 5750 adequate? It is difficult to follow the reasoning which would hold that it is not adequate. The evil caused by suits in equity to restrain the collection of taxes is grave, and has often been set forth by courts. Dows v. Chicago, 11 Wall. 108, 112, 20 L. Ed. 65; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796. To correct this evil, statutes of similar import to section 5750 have been passed in many of the states of the Union. The highest court of Colorado has frequently declared the correction of this evil to have been the object of its statute. Board of Commissioners of Bent Co. v. Atchison, T. & S. F. Ry. Co., 52 Colo. 609, 125 Pac. 528. The statute is not attacked upon the ground that it is unconstitutional, nor could such an attack, if made, be sustained.

[1] 18 N. E. 139.

The law is, therefore, valid legislation. It was not intended to be cumulative. Its object was to give an action at law for the recovery of sums paid on account of invalid taxes in place of a suit in equity to restrain their collection. Under such circumstances, does it lie with the courts to say that the remedy which the Legislature has provided is inadequate, and that the remedy which it has condemned shall therefore be continued? This would be to make the law of no effect through the traditions of equity. It would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional. It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer, and, from considerations of the highest public policy, abolishes the right to stay the collection of public revenues by injunction. The courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away. The statute being constitutional, the judgment of the Legislature on that subject must control. Such statutes have been frequently before the Supreme Court, and have been uniformly held to afford a plain, speedy, and adequate remedy such as excludes the right to resort to equity. Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; Shelton v. Platt, 139 U. S. 597, 11 Sup. Ct. 646, 35 L. Ed. 273; Allen v. Pullman Co., 139 U. S. 658, 11 Sup. Ct. 682, 35 L. Ed. 303; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288. Counsel for plaintiff insists that Raymond v. Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, is an exception. We do not so regard it. The opinion is expressly based on the ground that there was no statute in Illinois authorizing a single action for the recovery of money paid in discharge of an illegal tax; that the only remedy was the common-law remedy to pay under protest, to enforce which a multiplicity of actions was necessary. 207 U. S. 39 and 40, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757.

Counsel urges as an "equitable circumstance" that the tax will cast a cloud upon the title to the company's real property. The remedy which the statute prescribes, however, will dissipate any such cloud. Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted.

[4] Counsel also urges that the taxing officers were guilty of fraud in the assessment of plaintiff's property, and that fraud is a ground of equitable jurisdiction. But it is by no means true that wherever fraud exists equity may be resorted to for redress. That is not the case when a legal remedy has been substituted by statute for the remedy in equity. We are not concerned with the cause of the invalidity of the tax. It may be due to illegality, unconstitutionality, or fraud. Whatever the cause, it can do no more than make the tax invalid, and that alone is not a ground of equitable jurisdiction. In rare cases it may happen that the fraud of taxing officers will create a condition which statutes like section 5750 will not enable courts to redress. Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903, is mentioned in Bent County

v. Santa Fé R. R. Co., 52 Colo. 609, 125 Pac. 528, as an example of this kind, though in the state of Ohio, where that case arose, there was an express statute authorizing a resort to equity, and the Supreme Court of the United States has since held that Cummings v. National Bank rests upon that statute. Shelton v. Platt, 139 U. S. 591, 599, 11 Sup. Ct. 646, 35 L. Ed. 273. The inability of courts to assess property for purposes of taxation may also cause the remedy at law to be inadequate. Auditor General v. Pioneer Iron Co., 123 Mich. 521, 82 N. W. 260. In our judgment the present case contains no exceptional features of the kind to which we have adverted.

Again, we are told that the remedy given by the statute will lead to multiplicity of suits. The county treasurer is, under the statutes of Colorado, the collector of all taxes, state, county, school and municipal. In the acounting system, which the law provides, he is required to pay over the taxes to the state, city, school, and town authorities as the same are collected. It is therefore urged that, if the plaintiff should pay the taxes here complained of, they would be promptly distributed to the several public treasuries on whose behalf they were levied, and that plaintiff would be compelled to resort to a separate suit against each of these in order to recover the money paid. These difficulties are all of counsel's own creating. They do not exist in the statute. Its language is plain and comprehensive. It provides that:

"In all cases where any person shall pay any tax, interests or costs, or any portion thereof, that shall be found to be erroneous or illegal * * * the board of county commissioners shall refund the same, without abatement or discount, to the taxpayer."

As to state taxes, there is an express provision giving to the county credit in its accounting with the state for any taxes that have been refunded. We have no doubt that the same remedy would apply as to municipalities, and that the county treasurer could take credit in his settlements made from time to time with them for their proportion of any sum which the county was compelled to pay as a refund. Be this as it may, the language of the statute is plain. It has existed for more than 40 years. It has been repeatedly held by the highest court of the state to afford the taxpayer a plain, speedy, and adequate remedy. We cannot, from speculative reasoning as to difficulties of accounting, hold that the aggrieved taxpayer will not receive, in a single suit against the county, the full compensation which the law provides. All these dangers as to multiplicity of suits were present in the case of Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. Ed. 1288, and in Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; and still the remedy provided by the statute was held to be plain, adequate, and complete, so as to exclude a resort to equity.

[5] Finally it is urged that the evidence has been taken and shows the taxes to be illegal, and plaintiff is therefore entitled to keep its money; that to compel it to pay the taxes, and then bring an action to recover its money under the statute, would not be as complete and speedy a remedy as a decree and injunction in this suit. Hence the plaintiff is entitled to relief in equity. But, if this reasoning is sound, the wrong-

ful resort to equity becomes the very ground of equitable jurisdiction. It is true that an injunction could be issued in this case in a shorter time than would be necessary to pay the taxes and begin an action at law and prosecute it to judgment for the recovery of the money. That, however, is not the test. To determine whether the remedy at law is as speedy and adequate as that in equity, the court must place itself at the beginning before any litigation has been started. If the position of counsel were sound, every decision of the Supreme Court, reversing a decree in equity because the remedy at law was adequate, would be wrong. Decisions of this kind are numerous, many of them occurring in suits to restrain the collection of taxes. As the Supreme Court has often said, section 723 of the Revised Statutes (Comp. St. 1913, § 1244) "means something." Buzard v. Houston, 119 U. S. 347, 351, 7 Sup. Ct. 249, 30 L. Ed. 451. It at least emphasizes the rule which it declares. It can be given effect in no other way than by dismissing suits brought in violation of its provisions. We decline, therefore, to express any opinion touching the validity of the taxes. That issue must be determined in an action under the statute.

The decree of the trial court is affirmed.

In re LANE LUMBER CO., Limited.

HIRLINGER v. BOYD.

(Circuit Court of Appeals, Ninth Circuit. August 17, 1914.)

No. 2367.

BANKRUPTCY (§ 440*)—APPELLATE PROCEEDINGS—MODE OF REVIEW.

By the filing of a petition for the allowance of his claim as a secured debt, a creditor of a bankrupt institutes a bankruptcy proceeding, and the order made thereon, if the claim is $500 or over, is reviewable by appeal, under Bankr. Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), and not by petition to revise under section 24b.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

Upon Petition for Revision from the District Court of the United States for the District of Idaho, Northern Division; Frank S. Dietrick, Judge.

In the matter of the Lane Lumber Company, Limited, bankrupt, Samuel L. Boyd, trustee. Petition by Johanna Hirlinger to revise an order denying her petition for the allowance of her claim as a secured debt. Petition dismissed.

See, also, 207 Fed. 762, 213 Fed. 587, 217 Fed. 550, 555, 133 C. C. A. 402, 407.

Frank Langley, of Cœur d'Alene, Idaho, for petitioner.

E. N. Laveine, of Cœur d'Alene, Idaho, for respondent.

John H. Wourms, of Wallace, Idaho, amicus curiæ.

---

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

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

VAN FLEET, District Judge. The petitioner filed her proof of claim against the bankrupt estate for the balance remaining unpaid on the purchase price of certain lands sold to the bankrupt, in an amount exceeding $500, as an unsecured debt, and the claim was allowed; thereafter she filed a petition asking leave to withdraw the proof of the claim as an unsecured debt and to substitute therefor proof of the same as a debt secured by a vendor's lien on the land sold. The trustee objected to her right to make the substituted proof, but upon hearing the referee granted it, and thereupon the trustee took the matter before the court below for a revision of the order. The action of the referee was set aside by the court, and a judgment entered denying the right to make the substituted proof. This judgment is now brought here upon a petition by the claimant, prosecuted under the provisions of section 24 of the Bankruptcy Act, to have it reviewed and set aside upon the assumption that the case is one falling within the provisions of that section as furnishing the remedy for her relief from the judgment complained of. This mode of proceeding gives rise at the threshold to a question as to our jurisdiction in the premises, of which, although not challenged by the respondent, we are bound upon our own initiative to take cognizance, that the jurisdiction of the court may be protected against unauthorized invasion. The question is whether the judgment is one which may be competently reviewed upon petition for review or should be brought up by appeal. If appeal is the exclusive remedy, then we have no authority to review the judgment in this proceeding. The question turns upon the construction of sections 24 and 25 of the Bankruptcy Act, prescribing the mode of reviewing the different classes of orders and judgments obtained in bankruptcy courts. The provisions of those two sections, so far as pertinent to the question in hand, are as follows:

Section 24:

"(a) The * * * Circuit Courts of Appeals of the United States * * * are hereby invested with apellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

"(b) The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Section 25:

"(a) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States * * * in the following cases, to wit: * * *

"(3) From a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

The construction of these provisions of the act has given rise to considerable diversity of decision in the federal courts; some holding that the remedies afforded by them are cumulative, and others that they are exclusive as to the class of cases falling respectively within their provisions. We need not stop to review these cases from the lower courts since, in our judgment, the question is set at rest by two comparatively recent rulings of the Supreme Court.

In Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, involving, like the present, a disputed claim of secured debt, the trustee, feeling aggrieved by the action of the bankruptcy court, and being in doubt as to the proper procedure, took the case to the Circuit Court of Appeals for the Eighth Circuit both by petition for review and by appeal. That court dismissed the petition for review, and, after considering the appeal, affirmed the judgment in substance, and an appeal was then taken by the trustee to the Supreme Court. In the latter court the appellee contended that neither that court nor the Court of Appeals had jurisdiction by appeal from the judgment, and in considering that question, after referring to the fact that "questions of the jurisdiction in bankruptcy, particularly of the appellate courts, have given rise to numerous and not altogether reconcilable decisions," the court proceeds to consider and construe sections 24 and 25 of the act, and it is said:

"By paragraph (b) of section 24 the Circuit Courts of Appeals have jurisdiction to superintend and revise in matters of law proceedings of the several inferior courts of bankruptcy within their jurisdiction. The proceeding under this section is designed to enable the Circuit Court of Appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (section 24), or the special appeal given in certain cases under section 25.

"Section 25 of the act provides for appeals in bankruptcy proceedings, and in such proceedings appeals may be taken from the courts of bankruptcy to the Circuit Courts of Appeals in three classes of cases.

"We are concerned in this case with the third class, 'from a judgment allowing or rejecting a debt or claim of five hundred dollars or over.' The appeal must be taken within 10 days after the judgment.

"It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy or is it a controversy arising in bankruptcy proceedings?"

The court then proceeds to consider its previous rulings bearing upon the subject, and say:

"We are thus brought to the determination of the question, Was the proceeding instituted by Arts a controversy arising in bankruptcy proceedings, or did he institute a bankruptcy proceeding, properly speaking? The answer to this question depends upon an examination of the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved."

And after stating the facts as to the presentation and character of the claim it is said:

"We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition

and the appropriate appellate jurisdiction are to be determined by the provisions of the bankruptcy act governing bankruptcy proceedings."

And after a full discussion of the conflicting contentions of the parties it is said:

"We, therefore, reach the conclusion that the claim presented instituted a proceeding in bankruptcy, and, being for over $500, it was appealable to the Circuit Court of Appeals, bringing to that court the validity of the asserted lien," etc.

It will be observed that while that case clearly determines the right to review the judgment in such a case by appeal, there is nothing said as to the exclusive character of this remedy. The latter question, however, is concluded, we think, by the subsequent case of Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. In that case, likewise arising on a claim of secured debt, the trustee, as here, carried the case to the Circuit Court of Appeals (Sixth Circuit) by petition for revision, and the latter court certified the question to the Supreme Court whether it had "jurisdiction to revise the order of the District Court upon the petition for revision filed under section 24b of the Bankruptcy Act." The question was answered in the negative, the court, referring to its decision in Coder v. Arts, saying:

"Under the decision of this court in that case there can be no doubt that the bank in this case instituted a proceeding in bankruptcy, which was appealable under section 25a to the Circuit Court of Appeals. The fact that after the adjudication of the claim the trustee made no objection to its allowance as a valid claim, but intended only to contest its validity as a lien upon the bankrupt's estate, made no difference as to the appellate character of the controversy. A bankruptcy proceeding was instituted as to the claim and its alleged lien, as distinguished from a controversy arising in a bankruptcy proceeding, and the appeal was under section 25a to the Circuit Court of Appeals. Coder v. Arts, supra.

"The question now propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals under section 24b by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. Coder v. Arts, supra, p. 233. Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review, as to matters of law, where the facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.

"In our judgment the rule as well stated in Re Mueller, 135 Fed. 711, by Mr. Justice Lurton, then Circuit Judge (page 715): 'The "proceedings" reviewable [under section 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy, between the filing of the petition and the final settlement of the estate, which are not made specially appealable under sec-

tion 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under section 25a.'"

Under the construction here given the sections in question we are constrained to hold that the petitioner has mistaken her remedy, and that we have no jurisdiction to review the present judgment otherwise than upon appeal prosecuted under the provisions of section 25a of the act.

It is not unlikely that the error of petitioner in determining upon the mode of review here sought was based upon the theory that the case fell within section 24b by reason of the incidental fact that the record presents for consideration only the question as to the sufficiency of the findings to support the judgment—purely a question of law—but, as we have seen, that is not the test in determining the appropriate remedy for the review of the action of the court below; the test being, What was the "character of the proceeding" by which the jurisdiction of the bankruptcy court was invoked?

It results that the petition for review must be dismissed; and it is so ordered.

In re LANE LUMBER CO., Limited.

BOYD v. WALL.

(Circuit Court of Appeals, Ninth Circuit. August 17, 1914.)

No. 2363.

1. BANKRUPTCY (§ 188*)—VALIDITY OF LIENS—STATUTORY VENDOR'S LIEN.
Under Rev. Codes Idaho, §§ 3441, 3443, which give a vendor a lien on real property sold "valid against every one claiming under the debtor except a purchaser or incumbrancer in good faith and for value," such a lien is valid as against the trustee in bankruptcy of the purchaser.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286–289, 291–295; Dec. Dig. § 188.*]

2. BANKRUPTCY (§ 188*)—VALIDITY OF LIENS—POWER OF TRUSTEE TO CONTEST.
The purpose of the amendment of Bankr. Act, § 47a (Act July 1, 1898, c. 541, 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), by providing that as to all property coming into the custody of the bankruptcy court the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, was to confer on the trustee the power to contest the sufficiency of any claimed lien, pledge, or security that a lien creditor or judgment creditor might challenge had bankruptcy not intervened, but it does not prescribe any rule by which the validity or priority of such liens is to be determined, and a lien which is valid under the state law as against the claims of such creditors is valid under the bankruptcy law against a trustee since the amendment as well as before.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286–289, 291–295; Dec. Dig. § 188.*]

3. BANKRUPTCY (§ 189*)—LIENS—FAILURE TO RECORD.
Bankr. Act July 1, 1898, § 67a, c. 541, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), which provides that claims which for want of record or

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

for other reasons would not have been valid liens as against the claims of creditors of the bankrupt shall not be liens against his estate, applies only to such liens as are required by the state law to be recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291–295; Dec. Dig. § 189.*]

4. BANKRUPTCY (§ 188*)—VENDOR'S LIEN—VALIDITY.

The fact that a vendor of land to a corporation was its secretary, and that he did not assert his right to a vendor's lien until after its bankruptcy, in the absence of evidence of fraud, *held* not to invalidate his lien.

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

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

In the matter of the Lane Lumber Company, Limited, bankrupt. Appeal by Samuel L. Boyd, trustee, from an order (210 Fed. 82), allowing the claim of M. K. Wall to a vendor's lien. Affirmed.

See, also, 217 Fed. 546, 555, 133 C. C. A. 398, 407.

E. N. La Veine, of Cœur d'Alene, Idaho, for appellant.

John H. Wourms, of Wallace, Idaho, amicus curiæ.

Frank Langley, of Cœur d'Alene, Idaho, for appellee.

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

VAN FLEET, District Judge. On petition for review the court below affirmed the ruling of the referee allowing the claim of the appellee M. K. Wall against the estate and holding him entitled to a vendor' lien upon specific real estate in the hands of the trustee, and the latter appeals from the judgment, the question being whether the lien of the claimant prevails over the rights of the general creditors in the property.

[1] The material facts upon which the judgment rests, as found by the district judge, are that the land held subject to the lien was sold and conveyed by the claimant to the corporation bankrupt on March 6, 1911, at an agreed consideration of $5,000, the amount of the claim allowed, which remained at the date of allowance wholly unpaid and unsecured otherwise than by the personal obligation of the purchaser; that subsequently, on July 11, 1911, the corporation was adjudged an involuntary bankrupt and the appellant duly qualified as trustee; that the title to the property of the bankrupt, including the land declared subject to the lien, passed to the trustee on September 26, 1911; that claimant's proof of debt as a secured claim was duly filed on June 19, 1912, and, objection being made thereto by the trustee, the matter was heard by the referee, resulting in the order allowing the claim as valid and secured by a vendor's lien on the land sold. Upon these facts the court concluded as matter of law:

"That the referee's order complained of by the trustee should be affirmed and said vendor's lien decreed on the property described therein under sections 3441 and 3443, I. R. C., and under the Bankruptcy Act of 1898 and amendments."

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

The sections of the Idaho Revised Codes referred to in the court's conclusion are these:

"Sec. 3441. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

"Sec. 3443. The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value."

[2] That the federal courts in bankruptcy will recognize and give effect to a vendors' lien provided for by the statutes of the state, in the absence of some act of the vendor or claimant inconsistent with the purpose of claiming a lien or with its continued existence, is well settled. "Such a lien is one which appeals strongly to the favorable consideration of a court of equity." Slide & Spur Gold Mines v. Seymour, 153 U. S. 509, 14 Sup. Ct. 842, 38 L. Ed. 802; Chilton v. Lyons, 67 U. S. (2 Black) 458, 17 L. Ed. 304; Sturdivant Bank v. Schade, 195 Fed. 188, 115 C. C. A. 140. This is conceded by appellant to be the law unless found to be inconsistent with a recent amendment to the Bankruptcy Act, but his contention is that such effect is to be deduced from the language of section 47a of that act, as amended in 1910, which provides that the trustee—

"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."

It is claimed that the effect of this amendment is to vest in the trustee, as against all secret or unrecorded liens such as that involved, a title and equity in the property, for the benefit of the creditors of the bankrupt, superior in character to that of the lien of the vendor in all instances where the latter has failed to disclose his claim of lien by some appropriate proceeding to enforce it prior to the vesting of the property of the estate in the hands of the trustee. But we think that this contention involves a misconception of the purpose and effect of the amendment in question. Prior to its adoption the trustee was without power to question the validity of an asserted lien upon the property of the estate, however defective, if the defect were one which could not have been availed of by the bankrupt, the trustee being vested with no higher right as to the property than that possessed by the bankrupt at the time of the devolution of the title upon the trustee. York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and cases there cited. The amendment was obviously designed to cure what was deemed a defect in this regard, and to confer the power upon the trustee, in the interest of the general creditors, to contest the sufficiency of any claimed lien, pledge, or security that "a lien creditor or a judgment creditor might challenge had bankruptcy not intervened." Loveland on Bankruptcy (4th Ed.) § 372. There is nothing in the amendment indicating that its purpose was to prescribe a rule by which the validity or priority of such liens is to be determined or enforced. In that respect the law is left untouched, and the validity and rank of the lien is now to be ascertained by the same applicable principles as obtained prior to the

change; and "a lien which is valid under the state law as against the claims of such creditors, is valid under the bankrupt law as against a trustee since the amendment as well as before it." Id. The amendment, in other words, was designed only to clothe the trustee with the right to question the validity of any lien claimed against the property of the estate which may be defective under the law creating it, notwithstanding the bankrupt might have been estopped to do so. Pacific State Bank v. Coates, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846. It goes no further. It does not affect the character of the trustee's title as such. That is defined in section 70 of the act, which clothes the trustee only "with the title of the bankrupt as of the date he was adjudged a bankrupt."

[3] The question, therefore, is, Was the lien of the claimant for any reason defective under the law of the state as against "a creditor holding a lien by legal or equitable proceedings thereon"? If it was, then the trustee may question it; otherwise not. The Bankruptcy Act (section 67a) provides that:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

But this does not mean, as appellant apparently assumes, that no lien may be maintained against an estate unless or until it has been recorded. Section 67d expressly provides that:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon the act, and for a present consideration, and which have been recorded according to law, *if record thereof was necessary* in order to impart notice, shall, to the extent of such present consideration only, not be affected by this act."

The present lien was clearly not invalidated for want of record, since, as we have seen, the statute of the state is wholly silent as to any such requirement. Nor is there any provision requiring suit to be brought within any given time to enforce it. As suggested by the court below, an action to foreclose is not material to its validity; "the lien is established by operation of law and is quite as complete before as after the institution of proceedings to foreclose it."

[4] Was the lien invalidated from any other reason? While good faith in the inception of the appellee's claim is not, as in the court below, conceded here, no specific contention is advanced that there was any actual fraud in the transaction, but, based upon certain facts which the judge included in his findings at the appellant's request, the appellant now makes a somewhat general and indefinite contention that it would be inequitable to allow claimant's lien to prevail over the general creditors, and that he should be held estopped to assert its priority. These facts are, in substance, that "the claimant was secretary of the bankrupt with full knowledge of the embarrassed financial condition of the bankrupt at the time of said transfer," which was not ratified by the directors; that "as an officer of the bankrupt" he permitted the land in question to remain on the records as unincumbered; that the trustee had no notice of the vendor's lien until it was filed with the referee; and that the appraised value of the

land is but $919. Appellant urges in his brief that "it is very apparent from the vendor lien claims pending against this estate" that the claimant, "on behalf of the bankrupt, was extremely active and zealous in obtaining titles to tracts of land by making small payments thereon and not protecting the vendors by collateral security. He knew the financial condition of the company. It must have been his ambition to make millions. He knew when he transferred his land to the bankrupt that the credit world had a right to and would assume that he had been paid in full for his land. His very relation with the company and to its creditors, on account of the fraud worked upon them, should estop him from claiming his vendor's lien and defeat his right thereto." Some of these suggestions find no basis in anything appearing in the record, the evidence not being returned, and must therefore be ignored, but so far as they are based upon the findings there is nothing to induce the conclusion that the court below was in error in treating the facts just stated as wholly immaterial in determining the validity of the lien. None of them are of a nature necessarily tending to show fraud in the transaction, either actual or constructive, nor to estop the claimant from invoking his lien. That the land was sold to the corporation "for a present consideration" is not questioned, and the mere disparity between the contract price and the present appraised value is something which might arise from many causes not involving bad faith, and hence, standing alone, has no tendency to show fraud. Nor did the fact that the claimant was an officer of the bankrupt corporation preclude him from dealing with it in a proper case, and there is no showing that this was not such an instance. The other considerations based upon the facts found are equally without merit.

The further contention that the claimant was guilty of culpable laches in not earlier asserting his lien is not only answered by what has already been said as to the law, but is concluded by the express finding of the court that claimant "was not guilty of laches for waiting until after filing of the petition in bankruptcy before attempting to assert his vendor's lien."

Our conclusion is that the judgment of the court below was right, and that the lien allowed must prevail over the rights of the general creditors. A creditor "holding a lien by legal or equitable proceedings" is not "a purchaser or incumbrancer in good faith and for value" (Pacific State Bank v. Coates, supra; Pomeroy's Equity Jurisprudence [3d Ed.] § 721), and under the terms of the Idaho statute the lien there given must give way only as to one of the latter class.

The judgment is affirmed.

In re LANE LUMBER CO., Limited.

BOYD v. WALL.

(Circuit Court of Appeals, Ninth Circuit. August 17, 1914.)

No. 2364.

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

In the matter of the Lane Lumber Company, Limited, bankrupt. Appeal by Samuel L. Boyd, trustee, from an order (210 Fed. 82), allowing the claim of Mary Wall to a vendor's lien. Affirmed.

See, also, 217 Fed. 546, 550, 133 C. C. A. 398, 402.

E. N. La Veine, of Cœur d'Alene, Idaho, for appellant.

John H. Wourms, of Wallace, Idaho, amicus curiæ.

Frank Langley, of Cœur d'Alene, Idaho, for appellee.

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

VAN FLEET, District Judge. This, like case No. 2363 (Boyd v. M. K. Wall, 217 Fed. 550) just decided, is an appeal from a judgment affirming the order of the referee awarding a vendor's lien upon property of the bankrupt, and arises out of the same bankruptcy proceeding. Excepting only as to the tract of land involved and the date of sale, the material facts are not to be distinguished in legal effect from those in the last-mentioned case; and, as the appeal is submitted practically upon the briefs in that case and no new points are urged, no further discussion is required, but the judgment may be affirmed on the authority of the opinion filed in that case.

It is so ordered.

HARRIS et al. v. MARSH et al.

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

No. 3958.

1. EVIDENCE (§ 442*)—WRITTEN CONTRACT—PAROL EVIDENCE.

Alleged contracts to purchase jewelry were written orders constituting a memorandum, made up of abbreviations, statements of quantities, and a large number of figures, referring to styles in a catalogue. Neither the prices nor terms of sale were stated in the orders themselves, and without the catalogue, which was neither made a part of nor referred to in the orders, they were unintelligible; nor did they contain any reference to warranties. *Held*, that such orders did not constitute an entire written contract, so as to preclude parol proof that the goods were sold under a warranty of quality and a breach thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874–1897; Dec. Dig. § 442.*]

2. SALES (§ 288*)—ACCEPTANCE—WARRANTY—BREACH.

A buyer may accept delivery of goods sold under a warranty of quality, notwithstanding their failure to comply with the warranty, and invoke the seller's breach of warranty by way of counterclaim in reduction of damages, when sued for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817–823; Dec. Dig. § 288.*]

3. APPEAL AND ERROR (§ 274*)—QUESTIONS RAISED AT TRIAL—EXCEPTIONS.

Where, in a suit for the price of goods sold, the trial court excluded evidence of breach of a parol warranty, on the ground that the contract

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

of sale was in writing and contained no warranty, and defendants excepted many times to the court's ruling sustaining objections to questions by which it was sought to prove the warranty and breach, their right to review the court's ruling was not lost by reason of failure to except to the court's subsequent ruling directing a verdict for plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605, 1606, 1607, 1624, 1631–1645; Dec. Dig. § 274.*]

In Error to the District Court of the United States for the Western District of Missouri; Smith McPherson, Judge.

Action by Charles A. Marsh and others against P. Stephen Harris and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Battle McCardle, of Kansas City, Mo., for plaintiffs in error.

P. E. Reeder, of Kansas City, Mo. (New & Krauthoff and M. H. Winger, all of Kansas City, Mo., on the brief), for defendants in error.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. This suit was brought by defendants in error against plaintiffs in error to recover the purchase price of certain jewelry alleged to have been sold and delivered by the former to the latter. A lengthy itemized account, showing the articles sold, the dates of sales, and agreed price for each was filed with the petition as an exhibit. Defendants answered, pleading first a failure of consideration, in this: That plaintiffs agreed to manufacture and deliver to defendants jewelry for a certain particular retail trade, and warranted that it should be of certain specified quality, material, and workmanship, and would prove satisfactory to that trade; but that the jewelry delivered did not respond to the warranty, could not be sold to the trade as required, and was substantially worthless. Defendants also set up a counterclaim for damages sustained by them by reason of the breach of the warranty. At the inception of the trial the court ruled that the burden under the pleadings rested upon the defendants to prove the affirmative defenses pleaded by them.

A witness was then called and his examination entered upon, whereupon plaintiffs' counsel objected to the introduction of any testimony in support of the defense or counterclaim. A colloquy ensued between the court and counsel for defendants, in which it was admitted: That the jewelry was received by the defendants, had not been returned, and had not been paid for. That it was purchased upon several written orders addressed to plaintiffs by defendants, of which the following is a fair sample:

Order No..... Date 12—29—09.
C. A. Marsh and Co. Attleboro, Mass.
Ship to Harris-Goar Co.
At 3rd floor Boley Bldg. K. Cy. Mo.
How ship ex. When at once.
Terms. .....
1 doz. ea. v. chains 3003–4–8–11–12–13–14–17–18. 3020–22–23–25–27–28–29–32–33–34–35–36–37–3038–3039–40–42.

That the numbers so specified were found in a catalogue containing a general description of goods for sale by plaintiffs, with a cut or

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

illustration of such goods and a number set opposite each kind of goods so described, and that each party had a copy of this catalogue. The sample order just copied, if translated in connection with the catalogue, would read thus:

December 29, 1909.

C. A. Marsh & Co., Attleboro, Mass.

Ship to Harris, Goar & Co., third floor Boley Bldg., Kansas City, Mo., at once by express, 1 dozen *vest* chains of each of the following numbers, found in the catalogue of which you have a copy: 3003, 3004, 3008, 3011, 3012, 3013, 3014, 3017, 3018, 3020, 3022, 3023, 3025, 3027, 3028, 3029, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3042.

It was further admitted that the jewelry received by defendants corresponded in quantities and styles to the goods ordered. It does not appear that the catalogue contained any warranties, representations, or statements concerning the things alleged in the answer to have been warranted.

The defendants' counsel then propounded questions to the witness tending to prove the facts pleaded by them in their answer. To all questions of this kind plaintiffs' counsel objected, on the ground that a written contract had been entered into between the plaintiffs and defendants, and that the questions propounded sought to vary the terms of that contract by parol, and were for that reason incompetent. This objection was sustained by the court, defendants preserved proper exceptions to each and every such ruling, and error was properly assigned thereon. Not being permitted to introduce any evidence in support of their defenses, the defendants were compelled to rest, and the court, on motion of plaintiffs' counsel, instructed the jury to return a verdict for the plaintiffs for the full amount sued for. This was accordingly done, judgment was rendered on the verdict, and defendants prosecute this writ of error.

The alleged written contract, if any, is found in several written orders for the jewelry, a sample of which appears above. Reference to it discloses that it is a memorandum made up of some abbreviations (doubtless understood in the trade), statements of quantities, and a large number of figures admitted to have been found in the catalogue. Neither the prices nor terms of sale are stated in the orders themselves. Without the catalogue, which it is admitted disclosed the prices, the written orders manifestly would have been unintelligible.

[1] Conceding that with the aid of the catalogue a contract of sale might be made to appear, yet as the contents of the catalogue are not brought to our attention in this record, we have to rely on the admission of counsel that the prices of the jewelry appeared in the catalogue as our only information touching the terms of sale. In view of these facts, we think the written orders were not intended to constitute the entire contract. The catalogue, which was neither made part of the orders nor referred to in them, was absolutely essential to the creation of any contract of sale; but its connection with the orders as a part of them, as well as its contents, had to be established by parol.

Without the catalogue, and without oral testimony connecting the catalogue with the orders, no legal obligation was created. Resort

to some oral proof was therefore necessary to establish such an obligation. The written part of the contract made no reference to warranties whatsoever; accordingly the facts alleged to have been warranted are not inconsistent with any of the provisions of the writing. The warranty could have been made, and every part of the written portion of the contract remain the same. Such being the case, we think oral proof of the warranty sought to be made by the defendants was entirely competent and should have been allowed. Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682, 15 L. R. A. (N. S.) 855; Rollins v. Claybrook, 22 Mo. 405; Boulware v. Manufacturing Co., 152 Mo. App. 567, 134 S. W. 7; Mercantile Co. v. Tate, 156 Mo. App. 236, 137 S. W. 619. In the Seitz Case the Supreme Court of the United States laid down the rule thus:

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole transaction between them. * * * And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing."

In the other cited cases the same doctrine is enunciated.

[2] It is the settled law of this jurisdiction that in cases on contracts of sale involving a warranty the purchaser may accept delivery of the goods purchased by him, notwithstanding their failure to respond to the warranty of the seller, and invoke the breach of the warranty by way of counterclaim in reduction of damages. City of St. Charles v. Stookey, 85 C. C. A. 494, 154 Fed. 772; Omaha Water Co. v. City of Omaha, 85 C. C. A. 54, 156 Fed. 922.

The statute of frauds is invoked by counsel for defendants in error in support of their contention, and to their extended argument in this regard careful attention has been given; but we are unable to perceive its pertinency to the facts of this case.

[3] An extended argument is made in the brief of plaintiffs' counsel to the effect that, as no exception was taken to the action of the court in directing a verdict for the plaintiffs, nothing is reviewable on this writ of error. There is no merit in this argument. The defendants made a most earnest and persistent effort to introduce proof tending to establish their defense and counterclaim. They asked many questions to that end, objections to each and all of which were sustained by the court, and due exceptions allowed. The direction to find a verdict for plaintiffs was an inevitable consequence of prior rulings on the admission of evidence, and no further exception was necessary to "save the point." The only point in the case had already been saved 84 times by actual count.

Objection is made by counsel for defendants in error that the brief of plaintiffs in error does not conform to the requirements of our rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv), in the matter of specifying the part of the charge of the court complained of or quoting the

substance of the evidence improperly admitted or excluded; but, as the record contains neither charge nor evidence, it is difficult to see the applicability of this rule to the present case.

The judgment is reversed, and the cause remanded to the District Court for a new trial.

STEARNS SALT & LUMBER CO. v. HAMMOND.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1914.)

No. 2482.

1. BANKRUPTCY (§ 164*)—PREFERENCE—PROCEEDS OF INSURANCE POLICIES.
Where a mortgage obligated the mortgagor to insure the property for the benefit of the mortgage trustee "as a further security," and authorized the trustee to effect the insurance in case of the mortgagor's default, the premium paid to be an additional lien, the nonpayment of which immediately authorized foreclosure, and, after the proceeds of certain policies effected "under the mortgage" had been paid, the mortgagee relinquished a portion of such proceeds to the mortgagor, who had become bankrupt, that it might be repaid and credited on an unsecured account due the mortgagee, such amount, when relinquished, became the mortgagor's property, and a payment thereof to the mortgagee for credit on the unsecured debt constituted a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. § 164.*]

2. BANKRUPTCY (§ 168*)—PREFERENCES—INVALID PAYMENT—RESCISSION.
Where a mortgagee, on collecting certain insurance on the mortgaged property, surrendered a portion thereof to the mortgagor, that it might be repaid to the mortgagee and credited on an unsecured indebtedness, such transaction was not such that, on the repayment being declared a preference, the mortgagee was entitled to rescind the same in toto and claim the right then to credit the money relinquished on the mortgage debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. § 168.*]

3. BANKRUPTCY (§ 168*)—PREFERENCES—RIGHTS OF TRUSTEE.
Where a bankrupt delivered certain personal property to its creditor, receiving therefor credit for a specified sum as the price of the property on the bankrupt's indebtedness to the creditor, it appearing that the transfer constituted a voidable preference, the objection, to an action in assumpsit by the trustee to recover the amount, that the creditor had not received money or money's worth for the property, is not well taken.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. § 168.*]

4. BANKRUPTCY (§ 341*)—ALLOWANCE OR DISALLOWANCE OF CLAIMS—"FINAL JUDGMENT."
Action of a referee in bankruptcy allowing or disallowing a claim is a final judgment in the absence of review.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 516, 528; Dec. Dig. § 341.*

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

5. BANKRUPTCY (§ 341*)—ALLOWANCE OF CLAIMS—"RES JUDICATA."
Since it is of the essence of the doctrine of res judicata that the proposition respecting which it is invoked be adjudicated, either expressly or by necessary inference, the allowance of a claim in bankruptcy to a cred-

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

itor who had received a preference, without any express adjudication that a preference had not been created, was not res judicata of that fact, especially where, 30 days after the order allowing the creditor's unsecured claim, an order was entered directing the trustee to sue to recover the preference, and that the estate be kept open until the termination of such litigation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 516, 528; Dec. Dig. § 341.*

For other definitions, see Words and Phrases, First and Second Series, Res Adjudicata.]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit by William L. Hammond, as trustee in bankruptcy of the Handy Things Company, against the Stearns Salt & Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles McPherson, of Grand Rapids, Mich., for plaintiff in error.
H. T. Heald, of Grand Rapids, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is a suit by the trustee in bankruptcy of the Handy Things Company against the Stearns Salt & Lumber Company, under section 60b of the Bankruptcy Act (Comp. St. 1913, § 9644), to recover certain alleged preferential payments by the bankrupt. Plaintiff recovered verdict and judgment. The important facts are these:

On May 23, 1908, the Handy Things Company gave a trust mortgage for $35,000 upon its manufacturing plant and substantially all its property of every kind, to secure indebtedness to the Stearns Salt & Lumber Company (hereafter called the Lumber Company) and to a bank of which the mortgage trustee was cashier. One of the factories and part of the personal property was destroyed by fire on February 23, 1911. The mortgage trustee collected, under fire insurance policies upon the property so destroyed, $34,359.04. At this time the Lumber Company held a large unsecured running account against the Handy Things Company, in addition to its mortgage claim. At its request, the Handy Things Company gave the Lumber Company an order on the mortgage trustee to turn over to the Lumber Company $15,000 of the insurance money to be applied upon the open unsecured account mentioned. This payment and application were so made March 23, 1911. The remaining insurance money was applied upon the obligation secured by the mortgage, less $345 premiums upon the insurance policies in question. The mortgage indebtedness was thus entirely paid except about $15,000 still owing the Lumber Company, and the mortgage was continued in force. Between March 15 and March 31, 1911, which was in the month following that of the fire, the Handy Things Company turned over to the Lumber Company certain machinery, lumber, and other supplies, at a price of $3,227.20, which was also applied upon the unsecured claim of the Lumber Company. On April

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

4, 1911, the Handy Things Company was adjudicated bankrupt, upon involuntary petition, the Lumber Company being the principal petitioning creditor, the mortgage trustee being appointed trustee in bankruptcy, as well as receiver. The Lumber Company filed in the bankruptcy proceedings an unsecured claim for $25,888.76, being the amount remaining after the application of the alleged preferential payments, viz., the $15,000 insurance money and the $3,227.20 referred to. The Lumber Company also made proof of claim under the mortgage. To both these claims objections were made on account of the alleged preferences, with request that the trustee be directed to bring suit for the recovery of the preferential payments. Both claims were allowed, and the suit ordered. The total remaining assets of the bankrupt, after payment of expenses, were applied upon the Lumber Company's secured claim, leaving, after the inclusion of interest, a deficit of $1,235.88, and of course leaving nothing (unless through the proceeds of this litigation) for application upon the unsecured claim of the Lumber Company, or upon the claims of other creditors, amounting to upwards of $17,000. The alleged preferences were all within 20 days of bankruptcy. The verdict and judgment were for the full amount of the alleged preferences.

At the close of the testimony, defendant moved for directed verdict on the ground that the $15,000 of insurance money never belonged to the bankrupt's estate, and is therefore not recoverable by the trustee. In this connection it is urged that the policies ran to the mortgage trustee, and not to the mortgagor, a proposition we shall later refer to. It is to be noted that the case presents no controversy respecting the right of the trustee in bankruptcy to the proceeds of insurance upon property conveyed fraudulently or preferentially, under the Bankruptcy Act or otherwise, as was the case in certain decisions relied upon by defendant, such as Forrester v. Gill, 11 Colo. App. 410, 53 Pac. 230, and Insurance Co. v. Grocery Co., 113 Ga. 786, 39 S. E. 483. The mortgage in question was free from taint of fraud or preference. Nor is there here any question of insurable interest on the part of the mortgagee, either on behalf of the insurance company or as between the mortgagor and the mortgage trustee. The insurance company has paid the loss. It must be conceded that, as between the mortgagor and mortgagee, the latter had the prior claim to the insurance money, to the extent necessary to satisfy the mortgage debt, and that it could properly receive the money directly from the insurance company.

[1] The simple question is whether the insurance money to which the mortgagee voluntarily, and for its own supposed benefit, relinquished all claim under the mortgage became thereby, as between the mortgagor and mortgagee, the property of the mortgagor, and so within section 60 of the Bankruptcy Act. The mortgage obligated the mortgagor to insure the property for the benefit of the mortgage trustee, "as a further security" for the mortgage indebtedness, and, in case of the mortgagor's failure to so insure, authorized the trustee to effect insurance, the premium paid to be an additional lien upon the mortgaged property, whose nonpayment immediately authorized foreclo-

sure. We find no evidence that the policies insured only the mortgagee's interest, as distinguished from a policy insuring the mortgagor, with loss payable to the trustee as his interest might appear, unless contained in the testimony of the trustee that:

"Under this mortgage I caused insurance policies to be taken out payable to me as trustee, and it was upon these insurance policies that I collected a little less than $35,000."

In view of the provisions of the mortgage, we do not think the necessary inference from this testimony would be that the policies insured only the mortgagee's interest. In our opinion the natural inference would be that the usual practice in such cases was followed, viz., the issuance of the policies in the name of the mortgagor as the insured, with the well known standard-policy mortgage loss clause, making loss, if any, payable to the mortgagee (trustee) as its "interest may appear." The statement that the insurance was effected *under the mortgage* naturally, we think, so implies. It is noticeable that the testimony is not that the policies ran to the trustee, or that they insured only his interest, but that they were "payable" to him "as trustee." Under such a policy the mortgagor, under familiar principles, would plainly be entitled to the insurance, except so far as needed or desired by the mortgagee for the payment of his mortgage. But if the testimony is to be interpreted as meaning that the policy actually ran to the trustee, and did not in terms secure the mortgagor's interest, yet, under the circumstances stated, including the facts that the insurance was taken by virtue of the mortgage provision and at the expense of the mortgagor, the latter was entitled to its benefit to the extent of having its proceeds applied pro tanto to the liquidation of the mortgage debt (Pendleton v. Elliott, 67 Mich. 496, 498, 35 N. W. 97), and equitably, at least, was entitled to whatever was collected beyond the amount necessary or desired to satisfy the claims of the mortgagee thereto. See Wheeler v. Insurance Co., 101 U. S. 439, at page 441, 25 L. Ed. 1055; and see Brown City Savings Bank v. Windsor (C. C. A. 6th Cir.) 198 Fed. 28, 30, 117 C. C. A. 136, 41 L. R. A. (N. S.) 1012, and following, where the relative rights of mortgagor and mortgagee under the mortgage loss provisions in insurance policies are discussed in an opinion by Judge Warrington.

To say the least, it was entirely competent for the Lumber Company to waive its claim to the insurance money and to surrender it to the mortgagor, making it the latter's property; and this we think it practically and effectually did by the course taken, and as effectively as if the money had first been paid over to the mortgagor and afterwards paid by it to the Lumber Company. Circuity of arrangement will not alter the force of a transaction preferential in fact. Newport Bank v. Herkimer Bank, 225 U. S. 178, 184, 32 Sup. Ct. 633, 56 L. Ed. 1042. True, there can be no preferential transfer without a depletion of the bankrupt's estate; Continental Trust Co. v. Chicago Title Co. 229 U. S. 435, 443, 33 Sup. Ct. 829, 57 L. Ed. 1268; In re Kerlin (C. C. A. 6th Cir.) 209 Fed. 42, 44, 126 C. C. A. 184. But, in any view which may be taken of this case, it is obvious that the transfer in question did necessarily operate to deplete the assets available to the general and

unsecured creditors; for had it not been made, the Lumber Company's secured claim would have been paid to the extent of $15,000, and the remaining mortgaged property would, to the like extent, have been free for application to the claims of general creditors, instead of being ultimately absorbed in payment of the Lumber Company's secured claim.

[2] But it is urged that the alleged preferential transaction was a single one, consisting of the payment of the insurance money to defendant and its application upon the unsecured debt; that if the transaction was void, the insurance money is still in defendant's hands as insurance money, and free from any lien or claim on the part of the bankrupt or its trustee; that by the course taken the trustee has succeeded in taking the benefit of the transaction and in avoiding its burdens, in violation of the rule that one seeking to rescind must do so in toto. We think this argument involves the misconception that the bankrupt has no concern with the disposition of the insurance money. If, as we are not at all sure, defendant's contention is that through the form of action adopted by the trustee it has lost the opportunity to now apply the insurance money upon the secured instead of the unsecured debt, we think there is no merit in it. Had the remaining mortgaged property realized enough to pay defendant's secured debt, it would gain nothing by now applying instead the repaid insurance money. It may be that as the estate has turned out, and in view of the trustee's recovery of judgment for the preferential payment, defendant would be better off by now making such change of application. This would, of course, release for unsecured creditors generally the bulk of the money applied under the bankruptcy proceedings upon defendant's secured debt. It may also be that, had restitution of the preferential payment been offered or assented to, defendant might have obtained such relief, if desired, either in the bankruptcy proceedings or by appropriate action otherwise. But this question does not require consideration, for not only has restitution never been offered or assented to, but the proceeds of the remaining mortgaged property were, apparently at defendant's instance, applied, under the bankruptcy proceedings, upon its secured claim. If, as has been judicially determined, the transaction was preferential in character, the trustee had the right to sue at law to set it aside; and if the ultimate result is not so favorable to defendant as, under other circumstances, it might have been, defendant has not been legally prejudiced. We think the court did not err in refusing to direct verdict for defendant, or in permitting recovery on the theory that the bankrupt was concerned in the insurance.

[3] It is objected that the common-law action of assumpsit cannot be maintained for the items amounting to $3,227.20, turned over to defendant, for the reason that it does not appear that the latter has received money or money's worth for the property, and that in the absence of such showing trover is the appropriate remedy. It is the general rule in Michigan that assumpsit cannot be maintained against a tort-feasor for the conversion of personal property to his own use, unless he has converted it into money or money's worth. Grinnell v. Anderson, 122 Mich. 533, 537, 81 N. W. 329; Lyon v. Clark, 129

Mich. 381, 384, 88 N. W. 1046. The District Judge was of opinion that there was a conversion of the property into money by the very act of defendant in taking the property "and applying its value in payment of" its unsecured claim. The Supreme Court of Michigan, in Lyon v. Clark, supra, held that assumpsit would not lie under section 67e of the Bankruptcy Act (Comp. St. 1913, § 9651) for property fraudulently conveyed, unless converted into money or money's worth. The question would present no difficulty if we were at liberty to consider as an admission the deposition of defendant's vice president, taken on its behalf in this case, though not introduced in evidence and not a part of the bill of exceptions, although sent up with the record, by stipulation of counsel, at plaintiff's request; for that officer there says of the items in question that "we bought them and paid the purchase price for them and used them in other places."

But disregarding this testimony, and assuming, for the purpose of this opinion, that we are bound by the rule respecting remedy which prevails in the state court, we think the District Judge did not err in the view taken. Lyon v. Clark was not an action to recover a preferential payment, under section 60b, but to recover the value of property fraudulently conveyed. The action there was for the value of the property, and apparently without reference to what defendant paid for it. The action here is not to recover on account of a tort, but merely the amount of a preferential payment, viz., the actual amount at which the defendant received and accepted the property as a payment upon its claim. The transaction, as affects this action, is not essentially different than if the property had been money. It was received at an agreed price, and was to all intents and purposes an actual purchase at such price, the difference being that, instead of the price being paid to the bankrupt and then by it repaid to defendant for application upon the debt, the same result was accomplished by direct application.

[4] Finally, it is contended that the allowance of defendant's claims by the referee is res judicata of the question of preferential payment and transfer. It is well settled that the action of a referee in bankruptcy allowing or disallowing a claim is a judgment, final in the absence of review; and Clendening v. National Bank, 12 N. D. 51, 94 N. W. 901, is cited as holding that the order of a referee permitting a defendant to retain alleged preferences, and allowing its claim for the balance, is an adjudication that the claim so allowed to be retained did not constitute a preference, and was not reviewable in the absence of appeal.

[5] Assuming the correctness of that decision as applied to the facts of the case, we think it has no application to the case before us. It is of the essence of the doctrine of res judicata that the proposition respecting which it is invoked be adjudicated either expressly or by necessary inference. There was no express adjudication that a preference was not created, and the record clearly repels all implication of such determination; for the order allowing defendant's unsecured claim was not made until 30 days after the order directing the trustee to sue, and on the day of its allowance an order was made that the

estate be kept open until the end of the litigation, presumably to provide for the distribution of the recovery, if any.

We find no error in the record, and the judgment of the District Court is affirmed, with costs.

MUTUAL LIFE INS. CO. OF NEW YORK v. POWELL.

(Circuit Court of Appeals, Fifth Circuit. October 5, 1914.)

No. 2549.

INSURANCE (§ 378*)—LIFE INSURANCE—WAIVER AFFECTING RIGHT TO AVOID POLICY FOR FRAUD—COLLUSION OF AGENT.

The insured in a life policy, in her application, which was made a part of the contract, with a provision that in the absence of fraud the statements therein should be deemed representations, and not warranties, in answer to questions by the medical examiner, stated that she had been subject to no illness or disease since childhood and was in good health; that she had consulted no physician within five years, had undergone no surgical operation, nor been treated in a hospital. All of such statements were false, and known to be so by her and by the medical examiner; but such fact was not communicated or known to the company. She was in fact afflicted at the time with a mortal disease, for which she had undergone a surgical operation in a hospital, and which caused her death within ten months after issuance of the policy. Such facts were undisputed. *Held*, that the fact that the medical examiner was the agent of the company did not charge it with knowledge of the facts known to him and that the fraud avoided the policy.

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

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

Action at law by W. C. Powell, administrator of the estate of M. Emma Powell, deceased, against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Reversed.

James H. Gilbert, of Atlanta, Ga., and William H. Fleming, of Augusta, Ga., for plaintiff in error.

James N. Talley, of Macon, Ga., and John T. West, of Thomson, Ga., for defendant in error.

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

FOSTER, District Judge. This is an action on a policy of life insurance, brought by W. C. Powell, as administrator of the estate of his deceased wife, M. Emma Powell. The defendant admitted the issuance of the policy sued on and the receipt of the premium, return of which it tendered, but set up that the policy never took effect, as a contract binding upon the defendant, because at the time of the payment of the first premium and the issuance of the policy the applicant was not in good health, but was afflicted with a disease which caused her death within less than seven months thereafter, to wit, carcinoma or

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

cancer of the breast, of which fact defendant was ignorant at the time of the payment of the premium and the issuance of the policy, and continued ignorant until after the death of the applicant, relying upon statements of the applicant which were false. The policy was issued February 9, 1910, and the insured died on December 6, 1910, of cancer, shorty after an operation by which her entire left breast was removed.

At the close of the evidence defendant moved the court to direct a verdict in its favor, which was denied. This action of the court is one of the errors assigned.

The policy contains the following clauses:

"This policy and the application herefor, a copy of which is indorsed hereon, or attached hereto, constitute the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement of the insured shall avoid, or be used in defense to, a claim under this policy, unless contained in the written application herefor, copy of which is indorsed hereon, or attached hereto."

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

The application, made part of the policy, contains the following clause:

"All the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are true, and are offered to the company as an inducement to issue the proposed policy, which shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been issued during my continuance in good health."

The medical examiner's report, as set out in the policy, contains, among others, the following questions and answers (the answers are italicized):

"4. What illnesses, diseases, or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.)

"Name of disease, etc.: *None.* Number of attacks: *None.*

"5. Have you stated in answer to question 4 all such illnesses, diseases, or accidents? *Yes.*

"6. State every physician who has prescribed for you or whom you have consulted in the past five years.

"Name of physician: *None.* Address: *None.* When consulted. Give nature of complaint. Give full details above under Q. 4. (*No answer.*)

"7. (a) Are you now in good health? *Yes.* (b) If not, what is the impairment? (*No answer.*) * * *

"10. Have you undergone any surgical operation? *No.* * * *

"17. (a) Have you ever been under treatment at any asylum, cure, hospital, or sanitarium? *No.* (b) If so, when, how long, and for what cause? (*No answer.*)

As to her said answers the insured signed the following certificate:

"I certify that my answers to the foregoing questions are correctly recorded by the medical examiner.

"[Signature of the person examined.] M. Emma Powell."

All the above answers were untrue. It is shown that in 1904 the insured consulted Dr. Groves, who was her family physician, and who also conducted the medical examination for the insurance company, about a sore on her left breast, and he sent her to Dr. Culbertson, a

specialist in such matters, who treated her; that in 1907 she again consulted Dr. Groves, who this time sent her to Dr. Oertel, also a specialist, and he in turn took her to a hospital, where she remained two days and underwent an operation by Dr. Crane, by which her left nipple and some surrounding tissue were excised. Defendant also offered evidence to the effect that the said answers were material, and, had they been answered truthfully, the policy would not have issued. There was also some showing that other answers regarding family history were materially false. All of the physicians testified in the case, except Dr. Groves, who was deceased. Dr. Culbertson testified that he diagnosed the sore on her breast as epithelioma, or skin cancer, and was under the impression that he had so informed her and her husband; and Dr. Crane testified that the disease for which he excised the nipple was Paget's disease, which he now considers always develops into cancer.

Had the case ended here, the defendant undoubtedly would have been entitled to a directed verdict, regardless of whether the statements to the medical examiner be considered as warranties, because of the apparent fraud, or merely as representations, since they were untrue and material to the risk.

But plaintiff seeks to avoid the effect of the false answers on the theory that the insured was in good faith and made true answers to the questions propounded, but that they were incorrectly recorded by the medical examiner; that the insured relied upon his advice in permitting the answers as written to stand; that the said doctor was the agent of the insurer, and had full knowledge of the facts, and the company is charged with his knowledge and bound by his acts.

To support this theory the plaintiff was sworn as a witness in his own behalf, and testified that he was present when his wife was examined by Dr. Groves prior to her visit to Dr. Culbertson, and he was also present when she was examined for the insurance policy. His testimony in part is as follows:

"Q. Mr. Powell, when those questions were asked about the treatment, what treatment she had had, surgical operations and things of that kind, what answer did she make Dr. Groves? A. She says to Dr. Groves, 'You know my condition;' she says, 'You know I have been treated by you and Dr. Culbertson and Dr. Oertel; what should my answer be in a case like that?' The doctor says, 'You are done and well now; you have been well for four years; you haven't felt any effects of this place,' he says; 'I would answer in the negative; I would answer, "No"—that I was not in the hospital, and was not treated, according to the questions asked in the application.' Q. Who wrote those answers? A. Dr. Groves."

And he testified to similar conversations regarding the other questions, not necessary to set out more in detail.

Plaintiff cites the case of Fidelity Mutual Life Association v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193, decided by this court, and Continental Life Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341, as controlling authority, and various other cases along the same line. We do not think the two cases above cited are analogous to the one at bar.

In the Jeffords Case it was contended that, while the insured was afflicted with incipient consumption, he did not know it; that he men-

tioned several doctors who had treated him, but had merely forgotten to mention others; that under the Georgia Code, if in good faith, he could recover. The evidence was conflicting, and there was no motion to direct a verdict. The ruling of the court was only as to the charges given and refused. Here there is no conflict of evidence. The insured knew the facts, had not forgotten them, and actually discussed them at the time of answering the questions.

In the Chamberlain Case the false representation was as to other insurance. The insured was a member of certain co-operative societies, and informed the agent of that fact, and after considerable discussion it was decided to answer the question as to other insurance in the negative. There was no question as to the good faith of either the insured or the agent, and there was some latitude for difference of opinion.

The conduct of the insured in this case is incompatible with good faith. It may be that neither she nor her husband knew that she was afflicted with cancer, as all people are prone to deceive themselves with regard to lingering and fatal maladies; but even as to this there is considerable doubt. But it is unbelievable that she did not know that the trouble with her breast was serious, as otherwise her family physician would not have sent her to specialists. She could not help knowing that she had undergone a surgical operation, that she had been treated in a hospital, and that she had consulted physicians within five years before the application for the policy. As to her knowledge of these facts the testimony of her husband removes all doubt.

It would be fruitless to attempt to analyze and reconcile the many apparently conflicting decisions on this subject, though doubtless there are special facts in each case to distinguish it from the others, as in our opinion this case is controlled by the decisions in New York Life Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, Ætna Life Insurance Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356, and Prudential Insurance Co. v. Moore, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367. In this case it is apparent that a gross fraud was perpetrated on the insurer, which would have been impossible without the active participation of the insured. The medical examiner was not the agent of the company for the purpose of defrauding it. It had the right to rely on the statements of the insured that her answers were true and had been correctly recorded by the doctor, and it is not estopped to set up their falsity.

In the Fletcher Case, supra, the facts and contentions were practically the same as here, and the court, through Mr. Justice Field, quoting with approval the language of the Supreme Court of Connecticut, said:

"But it cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is manifest. He well knew that, if correct answers were given, no policy would issue. Prompted by some motive, he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might come to his knowledge from any other source. His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the

consummation of the fraud, would be monstrous injustice. * * * The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or insured, either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud, and the case falls within the principle of Lewis v. Phœnix Mutual Life Insurance Co., 39 Conn. 100. If she was an instrument, she was so because of her own negligence, and that is equally a bar to her right to recover."

In the two Moore Cases cited above the provisions of the Georgia Code were considered by the Supreme Court, and the decisions are clearly to the effect that where the statements in the application and answers to the medical examiner were false and material, if undisputed, the question of good faith was not one for the jury. It is true that the policies in the said two cases contained clauses to the effect that no statement or declaration made to any agent or examiner or other person not contained in the application could be taken or construed as having been made to or brought to the notice and knowledge of the company. While the language of the policy under consideration as contained in the clauses above quoted is somewhat different, its effect is the same. But this is immaterial, as on the undisputed facts the fraud was apparent.

In this case the defendant was entitled to a directed verdict. The overruling of the motion to that effect was error, and the judgment must be reversed. As the same questions are not likely to arise on the next trial of the case, it is unnecessary to consider the other assignments of error.

Reversed and remanded.

PRUDENCE COAL CO. v. PERKINS.

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

No. 1,250.

1. MINES AND MINERALS (§ 70*)—CONSTRUCTION OF COAL LEASE—PRACTICAL CONSTRUCTION BY PARTIES.

Where a lessee of coal lands paid royalties for ten years, three of which were after the death of the lessor, on a certain construction of the terms of the lease, which were somewhat ambiguous, it will be taken as the true construction as against the lessee.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192–197; Dec. Dig. § 70.*]

2. MINES AND MINERALS (§ 70*)—ACTION FOR ROYALTIES UNDER DEED OF LEASE—PLEADING.

A lessor of coal lands may recover royalties due under the lease on coal previously mined and sold by the lessee under the common counts in assumpsit in West Virginia, where by statute assumpsit may be maintained on a sealed contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192–197; Dec. Dig. § 70.*]

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

---

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

Action at law by Annette S. Perkins against the Prudence Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. G. Mathews, Malcolm Jackson, Mollohan, McClintic & Mathews, and Brown, Jackson & Knight, all of Charleston, W. Va., for plaintiff in error.

Geo. E. Price, of Charleston, W. Va., for defendant in error.

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

McDOWELL, District Judge. This is an action of assumpsit instituted August 30, 1912, by the defendant in error, the legatee of J. A. McGuffin, who will be hereafter referred to as the plaintiff, against the plaintiff in error, a corporation, which will be hereafter called the defendant. The declaration contains only the common counts. With it was filed a bill of particulars, which fully details the nature and items of plaintiff's claim. The defendant pleaded non assumpsit and offsets, and filed with the latter an account of offsets. The case was tried before a jury, and resulted in a directed verdict and judgment for the plaintiff.

On May 1, 1900, Mrs. Sarah Lyman and her husband made to J. A. McGuffin a coal mining lease of a tract of 138 acres. The lease was to run until all the workable and merchantable coal should have been mined from the leased tract and from other tracts operated in connection therewith, but not to exceed 30 years. The royalty agreed upon was 6 cents per ton of 2,240 pounds of coal mined from the leased premises. The following is the stipulation as to minimum:

"If the said royalty in any year or years after the period of one year from the date of this lease, and before all the coal is mined from said land as hereinafter provided, shall not under the provisions above set out amount to the sum of five hundred dollars ($500.00), then the lessee shall pay said sum of five hundred dollars ($500.00) to the said Sarah E. Lyman, her heirs and assigns, as a minimum rental for that year, but the excess of said five hundred dollars ($500.00) so paid over the amount of coal mined in that year at six (6) cents per ton of two thousand two hundred and forty (2,240) pounds, shall be credited on the excess of royalty over and above the five hundred ($500.00) dollars in the next succeeding year, provided the same is done within one (1) year from the end of the year in which the said sum of five hundred dollars ($500.00) rental becomes due and payable."

In this lease McGuffin was given the right to assign the lease to a corporation already chartered or to be chartered, and it is provided that the coal on the leased premises is to be mined "in connection with mines upon lands leased from Morris Harvey or any other person or persons." Under this lease the royalties are payable in quarterly installments on the 1st days of January, April, July, and October of each year.

On April 18, 1900, the said McGuffin secured another coal lease from C. T. Jones and others, for a term of 40 years, at a royalty of 5½ cents per ton of 2,240 pounds. The agreement as to minimum here follows:

"If the said royalty in any year or years after the year 1902, and during the term of this lease, shall not under the provisions above set out amount to the sum of four thousand dollars, then the lessee shall pay said amount of $4,000 as a minimum royalty for that year, but the excess of said $4,000 so paid over the amount of coal mined in that year at five and one-half cents per ton of 2,240 pounds, shall be credited on the excess of royalty over and above the four thousand dollars in the next succeeding year, provided the same is done within two years from the end of the year in which the said sum of $4,000 royalty becomes due and payable."

The royalty payments became due in quarterly installments on the same days as under the Lyman lease.

On November 28, 1900, McGuffin secured another coal lease from Morris Harvey. The royalty was 6 cents per ton of 2,240 pounds, payable quarterly, commencing April 1, 1902. No minimum is required.

On December 19, 1900, H. E. Firmstone and J. E. Johnson made a lease to McGuffin, which, as subsequently modified, provided for a royalty of 6 cents per long ton, payable quarterly on the same days as under the foregoing leases. The modified provision as to minimum royalty is as follows:

"If the said royalty, in any year or years, after the year 1902, and during the term of this lease, shall not, under the provisions above set out, amount to the sum of $2,000, then the lessee shall pay said amount of $2,000 as a minimum royalty for that year. But, should the actual royalty at 6 cents per ton, of 2,240 pounds, and 75 cents per 1,000 tons, as above provided, not equal the said sum of $2,000 in any year, the said lessee shall have the right to reimburse itself, without interest, by mining sufficient coal at the rate of royalty aforesaid, in excess of $2,000 per annum, at any time and in any year or years during the term of this lease."

This lease also provides for assignment to a corporation already chartered or to be chartered, and provides that the mining on the leased premises is to be carried on in connection with the mining of the Harvey land, the Jones land, and other lands.

On January 1, 1901, McGuffin executed a contract under seal to the Prudence Coal Company. After a recital that McGuffin owns leases from C. T. Jones et al., Mrs. Lyman, Morris Harvey, and from Firmstone and Johnson, this document, inter alia, provides:

"That the said party of the second part shall assume, observe, perform, and comply with each and all the obligations, covenants, provisions, and conditions contained in said several leases which the said party of the first part is obliged thereby to observe, perform, and comply with, and especially shall pay to the said several lessors therein named, or their assigns, the rents and royalties and all sums of money therein required to be paid to them by said party of the first part, and shall protect and save harmless the said party of the first part, from all claims of the said lessors or their assigns for said rents, royalties, and sums of money.

"That the said party of the second part, in addition to the rents and royalties to be paid by it to the said lessors as hereinbefore provided, shall pay to the said J. S. McGuffin, party of the first part, his personal representatives or assigns, such further rent or royalty as, with the rent and royalty provided for in said respective leases, will make ten cents rent or royalty for each and every ton of coal mined or dug by it from said respective leasehold properties upon which royalty is to be paid under said leases. The said additional rent or royalty to be paid to the said party of the first part by the said party of the second part at the same time or times that the original rents or royalties mentioned in said leases are payable, respectively, to the several lessors

therein named. And the tonnage upon which such additional rents or royalties are to be paid to the said party of the first part, so as to make up said 10 cents per ton, shall be determined in the same manner as the tonnage is determined for the rents and royalties to be paid to the said lessors; it being the intention of the parties hereto that the said party of the second part shall pay altogether the royalty of 10 cents per ton for all the coal mined from said leasehold premises upon which royalty is payable under said leases, and that it shall pay to the several lessors the rents and royalties provided for in their several leases, respectively, and then pay to the said J. A. McGuffin, party of the first part, his personal representatives or assigns, the balance of said 10 cents over and above what is paid to the said lessors.

"The said party of the second part shall stand in all other respects in the place of the said party of the first part under the said several leases hereinbefore transferred and assigned to it.

"And in consideration of the premises and the assignment to it of the leases and leasehold estates aforesaid, the said Prudence Coal Company, party of the second part, hereby covenants and agrees with the said party of the first part that it will observe, perform, and comply with all the obligations, covenants, stipulations, and conditions contained in the several leases hereinbefore assigned to it, and that it will pay to the several lessors therein named all the rents, royalties, and sums of money therein provided to be paid by the said J. A. McGuffin, and will protect and save the said McGuffin harmless from all claims on the part of said lessors for such rents, royalties, and sums of money, and that it will pay to the said party of the first part, his personal representatives or assigns, the additional rents and royalties provided for in said several leases, so as to make the rent or royalty of 10 cents per ton upon each and every ton of coal mined and upon which royalty is payable under said leases, as hereinbefore fully set forth."

The following were agreed facts:

"First. That prior to the execution of the lease from H. Firmstone and J. E. Johnson and wife to J. A. McGuffin, and prior to the assignment thereof, along with other leases, by the said McGuffin to the Prudence Coal Company by the deed of January 1, 1901, said Firmstone and Johnson had been long and close business associates in other coal properties with the said McGuffin, and personal friends, and that prior to the execution of both said lease and said assignment it was agreed and understood between said Firmstone and Johnson, on the one hand, and said McGuffin, on the other hand, that if said lease was made to said McGuffin that it, together with the other leases taken by said McGuffin, were to be assigned by him to a corporation to be formed, and that said Firmstone and Johnson were to purchase, take and own a controlling stock interest in said corporation, to wit, 60 per cent. of said stock, and said McGuffin and other associates the residue, to wit, 40 per cent., and that the entire management and full control of said properties was to be given the said McGuffin, who was to be elected president of said corporation, and that this agreement constituted one of the considerations of said lease from Firmstone and Johnson to said McGuffin, and was subsequently fully carried out by the assignment of said leases to the Prudence Coal Company, the purchase of stock therein, the election of said McGuffin as president, and the adoption of resolutions vesting him with full control and management of said properties for said corporation, and the assumption and discharge by him of such duties, until he sold his stock in said company on the 1st day of May, 1906.

"Second. That said lands so leased by said Firmstone and Johnson were essential to the economical mining of the other lands leased by said McGuffin and assigned to said company, and lay between said other lands and the Chesapeake & Ohio Railway and Kanawha river.

"Third. That for the year 1902 all of the rents and royalties due under said leases were paid by the defendant by check to said McGuffin, who was left to settle with his lessors, and thereafter until said McGuffin sold his stock and retired as president, on the 1st day of May, 1906, he caused himself to be paid by said company under his management a royalty of 4 cents per ton on each ton of coal actually mined and dug from the Lyman lease, the Firmstone

and Johnson lease, and the Harvey lease, and 4½ cents per ton for the Jones lease, without regard to the minimum royalty exceeding, equaling, or being less than the actual tonnage royalty due in each year under said leases, respectively, to the lessors therein which minimum royalty was paid said lessors during each year, *and that after the death of said John A. McGuffin until the third quarter of* 1911 *said like royalty was paid to the estate of John A. McGuffin, and that after said sale of stock by said McGuffin and until his death like royalties were paid him by said company.*

"Fourth. That the minute books of said company do not show that the propriety and amounts of royalties payable to said McGuffin, or his assigns, under said assignment of January 1, 1901, was brought before the stockholders or directors, or was at any time the subject of corporate action by either.

"Fifth. That the following is the number of tons actually mined and dug from all of said leased premises during the following quarters, respectively:

For the quarters ending	Lyman Lease.	Firmstone & Johnson Lease.	Harvey Lease.	Jones Lease.	Total.
Sept. 30, 1911	2,639	21,185	1,882	11,683	155,397
Dec. 31, 1911	3,657	18,308	1,388	10,796	141,633
March 31, 1912	1,669	18,882	1,462	12,484	144,229
June 30, 1912	2,156	20,815	2,267	14,653	166,889

"Sixth. That the usual and ordinary royalty under mining leases in the New River district at the time of the execution of the leases and assignment aforesaid was 10 cents per ton royalty on coal actually mined.

"Seventh. That said defendant took possession of said leases and leaseholds shortly after January 1, 1901, and has since continuously mined coal therefrom to the present time. That J. A. McGuffin died on the 8th day of February, 1908, leaving a legal will, which has been duly probated in Kanawha county, by which will, after certain specific devises and bequests, he devised and bequeathed all of the rest and residue of his estate to his widow, Annette S. McGuffin, who afterwards married Frank Perkins, and that all of the interest of said John A. McGuffin in and under said assignment of January 1, 1901, constitutes a part of said rest and residue of said estate. All of the debts of said John A. McGuffin have been paid, and that if any royalties are due under said assignment of January 1, 1901, for the quarters ending September 30, 1911, December 31, 1911, March 31, 1912, and June 30, 1912, the plaintiff is entitled thereto.

"Eighth. That the Prudence Coal Company was chartered and organized at the instance of John A. McGuffin and solely by his attorneys, and the president and board of directors of such company, were such attorneys, and the assignment of January 1, 1901, from said McGuffin to said company, was drafted by his said attorneys and submitted to and accepted by said company, by its directors, while the directorate consisted of said attorneys only, and before any stock other than that of the original incorporators, who were said attorneys, was issued.

"Ninth. It is further agreed that the plaintiff, Annette S. Perkins, is a citizen and a resident of the state of Ohio, and that the defendant, Prudence Coal Company, is a corporation organized and existing under the laws of the state of West Virginia, and a citizen of such state, and is doing business in Fayette county, West Virginia, in the Southern district of West Virginia."

Upon the introduction of the foregoing documents and the agreed facts the plaintiff rested.

The defendant's contention was that the total cost of coal to the coal company was not to exceed 10 cents per ton and that losses by

reason of payments of minimum were recoverable from the plaintiff. In its account of offsets it claims to have paid more than 10 cents per ton on coal mined from the Jones property as follows:

1907	$ 964 76
1908	847 17
1909	122 01
1910	88 21
1911	678 98
	$2,701 13

Evidence supporting this account was offered by the defendant, but the court, construing the contract as giving the plaintiff a right to 4½ cents per ton on coal mined from the Jones tract and to 4 cents per ton on the coal mined from the other tracts, regardless of the increase of cost to the defendant growing out of its failure to mine as much as the minimum, declined to allow the evidence to come in.

The Jones lease provided for a royalty of 5½ cents per ton, and the other leases for a royalty of 6 cents per ton. If all the leases had provided for a royalty of 6 cents per ton, the contract between McGuffin and the coal company in all reasonable probability would simply have provided for the payment to McGuffin of 4 cents per ton on each ton mined, and in such event the claim of the defendant would have had no foundation. The confused language adopted by the draftsman was doubtless to be explained by the fact above mentioned. There was, however, a way open to the coal company by which it could pay to McGuffin 4½ cents per ton on all coal mined from the Jones land and 4 cents per ton on the remaining coal actually mined, and still pay not exceeding 10 cents per ton on the coal actually mined. The coal company had merely to exercise the foresight and the diligence necessary to mine at least the minimum provided for by the Lyman, Jones, and Firmstone & Johnson leases within the time of grace provided for.

[1] We find it unnecessary to construe the contract between McGuffin and the coal company from the mere face of the paper. The provision for payments to McGuffin "at the same time or times that the original rents or royalties mentioned in said leases, are payable, respectively, to the several lessors therein named," and the total failure to provide for the contingency that has arisen, at least tend to support the conclusion of the court below. But, in any event, the parties have themselves construed the contract in accordance with the plaintiff's contention. Granting that from 1902 to May 1, 1906 (while McGuffin was in charge of the company), the acts of the parties may perhaps not be satisfactorily regarded as a construction of the contract by both sides, their acts from May 1, 1906, until McGuffin's death in 1908 and thereafter until July 1, 1911, must be regarded as a sufficient reason for holding that both parties to the contract have construed it according to the contention of the plaintiff. 9 Cyc. 588; Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. Ed. 594; Insurance Co. v. Dutcher, 95 U. S. 269, 273, 24 L. Ed. 410; Topliff v. Topliff, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 30 L. Ed. 1110; District of Columbia v. Gallaher, 124 U. S. 505, 510, 8 Sup. Ct. 585, 31 L. Ed. 526. It

follows that we find no error in the construction put upon the contract by the trial court.

[2] On the ground that there is no count in the declaration to cover the plaintiff's claim, or on which the bill of particulars could be founded, the defendant moved the trial court to strike out the evidence introduced by the plaintiff and to direct a verdict for the defendant. By statute assumpsit may be maintained on a sealed contract in West Virginia. The contract here had been executed prior to suit by plaintiff's testator, the event on which the payment sued for became due had happened, and as to such claims nothing remained to be done but payment by the defendant. Perkins v. Hart, 11 Wheat. 237, 251, 6 L. Ed. 463; Railroad Co. v. Lafferty, 2 W. Va. 104, 116; Moore v. Wetzell, 18 W. Va. 630, 640; Jackson v. Hough, 38 W. Va. 236, 18 S. E. 575, 576; Empire Co. v. Hull Co., 51 W. Va. 481, 41 S. E. 917, 920; Lord v. McCracken, 65 W. Va. 321, 64 S. E. 134, 135; Shipman, C. L. Pl. (2d Ed.) 22; 3 Standard Proc. 196. It is not an unreasonable inference from the agreed facts that the defendant had, prior to the suit, sold and been paid for the coal mined by it prior to June 30, 1912. The plaintiff's construction of the contract of January 1, 1901, being correct, we do no violence to the language of the fifth count of the declaration in holding that it adequately describes plaintiff's cause of action. To the extent of plaintiff's royalties the defendant had "had and received money for the use of" the plaintiff. Again, the ultimate object of the parties to the contract was that plaintiff's testator should be paid money for coal after it was mined. In this aspect the count for goods sold and delivered is sufficiently descriptive of the cause of action. However, we need not rest our decision here. There could have been no prejudice to the defendant from the trial court's ruling, unless the defendant was surprised. Not only did the bill of particulars filed with the declaration apprise the defendant of the exact nature of plaintiff's claim, but the account filed with the defendant's plea of offsets shows that defendant fully understood the plaintiff's case as it was subsequently set up by the evidence. We have no hesitation in affirming the action of the trial court here complained of.

The judgment below will be affirmed, at the cost of the plaintiff in error.

Affirmed.

TUCKER v. BRYAN et al.

In re EAST COAST LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1913.)

No. 1093.

1. LIENS (§ 16*) — COMMON-LAW LIEN — WAIVER BY CLAIMING STATUTORY LIEN.

By instituting proceedings to claim and perfect a lien given by statute, the claimant waives the right to claim a common-law lien.

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

2. LOGS AND LOGGING (§ 26*)—STATUTORY LIENS—"LABORER."

Persons contracting to log and cut certain timber for a stated price per thousand feet for the lumber produced *held* not "laborers," within the meaning of Code Va. 1904, § 2485, and not entitled to a lien on the lumber thereunder.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 60–66; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, First and Second Series, Laborer.

Who are entitled to liens or preferences as laborers or employés, see note to Latta v. Lonsdale, 47 C. C. A. 2.]

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of the East Coast Lumber Company, bankrupt. On petition of L. L. Tucker, as surviving partner of W. L. & L. L. Tucker, against George Bryan, trustee, and John A. Lamb and P. H. C. Cabell, receivers, of said bankrupt, to review and revise an order of the District Court denying petitioners' right to a lien. Affirmed.

The following is the opinion of Snead, Referee:

Pursuant to an order entered in the above-entitled matter upon the 12th day of November, 1910, referring the petition of W. L. & L. L. Tucker to him to consider, your referee in bankruptcy begs to certify:

That upon the 15th day of December, 1910, all parties interested herein appeared before your referee, either in person or by counsel, for the purpose of taking up the question raised in said petition, and, upon the motion of the receivers and trustee, by counsel, to reject said petition, and after hearing argument upon said motion, he entered an order, a copy of which is annexed to the petition hereinafter referred to, refusing said petitioners the right to file their said petition. That thereupon, on the 9th day of January, 1911, said petitioners presented a further petition for a review of said order, which was granted. That the question presented on this review is whether or not petitioners' first petition presented such a cause of action as would entitle them to have the same filed. That petitioners insisted upon taking depositions to show that they were entitled to have their petition filed, but your referee was of opinion that the same showed upon its face that it did not present a good cause of action, and that, therefore, it was not necessary to take any testimony to determine this question.

Said petition sets forth that upon the 23d day of July, 1906, petitioners entered into a contract with the South Atlantic Lumber Company, Incorporated, the name of which company was afterwards changed to that of the East

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

Coast Lumber Corporation, by which they agreed to move their sawmill upon the property of the South Atlantic Lumber Company, Incorporated, and to there log, mill out, and rack certain lumber for the sum of $5.50 per thousand; that they did so log, mill out, and rack 417,800 feet, for which they claim they are due the sum of $2,193.51, with interest from October 4, 1907; that petitioners are entitled to a common-law lien for this amount, and that they are also entitled to, and have perfected, a statutory lien for same, as provided by section 2485 of the Code of Virginia. That it fully appears, from the record in this matter, that petitioners have, as set forth in their said petition, perfected their statutory lien in accordance with sections 2485 and 2486 of the Code of Virginia; but it is contended by counsel for the receivers and trustee, and your referee is of opinion, that petitioners are not entitled to a lien under section 2485 of the Code of Virginia, and that by resorting to this method of collecting their money they have waived their common-law lien, if they ever had one. For authority for the proposition that petitioners have waived their common-law lien, as aforesaid, see Amer. & Eng. Ency. of Law (2d Ed.) p. 32.

Your referee is of opinion that petitioners are not entitled to a statutory lien under section 2485 of the Code of Virginia, because their petition sets forth and shows that they are contractors and not laborers, and laborers and not contractors are the class intended to be protected by this statute. Petitioners contend that they are laborers within the meaning and intent of this statute, but from a careful consideration of the cases construing this and similar statutes your referee is of opinion that they are not. See Vane v. Newcomb, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310, and Frick Co. v. Norfolk & O. V. R. Co. et al., 86 Fed. 725, 32 C. C. A. 31; the latter case construing the statute in question and citing the former, in which was construed a similar statute, which used the word "employé," and in which case the facts were practically the same as those in the Frick Case, as well as those in the one under consideration.

I hand up herewith the petition I refused to allow to be filed, as well as all other papers that have been filed in this matter incident to petitioners' claim. All of which is respectfully submitted for review by the District Court.

The following is the opinion of Waddill, District Judge:

The conclusion reached by the court is that the action of the referee, in deciding adversely to the claim of the petitioners of their right to assert at this time a lien against the fund under the control of the court, either under the statute or at common law, for the amount sought to be recovered by them, as set up in their said petition, is correct, and should be approved.

John A. Coke, Jr., of Richmond, Va. (W. E. Homes, of Boydton, Va., and Coke & Pickrell, of Richmond, Va., on the brief), for petitioner.

John A. Lamb and Henry C. Riely, both of Richmond, Va., for respondents.

Before GOFF and PRITCHARD, Circuit Judges, and McDOWELL, District Judge.

PER CURIAM. Affirmed.

MERRELL-SOULE CO. v. NATURAL DRY MILK CO.

(District Court, N. D. New York. October 22, 1914.)

PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — PROCESS OF DESICCATING MILK.

The Stauf patent, No. 666,711, for a method of desiccating blood, milk, etc., is for the same invention described and claimed in the original application, was not anticipated, and discloses patentable invention; also *held* infringed.

In Equity. Suit by the Merrell-Soule Company against the Natural Dry Milk Company. On motion by complainant for preliminary injunction, and by defendant to dismiss. Injunction granted, and motion to dismiss denied.

Motion by the complainant for an injunction pendente lite in a suit to restrain alleged infringement of the Stauf and other patents. Motion by the defendant to dismiss as to the Stauf patent, No. 666,711, dated January 29, 1901, application filed October 3, 1900.

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., and Livingston Gifford, of New York City, for complainant.

Paul Carpenter, of Chicago, Ill., and Melville Church, of Washington, D. C., for defendant.

RAY, District Judge. The Stauf patent, on which the complainant mainly relied on the argument (patent to Stauf, No. 666,711, of January 29, 1901, for method of desiccating blood, etc.), has been the subject of judicial examination and determination in Merrell-Soule Co. v. Powdered Milk Co. of America (D. C.) 215 Fed. 922, Hazel, District Judge, who arrived at the conclusion that the patent is valid and had been infringed by the defendant there. That case is now on appeal, and, as there was a supersedeas, no injunction is now in force. I would content myself with a reference to and an approval of that decision, but for the fact that the defendant now brings forward and urges the patent to Williams (British), No. 22,655, applied for December 29, 1891, and issued October 29, 1892, as a complete anticipation, or as demonstrating that, in view of the prior art, the Stauf patent shows no invention and is void. Stauf, in his patent says:

"I * * * have invented certain new and useful improvements in methods of obtaining the solid constituents contained in liquid—such as blood, milk, and the like—in the form of dry powder."

His process in substance is to eject the milk through very fine spray nozzles upwardly and laterally into a chamber (and the milk may be made quite warm before being sprayed, but must not be cooked in the slightest degree then or thereafter while undergoing the process) having and maintaining a predetermined temperature, "because if the proper temperature should be exceeded the dried powder might readily be decomposed," says the patent. Here comes in one of defendant's criticisms. It urges that the patent fails to disclose the proper temperature, or any temperature, to which the milk may or should be subjected in

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

bringing about the desired result without decomposing the solids of the milk or changing their chemical properties, and that, therefore, no disclosure is made which will enable a person reasonably skilled in the art to practice the invention. But I think it is expressed and understood that the heat must be such, and kept under such control, that the milk will not be scalded or cooked in the slightest degree, and that this temperature is easily determined or well known.

At the bottom of this chamber into which the milk is ejected in this fine spray is a heating device, and its draught may be regulated by the admission of more or less air as desired. Hot air rises, but this rising of the heated air into which the milk is sprayed or thrown is made more acute or forcible by means of a pipe which supplies air under pressure to the spray nozzles carrying and ejecting the milk. It follows that the milk in the form of fine spray comes in contact and mixes with the rising heated air and is carried upwardly, and if the contact is long enough and the heat sufficient it will continue to rise and spread, if facilities for its spread be provided, and provision is made for the escape of the air at the top. At the top of this chamber or tower is another chamber of much greater lateral dimensions, and by suitable means this current of hot air is divided or diverted outwardly away from the mouth of the first chamber mentioned, and over a pit or pits which receives the dried milk or solids of the milk as it falls. The moisture passes out of this upper chamber into the outside world through a sort of web, such as cheese cloth or the like, which retains any particles of the solids still floating and causes them to drop into the pits.

We have a new structure for carrying out this process, but I see nothing patentable in the structure itself as a mere structure. But the process itself was new and novel and useful. Cooked milk, or partly cooked milk—scalded milk—with the solids partly or wholly chemically changed, and with the water evaporated, was old. For the first time in this art Stauf separated the solids contained in fresh or new milk from the water and retained the solids in such form (a powder) and in such unchanged condition that on mixing this powdered milk (so called) with water he had again fresh, sweet milk, with the same properties as before it underwent the process. His means for carrying out the process were new in combination and in application. There was no new element, except, perhaps, in mere shapes and forms, but his combination of these elements was new. Stauf, therefore, invented a new and a useful process of great value to mankind, and he also provided means for carrying it out, and taught the world how to use it, unless Williams (British patent, No. 22,655, of 1891) was ahead.

It will be noted and remembered that Stauf's process provides heat for heating the air, mainly all, if not all, supplied at the bottom of the drying chamber, and it is forced, and partly, perhaps, drawn upward. In its upward course it overtakes and comes into contact and mingles with the fine sprays of milk, also having a tendency to rise, and which is ejected upwardly from the spray nozzles, and mixed with air introduced from nozzles at the same time at the same place upwardly. Thus we have two ascending currents, one of air and sprayed milk mixed, and another of hot air coming from below, but all commingling in the upper part of the chamber. The arrangement and draught and process

is such that the dried particles do not drop down on the heating apparatus, and the heat is so controlled and graduated that there is no scalding or burning of the milk when in vapor form or in the form of dried particles—powdered milk.

Now, turning to the Williams patent, we find that his is a process and an apparatus for "recovering salt from brine." His claims read as follows:

"1. As means for the recovery of salt from brine, or alkali, alum, or other salts from liquids, the employment of towers or upright hollow shafts into the upper end of which the brine or liquid is forced and sprayed, either with or without the aid of an air blast, the said falling spray being met by a current or currents of hot air introduced at the foot of the tower or shaft, and of a temperature sufficiently high to evaporate the brine or liquid, and separate the contained salt or matter, substantially by the means and in the manner hereinbefore described and shown.

"2. The arrangement, construction, and combination of parts comprising my improved apparatus or means for recovering salts from brine solutions or liquids arranged and operating substantially as hereinbefore described and illustrated."

The mode of operation is thus described:

"The mode of operating my invention is as follows: The air-heating portions of the apparatus having been brought to the required temperature, the exhauster in connection with the conduit *e* is set in motion, so as to draw hot air through the tower and thoroughly heat it. I then admit the brine current leading to the pipes *f* and at the same time turn on the cold air blast delivered by the blast pipes *h*. The cold air blows the brine in a fine spray from the delivery nozzles of the pipes *f*, and this spray showering down in the towers meets the ascending currents of highly heated air. The air is so hot that it completely evaporates the spray before it can reach the bottom of the towers, and thus separates the contained salts or other recoverable matters in the brine, the said separated salts or matters falling to the bottom of the towers and being ejected by the revolving valves *r r* which direct it to the pit *s*, from which it is removed in any convenient manner. The steam and vapors evolved by the evaporation of the brine are drawn away from the top of the tower by the exhauster as already described."

He has a tower or towers, heating apparatus, and pipes and openings for conducting the hot air at the foot on the sides of the tower into the tower, and means for forcing it upwardly. He has pipes with spray nozzles at the very top of the tower, through which the brine under pressure is forced into the tower downwardly through spraying nozzles. The descending brine in the form of spray is thus forced into the ascending current of *very hot air,* and the *great heat* evaporates the water, and the salt drops directly down to the bottom of the tower, and the water in the form of steam rises and escapes through suitable openings and a conduit. It is evident that Williams had no conception of a process for making dry or powdered milk by commingling ascending hot air with ascending milk spray and air under pressure, with the heat so regulated and controlled that the solids of the milk would not be at all changed, and would be left in a form which, on their being mixed with water, would reproduce pure sweet milk having all the properties it had before being subjected to the process.

It is self-evident that the process which Williams described for separating salt from brine, or extracting the salt from brine, will not produce the dried or powdered milk of the Stauf patent. Williams lays

great stress on the air being "heated to a very high temperature," and "the air becomes very highly heated." The real merit of his process was to drop brine in the form of spray into an ascending continuous current of very hot air, the hotter the better, so as to evaporate all the water contained in the brine before the salt contained therein reached the bottom of the tower. It is undoubtedly true that, should you substitute milk for brine in Williams' tower, and subject it to this great heat, you would get some dried or powdered milk. The water would be evaporated if the heat was great enough, but it does not follow that you would have powdered milk of any value for commercial purposes as dried milk, or which would produce milk having all the constituents of milk on being mixed with water. There is more to the Stauf process than merely injecting milk under pressure through spraying nozzles, or milk and air commingled into a tank or tower or receptacle having a strong current of hot air, with which it commingles, which receptacle has apertures for the escape of the hot air and vapor. The principle of the two processes, the operation and the result, are different. True, they have one thought in common, and that is separating the solids contained in a fluid from the water by means of a current of hot air under pressure into which the fluid is sprayed.

Coming to the question of infringement, I think this very plain. The defendant has adopted every step and feature of the Stauf process. It has hot air, regulated as to heat, introduced at the bottom sides of the tank (or call it tower), means for diverting the current to one side and allowing it to escape with the steam after the drying process has taken place, and the milk is introduced laterally under pressure with air through spraying nozzles, or it may be one nozzle on one side, or on the sides of the tank (not from the top downwardly); and the current of heated air is such as to carry the hot air commingled with the sprayed milk upwardly and along over receptacles for the solids of the milk as they drop down, the steam passing out through suitable receptacles. There is no doubt that the complainant uses the Stauf process. I have no doubt the defendant uses the same process, and in so doing infringes. It is true that the structure in which the process is carried on by complainant differs from that shown in the Stauf patent; but the process used remains the same. The defendant's structure is somewhat different from both, but not so as to change the process or result.

It will be noted and remembered that the Stauf process, as illustrated in the drawings, provides for heating the air so as to render it moisture absorbing; but it is immaterial how this is accomplished, provided it is made sufficiently moisture absorbing, and it is immaterial from what source it is produced, or at what point it enters the chamber, provided it does not seriously interfere with the spraying and vaporizing process. The claim is satisfied, irrespective of its source or point of entry, or the direction which it takes after entry.

The milk is sprayed into the chamber at any suitable or convenient point, by any suitable means, and the claim is satisfied, irrespective of by what means the spraying is done, or what direction the spray takes after its entry into the chamber, provided the air absorbs the moisture

contents of the liquid and then passes off, allowing the solids of the liquid to drop down, so as to be out of the active sphere of influence of the air current, or so as to be conveyed to any other suitable collecting space.

The claim of the Stauf patent 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."

The drawings show means for carrying out the process, but the patentee is not confined to the means shown. Other means may be used. It is not necessary that the heated air come in at the bottom, or that the milk be sprayed in upwardly. The essentials are: (1) Converting the milk into a fine spray; (2) bringing this spray or atomized milk into a regulated current of heated or moisture absorbing air, so that the liquid is completely vaporized; (3) conveying the dry powder to a suitable place for settling or deposit; and (4) procuring means or a place for the escape of the air and vapor separated from the powder or dried-out solids.

The Williams patent relates to a remote art, and is not, therefore, a pertinent reference to the claim of the Stauf patent.

I think the motion for a preliminary injunction should be granted.

On Motion to Dismiss.

I see no ground whatever for the motion to dismiss as to the Stauf patent. It is, of course, true that the patent granted must be for the same invention originally described and claimed. But the farmer with little education, who invents a new and a useful electrical device and applies for a patent, is entitled thereto, provided he describes it and claims it in terms which can be understood, even if his description and claim be in uncouth and ungrammatical language, and every rule of correct English be more or less violated. It is not necessary that he be a Chesterfield, an Edison, a Murray, a Webster, a Brown, or a Clark. When he gets into the Patent Office, the question is: Has he described his invention, and has he claimed it? If so, both the specification and claims may be made over, redrawn, and put in proper form and language, and one claim divided into two or more. In attempts to be too ornate, many an inventor has failed to properly describe his invention, or properly claim that which he did describe.

In my judgment there was no material departure in the patent granted Stauf from the invention first described and claimed by him.

The motion to dismiss is denied, and the motion for a preliminary injunction is granted.

In any event, I will suspend the issuing of such injunction for a period of 30 days. If in the meantime the appeal referred to is heard and argued, the issue of such injunction will be suspended until a decision is given by the Circuit Court of Appeals. The papers in this case so fully and elaborately present the questions arising on the Wil-

liams patent, and the new question (if it be new) on the validity of the Stauf patent, that an appeal from this order, taken and heard with that on the appeal from the decision of Judge Hazel, will fully present the whole controversy and bring about a speedy determination. However, this court has no right or power to determine the course the parties shall pursue. Undoubtedly the Circuit Court of Appeals, on application, would advance the case now on appeal from the decision of Judge Hazel, and this as well.

SUNDH ELECTRIC CO. v. GENERAL ELECTRIC CO.

(District Court, N. D. New York. November 2, 1914.)

1. PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—PROCEDURE—NEW INFRINGEMENTS.

   Where, after an interlocutory decree adjudging the validity of a patent and enjoining its infringement, defendant commences the manufacture and sale of new devices, also claimed to infringe, it is correct practice for complainant to move for a supplementary decree bringing such devices within the operation of the injunction, instead of resorting to a motion to punish for contempt.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613–619; Dec. Dig. § 326.*]

2. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — ALTERNATING CURRENT MAGNET.

   The Lindquist patents, Nos. 744,773 and 764,608, for an alternating current magnet, *held* not anticipated, valid, and infringed.

In Equity. Suit by the Sundh Electric Company against the General Electric Company. On motion for supplementary injunction. Granted.

Emerson R. Newell and Alfred Wilkinson, of New York City, for complainant.

Charles Neave, of New York City, for defendant.

RAY, District Judge. This court passed on the validity of the patents (Lindquist, Nos. 744,773 and 764,608) in Sundh Electric Co. v. General Electric Co., 198 Fed. 116, affirmed by the Circuit Court of Appeals 204 Fed. 277, 122 C. C. A. 475, and also on the question of infringement, a certain structure then before the court. The infringing device there is known on this motion as "defendant's infringing switch in suit." See Exhibit H. No final decree has been entered, as the accounting is now in progress.

[1] The defendant is putting out devices which complainant claims are plain infringements, and instead of resorting to a motion to punish for contempt the complainant brings this motion for a supplementary decree bringing within the operation of the injunction granted the devices so put out by defendant. I think this practice correct. Crown Cork & Seal Co. v. American, 211 Fed. 653, 128 C. C. A. 154. I understand the practice prevails in the First circuit.

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

[2] The defendant not only denies infringement, but challenges, on this motion, the validity of the patents in suit, as well as infringement, and brings in for consideration alleged prior art not before considered. Instead of compelling the complainant to resort to a new suit, this court entertained this motion, listened to extended and elaborate arguments, and has reconsidered the whole question as to the construction, etc., of such patents in view of *all* the prior art now presented by defendant, as in no other way could this court intelligently and satisfactorily determine whether or not the new devices infringe. This has involved the examination of a number of patents, all the prior art, and many devices. From the strenuousness and pertinacity shown by defendant up to this date, this court is of the opinion that the Circuit Court of Appeals, in any event, will be called upon to give its decision on the new questions presented, and I will therefore content myself with giving conclusions.

There seems to have prevailed with the defendant, and some of the witnesses called by it, the idea that this court held or intended to hold that Lindquist calls for and demands geometrical symmetry between the main coil and the shading coil. This court did not so hold. It may be that the Lindquist patents *show* circularly arranged cores symmetrical with respect to the geometrical center of the whole magnet, but it is far from correct that this is of the essence of the claims. The main thing is not geometrical symmetry, but magnetic symmetry. What this court said and held was, and this was the holding of the Circuit Court of Appeals also:

"I do not think the geometrical arrangement of the magnet coils about the axis of much importance. * * * That degree of symmetry and geometric arrangement was necessary which would secure a substantial degree of uniformity in the direction and magnitude of electro-magnetic attraction upon the armature under the conjoint action of out-of-phase electric currents."

These were described. And, as to the use of the words, "constant and uniform pull on the armature," it was not intended to intimate that such a pull was absolutely or perfectly "steady," as such a pull could not be secured in an "alternating current magnet." This, it seems to me, is obvious. After going over the whole question and the new matter, and giving the subject careful consideration, I am of the opinion that Lindquist was the first to disclose how to produce a commercially successful alternating current polyphase magnet, and one which was operable from a single-phase two-line wire current. He materially reduced the cost of installation. This was new in the art and useful, and it is what defendant uses, and the various devices sought to be covered by extending the operation of the injunction are infringements.

The motion must be granted.

WOOD v. CONCRETE FIBRE CO.

(District Court, E. D. Pennsylvania. November 4, 1914.)

No. 3216.

1. PLEADING (§ 348*)—AFFIDAVIT OF DEFENSE—SUFFICIENCY.
Where a contract employing plaintiff's decedent to assist defendant in the manufacture of fiber provided that decedent should have stock in defendant company of the par value of $50,000, a judgment could not be entered on the pleadings for such sum; plaintiff's right to recover being predicated on defendant's breach of the contract, and the affidavit of defense having denied the breach, and alleged that decedent himself failed from want of ability or refused to perform on his part, and voluntarily left defendant's employ, and that he was not to receive any compensation beyond a cash payment until he had demonstrated to defendant company that he could and actually had made marketable fiber by his process, which he failed to do.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.*]

2. PLEADING (§ 348*)—JUDGMENT ON PLEADING — AFFIDAVIT OF DEFENSE — SUFFICIENCY.
In an action for breach of a contract to employ decedent, an affidavit of defense, alleging that decedent voluntarily left defendant's employ, *held* sufficient to prevent judgment.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.*]

3. PLEADING (§ 343*)—AFFIDAVIT OF DEFENSE—JUDGMENT.
Where plaintiff, for alleged breach of a contract of employment, sought to recover $1,500 alleged unpaid wages, but the averments of plaintiff's statement showed $400 paid on account of such item, a judgment for $1,500 on the pleadings could not be granted.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048–1051; Dec. Dig. § 343.*]

At Law. Action by Georgeanne Wood, as executrix of Jerome I. Wood, deceased, against the Concrete Fibre Company. On rule for judgment on the pleadings. Denied.

George P. Rich, of Philadelphia, Pa., for plaintiff.
Nicholas H. Larzelere, of Norristown, Pa., for defendant.

DICKINSON, District Judge. The question involved in this case must be ruled upon the facts to be gathered from the affidavit of defense, read in the light shed by the averments in the statement of claim.

Jerome I. Wood, the plaintiff's decedent, before his connection with the defendant company, had discovered and controlled certain secret processes for the manufacture of fiber from paper stock. The defendant company was organized for the purpose of manufacturing fiber by the Wood processes. The value of the combination inhered in the ability and willingness of the defendant to supply the financial and material means for producing fiber and in the skill and knowledge of Wood and the merit of his processes. Although the processes themselves were deemed to have passed the experimental stage, it was with-

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

in the purview of the thought of the parties that the practical commercial results were more or less speculative.

The parties thus situated entered into a contract, a copy of which is annexed to the statement of claim. The claim of the plaintiff is that by this agreement Wood was to give the defendant the whole benefit of his processes and was to serve the company for one year as manager of its plant, in consideration of which he was to receive $500 cash down (on which he had been paid only $100), was to receive $1,500 for his year's services (on which he had received only $400), and was to get shares of stock of the defendant company of the par value of $50,000, and a further sum of $4,500, making a total claim of $56,000, with interest from May 20, 1909. This claim is based upon the averments that Wood complied fully with the agreement on his part, so far as he was permitted by the defendant to do. Further compliance with the agreement by him was prevented by the act of the defendant in discharging him without cause from its employ and in committing a breach of its contract. Wood thereupon tendered performance on his part of the agreement, which being refused by the defendant, this suit has been brought by his legal representative for the breach.

This statement was met by an affidavit of defense, and the affidavit was followed by a rule for judgment. The parties radically differ over the proper construction of the contract in several respects. As in the view we have taken the judgment asked for cannot in the present state of the record be entered, we do not feel called upon to construe the contract, except in those features necessary to the decision now made. The contract will doubtless be made the subject of future controversy. The reasons for the conclusions reached are indicated in connection with the statement of them respectively.

1. Judgment cannot now be rendered for the $500, for the reason that the affidavit of defense flatly avers the payment of this money in full. This is conceded by counsel for the plaintiff, who has not asked for judgment for this part of plaintiff's claim.

2. Judgment cannot be entered for the $4,500, part of plaintiff's claim, for the reason stated below, and also because the agreement provides that this shall not become payable until after the defendant company has paid a 10 per cent. dividend upon its stock, and the affidavit avers that no such dividend has been earned, declared, or paid. This latter view is also acquiesced in by counsel for plaintiff, and no judgment is asked for this part of the claim.

[1] 3. Judgment cannot be entered for the sum of $50,000, because plaintiff's right to recover is predicated upon the breach of the contract by the defendant, and the affidavit of defense contains the positive denial of the breach alleged and the averment that the plaintiff's decedent himself failed from want of ability, or refused, to carry out the agreement on his part, and voluntarily left defendant's employ. The further defense is interposed that the contract provides that Wood was not to receive any compensation beyond the $500 cash payment until he, in the language of the agreement, "had demonstrated to the satisfaction of the company, through its board of directors," that he

could and until he actually had made marketable fiber by his process, and that he had not in fact, after five months of costly efforts, produced a single pound of marketable fiber, and was not able to do so.

[2, 3] 4. Judgment cannot be entered for the claim for wages, for the reason already stated. The affidavit of defense alleges that Wood voluntarily left defendant's employ. There are, moreover, technical difficulties in the way of the entry of a judgment for $1,500, as asked. The judgment must be based on the averments of the statement. The statement avers a payment of $400 on account of this item of claim. How, then, could a judgment for $1,500 be justified, and what is there to support it?

The contract must be construed at the trial. We therefore have avoided commenting on the meaning given the agreement by the plaintiff, that Wood was to have one year in which to experiment with his process, and the meaning given it by the defendant, that the contract of employment began when fiber was commercially produced.

The rule for judgment is discharged.

NEW YORK SLATE WORKS et al. v. H. KRANTZ MFG. CO.

(District Court, E. D. New York. October 5, 1914.)

1. MECHANICS' LIENS (§ 271*)—PROCEEDING TO ENFORCE—PLEADING.
   A petition to establish a mechanic's lien on property in the hands of a receiver *held* insufficient in failing to show how much work was done or to be done out of the total contract price.
   [Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494–513; Dec. Dig. § 271.*]

2. MECHANICS' LIENS (§ 132*)—COMPLETION OF WORK—DEFECTS.
   Subsequent making good of a defect then appearing in the work will not reopen the time of actual completion, from which the 90-day period starts.
   [Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. § 132.*]

In Equity. Suit by the New York Slate Works and the Western Electric Company against the H. Krantz Manufacturing Company. On petition of the Estey Bros. Company for a lien. Lien denied.

Dorman & Dana, of New York City (Charles Bates Dana, of New York City, of counsel), for petitioner.

Sullivan & Cromwell, of New York City (John Foster Dulles, of New York City, of counsel), for receiver.

CHATFIELD, District Judge. [1] The filing of a lien after appointment of a receiver is not proper cause for treating the lien as invalid; but this lien does not seem to have been filed in 90 days, nor does it state in any way how much work has been done. It states that the total work of the contract is worth $200, and that nothing has been paid; but, aside from the dates between which certain work was done, it nowhere states that any pay has been earned. Bossert v. Fox, 89

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

App. Div. 7, 85 N. Y. Supp. 308, affirmed in 180 N. Y. 546, 73 N. E. 1120.

[2] The work was completed and accepted, if it was, in fact, completed, when turned over to the contracting party, and the subsequent demand to make good some shortcoming cannot (in the absence of proof that the work was incomplete until inspection and acceptance) extend the date from which the statute runs. The claim will be treated as a general claim against the estate.

FIDELITY TRUST CO. v. WASHINGTON-OREGON CORPORATION et al. (KIERNAN et al., Interveners).

(District Court, W. D. Washington, S. D. October 29, 1914.)

No. 15.

1. CORPORATIONS (§ 661*)—SERVICE OF PROCESS—DESIGNATION OF AGENT.

Where a trust deed was executed in 1911, appointing a Pennsylvania corporation trustee for bondholders, the trustee was not disqualified to maintain a suit to foreclose the mortgage because of its failure to appoint an agent in Oregon, where property covered was located, as required by Laws Or. 1913, p. 730, § 24; there being nothing in the act indicating legislative intention that it should be retroactive.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542, 2543, 2544, 2546, 2563–2567; Dec. Dig. § 661.*]

2. CORPORATIONS (§ 643*)—FOREIGN CORPORATIONS—TRUST COMPANIES—DEPOSITS.

Laws Or. 1913, p. 730, § 24, provides that in case any foreign corporation whose name contains the word "trust," or whose articles of incorporation empower it to do a trust business, desires to engage in the business of loaning money on mortgage security in the state, it shall file, in addition to its articles of incorporation or association, a resolution of its governing board stating that it will not receive deposits in Oregon or accept from citizens property or money in trust for investment. *Held*, that a foreign trust company named as trustee in a deed of trust on property in Oregon was not disqualified to act by a failure to comply with such act, in the absence of any claim that it had accepted deposits or received from citizens or residents of Oregon property or money in trust for deposit or investment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2510, 2511, 2536, 2538, 2539, 2541, 2543, 2545, 2546; Dec. Dig. § 643.*]

3. CORPORATIONS (§ 482*)—TRUST DEEDS—FORECLOSURE.

A trust company, appointed as trustee under a deed of trust securing bonds, providing that a majority in interest of the outstanding bondholders in case of default were entitled to declare the whole amount due and direct foreclosure, was not disqualified to act as trustee because it was named and consented to act with certain bondholders representing a large majority of the outstanding bonds in foreclosure proceedings and contemplating reorganization pursuant to a bondholders' agreement, which provided for the deposit of bonds with the trustee for a greater convenience in conducting the proceedings; the terms of the agreement not being such as to conflict with the duties the trustee owed to the bondholders as such.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

---

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

4. CORPORATIONS (§ 479*) — MORTGAGES — BONDHOLDERS' AGREEMENT — CONSTRUCTION.

A bondholders' agreement for reorganization, providing that a depositary shall be bound to exercise only reasonable care in the safe-keeping of the deposited bonds, etc., did not touch the depositary's duties to the bondholders as trustee under the deed of trust.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

5. CORPORATIONS (§ 479*)—DEED OF TRUST — FORECLOSURE — BONDHOLDERS' AGREEMENT.

A provision of a bondholders' agreement that the committee appointed to arrange foreclosure and reorganization assumed no obligation to any bondholder who should not within the period limited deposit his bonds thereunder, or to any other person except holders of certificates of deposit issued in accordance with the terms of the agreement, contemplated only that by the bondholders' agreement no new obligations were assumed or cast on the men composing the committee to any bondholders not depositing their bonds, but did not free the committee of the depositing bondholders, nor the trust company as trustee, of any obligation under the deed of trust, or growing out of it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

6. CORPORATIONS (§ 479*)—TRUST DEED—TRUSTEE—DELEGATION OF DUTIES.

The rule forbidding delegation of authority by a trustee does not forbid the majority of corporate bondholders from delegating to a committee the power to give necessary instructions to the trustee as to the foreclosure of the deed of trust securing the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

7. CORPORATIONS (§ 479*)—DEED OF TRUST — FORECLOSURE — BONDHOLDERS' AGREEMENT.

A bondholders' agreement preliminary to the foreclosure of a corporation's deed of trust authorized the committee to consent to the payment of interest on any bonds, securities, or other obligations against the corporation, and to instruct the trustee or trustees under any agreement under which any of the bonds may have been issued from time to time to sell or refrain from selling any of the property covered by any such mortgages. *Held*, that such provision constituted a delegation to the committee by the depositing bondholders of the power to consent and instruct for them, and did not bind the trustee, by its consent to act as depositary, to submit to the direction of the committee as to the sale of the property covered by the agreement, or to follow the committee's instructions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

8. CORPORATIONS (§ 478*)—DEED OF TRUST—SALE OF PROPERTY—CONDEMNATION—APPLICATION OF PROCEEDS.

A deed of trust executed by a corporation to secure a bond issue provided that the company, in the absence of default, should be entitled to convey, freed from the deed, all or any of its real estate which should no longer be useful or necessary to its business, the net proceeds to be paid to the trustee and applied, at the election, of the corporation, either to the benefit or extension of the corporation's plants or to the purchase "in the open market" of bonds secured by the deed. The following clause declared that the corporation should have the further right at all times, in the absence of default, to convey, free from the deed, any of its plants or systems, or any property so sold or assigned, in the same manner as set out in the preceding provision, the proceeds to be applied "only to the redemption and cancellation of outstanding bonds." *Held*, that the first provision should be construed as relating to sales of minor portions of the

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

corporation's property, and did not relate to the taking by a city in the exercise of its power of eminent domain of an entire water plant or system belonging to the company, which was covered by the second subdivision.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1871; Dec. Dig. § 478.*]

9. CORPORATIONS (§ 479*)—DEED OF TRUST — SALE OF PROPERTY — ACTS OF TRUSTEE.

Where property of a corporation covered by a trust deed was taken by a city in the exercise of its right of eminent domain, and it was doubtful which provision of the trust deed covered the disposition of the proceeds, the trustee would not be held disqualified for a mistake, which was not gross, in determining such question, in the absence of fraud, especially where it acted under the provision affording the bondholders the greatest protection.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

10. CORPORATIONS (§ 479*)—DEED OF TRUST—MISCONDUCT OF TRUSTEE.

An allegation that a trustee under a corporate deed of trust securing bonds used the proceeds of a taking of certain of the corporation's property to purchase bonds from the corporation's trustees, instead of in the open market, or for betterments or extensions as provided in the deed, did not show disqualifying misconduct, in the absence of an allegation that the bonds could have been obtained in the open market, that an excessive price was paid for those purchased, or that any request had been made to the trustee for the proceeds by the mortgagor to be used in betterments or extensions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

11. CORPORATIONS (§ 479*) — TRUST DEED — FORECLOSURE — BONDHOLDERS' AGREEMENT—DEPOSIT—CERTIFICATE.

Where a trust company, which was trustee under a corporation's trust deed securing a bond issue, was also depositary under a bondholders' agreement looking to foreclosure, a certificate issued by it, certifying that the holder was bound by the terms of the agreement and entitled to the advantages accruing to the depositors of bonds thereunder, was not an undertaking by the trust company that the certificate holder should receive the benefits of the bondholders' agreement beyond safe-keeping by the trustee of the deposited bonds and the dealing with them, while so kept, as directed by the bondholders' committee under the agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

12. CORPORATIONS (§ 479*)—DEED OF TRUST — FORECLOSURE — BONDHOLDERS' COMMITTEE—DEPOSITARY.

Where a bondholders' agreement, looking to the foreclosure of a corporation's deed of trust securing bonds, provided for the deposit of the bonds with the trustee as a depositary, and that the title to the bonds on deposit should pass to the bondholders' committee, the depositary was only bound to use ordinary care to keep the bonds and deal with them as the committee directed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

13. CORPORATIONS (§ 479*) — MORTGAGES — DEED OF TRUST — BONDHOLDERS' AGREEMENT.

A bondholders' agreement that a trust company, which was trustee under the corporation's deed of trust securing the bonds, should act as depositary in proceedings looking to foreclosure of the deed, and should deal with the bonds in accordance with the directions of the bondholders' com-

mittee, did not contemplate any broadening of the duties of the trust company under the deed of trust.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. § 479.*]

14. CORPORATIONS (§ 473*)—DEED OF TRUST—FORECLOSURE—BONDHOLDERS' COMMITTEE.

That bondholders were also holders of unpaid stock in the mortgagor corporation did not authorize the setting off of the amounts due on such stock against the bonds held by such delinquent bondholders, on foreclosure of a trust deed securing the bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. § 473.*]

15. CORPORATIONS (§ 247*)—DEED OF TRUST—PROVISION—SECURITY—UNPAID STOCK.

A trust deed securing corporate bonds provided that no recourse should be had for the payment of principal and interest of the bonds to the stockholders, officers, or trustees of the corporation by virtue of any statute, or by enforcement of any assessment or otherwise, and any and all personal liability of stockholders in respect to the bonds was waived and released by every holder thereof. It also provided that for the debt and bonds secured the corporation was liable in personam, and any deficiency after exhausting the mortgage security might be enforced against the corporation, but not against its officers, trustees, or stockholders individually. *Held*, that by such provisions the bondholders waived their right to have recourse to the stockholders on account of their liability for unpaid stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 983–997; Dec. Dig. § 247.*]

16. CORPORATIONS (§ 482*)—DEED OF TRUST—BONDS—VALIDITY—FORECLOSURE PROCEEDINGS.

An averment of an intervener's bill, in a suit to foreclose a corporate deed of trust, that bonds held by members of a bondholders' committee and other majority bondholders were issued without consideration and were invalid, was insufficient to warrant the stay of foreclosure proceedings until the amount and validity of the outstanding bonds had been determined.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

17. CORPORATIONS (§ 482*)—DEED OF TRUST—TRUSTEE—DISQUALIFICATION.

A bill of intervention, to disqualify the trustee under a corporate deed of trust securing bonds to proceed with foreclosure proceedings, alleging that the trustee's solicitor also represented the mortgagor, one of the members of the bondholders' committee under a second mortgage, the trustee under the second mortgage, a committee of consolidated bondholders under the first mortgage, holders of stock in the mortgagor company, the committee of second mortgaged bondholders, and certain general creditors of the mortgagor, merely showed that the trustee was acting in conjunction with other interested parties, and did not indicate disqualifying misconduct.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

18. CORPORATIONS (§ 482*)—DEED OF TRUST—FORECLOSURE—CONSPIRACY—KEEPING BOOKS OUTSIDE STATE.

An allegation that the books of a corporation have been and were kept outside the state, in violation of statute, did not support an averment that the trustees of the mortgagor company and others, including certain of the bondholders, had conspired to cause the mortgage property to be sold, free from the claims of intervening bondholders and other creditors, for a sum much less than its actual value, and insufficient to pay in full

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

the claims of the intervening bondholders, and insufficient to pay any sum to general creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877-1888; Dec. Dig. § 482.*]

Suit by the Fidelity Trust Company, as trustee, against the Washington-Oregon Corporation and others, with John Kiernan and others as interveners. On complainant's motion to dismiss the complaint in intervention, or, in the alternative, to strike certain portions of the intervening complaint. Motion to strike granted in part.

Maurice A. Langhorne and F. D. Metzger, both of Tacoma, Wash., and Randolph W. Childs, of New York City, for complainant.

Charles H. Carey and James B. Kerr, both of Portland, Or., for interveners.

CUSHMAN, District Judge. This suit is one to foreclose a mortgage, and the matter is now before the court upon complainant's motion to dismiss the complaint in intervention of certain bondholders under the mortgage. In the alternative, motion is made to strike certain portions of the complaint in intervention. Objection is also made to the interrogatories filed by the interveners.

The defendant Washington-Oregon Corporation, mortgagor, is a Washington corporation owning and heretofore operating certain electric, gas, and water plants in Washington and Oregon. Complainant is a Pennsylvania corporation. The mortgage was given to secure $5,000,000, par value, of bonds, $1,700,000 of which have been certified by the trust company, to the Washington-Oregon Corporation, all of which have been negotiated, save $5,500, face value, and of those negotiated $131,000, face value, have been retired, leaving outstanding $1,563,500, face value.

Certain property has been acquired by the Washington-Oregon Corporation, since the execution of the mortgage, which is claimed to be covered by it, and certain other property has been sold by the mortgagor and released from the mortgage. The mortgagor defaulted in the payment of interest on the bonds secured by the mortgage April 1, 1914. A majority of the bondholders elected to consider the whole debt due, and requested complainant to begin foreclosure of the mortgage. Suit for that purpose was begun July 31, 1914, and a receiver appointed for the property.

The bill in intervention asks the removal of complainant, as trustee under the mortgage, alleging unfitness upon its part to further act as such, and sets forth grounds claimed to entitle the intervening bondholders to special relief against certain majority bondholders, at whose request the trustee began foreclosure proceedings.

[1] The bill in intervention charges that the trustee is disqualified because it has failed to appoint an agent for the service of process, as required by chapter 354, Laws of Oregon for 1913. The mortgage herein sought to be foreclosed was executed in 1911. The Oregon act referred to provides:

"No foreign copartnership, firm, joint-stock company, association or corporation shall hold real or personal property in trust in this state, nor act in

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

any trust or fiduciary capacity therein, unless it shall have complied with all the provisions of this act: Provided, that a corporation qualified to act as a trust company in the state of its domicile may act as trustee for an issue of bonds, debentures or notes issued under the terms of a mortgage or deed of trust duly recorded in some county in this state; and provided further, that such foreign trust company shall have appointed and shall maintain an agent or attorney in this state, upon whom or upon which legal notice or process may be served; and provided further, that this act shall not apply to any foreign copartnership, firm, joint stock company, association or corporation engaged in the business of loaning money on mortgage security, which does not accept deposits or receive from citizens or residents of the state of Oregon property or money in trust, or deposit, or for investment. In case any foreign copartnership, firm, joint stock company, association or corporation whose name contains the word 'trust,' or whose articles of incorporation empower it to do a trust business, desires to engage in the business of loaning money on mortgage security in this state, it shall file in addition to its articles of incorporation or association, a resolution of its governing board, duly attested by its president and secretary, expressly stating that it will not receive deposits in the state of Oregon, or accept from citizens or residents of the state of Oregon, property or money, in trust for investment." General Laws of Oregon, c. 354, § 24, p. 730.

Nothing appears in the act to show an intention that it should be retroactive, and, in the absence of such a purpose clearly shown, it will be held prospective only. Chicago Title & Trust Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; Richardson v. U. S. Mtg. & T. Co., 194 Ill. 259, 62 N. E. 606; Keystone Mtg. Co. v. Howe, 89 Minn. 256, 94 N. W. 723; Commonwealth v. Danville, 207 Pa. 302, 56 Atl. 873; 13 Am. & Eng. Encyc. Law, 881, § 14. In the case of Farmers' Loan & Trust Co. v. Lake Street Elevated Railway Co., 173 Ill. 439, 51 N. E. 55, the trustee was held not eligible and subject to removal when, *subsequent* to the passage of an Illinois statute providing for the deposit of bonds to a certain amount to the state, it accepted a deed of trust to property in that state without complying with such act.

[2] It is not alleged that the complainant has accepted deposits or received, from citizens or residents of the state of Oregon, property or money in trust, or deposit, or for investment, without which conditions the act, by its terms, would be inapplicable.

[3] It is contended that the trustee is disqualified by reason of the fact that it has consented to act with certain bondholders, conceded to represent over $1,000,000, par value, of the outstanding bonds, in the foreclosure proceedings and contemplated reorganization of the mortgagor and its property. The bill alleges that a bondholders' committee has been selected by such majority, composed of four men, two of whom are trustees of the mortgagor and stockholders therein. The bondholders' agreement contains, among others, the following provisions:

"The company has made default in the payment of the interest on the bonds. The depositors are accordingly desirous of co-operating for mutual protection. This can most effectually be done by so depositing their bonds with the committee that the title thereto shall pass to the committee as trustees for the depositors, with the powers and subject to the restrictions hereinafter stated.

"The depositors, each for himself, but not for others, or any of them, agree with each other and with the committee as follows: * * *

"The committee may limit the time within which, and fix the conditions upon which, deposits may be made hereunder, and may extend the time so limited, and modify the conditions so fixed, and, either generally or in special

instances, may, in its discretion and upon such conditions as it may prescribe, accept deposits after the time limited for the deposit of bonds has expired.

"For each such deposit there shall be issued by or on behalf of the depositary to each depositor a certificate of deposit representing the bonds and coupons so deposited. The form of said certificates shall be substantially as is set forth in Schedule A. The deposit of bonds and the acceptance of a certificate of deposit therefor shall have the same force and effect as though the depositor had in fact subscribed his name to this agreement. Pending the preparation of forms of certificates of deposit, temporary certificates of deposit may be issued in such form as the committee may approve. Every certificate of deposit shall show whether or not the coupon or coupons maturing April 1, 1914, were deposited with the bond or bonds for which it was issued. * * *

"Second. The committee, by virtue of the deposit of any bond under the terms hereof, shall be irrevocably invested as trustees with the legal title thereto. The powers of the committee as such trustees shall include all the powers of owners, subject to the restrictions herein expressed. An enumeration of specific powers is contained in a schedule hereto annexed, made a part of this agreement, and marked 'Schedule B.' Such enumeration of specific powers shall not be deemed to limit the generality of the powers hereinbefore granted."

"The committee shall have authority to instruct the trustee or trustees under any mortgage under which any such bonds have been issued, from time to time, to sell, or refrain from selling, any of the property covered by any of such mortgages; * * * to give such directions to trustees or others, execute such papers, and do such acts, whether under the mortgage or any other instrument, or otherwise, as the committee may deem advisable in order most effectually to secure or promote the benefit of, or conserve the security for the payment of, the bonds, or to collect and enforce the payment of principal and interest of the deposited bonds. * * *

"The committee assumes no obligation, legal or equitable, expressed or implied, to any holder of bonds who shall not, within the periods limited by the committee, deposit his bonds hereunder, or to any other person whomsoever than the holders of certificates of deposit issued in accordance with the terms of this agreement."

"The depositary shall be bound to exercise only reasonable care in the safekeeping of the deposited bonds or other securities or property deposited with it hereunder, and to deal therewith in accordance with the directions of the committee; and the directions of the committee shall be a complete justification of any action or omission to act of the depositary."

The form of certificate agreed to contained the following provision:

"The holder hereof assents to and is bound by the provisions of said agreement by receiving this certificate, and is entitled to receive all the securities, benefits, and advantages to which the depositor of such bond is or may become entitled pursuant to the provisions of said agreement."

The interveners complain that complainant, by accepting the deposits of bonds and issuing the certificates provided for in the bondholders' agreement to the depositing bondholders, has disqualified itself as trustee under the mortgage; that thereby it has assumed duties inconsistent with those obligations which it undertook to all of the bondholders under the mortgage. The mortgage itself provides:

Article VII: "* * * In case such default shall continue for three (3) months, then and in any such case, if the holders of a majority in value of the outstanding bonds hereby secured shall so elect and notify in writing Washington-Oregon Corporation, its successors or assigns, and trustee, the whole principal of all the bonds hereby secured shall thereupon be declared in writing by trustee to be, and shall immediately become, due and payable, and it shall be the duty of trustee, upon request in writing, signed by the holders of a majority in value of said bonds then outstanding, and upon being

indemnified to its satisfaction, to institute proper proceedings at law or in equity to enforce the lien hereby created.

"The principal of the bonds secured hereby having become due at maturity, or as in this article provided, it shall be lawful for trustee, after entry as in article V above provided, or without entry, to proceed to sell at public auction unto the highest bidder all and singular the property and franchises hereby mortgaged that shall then be subject to the lien, operation, and effect of this indenture, with the appurtenances, and all benefit and equity of redemption of Washington-Oregon Corporation, its successors or assigns, therein. * * *"

Article VIII: "* * * And it is expressly understood and agreed that every right of action, whether at law or in equity, upon the said bonds or coupons thereto attached, as well as under this mortgage, shall be vested exclusively in trustee, and that no suit or proceeding for the foreclosure of this mortgage shall be instituted or prosecuted by the holder or holders of any bonds or coupons of the issue secured hereby until after trustee shall have been requested in writing by the holders of a majority of said bonds then outstanding to take such action and an offer of reasonable indemnity shall have been made to trustee, and it shall have refused or failed to comply with such request within thirty (30) days after the same shall have been made, nor shall any action of trustee, or of the bondholders hereunder, or both, in waiving any default, extend to or be taken to affect any subsequent default or to impair any rights arising thereunder, as herein provided."

Article IX: "At any sale or sales of the aforesaid property hereby mortgaged, or any part thereof, whether made by virtue of any power herein granted or by judicial authority, trustee may, and upon a written request from the holders of a majority of the bonds hereby secured and then outstanding trustee shall, bid for and purchase, or cause to be bid for and purchased, the same for and in behalf of all the holders of the bonds hereby secured and then outstanding, in the proportion of the respective interests of such bondholders, at a price not exceeding the whole amount then secured by said mortgage and the expenses of such sale or sales."

It is not made to appear that the trustee, by so becoming the depositary of bonds of those entering into the bondholders' agreement, has any further surrendered itself and the control of its discretion to the majority bondholders than it had already done under the mortgage. It does not appear that the trustee has been guilty of, or is threatening, any breach of duty owed by it to the bondholders.

[4, 5] The provision that the depositary, under the bondholders' agreement, "shall be bound to exercise only reasonable care in the safekeeping of the deposited bonds" does not touch the trustee in any of its duties under the mortgage. The provision:

"The committee assumes no obligation, legal or equitable, expressed or implied, to any holder of bonds who shall not, within the periods limited by the committee, deposit his bonds hereunder, or to any other person whomsoever than the holders of certificates of deposit issued in accordance with the terms of this agreement"

—contemplates only that, by the bondholders' agreement no new obligations were "assumed" or cast upon the men composing the committee to any bondholders not depositing their bonds. It cannot be said that, by this provision, it was meant to free the members of the committee of the bond depositors, or the trust company, of any obligation under the mortgage, or growing out of it.

[6] Concerning the power given the committee to instruct the trustee by the provisions of the bondholders' agreement quoted above, when it is considered how unwieldly would be a body composed of a majority

of the bondholders under such a mortgage, how unsatisfactory and prolonged would be the transaction of any business, the separate steps of which must be submitted to and approved by the individuals of such majority, it is clear that the rule forbidding the delegation of authority by a trustee, who is, at least in part, selected on account of the greater facility to be accomplished in the dispatch of any business, should not be extended to forbid the majority of bondholders delegating to a committee the power to give necessary instructions to the trustee. To warrant such a holding, it would have to be made to appear that such was the intention, by unequivocal, positive, and convincing terms, and not by implication.

By the bondholders' agreement, title to the bonds was vested in the committee. The committee became the bondholders, and so far as the bondholders not parties to that agreement are concerned it is doubtful whether it can properly be called a delegation of power. It is not contended that, by merely becoming a depositary of the bonds, the trustee would be disqualified; yet it is not clear how fewer obligations could have been imposed upon the trustee than by this agreement. The bondholders' agreement is simply a plan by which the majority bondholders propose to carry through the foreclosure of the mortgage and effect a reorganization of the company.

[7] In the enumeration of the powers conferred upon the committee, in the bondholders' agreement, the following are included:

"To consent to the payment of interest upon any bonds, notes, securities, or other obligations of, or claims against, the company, or of or against any allied corporation; to instruct the trustee or trustees under any mortgage under which any such bonds have been issued, from time to time, to sell or refrain from selling any of the property covered by any of such mortgages."

It is contended that, by consenting to act as depositary and giving the certificates provided for to the depositors of bonds, the trust company consented to submit to the direction of the committee as to the sale of the property covered by the mortgage, and thereby disqualified itself. This is not the effect of the foregoing provision. The bondholders' agreement provided for many things besides the deposit of the bonds, and the foregoing provision does not touch the trust company in a duty devolving upon it as a depositary under the agreement, but is rather the delegation to the committee by the depositing bondholders of the power to consent and instruct for them.

There is nothing to justify the contention that, in so far as instructions to sell the property covered by the mortgage are concerned, the trustee was obligating itself to follow such instructions. Rather is such a construction negatived by the provision in the agreement that the depositary should be bound only to reasonable care in safe-keeping the deposited bonds and to dealing therewith in accordance with the directions of the committee. The sale of the property cannot fairly be said to be included in any dealings, as depositary, with the deposited bonds.

[8] It is averred by the bill in intervention that, under the mortgage, the proceeds of any property sold by the Washington-Oregon Corporation should be applied, by the trustee, in the betterment or extension of the plant and property, or else applied towards the purchase, in

the *open market,* of the bonds secured by the mortgage; that the trustee under the mortgage, instead of paying over the proceeds of the sale of certain property covered by the mortgage to the Washington-Oregon Corporation for betterments or extensions, or else in the purchase of bonds in the open market, induced by the trustees of the Washington-Oregon Corporation and others, used such proceeds in the purchase, not in the open market, of bonds held by the trustees of the company and others associated with them.

If the duty of the trustee under the mortgage was clearly such as is claimed by interveners, and the trustee used such proceeds in the purchase of bonds from trustees of the mortgagor, at a price substantially in advance of the market price, there would be a grave question but that the complainant had not made such a gross mistake as to show its unfitness. The provisions of the mortgage covering the disposition of the proceeds realized from the property covered by the mortgage are:

"2. Washington-Oregon Corporation shall have the further right at all times, provided no default has been made as aforesaid, to convey or exchange freed from the incumbrances and trusts hereof all or any of the real estate now held, or which shall hereafter be acquired, by it, which shall no longer be either useful or necessary in the proper and judicious management and maintenance of its business or of the property hereby conveyed, or shall no longer be necessary or expedient to be retained in connection with the business of Washington-Oregon Corporation (except such as is set out in subdivision 3 hereof). * * * But any property so taken in exchange, if such there be, shall forthwith become and be liable under this mortgage as if the same had been originally included herein; and the net proceeds of such real estate so released (if sold) shall be paid over and assigned by Washington-Oregon Corporation to trustee, and shall be applied by trustee with all convenient speed at the election of Washington-Oregon Corporation, as follows: Such proceeds (except the proceeds of sale of such property as is hereinafter designated in subdivision 3 hereof) and the proceeds of all property subject to this indenture taken by the exercise of the power of eminent domain, shall either (a) be turned over to Washington-Oregon Corporation, for application by it to the betterment or extension of the plants and property owned by it, upon presentation by Washington-Oregon Corporation of a copy of a resolution by its board of trustees, duly certified by its secretary, requesting the payment to it of such proceeds and specifying the nature of the betterments or extensions of the plants and property above mentioned, and certifying that the value of such betterments or extensions is or will be more than the amount of such proceeds, so that the security of this mortgage shall not thereby be diminished; or else (b) shall be applied by trustee towards the purchase in open market, from time to time, and at such prices as trustee shall deem proper, and as shall be approved by Washington-Oregon Corporation of one or more of the bonds hereby secured; and all bonds so purchased and the coupons thereto appertaining shall be immediately canceled, and shall cease to be entitled to the benefit of the security hereby provided. It shall be no part of the duty of trustee to see to the application by Washington-Oregon Corporation of the proceeds of any property released by trustee as herein provided, or to determine whether the title to any property taken by Washington-Oregon Corporation in exchange for property released from the lien of this mortgage is a good title, or to determine whether the said property is subject to any liens, incumbrances, or other charges prior to this mortgage.

"3. Washington-Oregon Corporation shall have the further right at all times, provided no default has been made, as aforesaid, to convey, freed from the incumbrances and trusts hereof, any of its plants or systems for the generation of gas or electricity, and the distributing system appurtenant thereto, or any of its plants or systems for the supply and distribution of water, or any of its urban or interurban railway systems, and to assign the franchises

appertaining thereto, and the trustee is hereby expressly authorized to release, under its seal, from the operation and effect of this mortgage any property so sold or assigned in the same manner as set out in subdivision 2 of this article. The proceeds of such sale shall be applied only to the purchase or redemption and cancellation of outstanding bonds secured hereby: Provided, however, that there shall be purchased or redeemed and canceled at least such proportion of the outstanding bonds secured hereby as the net earnings from operation of such plant and system so sold for the fiscal year preceding such sale shall bear to the total net earnings from the operation of said Washington-Oregon Corporation for such year: Provided, however, trustee may require, before executing such release, the certificate of a chartered accountant to be selected by trustee, exhibiting and certifying as correct the net earnings of the plant or system. the sale whereof is contemplated, and the net earnings of Washington-Oregon Corporation for such fiscal year: Provided, also, that before executing such release trustee may require the certificate of a competent engineer to be selected by trustee, showing that the price for which it is purposed to sell such plant or system is fair and adequate."

The money invested by the trustee in the bonds was realized from the sale of a water plant at Centralia and a gas plant at Vancouver. The investment of the proceeds from such sales would, therefore, rather be controlled by section 3 than section 2, above quoted, which latter (section 2) contains the provision claimed by interveners to have been violated by the trustee.

Though it is conceded that this would, ordinarily, be true, yet it is contended that section 2, despite the character of the property, applies, so far as the sale of the water plant at Centralia is concerned, because that sale grew out of condemnation proceedings in the exercise of the power of eminent domain by the city of Centralia, for its acquisition. Section 2, describing such proceeds as are covered by its provisions, reads:

"And the proceeds of all property subject to this indenture taken by the exercise of the power of eminent domain."

And it excepts from its application property described in section 3. It is true that, after the express recital of such exception, the provision for the disposal of the proceeds of the property taken in the exercise of the power of eminent domain is inserted; but this fact alone, in the absence of any apparent or suggested reason to deny the effect of the exception in the latter class of property, will not justify a holding that the exception was not meant to apply to all property enumerated in section 2.

No reason appears for making a different disposition of the proceeds realized from the Centralia water plant, if it was sold to the city as the result, simply, of negotiations, than where such proceeds were obtained by reason of the plant being "taken" by the city in the exercise of its power of eminent domain. It rather appears, as the eminent domain provision is associated with those proceeds derived from the sale of real estate "which shall no longer be either useful or necessary in the proper and judicious management and maintenance of its business or of the property hereby conveyed, or shall no longer be necessary or expedient to be retained in connection with the business of Washington-Oregon Corporation," that some minor taking of property —the taking of some part of a plant, or system, as might often occur—

rather was in contemplation than the taking of an entire water plant or system.

[9] In this manner can both provisions be given harmonious and reasonable effect. Even were this not the correct construction of the contract, in view of the fact that, at most, it is doubtful which provision would be applicable, the trustee will not be held to be disqualified for such mistake—not gross, and where fraud is not shown—especially where, as here, the trustee acted under the section apparently affording the bondholders the greatest protection, in that it provides that:

"There shall be purchased or redeemed and canceled at least such proportion of the outstanding bonds secured hereby as the net earnings from operation of such plant and system so sold for the fiscal year preceding such sale shall bear to the total net earnings from the operation of said Washington-Oregon Corporation for such year."

[10] The bill in intervention has not alleged that such bonds could have been obtained upon the open market, or that an excessive price was paid for them, or that any request was made to the trustee for the proceeds by the mortgagor, to be used in betterments or extensions.

[11] By the certificate provided for, the trust company certifies that the certificate holder is the individual, bound by the terms of, and entitled to the advantages accruing to, the depositors of certain described bonds under the agreement. It is, in effect, an identification of the individual affected by the agreement, and not an undertaking that such individual shall receive the benefits of that agreement beyond the safe-keeping by the trustee of the deposited bonds and the dealing with them, while so kept by it, as directed by the bondholders' committee, under the terms of the agreement.

The main and controlling purpose of the bondholders' agreement is to confer such power upon the committee by the bondholders as to authorize it to act effectually and to protect the committee and those dealing with it against the claims of bondholders signing the agreement. To that end it is provided that the direction of the committee to act shall be complete justification.

[12] The legal title to the bonds had passed to the Committee. As long as the depositary used ordinary care to keep the bonds and deal with them as the committee—the legal owner—directed, it was not liable.

[13] The agreement that the trust company should deal with the deposited bonds in accordance with the directions of the committee cannot be said to fairly contemplate any broadening of the duties of the depositary trust company. This agreement provides for a registration of the certificates to be issued by the trust company to the depositing bondholders, in order to facilitate the transfer of such certificates, subject to terms of the bondholders' agreement, and necessarily implies, by such deposit, the ultimate surrender of the bonds and their production when necessary.

This provision of the agreement, fairly construed, only contemplates that, in dealing as such depositary, if the trust company deals according to the direction of the committee, its duty is performed, and not that it is bound to make such use of these bonds as the committee di-

rects, without regard to the duties specifically devolving on it, as depositary, under the bondholders' agreement, and in violation of its duties as trustee under the mortgage.

Trusts are always capable of being fraudulently exercised; but, by reason of that fact alone, fraud will not be presumed in the exercise of trust powers. Fraud is not to be inferred in the discharge of the trust under the bondholders' agreement any sooner than in the exercise of the trust powers under the mortgage. No analogy exists between such a situation as the foregoing and that found in any of the cases cited by interveners.

In Savage v. Gould, 60 How. Prac. (N. Y.) 234, the trustee had delegated the management of the trust estate to his law partner, who manipulated it for his own benefit. A number of cases are cited where the trustee under one mortgage is held to be disqualified by accepting duties as trustee under a second mortgage. In Investment Registry v. Chicago & M. Elec. R. Co. (D. C.) 213 Fed. 492, a mortgage trustee also held a number of bonds secured by the mortgage, as security for collateral notes. In American Tube & Iron Co. v. Kentucky Southern Oil & Gas Co. (C. C.) 51 Fed. 826, the mortgage trustee accepted a deed of general assignment of the mortgagor's property for the benefit of all of his creditors, which included the mortgaged property.

In such cases as the foregoing the duties devolving upon the trustee were inconsistent, and were not in contemplation at the time the trust was created. But in the instant case the predominance of the majority of the bondholders was provided for in the mortgage itself, and, beyond such powers given to the majority, their interest and that of the minority are the same.

No sufficient showing has been made to warrant the removal of the trustee or a stay of foreclosure proceedings while the interveners prosecute an independent suit seeking the removal of the trustee. Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1, 62 C. C. A. 23; Continental & Commercial T. & S. Bank v. Allis-Chalmers Co (D. C.) 200 Fed. 600; Bowling Green Trust Co. v. Virginia P. & P. Co. (C. C.) 132 Fed. 921; McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; Central Trust Co. v. Cincinnati, H. & D. Co. (C. C.) 169 Fed 466, 471; March v. Romare, 116 Fed. 355, 53 C. C. A. 575; Land Title & Trust Co. v. Tatnall, 132 Fed. 305, 65 C. C. A. 671; Trust Co. v. Norfolk, etc. (C. C.) 174 Fed. 269.

In the situations that hereafter arise in the course of this proceeding—many of which may not now be foreseen—if it becomes apparent that the trustee has assumed obligations growing out of the bondholders' agreement, inconsistent with those devolving upon it under the mortgage, or that it is making fraudulent use of the powers intrusted to it, it will then be time to consider whether this proceeding is one in which to determine whether the trustee should be removed, or whether those complaining of the trustee will be relegated to an independent suit.

[14] The interveners' bill alleges that members of the bondholders' committee and depositing bondholders are holders of unpaid stock in the mortgagor company. A prayer is made that the amounts so due

for unpaid stock be set off against the bonds held by such delinquent holders of stock. It was held by this court in Mississippi Valley Trust Co. v. Washington N. R. Co. (D. C.) 212 Fed. 776, that:

"Where the proceeds of corporate mortgage bonds were misappropriated or wrongfully diverted, a subsequent mortgagee could not rely on the misappropriation or wrongful diversion as a payment (or offset), unless the mortgagors had asked that the diversion or misappropriation should be applied as a payment."

The same general principle is applicable in the present case. If there is a liability, as alleged, for unpaid stock, the Washington-Oregon Corporation, mortgagor, is the party interested who is entitled to recover it. The general creditors are likewise interested in the application of any amounts recovered on such account. One bondholder will not be allowed, in this way, to better the security for his claim, already preferred, over the general creditors. Land Title & Trust Co. v. Asphalt Co. of America, 127 Fed. 1, 13, 62 C. C. A. 23; Land Title & Trust Co. v. Tatnall, 132 Fed. 305, 65 C. C. A. 671; Continental & Commercial T. & S. Bank v. Allis-Chalmers Co. (D. C.) 200 Fed. 600; Cook on Corporations (6th Ed.) § 848 et seq.

[15] The following provisions are found in the mortgage:

"No recourse shall be had for the payment of the principal or interest of this bond to stockholders, officers, or trustees of said Washington-Oregon Corporation, either directly or indirectly, by virtue of any statute or by enforcement of any assessment or otherwise, and any and all personal liability of the stockholders, officers, or trustees of said Washington-Oregon Corporation in respect to said bonds is hereby expressly waived and released by every holder hereof."

"For the debt and bonds secured hereby Washington-Oregon Corporation is liable in personam, and any deficiency, after exhausting the mortgage security, may be enforced against Washington-Oregon Corporation, but not against its officers, trustees, or stockholders individually; and it is expressly agreed between the parties hereto, and by every person who shall take or hold any bond or bonds issued hereunder, that no persons who are now, or who may hereafter become officers, trustees, or stockholders of Washington-Oregon Corporation, shall in any wise be held liable for the payment of either the principal or interest of the bonds secured hereby."

By the foregoing provisions, the right of the bondholders to have recourse to the stockholders, on account of their liability for unpaid stock, was waived. Grady v. Graham, 64 Wash. 436, 116 Pac. 1098, 36 L. R. A. (N. S.) 177; U. S. v. Stanford, 70 Fed. 346, 17 C. C. A. 143; Brown v. Eastern Slate Co., 134 Mass. 590. While the Washington decision might not be controlling as to rights to property in Oregon, yet the reasoning of these authorities alone warrants the holding.

The laws of Oregon provide:

"All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due, or to become due, on such stock." Lord's Oregon Laws, § 6696.

And its Constitution provides:

"The stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more." Const. art. 11, § 3.

It is not apparent that these provisions would in any way affect a waiver by contract of the bondholders' right to resort to such stock liability.

[16] The interveners' bill avers that bonds held by members of the bondholders' committee and other majority bondholders were issued without consideration and are invalid. The interveners contend:

"The authorities which have already been cited hold, among other things, that although, because of the rule of convenience, bondholders will be considered to be represented by a trustee when their interests are common, yet when a controversy exists between the bondholders, this rule of convenience must give way, and the real parties in interest must be admitted to wage their controversy before the court."

Such allegations are not sufficient to warrant the staying of foreclosure proceedings until the amount and validity of the outstanding bonds have been determined. Land Title & Trust Co. v. Tatnall, 132 Fed. 305, 65 C. C. A. 671; Merc. Trust Co. v. U. S. Shipbuilding Co. et al. (C. C.) 130 Fed. 725; Central Trust Co. v. Cincinnati, etc., Ry. Co. (C. C.) 169 Fed. 466; Trust Co. v. Norfolk, etc., R. R. Co., 174 Fed. 269; Central Trust Co. v. C., H. & D. Ry. Co. (C. C.) 169 Fed. 470. In Central Trust Co. of New York v. California, etc., R. R. (C. C.) 110 Fed. 70, at page 76, opinion by Judge Morrow—in which case intervention was allowed—it is said:

"This need not, however, delay the entering of a decree of foreclosure. It is not necessary at this stage of the proceedings to determine as a finality the ownership of the bonds in question. It is only necessary that there shall appear that there has been a default in their payment, and the amount of that default."

In the last case referred to, and in Farmers' Loan & Trust Co. v. San Diego Street Car Co. (C. C.) 45 Fed. 518, opinion by Judge Ross, also in Richardson's Executor v. Green, 133 U. S. 30, 33 L. Ed. 516,[1] intervention appears to have been permitted prior to decree, but it does not appear to have been opposed.

The mortgage contains the following provisions:

The property shall be held in trust "for the equal pro rata benefit and security of each and every the persons or corporations who may be or become the holders of said bonds, without preference, priority, or distinction, as to lien or otherwise, of any over or from the other, so that each and all of said bonds issued or to be issued in accordance with the terms hereof shall have the same right, lien, and privileges under this Indenture of Mortgage, and shall be equally secured hereby, with the same effect as if the same had all been made, issued, and negotiated simultaneously on the date hereof."

Having concluded that the question of the right of interveners to litigate the question of the invalidity of certain bonds secured should not be allowed prior to the decree of foreclosure, it is not now necessary to determine whether the interveners are barred by the foregoing provisions of the mortgage from asserting such claim.

[17] The bill in intervention avers that the solicitor for the complainant, upon whose application a receiver was appointed, was not merely the representative of complainant, but also undertook to represent, and held written authority to represent, the mortgagor, a copartnership, one of whose members was a member of a committee of bondholders under a second mortgage; also authority to represent the

[1] 10 Sup. Ct. 280.

trustee under the second mortgage and the committee of consolidated mortgage bondholders under the first mortgage, and of holders of stock in the mortgagor, and the committee of second mortgage bondholders and of certain general creditors of the mortgagor. These allegations merely show that the trustee is acting in conjunction with other interested parties, and it does not show that the object of such concerted action is the injury of the interveners. In the absence of acts hostile to interveners, it is more reasonable to presume that the saving of expense in litigation and prevention of deterioration of the property, consequent upon an extended controversy in the courts, was alone the object sought.

[18] The bill in intervention alleges that the trustees of the mortgagor and others, including members of a partnership to which certain of the majority bondholders belong, have conspired to cause the mortgaged property to be sold, free and clear of the claims of the intervening bondholders and other creditors, for a sum much less than its actual value, and for a sum insufficient to pay in full the claims of the intervening bondholders, and insufficient to pay any sum whatever on the claims of general creditors. In support of this allegation, it is averred that the books of the Washington-Oregon Corporation, in violation of the state statute, have been and are kept outside of the state.

While this might be a sufficient allegation to warrant a stay of proceedings until such time as the books are returned to the state, or until interveners had an opportunity to advise themselves of the exact nature of the dealings had between the trustee, majority bondholders, and the mortgagor, as disclosed by such books, yet the allegations as to fraud and conspiracy are too vague, general, and indefinite to warrant intervention on behalf of these bondholders.

As the terms of sale and distribution of the fund realized are, in practice, fixed by the foreclosure decree, and the interveners have, subject to the foregoing reservation, the ultimate right, before distribution, to attack the validity of such bonds as they assert were issued without consideration, it is held that the bill in intervention be not dismissed, but that it be considered in support of interveners' right to be heard at the time of the settlement of the decree.

In the case of Mercantile Trust Co. v. United States Shipbuilding Co. (C. C.) 130 Fed. 725, where intervention was denied—relying on Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423—a different situation appeared than in the present case. In denying the intervention, the court said:

"The foreclosure case has progressed to the point where, in the usual course of procedure, a decree for the sale of the mortgaged premises should be made. A draft of such decree was submitted to the court with the petition. * * * The decree of sale now presented to the court has been carefully framed so as to secure to her the fullest opportunity to contest, at the proper time, the rights of any other bondholder. This is not the proper time for instituting such a contest, and the petition must be denied." 130 Fed. at pages 725, 726.

All of the prayer to the complaint of the intervening bondholders will be stricken, except the first unnumbered paragraph. All of the interrogatories are likewise stricken.

THE VIRGINIAN.

(District Court, W. D. Washington, S. D. October 10, 1914.)

Nos. 1036, 1052.

1. COLLISION (§ 102*)—STEAM VESSELS MEETING—COMMON FAULTS.
The steamships Strathalbyn and Virginian, meeting nearly head on, came into collision at night in Puget Sound. The night was dark and cloudy, but there was no fog. When less than a mile apart, and about three minutes prior to the collision, the Strathalbyn signaled for passing port to port, and afterwards repeated the signal twice, and then blew an alarm signal. The passing signals were heard on the Virginian, but, being unable to see any lights or to make out the approaching vessel, they were not answered; but the engines of the Virginian were stopped on the first signal, and the alarm signal was answered by a signal that she was going full speed astern. The Strathalbyn had just left Tacoma with a cargo of lumber, and, her electric light apparatus being out of repair, had installed oil lamps. The testimony tended to show that she carried a masthead light and side lights, but that they were not bright, and also that the side lights were obscured by rows of stanchions which were placed along the sides of the deck load. *Held*, that she was in fault for not having proper lights; that the Virginian, while not required to answer the passing signals, was in fault for not giving an alarm signal on hearing them, as required by article 18, rule 3, of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 100 [Comp. St. 1913, § 7892]), which provides that such signal shall be given if either of two approaching vessels "fails to understand the course or intention of the other."

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

2. EVIDENCE (§ 586*)—NEGATIVE EVIDENCE—WEIGHT OF TESTIMONY.
On an issue as to whether or not a steamship, just prior to a collision at night, was showing proper lights, the testimony of those in charge of the navigation of meeting vessels, whose attention was necessarily called to the subject, though negative, is entitled to more weight than that of persons who had no special occasion to observe such lights.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432–2435; Dec. Dig. § 586.*]

In Admiralty. Suit for collision by the Strathalbyn Steamship Company, Limited, as owner of the steamship Strathalbyn, against the steamship Virginian, American-Hawaiian Steamship Company, claimant, and cross-libelant; also suit by the same libelant as bailee of cargo against the same respondent, with the steamship Strathalbyn interpleaded. Cases consolidated. Decree against both vessels.

Huffer & Hayden, of Tacoma, Wash., for libelant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for Strathalbyn S. S. Co., Ltd.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for respondent American-Hawaiian S. S. Co.

CUSHMAN, District Judge. On the night of January 12, 1912, between the hours of 7:30 and 8 o'clock, the British tramp steamer Strathalbyn, owned by the Strathalbyn Steamship Company, a corporation, and the American freight steamer Virginian, owned by the American-Hawaiian Steamship Company, were in collision on the waters of Puget Sound, at a point somewhere between Pully Point and Rob-

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

inson Point, as a result of which both vessels and a portion of the lumber cargo aboard the Strathalbyn sustained damage.

The above consolidated causes arise from the said collision, and were brought by the above parties for the purpose of recovering damages sustained as the result of said collision. The causes come before the court at this time upon the libel of the Strathalbyn Steamship Company, as owner of the steamship Strathalbyn, and the answer and cross-libel of the American-Hawaiian Steamship Company, as claimant and owner of the steamship Virginian, and the answer of the Strathalbyn Steamship Company, Limited, as owner and claimant of the steamship Strathalbyn, to the cross-libel of the American-Hawaiian Steamship Company.

Subsequent to the filing of the above-named libel, cross-libel, and answers, the Strathalbyn Steamship Company, Limited, as bailee of cargo aboard the steamship Strathalbyn at the time of the collision, filed its libel against the steamship Virginian on account of damage sustained by the said cargo, to which said libel the American-Hawaiian Steamship Company, as owner of the steamship Virginian, filed its answer and petitioned the court under Supreme Court admiralty rule 59, alleging that the said collision and consequent damage were caused solely by the fault of the steamship Strathalbyn, and asking that the said steamship Strathalbyn be seized to answer for the said damages, or that her owners be brought in as parties respondent to the said libel to answer for said damages, which petition was granted, and the Strathalbyn Steamship Company, Limited, as owner of the steamship Strathalbyn, filed its bond to answer for said damages, and filed its answer in the suit.

The parties hereto have stipulated that the consolidated causes should be submitted to this court for final determination upon the question of liability for the said collision, and should then be referred to a commissioner for the purpose of taking testimony as to damages, in accordance with this court's decision upon the question of liability.

As recovery is sought on behalf of each vessel for damage alleged to have been caused by the other, the facts must be determined without the usual aid from any rule as to the burden of proof.

Libelant contends the cause of collision was the fault of the Virginian in not keeping a proper lookout, and errors in navigation in not porting her helm when signaled to do so by the Strathalbyn, in not stopping and reversing her engines sooner, and in not giving a danger signal, if unable to see the lights of the Strathalbyn, after hearing the latter's passing signal.

The Virginian contends that the cause of collision was fault upon the part of the Strathalbyn, in that her lights were too dim to be seen, that her side lights were obstructed, so as not to be seen from ahead, that she had no range light, that she failed to stop and reverse her engines promptly upon receiving no answer from the Virginian to her passing signals.

A comprehensive statement or analysis of the mass of testimony taken will not be undertaken. The conclusion as to the effect of the testimony is deemed sufficient.

[1] The Strathalbyn was a tramp steamer 387 feet long, with a 52-foot beam, having a full cargo of lumber, bound from Tacoma for Sydney, Australia. The Virginian was a freight steamer 492 feet long, with a capacity of 12,000 tons, carrying about 2,000 tons, on her way to Tacoma from Seattle to finish loading.

The point of collision was not over a mile and a half southerly from Pully Point, off which point the Flyer overhauled, signaled, and passed the Virginian to starboard, keeping off about 200 yards. This signal was answered by the Virginian, both of which signals were heard by the Strathalbyn, then approaching the Flyer and Virginian, having passed Robinson Point and being on a course opposite to that of the Virginian. The Flyer was making 14 knots an hour, the Virginian 11, and the Strathalbyn 6, or a little more.

A few minutes after this passing of the Virginian, probably not over five minutes, the Strathalbyn blew one whistle to the Flyer, requesting a passing port to port; the Flyer and Strathalbyn being not more than a mile apart. The captain of the Flyer, seeing two white lights on her and concluding that they were range lights, accepted the signal, answering with one whistle. Both of these whistles were heard by those then navigating the Virginian, but they testify they saw no lights on the Strathalbyn.

When the Strathalbyn was on the bow, or abeam, of the Flyer, she blew one whistle to the Virginian, which then must have been considerably less than a mile away, as it would take the Flyer 20 minutes to get a mile ahead of the Virginian. It was 3 minutes or more from this first whistle to the Virginian until the collision occurred.

The pilot and third mate of the Virginian, on the bridge, and the lookout, properly stationed, heard this whistle. The pilot realized—as, under the circumstances, he could not well help—that the whistle was from ahead and intended for the Virginian. None of these men were able to see any light, or make out the approaching Strathalbyn. It is testified that the Virginian's pilot then signaled for the stopping of the engines, hearing which signal, the captain of the Virginian, then below, came on the bridge, and was immediately informed of the reason for stopping the engines. A second single blast of the whistle was then heard from the Strathalbyn ahead. Still no lights or vessel being seen by any of those watching from the Virginian, it is testified, the engines were reversed; and, a minute or over after reversing, a danger signal—four blasts—was heard from ahead. Still seeing nothing ahead, the captain of the Virginian gave three whistles to signify that his vessel was going full speed astern.

Within less than a minute, the boats came into collision, immediately prior to which the lookout and third officer on the Virginian saw a white light on the Strathalbyn. The Virginian immediately disengaged herself from the Strathalbyn, and, as they backed away, the port light of the Strathalbyn was seen aboard the Virginian. From the time of hearing the Strathalbyn's first whistle, those on the Virginian testify that her course was not changed, and that, not being able to make out the Strathalbyn or her lights, her whistles were not answered.

Those in charge of the navigation of the Strathalbyn testify that,

when the Strathalbyn gave her first signal, a single blast, to the Virginian, the red and green lights of the Virginian were plainly visible, indicating that she was coming directly head on; that, as this signal was given, the helm of the Strathalbyn was ported a point or more; that, after waiting a minute and receiving no answer from the Virginian, her red and green lights being still visible, another single blast was blown, the helm again ported, and the engine stopped; that, as this signal was given, the red light of the Virginian began to shut out and her green light to open, indicating that, instead of going to starboard, as signaled, she was directed across the Strathalbyn's bow; that, after waiting a minute, the Virginian not answering and her red light still being hidden, the Strathalbyn blew another single blast, and a minute and a half later reversed her engines. The Virginian still coming on, giving no signal, no change in her course being observable, and collision being imminent, the Strathalbyn gave the danger signal, which was immediately answered by three whistles from the Virginian.

In spite of a discrepancy in the testimony as to the number of passing signals blown by the Strathalbyn before the danger signal—two, as testified on behalf of the Virginian, and three, as averred by those on the Strathalbyn—it is clear that three were given.

The faults alleged as to the lights of the Strathalbyn will be first considered, as first in point of time, and so affecting that which followed. The night was dark and cloudy, a good night for seeing lights. The wind was southerly, an advantage to the Virginian in hearing the whistles of the Strathalbyn. There was, at the place of the collision, plenty of room for, and no embarrassing element to, the navigation of either vessel, other than that produced by the conduct of the other.

The Strathalbyn was equipped with electric signal lights, but several days before she was ready for sea the dynamo was found out of commission and was not repaired prior to her departure. She was supplied with standard oil lamps and oil. The lamps were new two years before, when brought aboard, but there had never been occasion before to use them. The oil had been secured six months before. Several hours before leaving Tacoma, Quartermaster Taylor, as he testifies, carefully prepared and tested these lamps, put in new wicks and oil fresh from the tank, lighted them, and trimmed the wicks. This witness' testimony, if true, could have been corroborated in certain particulars, where it has not been done.

Prior to reaching the point of collision, the Strathalbyn met and passed, on her starboard, near Brown's Point, the steamers Indianapolis and Daring. The Indianapolis later overtook and passed to starboard of the Strathalbyn at Robinson Point, a few minutes before the collision. The Strathalbyn met and passed port to port the steamer Flyer immediately before the collision. After the collision, the Salmora, a 30-ton gasoline tug, passed between the Virginian and Strathalbyn—about 150 yards away from the Strathalbyn and a little nearer the Virginian.

The effect of the evidence of those in charge of the navigation of the different vessels passing the Strathalbyn on the night in question is that her lights were not ordinarily bright, that they had difficulty

in seeing them, that they were not visible as far as they should have been, and that the lights could not be seen from points ahead where they should have been. The stern light upon the Strathalbyn went out before Robinson Point was reached. The starboard side light was trimmed and relit immediately after the collision—whether finding it to be out or very dim was the occasion is not clear from the testimony. The masthead light was taken down after the collision and examined. When it was again raised, the cap on the top of the lamp was left up to give ventilation. It is not clear whether it was not closed when it was taken down for examination.

The officers of the Strathalbyn appear to have looked at the lights often during and before the signaling to the Virginian. While vigilance in this regard is to be expected of men experienced in navigation, there appears to have been overanxiety on this night about the lights, which tends to show that it was realized that they were not satisfactory. A circumstance occurring an hour or more before the collision, when the Strathalbyn, near Brown's Point, met the Daring, probably called the attention of those on the Strathalbyn to the condition of the lights. The mate on the Daring, who was at the wheel, testifies:

"A. Well, first I heard two whistles, and then the next was I discovered a dark object ahead, and about that time the captain stepped out from his room and asked why I didn't answer the two whistles. [Interrupted.] Q. Did you answer the two whistles? A. Eventually; yes, sir. Q. Did you at the time when you first heard them? A. No, sir. Q. Why didn't you? A. Because I didn't recognize where they came from. * * * Q. Could you see the vessel that gave these whistles? A. Well, I will have to say no, under the circumstances, without explaining. Q. What was the first thing that you did see of the vessel, and whereabouts did you see her, if you saw her? A. Well, she was pointed out, and at about the same time it was apparent to me that the dark object was opening out lights, and I was convinced, then, that it was a vessel. Q. Did you see any lights on her? A. I saw two. Q. Where were they, and what kind of lights? A. They proved to be on the forward part of the vessel, white lights; and about the time I answered, or eventually answered, the two whistles, the one light—lower light—disappeared, and I concluded it was a lantern over the side where they had been clearing their anchors, or something of that kind."

The failure of the Daring to promptly answer the signal of the Strathalbyn, probably, suggested to the latter's officers a defect in her lights. The regular electric side lights of the Strathalbyn were placed on the upper bridge. The oil lights, being used upon the night of the collision, were not in the screens upon the upper bridge, but in those on the lower bridge, or chart room deck, which was 15 feet 4 inches above the cargo deck below. No defect has been shown in those screens, which were 8 inches above the chart room deck.

The cargo forward on the deck below was piled about 14 feet high —that is, approximately as high as the lower bridge—so that men moving about could step from the top of the lumber upon the lower bridge. This lumber was laid, or piled, lengthwise of the ship between stanchions placed on end, or standing up inside and against the rail on either side of the deck forward. The stanchions extended some distance above the lumber piled between them, some being as

high as 20 feet above the deck. All of the stanchions extended higher than the lights, and would obscure them from ahead, if not kept inboard from the blocks in the front of each light screen, placed there to keep the lights from shining across the bow. Inland Rules, art. 2 (d), 2 Fed. Stat. Ann. 174, 30 Stat. 97 (Comp. St. 1913, § 7876).

These stanchions were about 7 in number, upon either side, placed at irregular distances apart, the average being about 12 feet. They were 6 by 10 inches each, according to the testimony for the Strathalbyn, placed with the broad face to the rail, though it is shown to be usual to place the narrow face to the rail for greater strength in holding the cargo.

The outboard side of the blocks in the front end of the light screens were 47 feet 7 inches apart. The lights in the screens, back of the blocks, were the same distance apart. The first stanchion upon the port side was about 8 feet forward of the front of the lower bridge. At this point, from the inside of the bulb, or top of the rail on the port side, to a like point on the starboard side, was 48 feet 7 (or 7½) inches, about 6½ inches further outboard on each side than the side lights. It therefore follows that, unless this first stanchion on the port side leaned inboard at least 6½ or 7 inches at a point level with the lamps used, it would obstruct this light forward.

Much testimony has been taken as to the position, in this respect, of this and the stanchions forward of it, prior to and after the collision, as well as that of like stanchions used with later cargoes on the same ship, together with the question of whether such stanchions generally tend outboard or otherwise. The height of the rail above the deck, against which the stanchions were placed, was about 4 feet. The lumber cargo, therefore, extended 10 feet above the rail between the stanchions. The stanchions, after the cargo was on, were drawn together by lines passing across the deck over the lumber, the winch being used to draw them up.

Under these circumstances, it is reasonable to conclude that the stanchions would lean outward slightly. By the force of gravity, as the loading progressed, the tendency would be for the lumber to spread and shuffle outward, and all the effect of this would not be overcome by drawing the stanchions inboard afterwards. Such result with poles or lumber on railroad cars, or cordwood upon a wagon, between stanchions, are matters of common observation.

In one slight particular there was a difference between the stanchions on either side. Upon the port side, underneath and on the inside of the rail top, running lengthwise of the rail, was an iron pipe, which extended an inch further inboard than the innermost part of the rail top. To protect this pipe, an inch piece of board was placed between the stanchions and the rail. While this might tend to lessen, to a slight degree, the obstruction to the light shining forward, by the stanchions on the port side over the starboard, it would not cure it. The pilot of the Strathalbyn testified to seeing the port light shining on the stanchions, as follows:

"Q. Did you observe the rays of the red light upon the stanchions? A. Indeed, sir; several times. Q. State how they appeared. A. They ranged right

forward, and touched three or four stanchions, I noticed. Q. On what side? A. Port side; the red light. Q. I mean inside or outside the stanchions? A. The outside stanchions, sir. Q. It showed full on the first stanchion, did it? A. Yes, sir. Q. And ranged along so that you could see— A. I could see the reflection of the light on three or four stanchions. Q. Ahead of the first stanchion? A. Yes; back to the foremast rigging."

The captain of the Strathalbyn testifies to seeing the light shining on the stanchions:

"Q. Did you observe the rays of light upon these stanchions? A. Yes; I did. Q. How did it appear? A. They would shine on the outside of the stanchions."

As also does the first mate:

"Q. Did you notice whether or not the red rays of the port light shone on the outside of any of these stanchions forward of the light? A. I could see the reflection on both sides, the green and red one, on the after stanchions. Q. Did you notice it ahead on any other stanchions, ahead of the after stanchions? A. No; I don't think I saw it on any of the rest of them. I don't think so."

The condition described could only result in hiding the light from ahead. The only question would be the extent, or zone over which it would be hidden.

[2] Much testimony has been introduced on libelant's part to show that the lights of the Strathalbyn were bright and visible from ahead; but it is overborne by that which has been indicated. Passengers upon the Flyer were among the witnesses of libelant. While they were doubtless as honest and disinterested as the witnesses for the Virginian, those on the Flyer, Indianapolis, Daring and Salmora, actually engaged in navigating them with reference to the Strathalbyn, as witnesses, while possessing the advantage of having as great or better opportunity, knowledge, skill, and lack of interest in making these observations of the Strathalbyn and her lights, as had libelant's witnesses, also had an added advantage in the necessity and incentive, in navigating their respective vessels, with reference to the Strathalbyn, to observe her and her lights closely.

This one advantage on their part, though they gave negative testimony—that they did not see the lights upon the Strathalbyn, or see them as soon as they should have been seen—more than compensates for the advantage of those witnesses who had no particular reason to observe, who testify that they recall seeing the lights in question. This does not apply to a number of witnesses for libelant, who, after word had reached Tacoma of the collision, set out in a small boat to meet the Strathalbyn upon her return to Tacoma. They testify that, as the Strathalbyn came towards them, they could see both of her side lights at the same time. Owing to the evident interest of these witnesses, the inconsistencies in their testimony and the fact that their observations were made several hours after the collision, their evidence is considered of less value than that of those navigating the other boats.

The Virginian, by not answering the passing signals of the Strathalbyn, and the Daring, by not promptly answering her signal, acted in accordance with what those navigating the Virginian and Daring now testify was the condition of the Strathalbyn at that time, in not hav-

ing lights that could be seen. These facts give added force to their testimony. The Amboy (D. C.) 22 Fed. 555; The Westfield (D. C.) 38 Fed. 366; The General (D. C.) 82 Fed. 830; The Pierre Corneille (D. C.) 133 Fed. 604.

In a sense the same may be said of the Indianapolis, for her captain and quartermaster say that, having passed the Flyer and Virginian a few minutes before the collision, and having noted the poor condition of the Strathalbyn's lights upon the two occasions of meeting and overhauling her, the captain of the Indianapolis was apprehensive that there might be trouble in the Virginian and Flyer meeting the Strathalbyn, and, for that reason, he did not change his course immediately upon passing Pully Point as usual—which would have shut off his view of all these vessels, but kept on his course for a time watching them.

The greater value of the testimony regarding the lights on the Strathalbyn of those navigating the Flyer over that of her passengers would be greatly lessened as the Strathalbyn drew abeam and passed the Flyer, for, as soon as the Flyer was well clear of the Strathalbyn, the motive of the former's officers to closely observe the Strathalbyn would have ceased, and their attention be concentrated along the course of their vessel, while the passengers, without such responsibility, might then well observe the Strathalbyn and her lights more closely than the officers of the boat. It is therefore probable that these passengers did observe the port light of the Strathalbyn when she was abeam the Flyer, though the officers did not.

None of libelant's witnesses is more positive in testifying that both side lights were visible from a point ahead than Strand, a man taking care of the boats at the Tacoma Yacht Club, who testifies that, after putting the lights out on the yachts, he went ashore to the wharf, where he met a longshoreman, to whom he talked as he looked out over the Sound. His testimony regarding the lights on the Strathalbyn, as she lay at anchor shortly before going to sea, is as follows:

"A. And I seen both side lights at the same time. Boat was swinging once in a while, and mostly I seen the green light, and they appeared to me to be ordinary good side lights. Q. How did the masthead light appear to you? A. Just as good as the rest of them—side lights. Q. How far away would you say the Strathalbyn was from the Commercial bridge where you were standing? A. Oh, about a little bit more probably than a quarter of a mile. * * * Q. Now, captain, will you describe how the vessel was swinging, if she was swinging at all? Just describe that. A. Yes; she was swinging more or less, just as the wind appeared; sometimes a little bit stronger, you see, and sometimes dying down again. Q. And her bow was pointing which way? A. Her bow was pointing directly on the place where I was standing, most of the time. Q. How would you say the side lights appeared to be burning, compared with the ordinary lights of vessels? A. I could not see any difference from an ordinary good light—good side lights and her side lights. Q. And the same question with respect to her masthead light? A. Yes. Yes, sir; all the lights. Q. How long were you standing on the Commercial Street bridge observing these lights and the vessel? A. I was standing there for about a half an hour. Q. And how did it happen you were standing there for a half an hour? A. I was talking with a longshoreman and looking at the boats passing around there, and looking after the yachts, because it was blowing more or less, and that is why I happened to stay there and watch the harbor. Q. Did you see these lights more than once while you were standing there? A. Oh, yes; on and off, all the time."

The side lights are running lights, and only in place when the vessel is under way. Taylor, the quartermaster on the Strathalbyn, who had charge of and placed the lights in the screens, testifies:

"Q. What time did you light them? A. I had finished my tea, and they sang out, 'Lights out!' and they started to heave away the anchor. Q. Who told you to light the lights when they started out? * * * A. It was my place. Q. Is that your regular duty on the ship? A. It was that day. Q. Did anybody order you that evening to light the lights, and, if so, who was it? A. I heard the order come down from the deck, 'Lights out!' and it was my place to light them, and I went and lit them."

Mr. Strand was doubtless mistaken. A number of the crew of the Strathalbyn, in the forecastle at the time of the collision, who clambered back over the lumber along the port side, testified to seeing the Strathalbyn's port light. Some of them say they saw it inside, some outside, of the stanchions, and some are not clear how they saw it. The collision left the Strathalbyn with a bad list to starboard, taking her starboard side light nearly to the water. If any of the crew saw the port light inside the stanchions, there must have been a very considerable obstruction to the light forward and off the port bow.

Considering that the ship narrowed forward of the bridge from about 48 feet to about 44 feet (or 4 feet) in a distance of 80 feet, there would be 2 feet narrowing upon the port side; that seven stanchions were arranged in this distance along the rail, each exposing a 6-inch surface, a total exposed surface of 3½ feet, it is clear that, from any point forward of the stanchions, there would be such an overlapping of stanchions as to prevent a man seeing the side light between the stanchions. It is probable, on account of the list of the vessel to starboard, that, as the men came along the port stanchions, got near the light, and straightened upright between the last stanchions, all of which would be canted with the ship to starboard, they were able to look down over the outside of the last stanchion into the port light screen, the inside board of which would be also canted to starboard. This is to be inferred from the testimony of these witnesses.

One of the crew testifies that, after the collision, his knee was hurt, and he crawled on his hands and knees to the port side; then crawled along, leaning on the railing, walking along stanchion by stanchion, dragging himself along as best he could; after he got to the port side he stood up and went aft; that he saw the port light when he was going aft on the port side; that he could look straight back at it, and that he was about 10 feet in front of it when he first saw it. Another testifies that he did not see the port light until he got up on the port side. The vessel was heeling over, and he made for the high side of the boat. He did not look over the stanchions to see the side light. He could see through the stanchions and see the port light, because the stanchions were far apart. He saw the side light as soon as he came up on the port side. He walked up to the port side at right angles from where he came out. He was more than 15 or 20 feet from the light when he first saw it, and was standing inside the stanchions when he saw it. A third testifies "she [the Strathalbyn] had listed over all the time, * * *" and that, after the collision "she had listed bad

enough that I had to hold to those scantlings (stanchions) that was keeping the cargo tight, catch hold and walk around the port side."

On behalf of the Strathalbyn, it is contended that, even if it were conceded that the port light was, to some extent, obscured ahead, yet the angle of approach of the Virginian was so great that the light should have been seen, notwithstanding it was hidden from ahead. It is clear that the vessels, on opposite courses, came into practically a head-on collision. Probably the courses were not over a point off of being directly opposite. This conclusion is at variance with much testimony as to the repeated porting of the helm of the Strathalbyn, the change in the Virginian's course to port, and other testimony, expert and otherwise; but all of this is overborne by the evidence of contact left upon the vessels after the collision.

The Strathalbyn, at the time of the collision, had a six degree list to starboard. The Virginian had no list. The stem of the Virginian struck across the stem of the Strathalbyn at the 29-foot mark. Above that point, the stem of the Virginian entered the port bow of the Strathalbyn. Below that point, the stem did not enter the hull of the Strathalbyn; but the starboard bow of the Virginian moved, in contact, aft along the starboard bow of the Strathalbyn, the forefoot of each vessel passing by that of the other.

The lower structure of the Strathalbyn being stronger than the upper and able to fend off to starboard the Virginian, whose stem and bow remained rigid throughout, the stem of the Virginian above the 29-foot mark, as it entered the upper part of the Strathalbyn, instead of following a prolongation of the line of approach and contact, was deflected through to the starboard bow of the Strathalbyn, along a line corresponding to that of the latter's starboard bow, below the 29-foot mark. The stem of each vessel is practically perpendicular fore and aft—that is, with no overhang forward—so that there could have been no contact with the Strathalbyn's port bow above the 29-foot mark before that had with the starboard bow below. It is therefore concluded that the side lights of the Strathalbyn were hidden to the Virginian as she approached, and that this was a proximate cause of the collision. It is not clear whether, but for the obstruction, they could have been seen in time to prevent the collision.

It is contended upon the part of the Strathalbyn that, conceding her side lights were hidden from ahead, still the Virginian should have seen the masthead light of the Strathalbyn in time to answer her passing signal and avoid a collision. The failure on the Strathalbyn's part to properly position satisfactory side lights cannot be so excused. The failure of those on the Virginian to see the masthead light of the Strathalbyn, it is contended, is evidence of want of a proper lookout—enough of itself to explain the failure to see the port side light.

It is true the captain of the Flyer made out two white lights on the Strathalbyn, which he concluded were her range lights. One of those was probably her masthead light; but, as she had no aft range light, the other was probably a lantern forward about the forecastle. If it had been a port, hole light, necessarily on the port side, what the captain took for the range lights would not have opened so as

to satisfy him with a passage port to port. This lantern upon the deck would probably be hidden to the Virginian, then directly ahead, by the rise forward of the rail of the Strathalbyn, as the vessels were approaching head on, the masthead light would appear stationary, and, under the circumstances, a failure to distinguish it from shore lights upon Vashon Island will not be held a fault.

In the case of The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, the court found the failure on the part of the Oregon to recognize the Clan Mackenzie's anchor light to be a fault, but further found the government light, with which it was claimed the anchor light was confused, to have been plainly visible, and that it should have been seen, thus preventing any confusion.

Having reached this conclusion, the questions of whether the Strathalbyn should have carried an aft range light, or whether there was other fault in her navigation, will not be considered.

The question of fault upon the part of the Virginian remains to be considered. The collision did not occur for three or four minutes after the first whistle of the Strathalbyn to the Virginian, during which time the Strathalbyn blew two passing and a danger signal. On account of the general route of vessels at the point of collision, the signals exchanged between the Strathalbyn and the Flyer, indicating a passage port to port, and the signals given to the Virginian by the Strathalbyn, the Virginian must have known, approximately, the general position and course of the Strathalbyn, and when those aboard her could not make out the Strathalbyn or see her lights, they should have reversed her engines not later than the second whistle. That she did so is testified to by witnesses for the Virginian with some detail.

The bell book in the engine room of the Virginian contains the following entries:

	Starboard		Port
O	7:57	O	7:57
MM	.58	MM	.58
O	.59	O	.59
V	8:09	V	8:09

Indicating: (O) "stop," 7:57; (MM) "full speed astern," 7:58; (O) "stop" (reversing), 7:59; (V) "slow ahead," 8:09.

The engine room log book of the Virginian contains the following:

"Stop, 7:57; full astern, 7:58, stop, 7:59, ahead slow, 8:09. In collision with S. S. Strathalbyn at 7:58 p. m."

Article 28 of the Inland Water Rules provides:

"When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle." 30 Stat. 102 (Comp. St. 1913, § 7902).

The three whistles of the Virginian were not given until after the Strathalbyn's danger signal, less than a minute before the collision. Captain Beecher, pilot of the Strathalbyn, testifies:

"Q. When the Virginian and Strathalbyn came into collision, did you notice whether or not the Virginian was backing? A. When he blew his three whistles in answer to my danger signal, I looked along the hull which was

very plain, and I called attention that she was just beginning to back; the backwater was just getting back under his starboard quarter."

Captain Crerar of the Strathalbyn also testifies:

"Q. Did you observe whether or not the Virginian was backing at the time you came into collision? A. Just before she struck us, Captain Beecher directed my attention to the wash of her water coming up. Q. Where did that appear to be? A. Around her stern. Q. How far forward? A. It did not get forward at all, but was just beginning to come up. Captain Beecher remarked, 'He is just going astern now.'"

It is therefore concluded that the engines of the Virginian were not reversed until less than a minute before the collision, and that she was clearly in fault for not reversing her engines sooner.

Rule 1, article 18, of the Regulations for Inland Waters for steam craft, provides for passing signals for vessels approaching nearly head on. Rule 3 of this article provides:

"If, when steam vessels are approaching each other, either vessel *fails to understand the course or intention* of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." 30 Stat. 100, 2 Fed. Stat. Ann. 179.

Rule 5 makes provision for signals by vessels nearing river or channel bends, where approaching vessels from the opposite direction cannot be seen, and for signals by vessels moving from their docks, when other boats are liable to be moving towards them. Rule 8 provides for the signals to be used when vessels are running in the same direction and the rear one desires to pass the one ahead. Rule 9 provides:

"The whistle signals provided in the rules under this article, for steam vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and *the course and position of each can be determined* in the daytime by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow or heavy rainstorms, when vessels cannot so see each other, fog signals only must be given." 30 Stat. 101, 2 Fed. Stat. Ann. 179.

Article 28, set out above, provides for a signal where a steam vessel is going full speed astern and is in sight of another vessel.

Rule 3 of the Pilot Rules of July 25, 1911, made pursuant to article 30, c. 802, Act Aug. 19, 1890, 26 Stat. 328 (Comp. St. 1913, § 7869), provides:

"The signals for passing, by the blowing of the whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting head and head, or nearly so, but at all times. When the steam vessels are in sight of each other when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port. The whistle signals provided in the rules for steam vessels meeting, passing, or overtaking are never to be used except when steamers are in sight of each other and the course and position of each can be determined in the daytime by a sight of the vessel itself or by night by seeing its signal lights. In fog, mist, storms, when vessels cannot so see each other, fog signals only must be given."

Under these rules, it is the contention of the Virginian that she was excused from giving the danger signal required by rule 3, article 18, because she could neither see the Strathalbyn or her lights, and that,

under such conditions, rule 9 forbids the giving of any whistle signal; that, by her silence, the Virginian signaled that the Strathalbyn and her lights could not be seen.

By rule 3, the danger signal is required when "from any cause" either approaching vessel "fails to understand the *course or intention* of the other." Rule 9 forbids whistle signals, unless "the *course and position* of each [vessel] can be determined," by seeing the vessel in the daytime, or its lights by night. (The italics are the court's.) It is shown that those navigating the Virginian knew a vessel was "approaching" from ahead; that they knew the vessel's "intention," from her whistle, was to pass the Virginian port to port, but, not being able to either see the "approaching" vessel or her lights, they could not understand her "course." It was, therefore, the duty of the Virginian "immediately," and certainly not later than the second whistle of the Strathalbyn, to give the danger signal, as required by rule 3.

Article 28 positively directs three whistles by a steam vessel under way whose engines are going full speed astern, when the vessels are in sight of each other. It does not forbid such signals under all circumstances, unless the vessels are in sight of each other. Rule 9, forbidding the use of signal whistles provided in the rules under article 18, is limited to those signals provided for "steam vessels meeting, passing or overtaking." This quoted expression—if standing alone—it might plausibly be argued contemplates and includes any situation in which vessels are approaching each other; but an examination of the other rules of article 18 shows clearly that its application is not so broad.

Rule 1 covers steam vessels "approaching each other head and head," in which case they shall pass port to port, and the proper signal may be given by either for such passing; "but, if the courses are so far on the starboard of each other as not to be considered as *meeting* head and head," each shall pass on the starboard of the other, and either may give the signal therefor. Rule 8 provides for the passing of vessels running in the same direction, and provides for the signals for passage of the vessel astern to port and starboard of the vessel ahead. In this rule the following expressions are used:

"The vessel which is astern shall desire to *pass* on the right, * * * or if she shall desire to *pass* on the left, * * * or if the vessel ahead does not think it safe for the vessel astern * * * to *pass*, * * * and under no circumstances shall the vessel astern attempt to *pass*" the other.

The word "overtake" or "overtaking" is not used in rule 8; but when the word "passing" is used in rule 9, which rule is only applicable to "steam vessels meeting, passing or overtaking"—it, being separated from the context of rule 8, becomes too vague, and therefore it is clear that the word "overtaking" was added as a synonym, or explanatory of the sense in which the word "passing" was used.

The signals forbidden by rule 9 are clearly those provided for in rules 3 and 8 only. It is not meant to decide that the duty to give the special danger signal provided for in rule 8, where the vessel ahead does not think it safe for the vessel astern to attempt to pass, depends upon whether the course and position of each can be determined

by seeing the other or her lights. If the prohibition of rule 9 extends to the danger signal, provided for by rule 3, then the danger signal could never be used, except when the vessels were in sight of each other and the *"course and position* of each could be determined," while rule 3 makes the failure to understand the "course" of the other vessel a prerequisite to using the danger signal. If the construction of rule 9 contended for was adopted, no room would be left for the operation of rule 3, which depends upon the failure to "understand the course and intention of the other" vessel, while rule 9 forbids signals, except when the *course and position* of each can be determined.

Doubtless, the inability of competent and vigilant men on the lookout on the Virginian to make out either the Strathalbyn or her lights excused the Virginian for not accepting and answering the port to port passing signal of the Strathalbyn, provided for by rule 1; but it did not relieve her of the duty of "immediately"—being unable to understand the course of the Strathalbyn—sounding the danger signal and reversing. If this signal had been given promptly, the Strathalbyn would, doubtless, have reversed her engine a minute or two sooner, and the collision have been averted.

It is concluded that the Virginian was clearly in fault for failure to give the danger signal. It is therefore unnecessary to consider further the question of other faults charged against the Virginian. The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; Duluth S. S. Co. v. Pittsburg S. S. Co., 180 Fed. 656, 103 C. C. A. 622.

Both vessels are therefore found to be at fault, and the damage will therefore be divided.

THE DREDGE A.

(District Court, E. D. North Carolina. October 5, 1914.)

Nos. 44–53.

1 JUDGMENT (§ 717*)—RES JUDICATA—INTERLOCUTORY DECREE BY CONSENT.

In a consolidated suit by a number of libelants and interveners to establish and enforce liens on a dredge, an interlocutory decree was entered by stipulation of all parties, including the owner of the dredge, finding that all the material allegations of the libels were true and that the libelants severally were entitled to recover the sums set out. It also ordered the dredge sold and the net proceeds paid into court to await its further orders, and decreed that, if insufficient to pay all of the claims in full, it should be distributed "pro rata in accordance with the sums and amount of claims of equal dignity herein adjudged to be due and payable." *Held*, that while, by such decree, the amounts and dates of the claims of the several libelants and interveners, and the considerations on which they were based, became res judicata as between the claimants named, the decree was not conclusive as to conclusions of law stated in the libels, and that the questions whether any claim constituted a maritime lien, and, if so, to what extent and of what dignity, were open for determination by the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1248; Dec. Dig. § 717.*]

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

2. ADMIRALTY (§ 93*)—HEARING—REVIEW OF PRIOR INTERLOCUTORY ORDERS.
In admiralty, as in equity, on final hearing, all interlocutory orders relating to the merits are open to revision and under the control of the court.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 674–679; Dec. Dig. § 93.*]

3. MARITIME LIENS (§ 25*)—REPAIRS AND SUPPLIES—CONSTRUCTION OF STATUTE.
Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. 1913, § 7783), giving a lien for repairs, supplies, or other necessaries furnished to a vessel on order of the owner or a person authorized by him, does not create a new class of liens, and applies only to claims and contracts previously recognized as maritime and cognizable in admiralty.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31–36; Dec. Dig. § 25.*]

4. MARITIME LIENS (§ 25*)—CLAIMS ENTITLED TO LIEN—CONTRACTS FOR CONSTRUCTION AND EQUIPMENT OF DREDGE—"MARITIME CONTRACTS."
Respondent, having taken a government contract for dredging, bought an old hull and delivered the same to a contracting and constructing engineer to be used in the construction of a hydraulic dredge. *Held* that, until the dredge was completed and equipped for the use for which it was intended, it did not become a maritime entity within the admiralty jurisdiction, and that the contract for building the same, and contracts for materials, machinery, and equipment necessary for such completion were not "maritime contracts," and could not be the basis for liens on the vessel, under Act June 23, 1910.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 20, 31–36; Dec. Dig. § 25.*
For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]

5. MARITIME LIENS (§§ 10, 11, 12*)—CLAIMS ENTITLED TO LIEN—REPAIRS AND SUPPLIES FURNISHED TO DREDGE.
Creditors for repairs, supplies, pontoons, and other equipment furnished to a hydraulic dredge while engaged in work, which were necessary to her continued operation and furnished on the credit of the vessel, *held* entitled to maritime liens therefor.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 14, 15, 16; Dec. Dig. §§ 10, 11, 12.*]

6. MARITIME LIENS (§ 10*) — CLAIMS ENTITLED TO LIEN — EQUIPMENT FOR DREDGE.
While a hydraulic dredge was being built, libelant furnished on order of the owner rubber sleeves for use in connecting the pipes through which the material taken out by the dredge was carried and discharged. The sleeves were not unpacked nor used until the dredge had been completed and commenced work, and were necessary to its operation. *Held*, that they were a part of the original construction or equipment, without which the dredge was incomplete, and not repairs or supplies, and that libelant was not entitled to a maritime lien.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 14; Dec. Dig. § 10.*]

7. MARITIME LIENS (§ 38*)—REPAIRS AND SUPPLIES—CONSTRUCTION OF STATUTE.
Act June 23, 1910, c. 373, § 1, gives a lien for repairs or supplies furnished to a vessel on the order of her owner in her home port, which may be enforced by proceedings in rem, without proof that such repairs or supplies were furnished on the credit of the vessel, whereas previously such right only existed as to repairs or supplies furnished in a foreign port; but the lien so given is a "maritime lien," and the statute does not

affect or restrict the power of courts of admiralty to apply to such liens the principles applied to other maritime liens in determining rights of priority.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 71–77; Dec. Dig. § 38.*]

8. WORDS AND PHRASES—"RECONSTRUCT"—"CONVERT."
The words "reconstruct" and "convert" are not synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Convert; also, First and Second Series, Reconstruct.]

9. WORDS AND PHRASES—"CONSTRUCTION."
"Construction" is the process of bringing together and correlating a number of independent entities, so as to form a definite entity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Construct.]

In Admiralty. Suit by Howard S. Roberts and others against the Dredge A and Edmund H. Mitchell, trading as Mitchell & Co., owner. On settlement of final decree.

See, also, 204 Fed. 262, 122 C. C. A. 527.

Small, MacLean & McMullan, of Washington, N. C., and Joseph R. Wilson, and Geo. C. Mahly, both of Philadelphia, Pa., for Roberts and others.

J. F. Duncan, of Beaufort, N. C., for Hancock and others.

C. R. Wheatley, of Beaufort, N. C., for Noe and others.

Guion & Guion, of New Bern, N. C., for Craven Supply Co. and others.

Rountree & Carr, of Wilmington, N. C., for National Hoisting Co. and others.

Hughes, Little & Seawell, of Norfolk, Va., and A. D. Ward, of New Bern, N. C., for Nottingham & Wrenn Co.

Abernethy & Davis, of Beaufort, N. C., for Acme Rubber Co.

Henry W. Bland, of New York City, and Chas. R. Thomas, of New Bern, N. C., for Shellenberg and others.

Willard M. Harris, of Philadelphia, Pa., for Bougher & Bishop and others.

Biddle, Paul & Jayne, of Philadelphia, Pa., Wicoff & Lanning, of Trenton, N. J., and Moore & Dunn, of New Bern, N. C., for Kensington Shipyard Co. and others.

Daniel G. Fowle, of Atlanta, Ga., for Mitchell.

CONNOR, District Judge. Steam Dredge A, which constitutes the subject-matter of this controversy, after being constructed at Philadelphia, Pa., in the manner and under the conditions found by the special master, as hereinafter set forth, was brought to Beaufort, N. C., where it was to be operated in dredging the navigable waters in and around the ports of Oriental, Morehead City, and Beaufort, N. C., upon a government contract which had been secured by the said Edmund H. Mitchell, trading as Mitchell & Co. After being operated several months in the performance of the work for which he had contracted, the said Edmund H. Mitchell, being unable to continue there-

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

in, forfeited his contract with the government and suspended work thereon.

On August 28, 1911, Howard S. Roberts libeled said dredge upon a claim the amount and consideration whereof are hereinafter set forth. During the month of September, and prior to October 24, 1911, certain other libelants, to wit, the Hyman Supply Company, the Craven Foundry Company, the York Foundry & Machine Company, the J. K. Petty & Company, the Earl Gear & Machine Company, the Nottingham & Wrenn Company, the Hancock Company, A. E. Pittman & Son, A. D. O'Briant, the Texas Company, S. P. Hancock, the J. W. Paxson Company, Alonso Thomas, the National Hoisting Machine Company, Alexander Miller & Bro., H. W. Noe and others, H. C. Jones, J. T. Beveridge, and the Tolson Manufacturing Company, filed libels against said dredge for amounts hereinafter set forth. On October 24, 1911, all of the libels and intervening libels were by order of the court consolidated, and on said day the attorneys of record prepared and submitted to the court a consent order or decree reciting:

"That the court finds that all of the material allegations of the libels are true, and that the libelants, hereinafter named, are entitled to recover herein the sums respectively hereinafter set out. It is further ordered, adjudged, and decreed that the steam Dredge A, her tackle, apparel, furniture, and appurtenances, be, and the same are, hereby condemned to the payment of the aforesaid amounts as hereinafter stated, and already found to be due, and for the further sum of the costs and disbursements in these actions, to be taxed by the clerk," etc.

Following a list of the amounts of the several claims, it is further adjudged:

"And that said dredge, her tackle, apparel, furniture, appliances, and appurtenances, be, and the same is, hereby condemned to the payment of the said sums above in full, if sufficient there be; otherwise, pro rata in accordance with the sums and amounts of claims, of equal dignity, herein adjudged to be due and payable."

It was further ordered that the marshal proceed to sell the said dredge, and upon confirmation of the sale—

"pay the proceeds arising from such sale, after deducting therefrom the cost and expense thereof, into the registry of this court, there to await the further orders of the court in the premises as to the distribution of the same."

The consent decree was signed by the proctors and advocates for each of the libelants, and of Edmund H. Mitchell. Subsequent to the date of the consent decree, and prior to the date of the sale of the dredge, pursuant thereto, the Acme Rubber & Manufacturing Company and Marvin Briggs filed libels for amounts based upon claims hereinafter set out. The said Dredge A was sold by the marshal, on November 22, 1911, for the sum of $20,000, and the sale duly confirmed. The amount of the purchase price was paid into court, and certain libels, based upon claims due for seamen's wages, being included in the claims named in the consent decree, and conceded by all parties to be entitled to priority, were paid off and discharged. The cost of caring for the dredge and of making sale were paid, and the balance held by the court for distribution.

Subsequent to the date of the sale of the dredge, George M. Jacocks, Bougher & Bishop, Frederick Craemer, Frank C. Somers, and the Kensington Shipyard Company filed libels based upon claims hereinafter fully set out. Other claims were made upon the fund, which have been eliminated by decrees made herein. On April 15, 1912, a decree was made directing that certain claims, therein set forth, be first paid in full, and the balance of the fund be distributed pro rata among the other libelants. From this decree the libelants, other than those declared to be entitled to priority, appealed, and, upon the hearing, the Circuit Court of Appeals reversed said decree for the reason set out in the opinion of Judge Smith. 204 Fed. 262, 122 C. C. A. 527.

Upon the filing of the mandate of the Circuit Court of Appeals, this court made an order of reference to George Green, Esq., special master, directing him to find the facts upon which each of said libelants' claims were founded, and report his conclusions of fact to the court. Counsel representing libelants Howard S. Roberts, the York Foundry & Machine Company, J. K. Petty & Co., and the Earl Gear & Machine Company insisted that, upon a correct interpretation of the opinion of the Circuit Court of Appeals, this court should make a final decree making a pro rata distribution of the proceeds of the sale of the dredge. They excepted to said order of reference. Conceiving that, in refusing to make such final decree, and in making the order of reference, this court erroneously misconceived the purport and meaning of the decision and mandate of the Circuit Court of Appeals, they moved the said court to issue a writ of mandamus directing the judge of this court to make such decree. Upon the hearing of said motion, on the return of the notice to show cause why said writ should not issue, the Circuit Court of Appeals denied the said motion.

The special master proceeded, after notice to all parties in interest, to hear the evidence and filed his report, in which he found the facts relating to the origin, construction, and operation of said Dredge A, and of the claims upon which the several libels are based. Upon the coming in of the report, several of the libelants filed exceptions, all of which, except as hereinafter stated, are overruled. Libelants who appealed from the decree of April 15, 1912, insisted that, upon the record, including the findings of the master, the court should make a pro rata distribution of the funds in its possession, being the net proceeds of the sale of the dredge, and from the refusal to do so excepted. Libelants whose claims are for supplies furnished subsequent to the time when the dredge arrived at Beaufort, N. C., insisted that they should be paid in full, postponing the claims of the other libelants.

The claims fall into two general classes—the dates of their origin and the consideration upon which they are based fixing the conditions upon which their rights must be determined: (1) Those originating while the dredge was under construction, between December 10, 1910, and May 11, 1911. (2) Those originating while said dredge was operating at Beaufort, N. C., subsequent to May 11, 1911.

[1] Counsel for libelants whose claims originated prior to May 11,

1911, insist that, by the terms of the consent decree, certain questions, both of fact and of law, have become res judicata, and are not now open to review, either to the other libelants or to the court. It is conceded that by the consent decree, under the facts set out in the libels, the amount and consideration of the claims are adjudged to be true. From this concession it is argued that it is not competent for the court to inquire whether they constitute maritime liens, or into their status in respect to priority in the distribution of the fund, conceded to be insufficient to pay all of the claims in full. It is elementary that facts once solemnly admitted of record, or adjudged to be true by a court of competent jurisdiction, are not open to further litigation between the same parties or their privies.

Passing, for the present, the question as to the conclusive effect of the facts found by the consent decree, upon those libelants coming into the record subsequent to its rendition, a distinction must be kept in mind between the *facts* agreed upon by the parties to the decree and entered upon the record by the court at their request, and the legal conclusions so adopted by the court, upon subsequent proceedings had in the case. It is conceded, upon conclusive reasons, sustained by abundant authority, that if, upon appeal, a judgment is reversed, and further proceedings directed to be had in the lower court, the decision of questions of law by the appellate court, presented upon the writ of error or appeal, constitutes "the law of the case," and must be so treated by the parties and the court of first instance. Any other rule of practice would result in confusion, uncertainty, and unseemly conflict. If, for instance, in this case the Circuit Court of Appeals has adjudged that claims of all of the libelants constitute maritime liens of equal dignity, and are therefore entitled to share pro rata in the distribution of the fund, it is not open to either of the libelants thereafter to litigate that question.

The consent decree was interlocutory, and for the manifest purpose of enabling the court to direct the sale of the dredge, thereby saving loss by reason of deterioration and charges for guarding, pending the litigation. Certain admissions of fact were made. Without discussing the question whether, upon a final decree, these admissions are conclusive upon the parties coming into the record subsequent to the date of the decree, it is sufficient to say that it is not proposed to bring into controversy, or litigate any facts admitted therein. In so far as the allegations contained in the several libels are conclusions of law, they, of course, are not binding upon the parties or the court. It does not follow that, at all stages of the cause, and for all purposes, conclusions of law, stated in the libels, should be conclusive upon themselves or the court. This is manifest from the language of that clause of the decree in which it is directed:

"That said dredge * * * be, and the same is, hereby condemned to the payment of said sums in full, if sufficient there be; otherwise, pro rata in accordance with the sums and amounts of claims, of equal dignity, herein adjudged to be due and payable."

It is further directed that the marshal pay into the registry of the court the proceeds of the sale of the dredge, "there to await the fur-

ther orders of the court in the premises as to the distribution of the amount." The consent decree fixed the amount, dates of the claims of the several libelants, and the consideration upon which they were based. No question is now raised in regard to either of these facts; they are res judicata. Whether, and, if so, to what extent, and of what dignity, as between the claimants named in the decree, all of said claims are maritime liens, are questions of law and must be decided upon the facts fixed by the consent decree, and such other relevant facts as are found by the master.

[2] A court of equity, upon a final hearing, has the power to review its conclusions made upon interlocutory hearings and incorporated into such decree. "By the modern practice, on a final hearing, all previous decretal orders are before the court, and may be modified, altered, or vacated, as justice may require. Thus, where the court made an interlocutory order stating that the complainants were entitled to recover certain claims and directing an account to be taken by the master, it was held that upon final hearing, at the argument of exceptions to the master's report, its previous order was fully open for revision and correction." 2 Beach, Modern Eq. Prac. § 635.

In Fourniquet v. Perkins, 16 How. 85, 14 L. Ed. 854, Taney, C. J., disposing of the objection to the existence of the power, said that it could not be maintained:

"The case was at final hearing of the argument upon the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court."

In Fairbanks Co. v. Windsor, 124 Fed. 200, 61 C. C. A. 233, Lacombe, Circuit Judge, said:

"At final hearing all of the previous interlocutory orders in relation to the merits were open to revision, and under the control of the court." 2 Street's Fed. Eq. Prac. 1918.

It would seem that the same rule should obtain in a court of admiralty. Of course, the court will not, except upon careful consideration and for cogent reasons, reverse or modify its interlocutory decrees. In this instance it is manifest that the court should not be estopped from making careful inquiry into the correctness and finality of the interlocutory decree signed at the request of all of the counsel for the purpose of bringing the property in controversy to sale, expressly reserving the question of the status of the claims in respect to their dignity.

We are thus brought to a consideration of the question whether the funds now in the custody of the court shall be divided pro rata, or whether any of the claims, and, if so, which, are entitled to priority. This involves two questions:

First. Are the debts contracted while the dredge was in the shipyard at Philadelphia, Pa., in course of construction, prior to May 11, 1911, maritime liens? If so, should they be paid pro rata with the claims contracted for repairs and supplies furnished to the dredge subsequent to May 11, 1911, after it reached Beaufort, N. C., and while engaged in the working of dredging? It is conceded that Dredge

A, after it was completed, was a vessel, and within the admiralty jurisdiction. McRae v. Dredging Co. (C. C.) 86 Fed. 344; Barnes v. Dredge Boat (D. C.) 169 Fed. 895; Am. Dredging Co. v. Pac. Mail S. S. Co., 185 Fed. 698, 107 C. C. A. 620; Cope v. Valette Dry Dock Co., 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501; Hughes, Adm. 12.

When did Dredge A come within the definition of a vessel and within the admiralty jurisdiction? In The Iosco, Fed. Cas. No. 7,060, it is said:

"Whether the claim of libelants arises out of a maritime contract, and whether they have a right of action in this court in rem, depends upon the question of fact whether what libelants did and furnished were to and for a vessel already in existence, or whether they were so done and furnished in part to bring her into existence as a complete thing. If the former, then the action will lie. If the latter, it will not lie, and this court has no jurisdiction."

The special master finds that:

"In December, 1910, Edmund H. Mitchell bought a certain old hull and carried the same to the Naffy & Seavy shipyard, Philadelphia, Pa., for the purpose of overhauling and reconstructing the same into a hydraulic suction dredge. The old hull, so purchased by Mitchell, had been built from timbers taken from an old government dry dock, and, at the time, contained a boiler, a condenser, and heater, and was not, at this time, a completed boat. Said Edmund H. Mitchell thereupon proceeded to install upon said hull a power plant and proper equipment, in order to reconstruct and convert the same into a suction dredge. In the process of this construction of the said dredge, the said Edmund H. Mitchell contracted with certain parties residing in Philadelphia and Jersey City for the furnishing of certain equipment, appliances and machinery needed for the completion of the said hull as a hydraulic 20-inch dredge. In consequence of the arrangement so made, the said hull was completed as a dredge on or about the 11th of May, 1911, and was then turned over to Edmund H. Mitchell by the contractor and constructing engineer, Howard S. Roberts, as a completed dredge, and thereupon the said Edmund H. Mitchell, trading as Mitchell & Co., proceeded to and had said dredge towed by way of Norfolk, Va., to Beaufort, N. C., where said dredge was to be engaged in the dredging of the navigable waters in and around the ports of Oriental, Morehead City, and Beaufort, N. C., upon a certain government contract, which had been secured by the said Edmund H. Mitchell, trading as Edmund H. Mitchell & Co., prior to the time of the purchase of the aforesaid old hull, which was constructed as aforesaid into the dredge, later named Dredge A."

In regard to the consideration upon which the claims of the several libels are founded, the master makes the following findings of fact:

No. 1.—Howard S. Roberts.

"Libelant resided in the city of Philadelphia, Pa., during the year 1910. In November or December, 1910, libelant, at Philadelphia, in consequence of a phone conversation had with said Mitchell, who was then the owner of steam Dredge A, at New York, entered into a contract with said Mitchell to furnish to him, the said Mitchell, certain machinery and appliances to fit out a certain old hull, which said Mitchell then advised libelant that which it was desired to reconstruct and fit out as a suction dredge. That said contract, or agreement, so made, or so entered into, between libelant and Edmund H. Mitchell, provided that said libelant was to design and superintend the construction of said hull into a suction dredge. Said libelant was to procure to be furnished necessary machinery and equipment and superintend the installation of same and all necessary labor to do the installing. For his services in so designing, procuring material and labor, and constructing said dredge, libelant was to receive a commission of 10 per cent. on all such machinery and equipment furnished, and also a commission of 15 per cent. on

all labor used or performed in installing said machinery and reconstructing said hull into a dredge. Libelant did not, under said contract, agree to furnish said labor and material himself, but was to buy said machinery and equipment, have same billed to him, and then to rebill the same to the said Edmund H. Mitchell, at New York. The said labor, whether employed by said Roberts or Mitchell, was under the direction of the said Roberts, and upon the amount of labor so performed the commission to libelant was to be figured and charged. And in consequence of this contract, or agreement, the said machinery so bought for the said dredge was billed to libelant, and by him rebilled to the said Mitchell personally, or to Mitchell & Co., under which name said Edmund H. Mitchell was then doing business. That said machinery and equipment so furnished for constructing said dredge was rebilled to said Mitchell by said libelant at the exact face of the invoice at which it was originally billed to libelant, and upon said invoice libelant's commission of 10 per cent. was computed. That said machinery was so furnished to said Mitchell by libelant before the boat left the port of Philadelphia, Pa. That when libelant had completed his contract with said Mitchell [the said] hull was completely designed, constructed, and equipped as a hydraulic suction dredge; the said contract calling for the dredge boat as a unit. That the said machinery and material so furnished by libelant completely reconstructed and equipped said boat as a dredge of the type mentioned. That after all the items so furnished for the construction of the said dredge by libelant were billed and charged to Edmund H. Mitchell, or Mitchell & Co., by him, there was a certain amount of money, to wit, $924.16, to which said Mitchell was entitled to be credited by libelant to said Mitchell, leaving the balance due on said contract, as stated in the libel. $9,525.31. That libelant performed no service for the dredge after it left Philadelphia. That at the time said dredge left Philadelphia libelant's contract was fully performed, and the construction of said dredge was complete, except as hereinafter set out, in so far as said contract was concerned."

Upon the exception of libelant, the court makes the additional finding:

"After the dredge left Philadelphia, to wit, on May 12, 1911, libelant shipped to Beaufort, N. C., for the dredge, and on account of his contract, as hereinafter set out, a car load of discharge piping, amounting to $739.20, and on May 19, 1911, another car load of discharge piping, amounting to $739.20, and on May 22, 1911, a piece of special cast iron pipe, amounting to $62.20, all of which was placed on said dredge while she was at Beaufort."

No. 2.—J. K. Petty & Co.

"This is a claim which covers certain items of construction, equipment, and labor procured from libelants between the dates of December 22, 1910, and April 28, 1911, amounting to $1,257.77. That said items were so furnished by libelants and used by Howard S. Roberts under a contract made with Edmund H. Mitchell, in the designing and construction for a certain suction dredge known as Dredge A. That said items were furnished while said boat was in the shipyard at Philadelphia, Pa., pursuant to an order given by Howard S. Roberts, in performance of the contract made by him with Edmund H. Mitchell, for designing of the old hull into the Dredge A. That said account for the items so furnished was charged to the said Roberts, and by him forwarded to Mitchell & Co., and all of the items were furnished upon the credit of said Howard S. Roberts, the said Edmund H. Mitchell not being, at that time, in a position to secure credit for the construction of the said dredge."

No. 3.—J. W. Paxson & Co.

"Libelants, between the dates of April 5, 1911, and May 16, 1911, furnished certain items, composed of machinery and appliances (amounting to $645.46), to Howard S. Roberts, a constructing and designing engineer, or Edmund H. Mitchell, to be used, and which were used, in the construction of said dredge from an old hull at the time owned by the said Mitchell. That said items, as furnished, were billed either to said Roberts, constructing engineer, or to

Edmund H. Mitchell, in consequence of instructions given to libelants at the time of the purchasing of said items. Said items were furnished on the credit of said Edmund H. Mitchell, or Howard S. Roberts, contracting and constructing engineer. That during all the time of the furnishing of said items the said boat, later named Dredge A, was in the port of Philadelphia, Pa."

No. 4.—Earl Gear & Machine Company.

"This claim consists of certain items furnished between February 29, 1911, and May 5, 1911, amounting to $2,824.23, by libelant Howard S. Roberts, contracting and constructing engineer, in accordance with an agreement entered into between the said Edmund H. Mitchell and libelant. The material and labor was used and employed on said boat in reconstructing an old hull, into a suction dredge. The original amount was $3,824.23, on which the sum of $1,000 was paid in cash by Edmund H. Mitchell, and the promissory note of said Mitchell was given and accepted for the balance of the amount, $2,824.23. That the said items were furnished upon the credit of said Edmund H. Mitchell, and were used while the said boat was in the port of Philadelphia, Pa., in the process of construction as a steam dredge, the same as later known as Dredge A."

No. 15.—National Hoisting & Engine Company.

"This is a claim for machinery furnished by libelant during the period from February 23, 1911 to May 21, 1911, aggregating the sum of $1,995.01, to Mitchell & Co. Items as in the libel set forth consist of machinery and machines constructed and built on the order and specifications of Howard S. Roberts, of Philadelphia, Pa. All this machinery and machines were furnished in order to complete and fit the vessel as a dredge, and the same was so furnished upon the credit of Mitchell & Co., and so charged to Mitchell & Co., without regard to the boat, and, with the exception of $305.30, which was paid in cash, the note of Edmund H. Mitchell was executed."

No. 20.—Marvin Briggs.

"This is a claim for a balance due, in amount $700, on account of the purchase of a certain engine by Mitchell & Co. in March, 1911. This engine was delivered to Mitchell & Co. at the shipyard at Philadelphia while the dredge was in process of construction, and same there placed in the dredge as a part of its original equipment. Said Mitchell & Co. bought said engine at the price of $2,100, and paid thereon $1,400, leaving a balance of $700. Said engine was placed in the hull at Philadelphia, which was then and there being constructed into a hydraulic dredge."

No. 21.—George M. Jacocks.

"This is a claim by libelant for cash furnished to Edmund H. Mitchell between the dates December 23, 1910, and March 29, 1911, in the amount of $3,719, as shown in the libel. This claim was filed after the sale of the dredge under process November 22, 1911. No evidence has been offered or introduced in support of the allegations of the libel from which to find the facts with regard to this claim."

The findings above set forth, to which no exceptions have been filed, would seem to dispose of this claim. It is clearly not a maritime lien.

No. 22.—Bougher & Bishop.

"This is a claim for provisions and supplies furnished by libelants between February 28, 1911 and May 11, 1911, while the dredge was in the port of Philadelphia in the process of construction. The total amount of the claim was $612.34, on which $403.17 is credited as paid, leaving balance due of $209.17, as claimed in the libel filed. The said provisions and groceries were furnished by libelants while the dredge was under construction at Philadelphia, and before the same was completed."

The libel was filed after the dredge was sold under process of the court. There is a total absence of any finding that the provisions and supplies were furnished for the use of, or were used by any persons working upon, or having any connection with, the dredge.

No. 23.—Frederick H. Craemer.

"This is a claim for supplies, wharfage, lighterage, and labor furnished, and interest on money loaned, to Mitchell & Co., by libelant, between January 27, 1911, and May 12, 1911. At said time said dredge was in the port of Philadelphia and was in process of construction, being then fitted out from an old hull into a hydraulic dredge. The libel was filed December 28, 1911, after the dredge was sold under process of the court."

There is no finding separating the claim for "wharfage and lighterage" from supplies, labor, and interest on money loaned, nor is there any finding that either of the last-named items had any relation to the dredge. It would seem that, under no aspect of the case, is this claim a maritime contract.

No. 24.—Frank C. Somers.

"This is a claim for supplies and provisions furnished by libelant to Mitchell & Co., or Edmund H. Mitchell, between the dates March 25, 1911, and May 11, 1911, amounting to a balance of $471.78, as stated in libel. The items so furnished were furnished while the dredge was in process of construction in the shipyard at Philadelphia, and before same was completed as a dredge. This claim was filed December 30, 1911, after the dredge was sold under the process of the court."

There is no finding that the supplies and provisions had any relation to the dredge, nor any other fact found bringing them within the definition of a maritime contract.

No. 25.—Kensington Shipyard Company.

"This is a claim for work and labor done, and materials supplied, in the construction of Dredge A, at the shipyard in Philadelphia, on May 9, 1911, amounting to $426.79. The said material and work were furnished and performed while said dredge was in the port of Philadelphia, under construction and prior to its completion as a dredge. The libel was filed February 10, 1912, subsequent to the sale of the dredge under the process of the court."

The exceptions filed to the finding of the master in respect to this libel are overruled.

No. 26.—Gordon Miller & Bro.

"This is a claim for machinery furnished by libelants between the dates of April 11, 1911, and May 11, 1911, aggregating a balance of $1,264, to Mitchell & Co., and was a necessary part of the equipment of the vessel in order to prepare this dredge for the work it was intended to do, installed while the vessel was in port at Philadelphia, in the process of construction, and was included in the contract of construction between Mitchell and Howard S. Roberts, and that the same was furnished in consequence of a bid by libelants which was accepted by Mitchell & Co., and same charged to the account of Mitchell & Co. Same was a part of the construction of Dredge A, and was furnished in conformity with direction of constructing engineer in charge of the building of the said boat."

No. 27.—York Foundry & Machine Company.

"This is a claim which covers certain items of equipment procured by Howard S. Roberts for Mitchell & Co. from libelants, between the dates of February 12, 1911, and May 20, 1911, amounting to $437.07. That said items were

furnished pursuant to said Roberts' contract to equip the boat and construct same as a hydraulic dredge. The material was furnished partly in Philadelphia and part shipped to boat to Norfolk, or Beaufort, as the same was too late to reach the dredge at Philadelphia. That said Roberts, in the furnishing of said items, was acting under his contract with Mitchell as a constructing and contracting engineer and gave the orders for the items furnished. That said account for said items furnished was charged to Mitchell. All items were made in York, Pa., and shipped by rail. The iron bar cap head and spud points were used as a part of the original equipment and construction of the dredge. The pattern is a mold used in molding the ladder head."

[3] All the foregoing claims are for supplies and materials furnished upon the order of the owner, or Howard S. Roberts, while the dredge was in course of construction in her port of origin. It is conceded that, unless within the provisions of Act June 23, 1910, c. 373, 36 Stat. 604, Fed. Stat. Anno. (Supplement 1912) 352, none of them are maritime contracts, constituting maritime liens. This act makes a radical change in the law, and, by reason of the short period elapsing since its enactment, has been considered by courts in but few cases. It provides that:

"Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

In New York Trust Co. v. Bermuda-Atlantic Steamship Co. (D. C.) 211 Fed. 989, at page 996, the special master discusses the statute and the changes made in the existing law. He points out the evils which it was intended to remedy. In so far as the provisions of the statute are applicable to the libels filed herein, it is necessary to note that the maritime lien is given for "repairs, supplies and other necessaries" furnished in the home port, upon the order of the owner. The question, therefore, which must be settled, primarily, is whether, upon the facts stated in the consent decree and found by the master, the articles furnished and labor performed are within the terms of the statute; whether they are maritime contracts. In The J. Doherty (D. C.) 207 Fed. 997, it is held that the words "repairs, supplies and all other necessaries" do not include towage; that the words "other necessaries," as used in the statute, are limited, and are of the general nature of repairs and supplies as are fit and proper for the use of a ship. In The Sinaloa (D. C.) 209 Fed. 287, Dooling, District Judge, says:

"The purpose [of the statute] does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had always been recognized as cognizable in admiralty."

This is in accordance with well-settled canons of statutory construction by which courts are guided in ascertaining the intention of the Legislature. "The presumption is that the Legislature does not intend to change or modify the law beyond what it declares, in express terms, or by unmistakable implication." 26 Am. & Eng. Enc.

649. Mr. Justice Strong in Shaw v. Railroad Company, 101 U. S. 557, 25 L. Ed. 892, says:

"No statute is to be construed as altering the common law further than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express."

This canon of statutory construction, and the extent to which it has been applied and enforced, is illustrated in the reports of numerous cases in both state and federal courts. It may be assumed, therefore, that before libelants can invoke the provisions of the statute they will be required to show, not only the amount and consideration of their claim, but that they are within the admiralty jurisdiction, as limited by the decisions of the courts prior to the passage of the statute—that they are maritime contracts, as defined by courts of admiralty. The policy of the law, for well-known and salutary reasons, has been to discourage and reject secret liens upon property. The exception made by the courts of admiralty, giving such liens for repairs and supplies furnished to a vessel while in a foreign port, is based upon well-understood reasons, and should be carefully restricted.

[4] If, therefore, the libelants' claims are not for "repairs, supplies or other necessaries," they are not maritime contracts. In People's Ferryboat Co. v. Beers, 20 How. 393, 15 L. Ed. 951, it is said:

"The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation."

See The Lottawanna, 21 Wall. 558, 22 L. Ed. 654.

So it is said:

"Although maritime liens tend to build up commerce as furnishing a basis of credit, they are secret liens on movable property, following into the hands of innocent holders. Hence the law inclines against them, and any one asserting such a lien must satisfy the court of his right to it." 26 Cyc. 751.

An examination of some of the decisions, in which the distinction between construction and repairs is drawn, aids in ascertaining into which class the claims of libelants, originating in Philadelphia, prior to May 11, 1911, should be placed. In People's Ferry Co. v. Beers, supra, the contract for constructing the "hull" was in writing, payable in installments. Mr. Justice Catron says:

"It would be a strange doctrine to hold a ship bound in a case where the owner made the contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship."

In Roach v. Chapman, 22 How. 129, 16 L. Ed. 294, the boat was built at Louisville, Ky., and the libelants furnished the boilers and engine. Payments were made as the work progressed, and bills of exchange were taken for the balance due after the vessel was completed. Mr. Justice Grier says:

"A contract for building a ship, or supplying engines, timber, or other materials for her construction, is clearly not a maritime contract."

It was held that the claim was not within the jurisdiction of the admiralty. Mr. Hughes (26 Cyc. 763) says:

"The decisions agree that everything done before the vessel is launched comes under the head of construction. But there is much conflict on the question whether work done and material furnished after the vessel has been launched, but before final completion, should be classed as construction work. Some cases hold that the structure becomes a ship as soon as she rides upon her destined element; others, that anything forming a part of the ship or her tackle or apparel is, when first furnished, part of her construction. The better opinion is in favor of the latter view."

In The Winnebago, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836, Mr. Justice Day says:

"It is next objected that the court erred because certain items were allowed [by the state court under a state statute] for material furnished the vessel *after she was launched*, and therefore the subject of exclusive jurisdiction. * * * But we agree with the state court that these items were really furnished *for the completion* of the vessel and were fairly a part of her original construction. In such a case the remedy was within the jurisdiction of the state court."

See, also, The Winnebago, 141 Fed. 945, 73 C. C. A. 295.

The master finds that Edmund H. Mitchell, having entered into a contract with the government which required dredging in the navigable waters in and around Beaufort, N. C., purchased "a certain old hull * * * which had been built of timbers taken from an old government dry dock, and at this time contained a boiler, condenser, and heater, and was not, at this time, a completed boat." It would be to strain the meaning of words to call the thing, or object, thus described, a "ship" or "vessel." It has been held that "a hull is not a ship." Northup v. The Pilot, 6 Or. 297; Srodes v. The Collier, Fed. Cas. No. 13,272. It is manifest that the entity, or thing, which Mitchell purposed bringing into existence, was entirely distinct from the hull which constituted the original element in the new structure. The "dry dock," from the timbers of which the hull was constructed, was not a ship. The Warfield (D. C.) 120 Fed. 847; 26 Cyc. ——, note. In The Paradox (D. C.) 61 Fed. 860, Brown, District Judge (S. D. N. Y.), said:

"After the hull, constructed by other persons, was sufficiently advanced, it was launched, towed to the libelant's yard, and the machinery there put in by the libelant company, and by the preceding company, with changes of detail from time to time in the course of construction, so as to make the machinery as efficient as possible. * * * When the vessel is completed for the purpose intended, then the vessel is 'built' and not till then; whether it be a steamer, a sailing vessel, a barge, a scow, or a mere float designed to support and transport a bath house; * * * and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business of navigation intended, is a part of the 'building' of the vessel. This is the clear weight of authority."

It makes no difference that the vessel was in the water. It is always the case that a portion of the construction of a vessel is after she has been put in the water. It clearly appears that the vessel was not so far completed at the time as to enable her to discharge the function for which she was intended.

In McMaster v. One Dredge (D. C.) 95 Fed. 832, it appears that, at the time the contract was made, the Sneed Company (owner) had a scow, and that the purpose of the contract was to convert the scow into a dredge. The scow had never been used as a dredge but was merely a wood scow or barge. The judge, after citing a number of cases, said:

"Tried by this criterion, the work and labor and materials furnished in this case were for the building of the vessel. It can make no difference whether the scow was already built, and had theretofore been used for another purpose, or whether it was newly constructed for the purposes of a dredge. The purpose of this contract was to build this scow into a dredge. As a mere wood barge, the things done were not required. It was only for the purposes of a dredge, which, in its relation with the scow, was a new thing, that the work and labor in this case were performed, and the materials furnished; and this is a building of the dredge, within the rule adopted in the cases cited. What was done and supplied in this case was for the purpose of making the vessel what it was intended to be, and what it had theretofore not been, a dredge, a thing with which the wood scow, as such, had no relation. This contract, therefore, was not a maritime contract. It was a contract to convert the wood scow into a dredge, which is precisely the same as one to build a dredge."

If we substitute the word "hull," as described by the master, for "scow," the language describing the condition existing, in regard to Dredge A, at Philadelphia, prior to May 11, 1911, the result must be the same as arrived at by the court. The Rapid Transit (D. C.) 11 Fed. 322. It was then, and not till then, that the dredge became a maritime entity, and within the admiralty jurisdiction; it was then that she became a completed dredge and subject to be repaired and supplied to enable her to perform the work for which she was constructed.

[8, 9] It does not appear, from the master's finding, for what purpose the "old hull" was constructed, or that, at any time, was a part of, or used in connection with, a dredge. He says that Mitchell "proceeded to install upon said dredge a power plant and proper equipment in order to reconstruct and convert the same into a suction dredge." There lurks in the use of the words "reconstruct" and "convert" a confusion, and consequent obscurity of thought. They are not synonymous. They convey different mental conceptions. This is shown by the next succeeding sentence in the report. "In the process of this construction of the said dredge," etc. It is doubtful whether, by close adherence to the several shades of thought, expressed by the language used, a very satisfactory conclusion would be reached. Coming to a practical view of the situation, described by the master, we find that Mitchell was in need of a "suction dredge" for the purpose of dredging. He gathered certain elements, which, when brought together, assembled, co-ordinated, resulted in, or brought into existence the entity, the thing, which he desired. The "old hull" was the first element obtained, and upon this he placed certain machinery and appliances, which, being brought into orderly relation, constituted the dredge. The process, described by the master, is not "reconstructing" or repairing an existing entity, but, by bringing together—correlating—a number of independent entities, constructing a definite

entity; and this process is construction. The Count De Lesseps (D. C.) 17 Fed. 460.

These claims come clearly within the letter and spirit of the language of Justice Clifford in Edwards v. Elliott, 21 Wall. 532, 22 L. Ed. 487, in which, after a discussion of the earlier cases, he says:

"Convinced or not, every candid inquirer must admit that this court did decide in that case [People's Ferryboat v. Beers, 20 How. 393 (15 L. Ed. 961)] that neither a contract to build a ship, nor to furnish materials for the purpose, is a maritime contract."

The master finds, in regard to many of these claims, that in furnishing the articles and the cash the libelants extended credit to the owner and not to the dredge; as to one or more, the owner's note was accepted, the price was payable by contract in installments. The circumstances under which the materials and cash were furnished, and the labor performed, strongly tend to show that credit was extended to the owner. The statute had been in force only a few months, and it must have been well known to libelants that materials and supplies for construction were not maritime contracts, and therefore not maritime liens. It is true that the statute removes the presumption that materials and supplies furnished in the home port, upon the order of the owner, are furnished upon his credit, and not that of the boat. In Ely v. Murray & Co., 200 Fed. 368, 118 C. C. A. 520, Judge Putnam, writing for the Circuit Court of Appeals, referring to the words of the statute in that respect, says:

"Of course, this does not bar proof that whatever was furnished was furnished on the mere credit of the owner, and in no sense on the credit of the vessel; but it meets the presumption that there is no lien for materials furnished on the order of the owner, as there is a presumption in favor of a lien when the articles are ordered by the master under appropriate circumstances."

Judge Toulmin (D. C. S. D. Ala.), in The Lucille, 208 Fed. 424, citing the language of Judge Putnam, says:

"An agreement or understanding as to whom credit was given may be inferred from acts and circumstances, as well as from express language, as is ordinarily true with reference to all alleged contracts where it must be shown that the minds of the parties met."

In respect to the claims of the other libelants, the master finds:

"That after the arrival of said dredge into the port of Beaufort, N. C., where its operations were to be begun, the said dredge was, at the time, in a leaky condition, and the owner, Edmund H. Mitchell was at that time without funds wherewith to provide the necessaries for labor and materials for its preservation. The said dredge stood in need of certain repairs, supplies, and working facilities in order to enable it to carry on its operations of dredging on the contract in which it was engaged in the waters of the harbor of Beaufort and Newbern; the said dredge was preserved and enabled to continue its dredging operations, and to carry on the work of dredging in the said waters about the harbor of Beaufort, until the sale of said dredge by the marshal under the process in these proceedings. The said dredge was so sold under a ven. ex. at the courthouse door in Beaufort, N. C., on the 22d day of November, 1911. The supplies advanced and repairs and equipments furnished said dredge, after its arrival at the port of Beaufort, N. C., were absolutely necessary and essential to enable the said dredge to continue and carry to completion the operation of dredging which had been undertaken under the contract of Edmund H. Mitchell, aforesaid, in the navigable waters in the harbor, or port, of Beaufort, N. C."

In respect to these claims the master makes the following findings of fact:

Nos. 5 and 18.

"These are the claims of H. W. Noe and others and of A. D. O'Bryan for seamen's wages. They have been, by consent of all parties, paid in full, having priority."

No. 6.—Hancock & Co.

"This is a claim for certain supplies furnished by libelants between the dates May 23, 1911 and September 11, 1911, amounting to $2,198.86, to steam Dredge A, at the port of Beaufort, N. C. Said supplies consist of provisions and groceries for the maintenance of the crew engaged on said dredge during its dredging operations, while in the port of Beaufort, and consist of necessaries for said crew and seamen. That said supplies so furnished were furnished upon the sole credit of Dredge A, pursuant to an agreement made with Edmund H. Mitchell, owner of Dredge A, and S. P. Hancock, in behalf of the firm of Hancock & Co.; said contract so made between the owner of said dredge and libelants being based upon the assurance of said owner that there was no claim against said boat, and that the boat was his own property, and the supplies so furnished were delivered to the said dredge upon the order of said Edmund H. Mitchell, or A. D. O'Bryan, superintendent in charge of the dredge, while same was operating at Beaufort, N. C."

No. 7.—Alonzo Thomas.

"This is a claim consisting of items for supplies furnished between May 30, 1911, and September 5, 1911, in the amount of $88.73, by libelant to steam Dredge A. Items composing said account were furnished by libelant upon the sole credit of steam Dredge A, and the same consist of groceries and provisions and sundry necessaries for said dredge and its crew while the same was engaged in its dredging operations in the port of Beaufort, N. C."

No. 8.—H. C. Jones.

"This is a claim for materials and supplies, in amount $315.20, furnished by libelant to Dredge A, between January 5, 1911, and September 11, 1911, at the port of Beaufort, N. C. Said supplies and materials consist of ropes and other sundry supplies for said dredge necessary in the performance of its work at Beaufort, same being in amount $265.20. The further item of $50 is for towing said dredge from its docking place at Beaufort to the point in Beaufort harbor where it began its work of dredging. Said supplies and services were necessary in order to enable said boat to continue its dredging operations."

No. 9.—J. T. Beveridge.

"This is a claim for the hire of barges and transports and other necessaries from Beaufort to Dredge A between July 1, 1911, and September 21, 1911, amounting to $386.50, as set forth in the libel. Said barges were necessary, as a means of transporting coal and other necessary articles from Beaufort to the dredge, in order to enable it to continue to perform the dredging."

No. 10.—Hyman Supply Company.

"This is a claim for materials and supplies in the amount of $1,277.43, furnished to steam Dredge A in the port of Beaufort, N. C., between May 22, 1911, and September 23, 1911. These materials and supplies consisted of various parts and fittings to replace and repair and supplement parts of like nature and kind, which had become worn and unable to perform their functions, integrals of the said dredge, and were necessary for the operation of the said dredge and the continuation of its work under the contract with the United States government. These materials were furnished upon the sole and express credit of Dredge A, and were received on the dredge by the owner, Edmund H. Mitchell, or A. D. O'Bryan, superintendent in charge, while the dredge was engaged in its work or about the port of Beaufort, and but for which it could not pursue its work or operations of the class or nature."

No. 11.—Claim of Craven Foundry & Machine Company.

"This claim is for labor of men on board the dredge, while at the port of Beaufort, and various parts and castings and fittings for the repairs to said dredge and machinery, between the dates of May 25, 1911, and August 31, 1911. The work and materials were furnished at request of the owner, at times when the same was imperative and necessary, either because of breakdowns in the machinery or parts, or of such calamities as required expert mechanical attention, in order to permit the said dredge to continue its functions. This was furnished upon the sole and exclusive credit of the dredge, and is for the amount of $973.03."

No. 12.—Tolson Lumber & Manufacturing Company.

"This is a claim for lumber furnished steam Dredge A between June 7, 1911, and July 19, 1911, amounting to $196.19, and said lumber was used on said dredge in rebuilding and repairing the framing, deckwork, and cabins, which had been damaged and partly destroyed by accident during the operation of said dredge, and which it was necessary to repair in order to continue work. The said timber was furnished on the sole credit of said dredge."

No. 13.—S. P. Hancock.

"This is a claim for supplies and cash furnished for the payment of supplies for the protection and preservation of Dredge A, while engaged in dredging at the port of Beaufort, N. C., said items being so furnished between May 22, 1911, and July 3, 1911, and aggregating amount of $5,511.40. The amounts in cash furnished cover payments for pontoons used in connection with the dredge in its dredging operations, for the purchase of coal, and for seamen's wages in manning and running boat for immediate necessary supplies and repairs procured for said dredge during its dredging operations. The items so furnished were furnished by libelant upon the sole credit and security of said dredge, the same having been furnished by libelant in consequence of representations made to him by the owner, Edmund H. Mitchell, that the dredge was clear of any claim against it, and that the amounts furnished each month would be a first lien upon the earnings of said boat during said month and same to be paid out of such moneys. The said amounts and items so advanced were necessary and essential to enable the boat to begin and continue the operation of its dredging in the harbor of Beaufort, for which purpose it was, at the time, stationed at Beaufort. At the time of the original furnishing of said amounts, the said dredge was in a condition wherein it was necessary to have and maintain a sufficient crew of men to operate the machinery on said boat, in order to keep the said boat from accumulating bilge water and to protect and preserve the same, that it might continue the contract of dredging which it was undertaking consequent to the contract between libelant, under the representation made to him by said owner that it was necessary to have additional furnishings in order to preserve the property, to make necessary repairs for its recurring breakdowns, and to keep said dredge in operation, furnished upon the credit of said dredge and its earnings, between the dates set forth, as to items composing this claim. Without the item so furnished by libelant Mitchell could not have continued its operations. He would have been subject to loss by reason of the leaky condition of the dredge, since he was not, at that time, in a position to secure such advances as were necessary to preserve the boat otherwise than by specially pledging it and its earnings for payment for said advances."

No. 14.—The Texas Company.

"This is a claim for lubricants and oils, furnished by libelant to Dredge A during the period from May 11, 1911, to September 12, 1911, in amount $234.59. Said lubricants and oils were necessary for the operation of the said dredge and for the protection and preservation of its machines, machinery, and equipment. Said supplies were furnished and delivered to Dredge A upon the credit of said dredge, upon the order of Edmund H. Mitchell, owner, and A. D. O'Bryan, superintendent, of said dredge."

No. 16.—Nottingham & Wrenn Company.

"This is a claim for coal furnished to Dredge A by libelant between June 20, 1911, and September 6, 1911, amounting to $418.66. The said coal was a necessary supply for said dredge in order to enable it to operate the machinery and maintain said dredge in a safe and working condition. The same was furnished and delivered to said Dredge A by order of Edmund H. Mitchell, owner, and A. D. O'Bryan, superintendent."

No. 17.—A. E. Pittman & Son.

"This is a claim for two-horse gas engine and appurtenances furnished by libelants to Dredge A on June 17, 1911. Said engine was used for the purpose of pumping water which was used upon said dredge in running its boiler, and was also used in pumping the said dredge free from bilge water. The same was so furnished while said Dredge A was at Beaufort engaged in dredging and was a necessary appurtenant thereto."

[5] The foregoing claims are clearly for necessaries, being for materials, supplies, and repairs. They were furnished after the dredge was complete, and while actually engaged in the work for which it was constructed. They were furnished upon the credit of the dredge. They come clearly within the class of contracts upon which a maritime lien accrues, as defined by Mr. Hughes. He says:

"Necessaries, in this connection, mean whatever is fit and proper for the service on which a vessel is engaged. Whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term as applied to those repairs done, or things provided for the ship by order of the Master." Adm. 96; The Grapeshot, 9 Wall. 129.

[6] One other claim remains to be disposed of:

No. 19.—Acme Rubber & Manufacturing Company.

"This is a claim for certain rubber sleeves furnished by libelant to Mitchell & Co. for Dredge A at the shipyard in Philadelphia, between December 20, 1911, and March 23, 1911, amounting to $1,336.50. Said rubber sleeves were shipped to Mitchell & Co. by libelant, and were kept for use in connecting pipes through which the dredge discharged material from the channel as the same might become necessary in its operation. Said sleeves were so furnished to Mitchell & Co. while the dredge was at Philadelphia, and while the same was in process of construction; said sleeves being so furnished as a part of construction of said dredge. The necessity of said sleeves was determined by the distance from the dredge to where the mud was inspected. The rubber sleeves were not used on the dredge until she began the work of dredging at Beaufort, N. C. They were not taken out of the original package until the work was begun. They were used to connect the pipes which discharged the mud and material, and were used from time to time until the dredge stopped work. They were necessary for the work at Beaufort, and were purchased to be used in said work."

This claim seems to be along the border line. While the master finds that it was a part of the construction of the dredge, and was purchased while it was being constructed at the shipyard at Philadelphia, it appears that the sleeves were not used, nor the package opened, until the dredge reached Beaufort, and begun the work of dredging. It is manifest, however, that, until supplied with the "sleeves," as found by the master, the dredge was not completed. It was not a suction dredge. They come within the principle announced in The Win-

nebago, supra. They were "furnished for the completion" of the dredge. The contract was made while in course of construction, and the master finds "as a part of the construction."

Careful consideration, in the light of the principles of maritime law, as announced and enforced by the authorities cited, leads me to the conclusion that the claims originating prior to May 11, 1911, and while the dredge was in the shipyard at Philadelphia, are for construction, and not repairs; that the cash and articles furnished between those dates were furnished for construction, and not maritime liens. I am also of the opinion that they were furnished upon the credit of Edmund H. Mitchell. The claim for the articles, cash, and materials furnished and labor performed for the dredge after May 11, 1911, and while she was engaged in the work of dredging in Beaufort harbor, are for repairs and necessary supplies, clearly within the admiralty jurisdiction, and constitute maritime liens on the dredge.

[7] Another view of the facts found in this record has been advanced which is entitled to careful consideration. Conceding, pro hac vice, that by the statute of June 23, 1910, the claims originating, as found by the master, while the dredge was in the shipyard at Philadelphia, prior to May 11, 1911, are made maritime liens, the questions arise whether, as between them and the claims for materials and supplies furnished, as found by the master, while the dredge was in the port of Beaufort, engaged in the work for which she was designed and constructed, they should be paid pro rata. In the opinion of Judge Smith, in Steam Dredge A, 204 Fed. 262, 122 C. C. A. 527 it is said:

"The general rule, as to maritime liens of this class, is that, in the absence of special reasons existing for preferring one over the others, they will be placed upon the same basis as to rank and priority, where the supplies and repairs have been furnished and performed for the same voyage, or purpose, or substantially during the same period, or, as it may be otherwise stated, as a rule maritime liens for supplies and repairs furnished and performed in the same season and within a period of reasonable time are placed upon the same footing. Where they are separated by distinct voyages, or by an appreciable length of time, it has been held that those furnished and performed last are entitled to priority of payment, and the courts of maritime jurisdiction have also held generally that under special circumstances attending a claim of this character, such as supplies or repairs furnished or performed under circumstances that saved the vessel from threatened loss or destruction, such a claim, although last in order of time, may yet be decreed priority in payment."

The error found in the decree appealed from was that the record did not disclose "such special circumstances." Unless, therefore, the findings of the master discover "such special circumstances," assuming that the claims for labor and materials performed and furnished at Philadelphia are maritime liens, the decree now rendered should direct the application of the proceeds of the sale of the dredge to all of the claims pro rata.

In The Jerusalem, Fed. Cas. No. 7,294, Mr. Justice Story says:

"A tradesman has a lien on a foreign ship, lying in a port of the United States, for repairs made by him on board, and such a lien will be preferred, in point of right, to a bottomry interest, which is prior in point of time, if it appear that the repairs were indispensable."

Judge Hughes (E. D. Va.) in The Omer, Fed. Cas. No. 10,510, says:

"Among materialmen, the one contributing 'most immediately'—that is to say, at the latest stage of the voyage—to enable the vessel to complete it, has preference over those who contributed at an earlier stage of the voyage."

Hughes, Adm. 332 (176), stating the ground upon which a priority among maritime contract claims is based, says that such right of priority is recognized, "as there is supposed to be an inherent merit in certain ones over others, in the absence of special equities, arising from the comparative dates of their service, and other considerations." In the absence of authoritative decisions, or enlightening judicial expressions, as to the extent to which the maritime lien given by the act of 1910, for claims attaching to vessels for supplies and materials furnished in their home ports, shall be enforced, when conflicting with claims of a similar character originating in foreign ports, resort must be had to analogies and suggestions based upon principles of justice and equity. Prior to the enactment of the act of 1910, the question presented in this case could not have arisen. Such claims were dependent upon state statutes, enforceable in state courts. If, as insisted by counsel, the statute fixes upon a vessel for contracts for construction, as found by the master, in its home port, a maritime lien of equal rank and merit as claims for supplies and repairs furnished or performed in a foreign part, it would seem that the basis or policy upon which a maritime lien is given for supplies or materials, is impaired. If a vessel goes out from her port of origin, incumbered with maritime liens, based upon contracts for materials and supplies and construction, furnished upon the order of her owner, or his representative, of equal rank and dignity as the lien given for repairs and supplies furnished in a foreign port to enable her to perform the mission for which she is designed, her ability to obtain such supplies or secure such repairs as are necessary will be very seriously curtailed. While for such repairs and supplies as come within the scope of the statute a maritime lien is given which may be enforced in rem, the power exercised by the courts of admiralty to apply to them the principles applied as between other maritime liens is not affected or restricted. The statute does not create a new or different character of lien or right from that which existed in favor of those who furnished materials for repairs or supplies to a vessel in a foreign port, but extends such lien to the same class of claims furnished in her home port. The Sinaloa, supra. The statute gives "a maritime lien" in such cases, not a statutory lien. It is a recognized rule of construction that when words are found in a statute, which have a well-defined, legal definition, or meaning, it will be presumed that the Legislature intended them to be construed in the light of such meaning; therefore, when a "maritime lien" is given for supplies and repairs furnished to a vessel in her home port, the term must be given the definition and meaning attaching to it in the administration of maritime law. If, therefore, such special circumstances are found, in regard to the claims of libelants, furnishing repairs and materials while the dredge was in Beaufort, they would bring such claims within the exception to the general rule.

The question, therefore, arises whether the findings of the master disclose such circumstances. It is not practicable to discuss, in detail, the peculiar circumstances under which each of these claims originated. The master finds that:

"After the arrival of said dredge into the port of Beaufort, N. C., where the operations were to be begun, the said dredge was at that time in a leaky condition, and the owner, Edmund H. Mitchell, was at that time without funds wherewith to provide the necessaries in labor and materials for its preservation. The said dredge stood then in need of certain repairs, supplies, and working facilities to enable it to carry on its operation of dredging in the waters of the harbor of Beaufort, and, by reason of the supplies so furnished by libelants at Beaufort and Newbern, the said dredge was preserved and enabled to continue its dredging operations."

He further finds that the supplies, advances, and repairs "were absolutely necessary and essential in order to enable the said dredge to continue to carry on to completion the operation of dredging," etc. An examination of the testimony as to the articles furnished and labor performed, as set out in the libels of Hyman Supply Company, Craven Foundry Company, Tolson Lumber Company for repairs, etc., of Hancock & Co., Alonzo Thomas, H. C. Jones, and S. P. Hancock for supplies, of the Texas Company for lubricating oil, of Nottingham-Wrenn Company for coal, of J. T. Beveridge for conveying coal and other necessaries to the dredge, and of A. E. Pittman & Son for a gas engine for pumping water from the dredge, etc., amply sustains the conclusions of the master. These articles, he finds, were all furnished, and labor performed, on the credit of the dredge, the testimony sustains this finding. They all come clearly within the definition of necessary repairs, supplies, and services, constituting maritime liens of high order. He finds that several of the libelants were assured by Mitchell that there were no liens or claims on the dredge; "that he had spent all the money he had in constructing the dredge—sixty odd thousand dollars—that he had made up North."

While these declarations are not binding upon the libelants who constructed the dredge, or furnished materials for her construction, they are not denied. They illustrate the wisdom of the well-settled principle that, when one of two innocent parties must suffer, the injury will be imposed upon the one who put it into the power of the wrongdoer to cause the loss. The libelants who constructed the dredge surrendered it to Mitchell, who, it seems, was insolvent, and enabled him to represent it in a foreign port as his property, free of liens; whereas, in truth, if libelants' contention is correct, it was literally shielded over with secret liens for amounts in excess of its value. It seems that the statute in force in Pennsylvania gives a lien "for construction work." 26 Cyc. 763 (note 96). This state statutory lien they could have enforced before surrendering the possession of the dredge, or before it was carried away from the shipyard. They elected not to do so, but permitted the dredge to go on her voyage into a foreign port as an unincumbered maritime entity. If, by reason of this course, voluntarily taken by them, innocent persons, acting as they were justified in doing, furnished the dredge with articles necessary for her preservation and the performance of her maritime mission, they should,

upon plain principles of equity, be given priority in the payment of their claims.

An examination of the claim of libelant Howard S. Roberts discloses that a large part of it is based upon charges for commissions, computed upon the price of articles purchased and labor furnished in the construction of the dredge. It is difficult to entirely avoid the thought which comes from the peculiar condition disclosed by the record. It appears that a man having a valuable government contract, the performance of which required a suction dredge of considerable proportions, purchased an "old hull" and made a contract for her construction, or, if preferred, her conversion, into such a dredge. He incurs an indebtedness of $24,000, none of which, it is claimed, has been paid, and for none of which is any security taken, and with this burden upon her she is permitted, under the conditions found by the master, to leave her domicile of origin in the possession of an owner who, as found by the master, was without funds with which to provide for her safety, or to begin her operations at Beaufort. There is an absence of evidence that anything was said by Mitchell, or any of the libelants furnishing materials for construction, about looking to the dredge for payment. Although all of the debts were contracted at Philadelphia prior to May 11, 1911, no proceedings were instituted to enforce their payment until August 28, 1911, when Howard S. Roberts filed his libel; the others following during the months of October and November. Edmund H. Mitchell, pending this suit, filed his petition in bankruptcy in the District Court for the Southern District of New York. His schedule shows only nominal assets.

A careful examination of the testimony taken by the master strongly impresses my mind with the conviction that the libelants, whose claims were based upon transactions had with Mitchell while the dredge was under construction, were looking to him personally for payment. He was not examined as a witness. A court of equity, in the adjustment of equitable liens, having regard to the inherent merits of the claimants, in the light of all the facts and circumstances disclosed by this record, would, I think, be compelled, upon the application of well-settled principles, to give priority to those claimants who furnished the supplies and performed the labor which were indispensable and absolutely necessary to enable the dredge to perform the work for which it was constructed. The claim for priority finds strong support on this ground; but I am of the opinion, for the reasons stated, that the claims originating prior to May 11, 1911, are for construction, and therefore not maritime liens. It has been frequently held by courts of admiralty that, after discharging the maritime liens upon a vessel which has been sold under the process of the court, if any balance remains in the hands of the court, it will be paid to libelants who have established debts not coming within the jurisdiction. This is because the court has seized and disposed of the res, and, as here, the owner is insolvent.

This opinion has been drawn out to an unusual, and probably unreasonable, length. Many of the questions presented upon the somewhat peculiar facts, in the light of the change wrought in the law of the

statute of June, 1910, are not free from difficulty and doubt. The amounts involved are to the parties interested large, and the result of the litigation, unfortunately too long delayed, of much importance. A decree may be drawn in accordance with the views expressed herein.

CLARK v. ARIZONA MUT. SAVINGS & LOAN ASS'N et al. (DENNETT et al., Interveners).

(District Court, D. Arizona. March 12, 1914.)

1. JUDGMENT (§ 349*)—POWER OF COURT AT SUBSEQUENT TERM TO VACATE—VOID JUDGMENTS.

While a court has no power to vacate, modify, or amend a valid judgment or decree after the term at which it was entered, all courts have the inherent power to vacate at any time their own judgments rendered without, or in excess of, jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 685; Dec. Dig. § 349.*]

2. JUDGMENT (§ 15*)—JURISDICTION TO RENDER—CONFORMITY TO ISSUES.

Although a court has jurisdiction of the subject-matter of an action and of the parties, its power to render a valid judgment is nevertheless limited by the nature of the suit and the issues made by the pleadings, and if it transcends such limits its judgment is without jurisdiction and void.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 22, 23; Dec. Dig. § 15.*]

3. JUDGMENT (§ 248*)—CONFORMITY TO PLEADING.

A suit by a stockholder against the corporation and another, brought on behalf of himself and all other stockholders, in which the bill alleges a fraudulent transfer by its officers of all of the property and assets of the corporation to its codefendant, and prays that such transfer be set aside and the property restored, that an accounting be had between the defendants and between the corporation and its stockholders, that a receiver be appointed and the affairs of the corporation be wound up and its assets distributed to those found to be entitled thereto, is a suit for an injury to the corporation and to enforce a right of the corporation for the benefit of all of its stockholders, and a decree finding that the transfer of the property was fraudulent, but confirming the title in the transferee, and adjudging that complainant, or other stockholders who have intervened and adopted the allegations and prayer of his bill, recover from defendants the several amounts they had paid into the corporation, and making the same a lien on the transferred property, was not authorized by due course of procedure, and is outside the issues and void as to stockholders who were not before the court, but had a right to expect such course of procedure to be followed and their rights protected.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. § 248.*]

4. JUDGMENT (§ 342*)—DECREE IN EXCESS OF JURISDICTION—POWER OF COURT TO VACATE.

In such case the court has power at a subsequent term to vacate the decree, and to enter a decree in conformity to the pleadings and findings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 668–671; Dec. Dig. § 342.*]

In Equity. Suit by Charles W. Clark against the Arizona Mutual Savings & Loan Association and the Arizona Trust Company. On

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

motion of John Dennett, Jr., and others, interveners, to dismiss petition of other persons for leave to intervene. Motion overruled, and interlocutory decree entered.

William M. Seabury, of Phœnix, Ariz., for plaintiff and interveners.
Robert E. Morrison, of Prescott, Ariz., and Joseph E. Morrison and Richey & Dick, all of Phœnix, Ariz., for Waring and others, stockholders of Arizona Mut. Savings & Loan Ass'n.
Stoneman & Ling, of Phœnix, Ariz., for receiver.

SAWTELLE, District Judge. This is a bill in equity, brought by Charles W. Clark, a citizen of the United States and a resident of the state of California, against the Arizona Mutual Savings & Loan Association and Arizona Trust Company, corporations organized and existing under the laws of the state of Arizona. The bill is brought by plaintiff as a stockholder in said loan association, in his own behalf and in behalf of all other stockholders in said association similarly situated, and seeks to have an attempted transfer by said loan association to said trust company of all of its assets annulled and declared void and held for naught, and prays for an accounting between the two defendant companies, for the appointment of a receiver of said loan company, that its affairs be wound up, and its assets distributed to those found to be entitled thereto. The bill was filed on July 15, 1912. Plaintiff filed his written order to dismiss said bill on August 6, 1912, but 10 days prior to the time of filing said order of dismissal the above-named John Dennett, Jr., and others, as stockholders of said loan association, filed their petition for intervention herein, adopting the allegations of said original bill, and the court declined to dismiss the cause.

On February 27, 1913, the then judge of said court entered a decree in favor of said interveners for the amount by each of them paid into said loan association, and impressed the assets so attempted to be transferred to said trust company with a trust and lien in favor of each of the said interveners to the extent and amount by them paid into said association. On July 15, 1913, after the adjournment of the term of said court at which said decree of February 27, 1913, was entered, numerous other stockholders filed their petition, in which they adopted the allegations of said original bill and asked leave to intervene in said cause and to be permitted to share in the distribution of the assets of said loan association. Said John Dennett, Jr., and the other interveners mentioned in said decree of February 27, 1913, have filed their motion to dismiss said petition on the ground that this court has no authority or jurisdiction to grant the said petition for intervention, or to alter, modify, or change said decree of February 27, 1913.

This cause came on to be heard during a very busy term of the court, and it was not practicable at that time, without neglect of other important duties, to prepare a written opinion. The substance of the views set out below were announced orally from the bench, and the reasons here assigned were those which influenced the court in its decision. They are now set out more at length:

[1] If this court did not, in entering the decree of February 27, 1913, transcend the powers conferred upon it by law, and did not exceed its jurisdiction, then this court has no authority or jurisdiction, after the

term at which said decree was rendered and the judgment therein entered, to vacate, modify, or amend said decree or judgment, and it will become the duty of this court to sustain the motion to dismiss the petition of July 15, 1913, and to deny the prayer of the said petitioners to intervene. On the other hand, all courts have the inherent power to vacate at any time their own judgments rendered without or in excess of jurisdiction. Pollitz v. Wabash R. Co. (C. C.) 180 Fed. 950, and cases cited. The vital question, then, is whether this court exceeded its jurisdiction on the pleading and proof then before it in entering the decree of February 27, 1913.

[2] It may be admitted as elementary, and as settled by undisputed authority, that a decree which finally determines the equities of the parties before the court in a case where the court has jurisdiction of the subject-matter and of the parties, when the parties are before the court, and the issues determined and within the issues made by the pleadings and according to due course of law, become a finality upon the expiration of the term at which it is rendered, and the court cannot at a subsequent term vary, alter, or amend it, except to correct clerical errors. But it does not follow from this that any decree which a court may render is after the expiration of the term at which it is rendered, beyond the power of the court. I refer to a few cases of the Supreme Court of the United States in which this subject is discussed. In the case of Standard Oil Co. v. Missouri ex rel. Hadley, 224 U. S. 280, 32 Sup. Ct. 409, 56 L. Ed. 760, Ann. Cas. 1913D, 936, the court says:

"For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based. 'Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases.' Windsor v. McVeigh, 93 U. S. 274, 282, 23 L. Ed. 914, 917. See, also, Reynolds v. Stockton, 140 U. S. 265–268, 11 Sup. Ct. 773, 35 L. Ed. 467–469; Barnes v. Chicago, M. & St. P. R. Co., 122 U. S. 1, 14, 7 Sup. Ct. 1043, 30 L. Ed. 1128, 1132."

Speaking on this subject in the case of Windsor v. McVeigh, 93 U. S. 274–282 (23 L. Ed. 914), the court says:

"The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary

disposition of estates; or to the use of particular process in the enforcement of their judgments. Norton v. Meador, Circuit Court for California. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice Miller, to the same purport, in the case of Ex parte Lange, 18 Wall. 163 [21 L. Ed. 872]. So it was held by this court in Bigelow v. Forrest, 9 Wall. 341 [19 L. Ed. 596], that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: 'Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction.' So a departure from established modes of procedure will often render the judgment void. * * * The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of Cornett v. Williams, reported in 20 Wall. 250, 22 L. Ed. 254, is more accurate. 'The jurisdiction,' says the justice, 'having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties unless impeached for fraud.'"

In Barnes v. Chicago, etc., Railway, 122 U. S. 1–14, 7 Sup. Ct. 1043, 1050 (30 L. Ed. 1128), the court says:

"Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. Graham v. Railroad Co., 3 Wall. 704 [18 L. Ed. 247.]"

In Reynolds v. Stockton, 140 U. S. 265, 11 Sup. Ct. 773, 35 L. Ed. 467, the court uses this language:

"The inquiry is: Had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment, arising from the fact that the matter decided was not embraced within the issue, has not, it would seem, received much judicial consideration; and yet I cannot doubt that, upon general principles, such a defect must avoid a judgment."

The court then proceeds to discuss the validity of a judgment which is not embraced within the issues, and says:

"A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. * * * 'The matter in issue' has been defined in a case of leading authority as 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading.' King v. Chase, 15 N. H. 9 [41 Am. Dec. 675]. But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings."

A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered; if it is not supported by the pleadings, it is fatally defective. 23 Cyc. 816, and cases cited. There are many cases in the state courts which decide the same questions, but as the decisions of the Supreme Court are decisive of the issue it has not been thought necessary to cite them.

[3] Let us examine the pleadings to ascertain what are the issues in the case. The bill was filed by a stockholder in the loan association, on behalf of himself and all other stockholders who might decide to come in and join in the suit. Its fundamental equity is the wrongful transfer of assets of the loan association to the trust company, and the fundamental relief prayed for is the restitution of the assets of the loan association to the corporation, or to the receiver of that corporation, to be distributed to its stockholders on its dissolution by order of the court.

Let us look to the allegations of the bill filed in this cause, which are adopted by the interveners mentioned, and whose names are set out in the decree of February 27, 1913. It is alleged, among other things, that the complainant is one of the many stockholders in said loan association who are the holders and owners of certificates of stock therein, and as such are entitled to all the rights, privileges, and property of such stockholders, and that said rights, among others, include the right of complainant and all other stockholders similarly situated to participate in all of the assets of the defendant loan association, and upon the dissolution thereof to receive such, if any, of the property as may remain undistributed as the property of the defendant loan association after it had discharged all of its obligations; that the officers of said association, knowing that the same was insolvent and unable to meet its obligations, and without the knowledge of complainant and many others similarly situated, entered upon a fraudulent and corrupt agreement with certain persons for the organization of the Arizona Trust Company, for the purpose of taking over the assets and property of the loan association; that a pretended directors' meeting and stockholders' meeting, at which the loan association, in consideration of 1,300 shares of the capital stock of the trust company, agreed to deliver to the trust company all of the said loan association's assets and property; that said loan association had no right to convey all or any of its assets to the said trust company, and that the said transfer was in fact a corrupt scheme; that the loan association was insolvent, that

its officers knew this fact, and that they were trustees for the benefit of the complainant and the other stockholders similarly situated, and that the assets were impressed and charged with a trust for the benefit of the stockholders; that there was a close and intimate relationship of trust and confidence existing between the officers of the defendant trust company and the officers of the loan association, and that it was their duty to safeguard and protect the interests of complainant and other stockholders; that these officers violated their duties of trust and confidence, and dealt with the property belonging to the loan association for their own private and selfish ends, and without the slightest benefit to either the loan association or its stockholders; that the transfer of the assets of the loan association to the trust company was fraudulent and void; that at the time the trust company had no assets or property or any kind or character, and had none at the time it entered into the agreement with the loan association, and that the 1,300 shares of stock of the trust company had no value of any kind or character, and that the assets of the loan association were intermingled with the assets of the trust company in a deliberate and premeditated attempt to secure the assets and property of the loan association at a sacrifice of the rights of its stockholders; that it was impossible to determine the rights and equities of complainant and the other stockholders of the loan association without a judicial accounting between both of the defendant companies, and that the officers and directors be compelled to account for their official misconduct in the matters set forth; *and for that reason* complainant brings this bill in equity in his own behalf, and in behalf of all others similarly situated, to the end that the transactions above herein set forth, 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, and between the loan association and other stockholders similarly situated, that a receiver be appointed to take charge of and administer the assets of the loan association, that others similarly situated, who may desire to intervene, be permitted to do so, and that they be awarded such relief as to a court of equity may seem proper.

The prayer of the bill was: (1) That the transactions between the defendants be declared void; (2) that a restitution of all the assets of the loan association by the trust company be decreed; (3) that an accounting between the defendants be had; (4) that an accounting between the loan association and the complainant and those other stockholders similarly situated be decreed; (5) that a receiver for the loan association be appointed to reduce its assets to possession; (6) that a master be appointed to take evidence of the facts alleged in the bill "and to determine the rights and equities of complainant and *all of the parties concerned herein*"; (7) "that the affairs of the said defendant loan association *be wound up, its assets marshaled as aforesaid, and distributed to those found to be entitled thereto.*"

The petitioners mentioned in the decree of February 27, 1913, expressly state in their petitions of intervention that they adopt the allegations of the bill of complaint, and desire to be permitted to intervene in support of the allegations. These petitions then allege the circumstances under which the petitioners were induced to exchange their

stock for the stock of the trust company, and their prayer is, in addition to the prayer of the bill: (1) That they be allowed to intervene and pray in accordance with the form of complainants' bill; (2) that they be restored to their status as stockholders in the loan association; (3) that a restitution of the assets be decreed against the trust company.

Answers were filed by the loan association and by the trust company, which asserted the validity of the transfer and denied all charges of fraud.

It is plain that this was a stockholders' suit for an injury done to the corporation, and the decree must be such as is authorized by the due course of procedure in such a case. All of the stockholders had the right to expect that such procedure would be followed, and that, upon a dissolution of said loan association and a distribution of its assets as prayed for in said bill, their interests would be fully protected. *It is equally plain that the avails of such a suit belong to the loan association,* and are for the joint and equal benefit of *all* of its stockholders. It is said in Cook on Corporations (6th Ed.) p. 2426:

"It is a well-established rule of law that a stockholder's suit to remedy a wrong done to the corporation must be in behalf of all the stockholders, since they are equally interested in the results of the suit."

"'An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders in common.'" Id. p. 2429, note 1.

"Money or property recovered from directors or third persons, in a suit in equity instituted by a stockholder in behalf of all the stockholders, belongs to all the stockholders and not to the complaining stockholder. It goes to the corporation. The decree must be for the benefit of the corporation and not for the complainant stockholders." Id. p. 2431.

See, also, Howe v. Barney (C. C.) 45 Fed. 668.

"When a stockholder sues in equity to enforce a right belonging to the corporation, or to enjoin or redress an injury to the corporation, all the stockholders are interested in the result of the suit. It is not for his own benefit alone, but for the benefit of all the stockholders, and it must therefore be brought on behalf of the complainant, and all the stockholders other than such, if any, as are made defendants." Clark & Marshall, Private Corporations, vol. 2, p. 1708, and cases there cited.

"Such a suit can only be maintained on the ground that the rights of the corporation are involved. * * * The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it." Id. p. 1709.

"If a suit brought by a stockholder on behalf of himself and the other stockholders is based upon fraudulent or wrongful acts or neglect on the part of the *directors or other stockholders, they must be made parties defendant, so that* they may have an opportunity to defend, *and so that redress or relief may be given against them.*" Id. p. 1710.

There is not in the bill, nor in any of the petitions for intervention, any prayer that the transfer of the assets of the loan association be confirmed; but, on the contrary, the allegations of all the pleadings are that such transfer is fraudulent and corrupt, and the prayer is for a restitution of the assets to the loan association or its receiver. There is no pleading to support the decree in this particular. There is no allegation in the bill or the petitions that a restitution would be impossible or work a hardship to innocent stockholders.

It is alleged that at the time of the said transfer the trust company

was insolvent and paid nothing of value for the assets of the loan association, and that the whole transaction was a fraudulent scheme. Then, why vest the title in the trust company? The effect of this transfer was to subject all the assets of the loan association remaining after the payment of the interveners' preferred lien to the obligations of the insolvent trust company, thus leaving the shares of stock of the remaining stockholders valueless.

This part of the decree is contrary to the usual course of procedure in such cases and without pleading to support it. It is nowhere alleged or shown that any of the stockholders in the decree of February 27, 1913, had been guilty of any act or omission which deprived them of their equal rights in the assets of the loan association. Paragraphs 7 and 8 of said decree are as follows:

"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 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: [Then follows a list of the names, with the amount set opposite each name.]"

If it be admitted that in this class of cases the avails of the litigation belong to the corporation defrauded, and not to the complaining stockholders, then it seems to me that the learned judge erred in entering the decree of February 27, 1913. The said decree with great particularity gives the lien and declares the trust for the benefit of certain named stockholders, which the record shows are not the only persons who are stockholders of the loan association and therefore entitled to share in its assets. There is no law which authorizes the court to charge the entire property of the loan association with a lien and trust in favor of a part only of said stockholders, and leave the losses and the expenses of litigation to be borne by the remaining stockholders.

Again, the said decree is conflicting in its provisions. In adjudging a fee of over $3,000 to the attorney for the interveners in this case, who was also originally the attorney of the plaintiff filing the bill, but which complainant is not mentioned in said decree of February 27, 1913, the court must have found that he rendered services which entitled him to a claim against the corporation itself, and which was a proper charge against the avails of the litigation which he had conducted, for the decree directs that this fee shall be paid out of the

funds belonging to the corporation in the hands of the receiver. If the services were not rendered for the corporation, and if the avails of the litigation which he conducted did not inure to its benefit, then the court was not authorized to pay him out of the funds which belonged to the corporation. Such compensation should have come from the interveners or from funds which belonged to them alone.

One provision of the decree limits the liens granted by it to the interveners named therein, while another provision gives the attorney for the same interveners a substantial fee out of funds to which they had no interest, and which did not diminish the amounts to be received by them. Furthermore, if this was not a stockholders' suit for the benefit of the corporation and all of its stockholders, then unquestionably every stockholder whose name is not mentioned in said decree of February 27, 1913, should have been made a party defendant in the cause and given his day in court.

No provision for the losses incurred in the business of the loan association is made by this decree, though it is held by said decree that this association is and was insolvent, and the court approves and decrees the transfer of all of its assets, charging these assets with liens in favor of persons who were only stockholders therein, and who are compelled to equally bear its losses and entitled to share in its assets only on an equality with all of its stockholders. Certainly all the stockholders must share equally in the losses and profits of the association, yet this decree expressly relieves the interveners and nonexchanging stockholders from any share of these losses or expenses, and leaves them to be borne by the stockholders who are not parties to the decree. Such an advantage is warranted by neither the law nor the pleadings in this cause.

The transfer of said assets is declared to be fraudulent and void *as to the parties named in the decree,* and that the stockholders who exchanged their stock in the loan association for stock in the trust company and subsequently became interveners were induced to exchange their said stock "in reliance upon representations theretofore made to them in the printed literature of one or both defendants, and by verbal statements made to them by the representative of the defendants, and that such representations were in fact false, and were known by the defendants to be false when made, and induced the said interveners to make the exchange of their said stock as aforesaid."

It thus clearly appears that the company was guilty of fraud in the transfer of its assets and in the inducements held out to all of its stockholders to exchange their stock. The answers of the defendants show that the same representations were made to all the stockholders and deny their fraudulent character. Yet on the pleadings the court decrees that the parties to the decree shall be paid their claims in full, every cent that they have paid into the association, and be relieved from all losses incurred in the business of said insolvent loan association and from the expenses of this litigation, including their own counsel's fees. No opportunity is given any creditor of the loan association to present his claim, and other stockholders are given no opportunity to assert their equities in the assets of the corporation.

[4] In view of these things, I am constrained to hold that the said decree of February 27, 1913, entered by the then judge of this court, was beyond the powers of said court under the issues raised by the pleadings, and that the court departed from the usual mode of procedure to the detriment of the stockholders not a party to said decree. I am likewise of the opinion that the court was without authority in this case to vest the title of the assets of the loan association in the trust company, charged only with the said lien, and that such action is of no legal effect. For these reasons, said decree cannot be held to be a final determination of the equities raised by the pleadings, or to be beyond the power of this court to modify it as the equities require.

It is therefore ordered that the decree of the 27th day of February, 1913, be and the same is hereby modified as follows:

It is ordered that all the properties and assets, of every kind and description, which were transferred to the trust company by the loan association, be restored to the said loan association, or the receiver for said loan association, and that all contracts, conveyances, and agreements which were entered into by the said loan association or its agents or officers be and the same are hereby set aside, vacated, and annulled.

It is further ordered that the trust company transfer and deliver to the receiver in this cause all property of every kind received by it, its officers or agents, from or on account of the transfer of the said assets of the said loan association, or received by it from the use and investment or other disposition of any moneys or other property of the said loan association.

It is further ordered that this cause be referred to Edwin F. Jones, standing master of this court, to state the account between the loan association and the trust company, and to that end he shall hear testimony and may examine and inspect all papers on file in this court, or in the hands or possession of the receiver in this cause.

It is further ordered that the said standing master ascertain and report the exact amount due by said loan association to each of its stockholders, and in order to do so he is directed to publish a notice in some newspaper in the city of Phœnix, for at least five times, requiring all persons claiming to be stockholders in said loan association to file their claim, with proof thereof, with him within thirty (30) days from the first publication of such notice, and that he send by mail to each of the stockholders of said loan association a copy of such notice.

It is further ordered that the said standing master report on the priorities or equities of all persons claiming to be interested in the property of the said loan association and the order in which same are to be paid out of the assets of the said loan association.

It is further ordered that the master report what are the rights of said loan association in any assets now in the hands of persons not parties to this suit, and whether or not same can be recovered from the parties to whom they were transferred.

It is further ordered that the master ascertain and report what sum of money or other assets of the said loan association were unlawfully used by any officer or agent of either the loan association or trust com-

pany, and whether same or any part thereof can be recovered from said parties or their transferees.

It is further ordered that the demurrers to the petitions now on file seeking intervention be and the same are overruled, and that the petitioning parties mentioned in the petition of July 15, 1913, be allowed to intervene in this cause and present their claims to the master for adjudication in accordance with this decree.

It is further ordered that Sims Ely, the receiver in this cause, be appointed general receiver herein, with all proper powers, and that he hold all of the assets and property now in his hands belonging to either of said corporations until the further order of this court.

All other questions are reserved until the coming in of the report of the master.

UNITED STATES v. McCUTCHEN et al.

(District Court, S. D. California, N. D. September 1, 1914.)

No. A-12.

1. MINES AND MINERALS (§ 36*)—OIL LOCATIONS—VALIDITY.

Where subsequent locations are made in the interest of and to protect and strengthen a prior location, neither of such subsequent locations will be held fraudulent, though made in whole or in part by persons who had no intentions of claiming the land or any interest in it for themselves.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. § 36.*]

2. MINES AND MINERALS (§ 36*)—LOCATION—GRANTEES.

Where several persons interested in a location of oil land conveyed their rights to one of their number for convenience in handling the land for their benefit, he was bound to exercise the highest good faith toward the others interested in the location, and having neglected to do the assessment work for one year, and being of the opinion that the original locators could not relocate after such failure, he was not guilty of fraud in procuring a relocation by other relatives for the benefit of the original parties.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. § 36.*]

3. MINES AND MINERALS (§ 36*)—OIL LOCATION—QUANTITY OF LAND.

An oil location of 160 acres, if made in good faith by eight locators for the benefit of eight other persons eligible to locate, is not fraudulent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. § 36.*]

4. MINES AND MINERALS (§ 36*) — OIL LOCATION — WITHDRAWAL OF LAND FROM ENTRY.

Where a grantee of an oil location was actually on the land, had expended a large sum of money, and had discovered oil before the passage of Act Cong. June 25, 1910, c. 421, 36 Stat. 847 (U. S. Comp. St. 1913, §§ 4523, 4524), authorizing the withdrawal of oil land from entry, a withdrawal order, entered September 27, 1909, was ineffective to terminate such corporation's right to land.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. 36.*]

---

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

5. MINES AND MINERALS (§ 38*)—OIL LAND—LOCATION—WITHDRAWAL FROM ENTRY—RECEIVERS.

In a suit by the United States to quiet title to oil land alleged to have been fraudulently entered, facts *held* insufficient to justify the appointment of a receiver pendente lite.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

In Equity. Suit by the United States of America against G. W. McCutchen and others to quiet title to certain oil land. On application for the appointment of a receiver. Denied.

E. J. Justice, Sp. Asst. Atty. Gen., of Greensboro, N. C., and A. I. McCormick, Sp. Asst. Atty. Gen., of Los Angeles, Cal., for the United States.

Harding & Monroe, Lindley & Eickhoff, and W. E. Colby, all of San Francisco, Cal., for defendant Pacific Midway Oil Co.

Lewis W. Andrews and T. O. Toland, both of Los Angeles, Cal., for defendant Maricopa Star Oil Co.

Curtis H. Lindley, of San Francisco, Cal., for defendant Obispo Oil Co.

Samuel M. Shortridge, of San Francisco, Cal., for defendants Spreckles Oil Co. and J. D. Spreckles, Jr.

J. W. Wiley, of Bakersfield, Cal., for defendants McCutchen and McCutchen Bros.

A. L. Weil, of San Francisco, for defendant General Petroleum Co

DOOLING, District Judge. This is a bill in equity, brought by plaintiff for the purpose of quieting its title to the S. W. ¼ of section 32, township 12 N., range 23 W. S. B. M., situated in Kern county The land is oil-producing land, and is averred in the bill to be of a value exceeding $10,000,000. The present motion is for the appointment of a receiver. Upon the hearing of the motion something over 40 affidavits were submitted, together with nearly 700 pages of typewritten testimony, which was taken in support of and in opposition to the application for a patent to this land, made on behalf of the defendant Pacific Midway Oil Company. An extended review of all of this testimony is impossible within the limits of this decision. I must content myself with a brief statement of some of the salient facts, though the omission herefrom of any fact appearing in the evidence does not mean that such fact was not considered.

In January, 1900, G. W. McCutchen, R. L. McCutchen, Lena McCutchen (his wife), W. C. McCutchen, J. B. McCutchen, M. P. McCutchen (his wife), C. W. Johnson, and M. A. Johnson (his wife), known in the record as the McCutchen family, filed a mineral location notice upon this land, and recorded the same in the office of the recorder of Kern county. G. W. McCutchen, R. L. McCutchen, J. B. McCutchen, and W. C. McCutchen are brothers, known in the record as the McCutchen Bros., and M. A. Johnson is their sister. The location thus filed is known as the Lone Star location. Before the making of this location G. W. McCutchen, R. L. McCutchen, and C. W. Johnson, their brother-in-law, went upon the ground, surveyed

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

it, staked the corners, and put a mound around each stake. In December, 1900, the other locators by quitclaim deed conveyed their interest to R. L. McCutchen for the better convenience in handling it for them. He was to do the annual assessment work, presumed to be necessary in order to prevent others from locating the land. This work he did yearly until the year 1906. Failing to do the work in that year, he procured some of his wife's relatives, known as the Freears, to locate the land on January 1, 1907. This location was known as the Cormorant, and while actually posted on the land contained a misdescription of it, both as to township and range, and an amended location by the same persons was made on December 15, 1908. This location was also posted on the land; but it, like its predecessor, contained a misdescription, this time as to the range only.

By deed dated December 5, 1908, the locators of the Cormorant quitclaimed to the McCutchen Bros.; but before that, in November of that year, the latter had already begun the erection of a standard drilling rig upon the land, which rig they afterwards completed at an expense of about $2,000. Though this deed is dated December 5, 1908, the last acknowledgment thereon is dated February 2, 1909, on which day also it was recorded. In January, 1909, and before receiving this deed, the McCutchen Bros., through G. W. McCutchen, entered into negotiations with one C. W. Smith, looking to the making of an agreement by which Smith was to develop the land, and, if oil were discovered, he was to apply for a patent therefor, upon the receipt of which he should convey the north half thereof to the McCutchen Bros. and retain the south half for himself. In the development work he was to have the use of the rig which the McCutchen Bros. had placed on the land. These negotiations resulted in the making of an agreement on February 26, 1909, with the Obispo Oil Company, which had been organized through the efforts of Smith and others for the purpose of developing this land upon the conditions stated above. These negotiations also had another result. One of the McCutchen Bros. was absent, and it was not possible to secure his signature to any agreement. The Cormorant locators had conveyed to the four McCutchen Bros., and while their deed correctly described the land their location notices did not. The absence of one of the parties, and a misdescription of the land prevented any immediate action under the Cormorant location.

G. W. McCutchen, who was negotiating with Smith, then procured another location to be made upon this land, which is known as the Hawk location. This location contained the names of himself and his sister, M. A. Johnson, two of the original Lone Star locators, together with the names of six others, who permitted G. W. McCutchen to use their names for the purpose of locating the land, but who never claimed any interest therein. The location was made February 12, 1909, and on February 13th a quitclaim deed from all the other locators to G. W. McCutchen was executed and recorded. The agreement with the Obispo Oil Company of February 26th, mentioned above, was made by G. W. McCutchen, who then held whatever title was secured by the Hawk locators, and who on the same day by quit-

claim deed conveyed the land to the Obispo Oil Company, for the purposes in the agreement mentioned. Neither the deed nor the agreement referred to any of the locations that had been made upon the land, but simply described the land itself by government subdivision. Under this deed and agreement the Obispo Oil Company in March, 1909, began operations upon the land, and continued without interruption until August 5th of that year, by which time it had expended something between $16,000 and $18,000 in a vain attempt to discover oil. For lack of funds active operations were suspended upon August 5th, and the land, rig, and machinery were left in charge of representatives of the Obispo Oil Company, while the latter was endeavoring to secure more money, or make some other arrangement for the further development of the land. On September 27, 1909, the land was withdrawn by the withdrawal order of that date known as "temporary withdrawal order No. 5."

The Obispo people were not able to make any arrangements until January 19, 1910, on which date the company entered into an agreement with one F. W. Nightingill (subject to the Obispo Company's contract with G. W. McCutchen) by which Nightingill agreed to pay the company $6,000 and take upon himself the fulfillment of the Obispo contract with McCutchen, and upon the discovery of oil, and the securing of a patent by him, he was to convey to McCutchen the north half of the land, and to the Obispo Company the southeast quarter thereof, retaining the southwest quarter for himself. Pursuant to this agreement the Obispo Oil Company on January 26, 1910, by quitclaim deed, conveyed the land to said F. W. Nighingill, and on February 7, 1910, the latter by similar deed conveyed it to defendant Pacific Midway Oil Company. This company, using the rig and machinery placed on the land by the McCutchen Bros. in December, 1908, and beginning operations in February, 1910, prosecuted the work of development uninterruptedly until June 6, 1910, at which time oil was discovered in paying quantity upon the southwest quarter of the land. Up to the time of the discovery of oil the defendant Pacific Midway Company had expended about $24,000. After discovery, and on June 27, 1910, another location, known as the Mudhen location, was made of the land in the name of five of the original locators of the Lone Star and three other McCutchens. Those of the original Lone Star locators whose names were not used in the Mudhen location, were Geo. McCutchen, C. W. Johnson, and Mrs. M. A. Johnson. The other locators of the Mudhen all conveyed to G. W. McCutchen by deed dated July 12, 1910. On July 2, 1910, the land was again withdrawn under the act of June 25, 1910.

In the winter of 1910, the Obispo Oil Company began operations upon the southeast quarter of the land, to which it was entitled to a reconveyance from the Pacific Midway Company under its contract with Nightingill, which the Pacific Midway Company had agreed to carry out. It sank three wells upon this quarter, one of which proved very productive. G. W. McCutchen, it will be remembered, was entitled to a reconveyance from the Pacific Midway Company of the north half of the tract, containing 80 acres. In September, 1910, he

entered into a contract with the defendant Maricopa Queen Oil Company, by which the company was to sink eight wells upon the westerly 20 acres, under lease from him, by the terms of which he was to receive one-fourth of the product of the wells. This company operated up to October, 1913, by which time it had sunk seven of the eight wells required, and had been by agreement with McCutchen relieved of the necessity of sinking the eighth. In October, 1913, it sold its lease to the defendant Maricopa Star Oil Company, which is now in possession and operating upon the 20 acres mentioned. The remaining 60 acres of the north half of the tract were sold by G. W. McCutchen to J. D. Spreckles, Jr., in April, 1911, for the sum of $120,000, $60,000 of which was paid by Spreckles before obtaining possession. Of these 60 acres, 20 acres, being the east half of the northwest quarter of the land in dispute, have passed to the ownership of the defendant Spreckles Oil Company, which has sunk seven wells thereon, and the remaining 40 acres have passed to the ownership of defendant General Petroleum Company, which company paid therefor a sum stated to be $281,482.46. This company has also sunk a number of wells on this 40 acres, and is now in the possession thereof. It will thus be seen that of the 160 acres involved in this action the defendants, the so-called operators, are in the possession of the following portions, their paper titles thereto being all derived through G. W. McCutchen:

Pacific Midway Company, S. W. ¼	being	40 acres
Obispo Company, S. E. ¼	"	40 acres
Maricopa Star Company, W. ½ of N. W. ¼	"	20 acres
Spreckles Company, E. ½ of N. W. ¼	"	20 acres
General Petroleum Company, N. E. ¼	"	40 acres

The Pacific Midway Company being under obligation to secure a patent, by reason of its contract with Nightingill, who in turn had assumed the obligations of the Obispo Company, made application for such patent on April 28, 1912, basing its application upon the Hawk location. Plaintiff has opposed this application in the Land Office, on the ground that said Hawk location was a fraudulent one, and made by seven dummy locators in conjunction with G. W. McCutchen for the purpose of fraudulently endeavoring to secure for said McCutchen 160 acres of land, being 140 acres more than as an individual he could claim under the law. The present bill is based upon the claim that the Hawk location was fraudulent for the reasons above set forth, and that as all of the defendants have entered upon the land, and operated thereon, under this location and none other, the possession of each and the claims of each are tainted with the original fraud. The defendants in answer to this charge deny that there was any fraud in any of the locations, but claim that every location subsequent to the Lone Star location of January, 1900, was made in good faith in aid of that location and for the benefit of the original Lone Star locators.

[1] If this claim be true, and the Hawk location and the Freear or Cormorant locations were made in the interest of and for the purpose of protecting and strengthening the original Lone Star location,

then neither the Cormorant location nor the Hawk location was a fraudulent one, even though made in whole or in part by persons who had no intention of claiming the land or any interest in it for themselves. That the Cormorant location was made at the instance of R. L. McCutchen for the purpose claimed the testimony leaves little room to doubt. The original Lone Star locators had conveyed to him for convenience in handling the land for their benefit; he had neglected to do the assessment work for 1906, which was deemed necessary to prevent the land from being located by others; he was of the opinion that the original locators could not relocate after failure to do assessment work; and he therefore secured a relocation by other relatives. It is of interest to note in this connection that the McCutchen Bros., who were the only ones of the Lone Star locators possessed of any means, had, before securing any deed from the Cormorant locators, begun the erection of a standard rig, which eventually cost at least $2,000.

[2] R. L. McCutchen was bound to act, in so far as this land was concerned, in the highest good faith towards the other members of the McCutchen family, who had been the original Lone Star locators and had intrusted to him their legal title for protection. This is also true of Geo. McCutchen, W. C. McCutchen, and J. B. McCutchen, who with him were the grantees of the Cormorant locators. At the time of the Hawk location it seemed to be necessary to act quickly, one of the brothers was away, and his signature not available. There was a misdescription of the land in the Cormorant locations, and G. W. McCutchen, acting, if not upon the advice of Judge Claflin, a reputable attorney and former superior judge, at least with his knowledge and acquiescence, caused the Hawk location to be made, and took a conveyance to himself, in order to be able to enter at once into a contract with C. W. Smith. Whether upon a trial of this cause it should be found that, as claimed, the Hawk location was for the benefit of and in support of the former locations, and reverted to the Lone Star location, cannot, and need not, now be determined.

[3] Such a location, if made in good faith, by eight locators, for the benefit of eight other persons eligible to locate, would not be fraudulent. The question here is: Should a receiver be appointed under all the circumstances disclosed? It must be borne in mind that all of the operators who are now upon the land have expended their money in purchase and development in good faith, and without any knowledge of the existence of any fraud, if there were such, in the Hawk location, which was regular on its face. They have all expended large sums of money in developing what was undeveloped and unimproved territory. Not one of them has as yet been repaid the amounts so expended. *Their* operations, at least, are not tainted with fraud, and it is not at all certain that their good faith might not protect them even against a finding that the Hawk location was a fraudulent one.

[4] Moreover, the Pacific Midway Company was actually upon the land, had expended a large sum of money, and had discovered oil before the passage of Act June 25, 1910, c. 421, § 1, 36 Stat. 847 (U.

S. Comp. St. 1913, § 4523); and this court has held, in another proceeding, that the withdrawal order of September 27, 1909, was ineffective.

[5] The Pacific Midway based its application for a patent upon the Hawk location, because it appeared to be regular; but, even if it were not, as under the evidence so far presented no fraud can be imputed to this company, and as it was in possession, and had made discovery while the land was still open to exploration, it may well have inaugurated rights of its own. Besides, if the Hawk location were in fact invalid, it could not affect the rights of the McCutchen Bros., who were actually in possession, and engaged in the erection of a rig, at the time that it was made. And up to that time at least there seems to be no reason to doubt the truth of their claim that they were acting for the original Lone Star locators. The whole situation is too clouded to warrant the court at this time in disturbing the possession of the operating companies, whose good faith is beyond question, and who have expended such vast sums of money in developing what was before their advent wholly unproved, and possibly worthless, territory.

The application for the appointment of a receiver will therefore be denied.

UNITED STATES v. GREAT LAKES TOWING CO. et al.

(District Court, N. D. Ohio, E. D. June 15, 1914.)

No. 8003 (72).

1. MONOPOLIES (§ 26*)—ANTI-TRUST ACT—UNLAWFUL COMBINATIONS—EQUITABLE REMEDY.

The Sherman Anti-Trust Act July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1913, § 8820 et seq.]), section 4 of which alone relates to an equitable remedy for its violation, contains in terms no provision for equitable relief to the public, except by way of injunction or prohibition; and while the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy as disclosed by the terms of the act is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate. The means to be employed to put an end to such a combination are governed by no uniform rule, but depend upon the facts of the particular case; and even where dissolution seems to be required to the furnishing of complete relief, such requirement does not necessarily amount to more than that the combination be dissolved so far as unlawful.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 26.*]

2. MONOPOLIES (§ 26*)—ANTI-TRUST ACT—SUIT AGAINST UNLAWFUL COMBINATION—RECEIVERSHIP.

While a receivership is proper, when necessary to effect the dissolution of a combination which is unlawful, as in violation of the Anti-Trust Act, it is not always necessary, even in such case, and when it is not it should not be resorted to.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 26.*]

---

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

3. MONOPOLIES (§ 26*)—ANTI-TRUST ACT—SUIT TO RESTRAIN UNLAWFUL COMBINATION—NATURE OF RELIEF.

A towing company, which through purchases of the stock of other competing companies and the vessels of still other owners, acquired a large percentage of the tugs operating on the Great Lakes, was adjudged to have created a monopoly, in violation of the Anti-Trust Act by using unfair means to prevent competitors from doing business anywhere on the Lakes. *Held*, that the violation of the law did not consist in the ownership of the stock and vessels so acquired, but in the illegal method of doing business; that the remedy which would be most beneficial to the public was not a dissolution of the company through a receivership and sale of its vessels to a number of separate and independent purchasers, but a decree permitting it to continue business under proper and stringent injunctive regulations, which would eliminate the illegal practices and keep the way open for full and free competition.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 26.*]

In Equity. Suit by the United States against the Great Lakes Towing Company and others. On settlement of decree for complainant.

U. G. Denman, U. S. Atty., of Cleveland, Ohio, and E. P. Chamberlin, Sp. Asst. U. S. Atty., of Bellefontaine, Ohio.

Goulder, Day, White & Garry and Hoyt, Dustin, Kelley, McKeehan & Andrews, all of Cleveland, Ohio (Harvey D. Goulder and Hermon A. Kelley, both of Cleveland, Ohio, of counsel), for defendants.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. We reached the conclusion, upon final hearing, that the defendant Great Lakes Towing Company and the corporations which it controls constitute a combination in violation of the Anti-Trust Act. 208 Fed. 733, 746.

The towing company was given opportunity to present, if it could, a feasible and satisfactory plan whereby the offending administrative practices mentioned in our opinion should be eliminated, and by which the towing company's services should be given for the equal benefit of all vessel owners needing its facilities, and the rights of competitors be completely safeguarded, in which case, we said, the injunction need only forbid continued operation except in compliance with the terms of such plan. Otherwise, the parties were to be heard upon a plan of dissolution, with form of decree for injunction, and for receivership, if necessary, to effect dissolution. The towing company thereupon presented a plan which it was urged would conform to the suggestion of the court. The government not only made specific criticisms upon various features of the suggested plan, but insisted that the combination could be effectively terminated only through a sale of the physical properties of the towing company, under direction of the court, through a receivership by which the company should be operated pending sale.

We indicated, by memorandum filed, that neither of the proposed plans was satisfactory, at least without important modifications, and gave opportunity for the presentation of further plans, both by the

government and the towing company, submitting also certain questions on which we asked the views of counsel. The towing company still confines its suggestions substantially to the general plan first presented by it, and has offered no plan of dissolution. The government suggests no plan, except dissolution by way of sale of the towing company's assets, urging that as the only remedy, and to be effected only through receivership (in the absence of the towing company's consent to a plan of dissolution), modifying its former position only by suggesting that the plan provide for the distribution of the property and business of the towing company among such number of separate, distinct corporations, of divergent ownership, as may be necessary to restore competitive conditions.

[1] The Anti-Trust Act contains in terms no provision for equitable relief to the public on account of violations of the act, except by way of injunction or prohibition. Section 4, which alone relates to the equitable remedy, invests the appropriate courts with "jurisdiction to prevent and restrain violations of this act." It is made the duty of the district attorneys, under the direction of the Attorney General, to "institute proceedings in equity to prevent and restrain such violations." The prescribed prayer of the petition is that "such violations shall be enjoined or otherwise prohibited," and provision is made for "such temporary restraining order or prohibition as shall be deemed just in the premises." While the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of the act, is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate.

In United States v. Freight Association, 166 U. S. at page 343, 17 Sup. Ct. 560, 41 L. Ed. 1007, injunction is spoken of as "more efficient than any other civil remedy." In the Reading Case, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243, the only relief given, aside from cancellation of the 65 per cent. contracts, was injunctive. In Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, none but injunctive relief seems to have been given. Moreover, where dissolution of an offending combination seems to be required to the furnishing of complete relief, such requirement does not necessarily amount to more than that the combination be dissolved so far as unlawful; in other words, that the features which make it unlawful be eliminated by whatever means may be necessary therefor. For example:

In the Northern Securities Case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, dissolution was accomplished by requiring such Securities Company to largely reduce its own stock, and in lieu of the stock so retired to distribute to its own stockholders a proportionate amount of the competitive stocks held by it. In the Standard Oil Case, 223 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, the New Jersey corporation, which held the stocks of a large number of other corporations in exchange for its own, was required to distribute the stock so held among its own stockholders. In the Tobacco Case, 221 U. S. 106, 31 Sup. Ct.

632, 55 L. Ed. 663, the business was divided between four corporations; the controlling companies being again so subdivided that business control was in the hands of a large number of separate corporations. Certain stock distributions were made, and injunctive relief given. In the Union Pacific Case, 226 U. S. 470, 33 Sup. Ct. 162, 57 L. Ed. 306, dissolution was effected by the sale of the Southern Pacific stock. In the Reading Case, the unlawful combination was held to exist as to the Temple Iron Company and the 65 per cent. contracts; and defendants were enjoined from voting the stock of the iron company, the contracts referred to were canceled, and their further execution enjoined. In the St. Louis Terminal Case, 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810, the unlawful condition was relieved against by such revamping of the conditions as that all the railroad companies could get the benefit of the terminal facilities on equal terms.

It is thus seen that, even where the remedy by injunction is thought to be inadequate, there is no uniform rule respecting the means to be employed in putting an end to the unlawful combination. Each case must stand upon its own facts; and methods adopted in other cases are not necessarily to be followed as precedents, except where the same situation is presented. Union Pacific Case, 226 U. S. 470, 474, 33 Sup. Ct. 162, 57 L. Ed. 306.

[2] While receivership is clearly proper when necessary to effectuate dissolution (Union Pacific Case, supra; St. Louis Terminal Case, supra), it is not always necessary even in such case, and should not be resorted to except where necessary. In none of the anti-trust cases to which we have referred does there appear to have been actual receivership. The nearest approach to it is in the Union Pacific Case, where a trustee was appointed to hold and transfer the stocks required to be disposed of.

The controlling inquiry thus is: What remedy promises the most effective measure of relief against the evils which we have found to exist?

[3] In the instant case, the evil to be remedied is not the ownership by the towing company of the corporate stocks of the Dunham and the Union Companies, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, and the Great Lakes Towing Company, Limited. These companies were not substantial competitors. No good would result from distributing to the stockholders of the towing company the stocks of the five companies above enumerated; and the government does not so request. Nor does the evil reside in the mere ownership of the corporate stocks, or physical properties, or both, bought from the other corporations or individuals. It is concededly impossible to restore to the sellers the properties so bought. The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means, the most important of which are (a) the system of exclusive contracts by which vessel owners who employ throughout the entire season the towing company's tug and wrecking service, at all the ports covered by its tariffs (so far as the vessel owner had occa-

sion for such service), receive a large discount from tariff rates, which is denied to all others; (b) the giving of special concessions, rebates, and discriminations to customers; (c) the restraint of competition by means of operating contracts, by unnecessary conditions imposed upon sellers of towing properties to buyers of tugs from the towing company; and (d) unfair rate wars, all adopted or engaged in for the purpose of obtaining and effectuating monopolistic control. Unless for such means, purposes, and practices, the size alone of the combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business.

Merely enjoining further operation by the towing company would injure, rather than benefit, the public by depriving it of the present service pending the reorganization of a new and sufficient service. A receivership, and operation thereunder, until competitive conditions should be restored, without utilizing the towing company's property, would amount to a partial and unnecessary confiscation. We are thus left practically to a choice of two remedies: First, selling the towing company's properties to purchasers dissociated from the officers, directors, and stockholders of the towing company, with the expectation that operations will be carried on under a number of separate and independent ownerships, each confined to a given port or group of ports, and by receivership insuring a continuance of service pending sale and the ability to deliver the towing company's properties upon sale; or, second, to permit continued operation by the towing company only upon complete elimination of the offensive practices under which its monopoly has been created and maintained, and the imposition of such injunctive restrictions as will keep the way open for full and free competition. The towing company is before the court and subject to its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate past abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest.

We do not overlook the government's contention that a corporation which has, by improper practices, created a monopoly, will, if left in control, find means through indirect and secret methods to evade any injunctive restrictions which may be imposed. We also appreciate that the towing company's present occupancy of the field places all prospective competitors at such disadvantage as in considerable measure to deter them from entering into competition. Nor do we fail to appreciate the insistence that this court cannot effectively superintend the conduct of the defendant's business. Indeed, in our former opinion we said that, for reasons there stated, it then seemed to us unlikely that a decree merely enjoining administrative practices would give complete relief, in the absence of radical change in the fundamental principles upon which the towing company was organized and operated, one of which reasons was the fact that a decree command-

ing cessation of purely administrative practices would not be self-executing.

In spite, however, of these difficulties, we are convinced, after mature consideration, that continued operation by the towing company under proper and stringent injunctive regulations will, if obedience to such regulations can be adequately enforced through punishment for contempt, give better assurance of free competition and better public service than is promised by a division of the towing company's properties among several new ownerships. In reaching this conclusion, we take into account the unsatisfactory history of the towing business previous to the organization of the Great Lakes Towing Company, the fair possibility of a recurrence of those conditions if the parties interested in the towing company's business are wholly excluded from the field and the new organizations released from all restraint by means of our decree, and the possibility of a renewal of the present monopoly through the reacquisition of the interests in the new organizations by those now interested in the towing company (which again would be released from the restraint of our decree), and the fact that under the plan we propose to adopt we shall have, if such plan can be enforced, the effect of 14 separate organizations, so far as concerns opportunities for competition and the avoidance of discriminations, and under the continued control of this court.

The plan we have adopted, not only includes the limitation contained in the plan presented by the towing company, but in the extent and stringency of its provisions goes far beyond that plan. For example: The so-called "exclusive contracts" are forbidden, not only as affecting more than one port, but as applied to even one port; and such restrictions, as well as the towing company's tariffs, are made to apply to all classes of service given by that company. Stringent provisions against unfair rate cutting are also contained, and the provision against discriminations is practically unlimited. Again, we have sought to impose the general prohibitions contained in the Sherman Act, so far as applicable, as well as to apply the rules of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1913, § 8563 et seq.]) as far as seems possible unless Congress shall include within the terms of that act corporations of the class of the towing company.

We see no reason to doubt that under the decree as drafted obedience to the injunctive process can be enforced, and disobedience thereto punished, without serious difficulty, for operation is expressly forbidden, except in strict compliance with the terms of the decree. Receivership and sale will, however, be resorted to in the event that the towing company shall not consent to be bound by the plan embodied in our decree.

The decree will be filed contemporaneously with this opinion, and notice thereof given by the clerk to counsel for all parties. It will not be entered until further order, nor until after the expiration of the time given the towing company to file the consent provided for by the sixth paragraph of the decree.

Injunction is not by the decree filed herewith made to run against the Great Lakes Towing Company, Limited, because, perhaps by inadvertence, that company appears not to have been made a defendant. Opportunity should be given to bring it in, if desired.

EADIE v. NORTH PAC. S. S. CO. et al.

(District Court, N. D. California, First Division. July 10, 1914.)

No. 15636.

1. ADMIRALTY (§ 10*)—JURISDICTION—"MARITIME CONTRACTS"—BOND CONDITIONED ON PERFORMANCE OF CHARTER PARTY.

A bond executed by a surety company, conditioned for the payment of any damages arising from the breach by the charterer of the covenants and conditions of a charter party, is not a "maritime contract," but a common-law obligation for the payment of damages in case of default in the performance of such a contract by another, and a suit thereon is not within the jurisdiction of a court of admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 131–149, 185–190; Dec. Dig. § 10.*

For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]

2. SHIPPING (§ 58*)—SUIT FOR BREACH OF CHARTER—DAMAGES.

An averment, in a libel by the owner of a vessel against a time charterer, filed before the expiration of the charter term, that respondent has refused to continue the use of the vessel, does not state a cause of action for the recovery of damages beyond the charter hire as it becomes due.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. § 58.*]

In Admiralty. Suit by William Eadie against the North Pacific Steamship Company, the Illinois Surety Company, and the freights of the British steamer Cetriana. On exceptions to libel. Exceptions sustained.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for libelant.

C. H. Sooy, of San Francisco, Cal., for respondent North Pac. S. S. Co.

F. R. Wall, of San Francisco, Cal., for respondent Illinois Surety Co.

DOOLING, District Judge. The libel herein sets forth that libelant chartered its vessel, the Cetriana, to the libelee North Pacific Steamship Company for the period of 12 months from the date of the delivery of said vessel, at an agreed charter hire of $75 per day, said vessel to be delivered between January 1 and 5, 1914. The charter party is made a part of the libel, and provides, among other things:

"This charter party shall only become effective after the second party shall have furnished a duly executed bond from a bond or surety company, in a form satisfactory to said party of the first part, binding said surety in the sum of $15,000, United States gold coin, for the faithful performance of each and all of the provisions, covenants, and agreements in said charter party, on the part of said party of the second part to be performed."

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

The libel also alleges the execution of such bond in the sum of $15,000 by the libelee Illinois Surety Company, which bond is also made a part of the libel, and contains the following provisions.

"The condition of the above obligation is such that, whereas, the said North Pacific Steamship Company and the said William Eadie have entered into a contract of charter party under date of December 22, 1913, wherein and whereby the said William Eadie chartered to the said North Pacific Steamship Company, a corporation, the steamship Cetriana, under the terms and conditions in said charter party set forth, a copy of which charter party is hereto attached and made a part hereof as fully as if set forth at length herein: Now, therefore, if the said North Pacific Steamship Company, a corporation, shall well and truly keep and perform all the covenants, conditions, and agreements in said charter party on its part to be kept and performed, then this obligation to be void; otherwise, to remain in full force and effect: Provided, however, this bond is executed upon the express condition precedent that it shall not extend or cover the terms and conditions of the seventh paragraph of said charter party, and the surety hereunder shall not be liable on account of any accident or personal injury to any person whatsoever."

The libel further avers the failure of the libelee North Pacific Steamship Company to pay the charter hire for the months of February, March, and April, 1914, amounting to the sum of $6,675, and that the said steamship company has also incurred indebtedness in and about the vessel, and which is a lien thereon, amounting to $472.07, and which under said charter party the said steamship company should have paid. It is also averred in article IX of said libel:

"That the said North Pacific Steamship Company has further refused to continue the use of the said vessel for the balance of said charter, by reason of which said libelant has suffered further damage, the exact amount of which said libelant is at this time unable to definitely allege, but on his information and belief alleges the same will exceed the sum of $10,000."

The libel was filed April 7, 1914, and seeks to recover the sums mentioned from the North Pacific Steamship Company on the charter, and from the North Pacific Steamship Company and the Illinois Surety Company on the bond, and from certain freights under the provisions of the charter party. With the last we are not at present concerned.

The Illinois Surety Company has filed exceptions to the libel, on the grounds, first, that as to it the court has no jurisdiction because of the nonmaritime nature of the bond sued upon; and, second, because article IX is surplusage, irrelevant, and impertinent, in that it alleges damages for a time subsequent to the filing of the libel. The North Pacific Steamship Company has also filed exceptions to the libel on substantially the same grounds.

[1] The main question presented, therefore, has to do with the jurisdiction of the court to entertain the libel in so far as it is based upon the bond given by the Illinois Surety Company. This bond is in form an ordinary common-law obligation, the condition of which is that the North Pacific Steamship Company shall well and truly keep and perform all the covenants, conditions, and agreements in the charter party on its part to be kept and performed. The covenants of the charter party are many and varied, but the obligation of the surety is not to perform these covenants, but to pay such damages as result from their nonperformance. The extent of the jurisdiction of the admiralty courts of the United States over contracts has never been

clearly and definitely determined. But the Supreme Court, in Insurance Co. v. Dunham, 78 U. S. (11 Wall.) 26, 20 L. Ed. 90, decided in 1870, lays down the rule that the true criterion by which to test the admiralty jurisdiction is the nature and subject-matter of the contract, as whether it is a maritime contract, having reference to maritime service or maritime transactions. Whatever difficulty arises in determining what contracts are subject to the admiralty jurisdiction arises, of course, out of the application of this criterion to the matter immediately in hand, because in dealing with specific contracts it is not always easy to determine whether they have to do with maritime service or maritime transactions within the meaning of the rule as laid down by the Supreme Court. In the case of Pacific Surety Co. v. Leatham & Smith T. W. Co., 151 Fed. 440, 80 C. C. A. 670, the Circuit Court of Appeals of the Seventh Circuit decided in 1907 that a bond similar to the one here in suit was not the subject of admiralty jurisdiction, holding that such a contract is not for maritime service, nor does its performance involve maritime transactions, because its sole obligation is for payment of money arising out of a breach of the terms of the charter party, and in no sense for the performance of such terms. On the other hand, Judge Hanford, in Haller v. Fox (D. C.) 51 Fed. 298, decided in 1892, held such a bond to be a maritime contract, and a suit thereon to be a matter of maritime jurisdiction, using the following language:

"The bond in suit is to be construed as if it contained all the promises and conditions of the contract [charter party] between the libelant and Fox. By this the respondents assured the libelant that their principal would do and perform the things specified in said contract, and obligated themselves to pay whatever damages should result from any failure on his part. This suit, therefore, is founded upon a contract relating directly to the employment, navigation, supplying, repairing, insurance, and possession of a ship. Contracts touching these several matters are subjects of admiralty jurisdiction in this country."

But is the suit on the bond founded upon a contract relating to the employment, navigation, etc., of a ship? Is it not rather founded upon an obligation to pay money, and to pay money alone, which obligation becomes effective only upon the failure of another to perform a contract relating to the employment, navigation, etc., of a ship? The charter party is undoubtedly a maritime contract, and the admiralty has jurisdiction of a suit based thereon; the bond is nothing more than a common-law obligation, not that the terms of the charter party shall be complied with, but that upon a failure to comply with them the surety will pay such damages as the owner of the vessel may have suffered by reason of such failure. It was long an open question in this country whether a policy of marine insurance was the subject of admiralty jurisdiction, and it was not until 1870 that the Supreme Court, in Insurance Co. v. Dunham, above cited, finally set that question at rest. But in determining that a suit on such policy was maintainable in the admiralty, the court bases its decision on the fact that the contract of insurance sprang originally from the law maritime, and the further fact that it is a contract or guaranty that "the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to

the port of its destination," and, paralleling this contract with that of affreightment, holds that "the object of the two contracts is, in the one case maritime service, and in the other maritime casualties."

But in the case of the bond in suit we have an obligation based neither upon maritime service nor upon maritime casualties, but upon the default of a third person in the performance of certain stipulations to which the surety was in no sense a party. Libelee Illinois Surety Company did not agree to perform the services to which the North Pacific Steamship Company was bound by the terms of the charter party, nor was it authorized to perform such services either by the charter party or the bond. The bond is not for the performance by the surety of any maritime service, nor does its obligation depend upon any maritime contingency or casualty. It becomes effective solely upon the default of the charterer to perform his agreement, and even then its obligation would be resolved if the charterer should pay the damage occasioned by such default, as it is in law bound to do. The fact that the practice of executing such bonds in connection with charter contracts is of comparatively recent origin is not sufficient to confer jurisdiction upon the admiralty court, if such jurisdiction does not arise out of the nature of the contract itself. Unless this court has such jurisdiction, the surety is entitled to defend in a court of common law, where he may, if he so desire, submit his defense to a jury.

I am therefore of the opinion that the case of Pacific Surety Co. v. Leatham, etc., supra, is supported by the better reasoning, and that the exceptions to the libel on the ground of lack of jurisdiction must be sustained.

[2] As to the second exception, based upon the averments of article IX of the libel, I am of the opinion that nothing stated in this article shows that libelant would be entitled to anything more than the charter hire as it became due.

The exceptions are therefore sustained.

POTOMAC MILLING & ICE CO. v. BALTIMORE & O. R. CO.

(District Court, D. Maryland. November 2, 1914.)

1. PLEADING (§ 104*)—PLEA—DEMURRER.

Where plaintiff sued in a federal court in Maryland to recover damages for the destruction of buildings and various articles of personal property by a fire negligently set out by defendant railroad company in West Virginia, a plea to the jurisdiction, that the land in question was located in West Virginia, and that the court had no jurisdiction in the premises, did not meet the entire case, and was therefore demurrable.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 213-217; Dec. Dig. § 104.*]

2. COURTS (§ 269*)—JURISDICTION—"TRANSITORY ACTION."

An action to recover for the value of personal property destroyed is transitory, and may be brought in a federal court in a state other than that in which the property was situated.

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

For other definitions, see Words and Phrases, First and Second Series, Transitory Action.]

---

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

3. COURTS (§ 7*)—JURISDICTION—LOCAL OR TRANSITORY ACTION—WHAT LAW GOVERNS.

In determining whether an action is local or transitory, the law of the forum governs.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14, 16, 22–31; Dec. Dig. § 7.*]

4. COURTS (§ 269*)—JURISDICTION—LOCAL OR TRANSITORY ACTION—INJURY TO REAL PROPERTY.

An action for the destruction of buildings in West Virginia by a fire set out by defendant railroad company was local in character, for trespass on real property; and, defendant being present and subject to suit in West Virginia, the action could not be maintained in a federal court sitting in Maryland.

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

At Law. Action by the Potomac Milling & Ice Company against the Baltimore & Ohio Railroad Company. On demurrer to defendant's plea to the jurisdiction. Sustained.

Walter C. Capper, of Cumberland, Md., Harry G. Fisher, of Keyser, W. Va., and Albert A. Doub, of Cumberland, Md., for plaintiff.

George A. Pearre, of Cumberland, Md., for defendant.

ROSE, District Judge. The plaintiff is the owner of land in West Virginia. Its declaration alleges that some of the buildings on such land, together with various articles of personal property therein, were destroyed by fire which had been caused by sparks which defendant had negligently permitted to escape from one of its locomotives. To recover for the damage thus done this suit is brought.

[1] Defendant has pleaded that the land in question is in Mineral county, in the state of West Virginia, and that this court has, therefore, no jurisdiction in the premises. To this plea the plaintiff demurs. As the declaration states that personal property of value belonging to plaintiff was destroyed, the plea does not meet the entire case, and the demurrer to it will, therefore, on that ground have to be sustained. The parties have, however, fully argued the question as to whether this court has jurisdiction to entertain the suit, so far as it seeks to recover for damage to the real property; and as that question will have to be decided at some stage of the proceedings, it might as well be passed on now.

[2] Defendant contends that a suit for injury to real property is a purely local action and cannot be maintained in any court whose writ will not run into the county in which the land lies. When an action of trespass was a semi-criminal proceeding, there was good reason to require that redress for it be sought where the wrong was done. Any proceeding which may require the officers of the court to put somebody either in or out of possession of the land must necessarily be instituted in a tribunal which can give such relief. Something, perhaps, may be said for denying to other than local courts jurisdiction over any action in which the title to land or the right to its possession is one of the questions in dispute. The rule invoked by the defendant, when extended beyond the limits named, is purely arbitrary.

In this particular case the fire which burned the buildings consumed personal property. There is no question that this court may properly entertain a suit to recover for the value of the latter.

The defendant's responsibility for the damage to buildings will depend on precisely the same state of facts as that which will determine its responsibility for the destruction of the chattels. In short, the substantial issues involved and the testimony by which they are to be supported will be the same with reference to the real and the personal property. If the defendant is right, there will be cases in which it will be impossible for a deeply wronged landowner to secure redress. The inconvenience and occasional injustice which the rule relied on here may cause has led a number of states to restrict its application or to abrogate it altogether.

In West Virginia it is provided that any action at law, except an action of ejectment or unlawful detainer, may be brought where any of the defendants reside. Code W. Va. c. 123, § 1 (sec. 4734).

[3] The only legislation in Maryland upon the subject is section 148 of article 75 of Bagby's Code, to the effect that if any trespass shall be committed on any real property, and the person committing the same shall remove from the county where such property may lie, or cannot be found in such county, such trespasser may be sued in any county where he may be found. There is in this case, of course, no suggestion that the defendant, the Baltimore & Ohio Railroad Company, has removed from Mineral county, or that it cannot be found therein. It is clearly settled that on this question the law of the forum governs. Huntington v. Attrill, 146 U. S. 669, 13 Sup. Ct. 224, 36 L. Ed. 1123; Peyton v. Desmond, 129 Fed. 1, 63 C. C. A. 651.

[4] The Court of Appeals of Maryland does not appear ever to have had before it a case in which it was sought to recover in the courts of this state for an injury done to real property in another; but the distinction between local and transitory actions has been repeatedly recognized in its decisions, and the line of demarcation between them has been clearly defined. Thus, in Gunther v. Dranbauer, 86 Md. 1, 38 Atl. 33, cited with approval in the subsequent case of Phillips v. Baltimore City, 110 Md. at page 435, 72 Atl. at page 904, 25 L. R. A. (N. S.) 711, Judge McSherry said that the unerring test by which it may be determined whether a particular cause of action sounding in damages is local or transitory—

"inheres in the nature of the subject of the injury as differing from the means whereby and the mere place at which the injury was inflicted. If the subject of the injury be real estate or an easement, * * * obviously the action must be local, for the reason that the injury to that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated. But if the subject of the injury be an individual, then an injury to that individual's person, no matter by what means occasioned or where inflicted, is essentially an injury to a subject not having a fixed, * * * immovable location; and an action to recover damages therefor would necessarily be transitory."

In the courts of Maryland, therefore, a suit for damages to real estate caused by fire negligently communicated to improvements thereon is local. Such was the common law of England, in spite of Lord

Mansfield's opinion to the contrary in Mostyn v. Fabrigas, 1 Cowp. 166, as the subsequent case of Doulson v. Matthews, 4 Durn. & E. (4 Term Rep.) 503, showed. Such is still the law of England, as determined in the relatively recent case of the British South Africa Co. v. Companhia de Mocambique, Law Rep. Appeal Cases (1893) 602.

The plaintiff, however, in effect argues that as the common law, according to one of its most distinguished disciples, was the perfection of human reason, and as that quality seems singularly lacking in the doctrine for which the defendant contends, it must follow that the English judges and their American brethren who have followed in their footsteps, have misunderstood and misinterpreted the true meaning of the common law in this respect. It claims that the Supreme Court has restricted the old rule within narrow limits. Stone v. United States, 167 U. S. 182, 17 Sup. Ct. 778, 42 L. Ed. 127. In the case cited it was held that where the defendant had cut down trees growing on the plaintiff's land, and had converted them to his own use, the action would be transitory, if plaintiff chose to make the gravamen of his suit the conversion of the trees after they were cut, but local, if recovery was sought for the damage done to the land by the cutting. Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913.

It is suggested that the distinction has thus become very much like that between tweedledum and tweedledee, which is a matter of the ending only. It relies on the reasoning of the Supreme Court of Minnesota in Little v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 Am. St. Rep. 421. It argues that, if the application of the old rule be confined strictly to cases in which the title or right of possession of the land is at issue, it will be given all the force which either the later authorities or common sense justify. I would be glad to accept this view. If in this case plaintiffs were remediless, I might feel it my duty to give a higher court an opportunity fully to consider the question anew. In point of fact, however, plaintiff will not have the slightest difficulty in suing the defendant in West Virginia and there securing the service of process upon it.

Chief Justice Marshall felt, as does the plaintiff in this case, that from the standpoint of either reason or convenience little could be said for the old rule. Nevertheless he declared that the courts had made it clear that actions "are deemed transitory where the transactions on which they are founded might have taken place anywhere, but are local when their cause is in its nature necessarily local." And he added, "It would require a hardihood which I do not possess to pass this limit." Livingston v. Jefferson, 1 Brock. 203, 15 Fed. Cas. 660.

Where he did not dare to go, others may well hesitate to venture.

THE CALYPSO.

(District Court, N. D. California, First Division. September 30, 1914.)

No. 15522.

ALIENS (§ 36*)—OFFENSES AGAINST CHINESE EXCLUSION ACTS—LIABILITY OF VESSEL—"MASTER OF VESSEL."

A gasoline launch was built and owned by two persons, one of whom owned a five-sixths interest. An agreement was signed by both owners of the vessel, providing that the minority owner should make no contracts or debts, or take the vessel out, or hire a crew without a permit from the majority owner. He had previously, however, without the knowledge of the latter, had himself enrolled as master, and a week after the agreement he, with others, and without the knowledge or consent of the other owner, took the vessel and brought a number of Chinese, who were not entitled to enter the United States from Mexico, to a California port, where the vessel was seized under Chinese Exclusion Act May 6, 1882, c. 126, § 10, 22 Stat. 61, as amended by Act July 5, 1884, c. 220, 23 Stat. 115 (Comp. St. 1913, § 4297), which provides that "every vessel whose master shall knowingly violate any of the provisions of this act" shall be forfeited to the United States. *Held*, that such minority owner was not the "master of the vessel," within the meaning of the act, as against the principal owner, and that the interest of the latter was not subject to condemnation thereunder.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 36.*

For other definitions, see Words and Phrases, Master of a Ship.]

In Admiralty. Suit by the United States against the gasoline launch Calypso; William L. Sassaman and Morris Pettenger, claimants. Decree for libelant as against the interest of claimant Pettenger alone.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal.

Lloyd, Cheney & Geibel, of Los Angeles, Cal., for claimants.

DOOLING, District Judge. The gasoline screw steamer Calypso was seized in Monterey Bay, while engaged in unlawfully smuggling into this country certain Chinese not entitled to admission. This action is brought to have the vessel condemned in accordance with section 10 of the Chinese Exclusion Act, which is as follows:

"Sec. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found."

The undisputed facts are as follows:

The Calypso is jointly owned by Wm. L. Sassaman and Morris Pettenger; the former owning a five-sixths and the latter a one-sixth interest. Wm. H. Singleton is a creditor, who is, by agreement with the owners, entitled to a mortgage upon said vessel for $3,400, and the Los Angeles Creamery Company is also a creditor holding mortgages thereon aggregating $760. Sassaman has put into the boat $5,000, and Pettenger $1,000, in addition to the $3,400 secured by Singleton, and about $800 advanced by the Los Angeles Creamery

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

Company, making the cost of the boat something over $10,000. On May 22, 1913, Sassaman was regularly enrolled by the collector of the port of Los Angeles as master of the Calypso, and thereafter, with the knowledge and consent of Sassaman, Oren H. Dickason was enrolled as master on July 2, 1913, Ralph L. Lopes on July 15, 1913, and James H. Castle on September 13, 1913. On November 24, 1913, Pettenger, without the knowledge or consent of Sassaman, procured himself to be enrolled as master in lieu of James H. Castle, and was so enrolled on the ship's papers at the time of the contraband voyage out of which this action arose.

In December of that year certain creditors of Sassaman and Pettenger were pressing for payment, and Sassaman arranged a meeting with them for December 23d, and requested Pettenger to attend. While Sassaman was endeavoring to satisfy the creditors in some way, and, indeed, while he was arranging with Singleton for the indorsement of notes, which finally did satisfy them, instead of attending this meeting, Pettenger, without Sassaman's knowledge, took the boat from Los Angeles to San Diego, the purpose of his voyage being to secure a load of contraband Chinese to smuggle into the United States; but, as stated by the witnesses, on this voyage "he failed to make connections." After his return from San Diego, and upon December 26, 1913, Pettenger entered into a written agreement with Sassaman as follows:

"Amendment to articles of agreement made August 10, 1912, for the Calypso, between Wm. L. Sassaman and Morris Pettenger, both of Los Angeles, California.

"This agreement, made this twenty-third day of December, 1913, in consideration that Wm. H. Singleton agrees to pay promissory notes to the amount of $3,400, which amount clears the indebtedness of the Calypso, I, Wm. L. Sassaman, and I, Morris Pettenger, agree to give said Wm. H. Singleton a mortgage on the Calypso for the amount of $3,400, with interest at 8% and deliver to Wm. H. Singleton the insurance policy, which amounts to $5,000.00; and, further, that I, Morris Pettenger, agree to make no contracts or take the Calypso out on any trip without a permit from Wm. L. Sassaman, also that I, Morris Pettenger, agree to borrow no money or give any personal note at any time on the Calypso. It is also agreed that I, Morris Pettenger, shall not employ a crew without a permit from Wm. L. Sassaman, and under no circumstances shall the ship's papers be transferred to any one except by Wm. L. Sassaman.

Wm. L. Sassaman.
"Morris Pettenger.

"Witnessed by Louise E. Grimaud."

On January 2, 1914, Pettenger, accompanied by Fred Fox, Will Fox, David Main, and a Chinaman named Lee, took the Calypso out on the trip which resulted in her seizure. They went to Mexico, took on board a number of Chinese, who were not entitled to enter the United States, and about January 16th secretly landed them at Monterey, at which time and place the Calypso was seized by the officers of the United States. The Calypso is therefore liable to condemnation in this proceeding, if Pettenger were her master within the meaning of the law.

The disputed facts that are material are as follows:

Pettenger testified that, about a week after his enrollment as master of the Calypso, he informed Sassaman of the fact of such enrollment,

and that on December 26, 1913, and about an hour after the execution of the agreement above set forth, he had a conversation with Sassaman which he details as follows:

"It was on the 26th of December. I was in the city, and I saw Mr. Sassaman, and I told him that Fox had a proposition on for Mexico, and he wanted — We did not go into the details of it. He wanted to know if there was any money in it. I says, 'Yes.' I had already told him I had signed as master of the ship. There was not anything mentioned at that time whose name was on the ship's papers. I did not tell him what Fox's proposition was. I told him there was a chance proposition, and asked him if he wanted to go down and talk to Fox about it. He says, 'No; you go ahead,' he says, 'and take the boat.' Fox was not employed; he was a partner. Sassaman did not want to go. He proposed I should go. I says, 'Are you willing to put your interest in the boat up against my liberty?' He says, 'Yes; go ahead and use the boat, and get some money in.'"

That he had been informed or had learned that Pettenger was enrolled as master of the Calypso is vigorously denied by Sassaman, as is also the fact that any such conversation occurred as is detailed above. There is no doubt that Pettenger procured his enrollment as master without the knowledge or consent of Sassaman, nor is there any doubt that the agreement by the terms of which Pettenger was not to take the Calypso out on any trip without a permit from Sassaman was executed on December 26th. There is also no doubt that a few days prior thereto, and without the knowledge or consent of Sassaman, Pettenger made the trip to San Diego in an endeavor to secure a load of contraband Chinese, at the very time that Sassaman was endeavoring to arrange a settlement with their creditors. Sassaman is a workingman, long employed by the Los Angeles Creamery Company as a driver and collector, whose hours of work are from midnight until 7 or 8 a. m., and all of whose earnings for a number of years have gone into the Calypso.

The testimony of Pettenger, if true, as to the conversation above set forth, and as to his informing Sassaman of his enrollment as master of the Calypso, is sufficient to establish the fact that he was master, within the meaning of the law, at the time that the vessel was seized. But if Sassaman had no knowledge of Pettenger's enrollment as master, and if after the execution of the agreement of December 26th Pettenger took the Calypso upon the trip which resulted in her seizure, without Sassaman's knowledge or consent, and contrary to the express terms of such agreement, Pettenger, although actually in charge of the Calypso, was not her master in any sense that would authorize the court to condemn Sassaman's interest in her, even though his own interest be subject to condemnation in this proceeding; for Sassaman, having a five-sixths interest in the Calypso, was entitled to name her master and control her movements, and this right he could exercise against the wishes of Pettenger, who owned but a one-sixth interest. The question at issue, then, narrows itself into a question of veracity as between Sassaman and Pettenger. The testimony of Pettenger detailed above was given before the commissioner on April 27th, at which time he testified that the conversation with Sassaman occurred in the barnyard of the Los Angeles Creamery Company, on December 26th, and about an hour after the agree-

ment had been signed. In a deposition sworn to by him in Los Angeles on April 9th he testified that after signing the agreement and before the Calypso was seized he had not seen Sassaman. Both of these statements cannot be true.

To warrant a decree forfeiting Sassaman's interest in the Calypso, the testimony of Pettenger must be accorded full credit, and that of Sassaman disregarded. But all the circumstances seem to me to corroborate Sassaman rather than Pettenger. Although Sassaman had the absolute right to name the master, Pettenger had without his knowledge or consent procured his own enrollment as such, and had also without Sassaman's knowledge and against his will made the San Diego trip, which had an unlawful purpose in view, and had upon his return signed the agreement that he would not without Sassaman's consent take the boat out, contract any bills, or hire a crew; and I cannot give sufficient credence to his statement that within an hour after the execution of this agreement, made alike for the protection of Sassaman and the creditors, he secured Sassaman's assent to the use of the vessel in an illegal enterprise, to base upon such statement a decree the effect of which might be to deprive an innocent person of the fruits of years of labor.

The finding of the court will be that on the trip in question Pettenger was again acting without the knowledge and against the will of Sassaman, that Sassaman had no knowledge of his enrollment as master, that as against Sassaman he was not such master, within the meaning of the law, and that consequently the interest of Sassaman cannot be condemned.

A decree will be entered condemning the interest of Pettenger only, and such interest will be sold free of incumbrance or lien.

AMERICAN MALTING CO. v. KEITEL.

(District Court, S. D. New York. October 20, 1914.)

INJUNCTION (§ 63*)—EQUITY JURISDICTION—LIBEL—INDUCING BREACH OF CONTRACT.

A court of equity is without jurisdiction, in the absence of statute, to enjoin the publication and circulation of libels, even though they may injure the complainant in his business or property; but it has jurisdiction to enjoin the issuance of circulars to customers of complainant, which are not only libelous, but are direct and malicious attempts to induce such customers to break existing contracts with complainant, and to refuse to pay for merchandise purchased, and, where the case is clearly established, complainant is entitled to such injunction.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 63.*]

In Equity. Suit by the American Malting Company against Adolph Keitel. Decree for complainant.

See, also, 209 Fed. 351, 126 C. C. A. 277.

Isaac H. Levy and George Gordon Battle, both of New York City, for complainant.

Ralph B. Ittelson, 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. A full hearing in this litigation has not changed what appeared to be its nature when looked into on motion for preliminary injunction. The Circuit Court of Appeals (209 Fed. 351, 126 C. C. A. 277) found in the bill and affidavits an endeavor to enjoin defendant from the further issuance of libels well calculated, not only to hold sundry persons connected with complainant up to hatred, ridicule, and contempt, but also to seriously injure complainant's business. The Appellate Court has in unmistakable terms held that, in so far as the action is brought to prevent repeated libels, it cannot be maintained for lack of jurisdiction in equity; but it has also pointed out (209 Fed. 358, 126 C. C. A. 277) that it is an actionable wrong for a third person without justification to induce a party to a contract to break his agreement.

The testimony of Keitel himself has established beyond peradventure that the numerous and long-continued circulars issued by him do relate to the American Malting Company. In these circulars he has accused the complainant of fraud, extortion, and dishonesty of many kinds, and branded some of the men connected with the complainant as criminals. Most of his accusations contain (whatever else he says) the assertion that these evil things are done by the trust or combine. On the trial of this case he denied over and over again that by trust or combine he referred to the American Malting Company at all; but when one of his circulars was made the ground of criminal prosecution he admitted in open court that he did refer to the complainant here when he used the word trust or combine. He says now that he lied upon his trial for criminal libel at the suggestion of his counsel. This admission alone is enough to destroy the value of his oath, but it is demonstrable from the language of his own circulars as to the complainant that he is not telling the truth.

His object in attacking complainant is not very clear unless it be inspired by personal hatred. He says he does not think that complainant makes more than 10 per cent. of the amount of malt necessary to supply the United States, and that his object in issuing circulars is to reduce the price of malt by breaking up through the hostility of customers any and all combinations to raise prices. Why such a long series of assaults upon a 10 per cent. producer should be expected to bring about this result I do not see. From Keitel's own testimony it is inferable that he seeks contributions from consumers of malt, telling them that a combination to maintain prices exists, and holding out to them the hope that by abusing the combination he can reduce the price of what they want, and he has volunteered the statement that out of such contributions he gets a good living. So far as discoverable he has no other source of livelihood. A living is his probable motive.

It is concluded, therefore, that statements of the most injurious character, and libelous both as to persons and business, have been for years propagated by the defendant, clearly directed toward complainant, and continued after his conviction for libels contained in one circular, which does not differ in any material respect from any of its successors and predecessors. As defendant has stood upon the deci-

sion of the Circuit Court of Appeals, no endeavor has been made to show the truth of any of the libelous statements—indeed, most of the statements complained of have been (so to speak) avoided by the false assertion that they did not refer to the American Malting Company. As to some of the libelous statements, complainant has given evidence tending to show their falsity.

It has been plainly shown that defendant issued broadcast circulars suggesting to complainant's customers not to pay their bills and to cancel their contracts. No pecuniary damage has been shown to have arisen from these efforts. Contracts have been canceled and customers have refused to pay their bills, but there is no evidence that they took either course by reason of defendant's operations. Upon the whole, the case stands just as it did in the Circuit Court of Appeals. Encouraged by the opinion of that court, Keitel now admits (or unsuccessfully denies) a deliberate, malicious, and, so far as this court is informed, wholly unfounded, series of libels; but he is, I think, quite right in asserting that this suit yields no remedy against him.

It is suggested that, now the record of conviction is before the court, and it can be seen for just what Keitel was convicted, the case stands on a different foundation. I do not think so. Even if he had always disseminated the same libel—had always used the same form of words—each publication would have been a new defamation and a new cause of action. The argument advanced against equitable jurisdiction would have been just the same as that which has prevailed so frequently and become authoritative in this circuit by the decision herein.

The legal propositions to which complainant has appealed by bringing this suit may be stated under three heads:

(1) Admitting that injunction will not lie against mere libel or slander—it may nevertheless be resorted to, after judgment, by way of enforcing the judgment. This proposition has been denied by the circuit Court of Appeals in this case. It may be noted that the denial of power made in the federal courts cannot go any further than that which has been laid down in the courts of our own state. In Marlin Fire Arms Co. v. Shields, 171 N. Y. at page 391, 64 N. E. 163, 59 L. R. A. 310, it was admitted that the plaintiff there had no adequate remedy at law, and it was also held that even that fact gave him no remedy in equity.

(2) Where the words and writings of a defendant are not only slanderous or libelous, but are calculated to frighten, intimidate, or coerce the customers or clients of the complainant into discontinuing business relations, equity may interfere by injunction. It did not appear on preliminary hearing, nor does it appear now, that Keitel's circulars are calculated to frighten, intimidate, or coerce anybody. They are calculated to make the complainant very angry. They do seek to produce feelings of hatred toward complainant and its officers. In other words, they are merely libels. There is nothing coercive about them. The difference between the two kinds of abuse is well illustrated by Marlin Fire Arms Co. v. Shields, supra (which, like this, was a case of mere defamation), and Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701, 118 Am. St. Rep. 601 (where the defendant was a person in

authority who issued defamatory matter accompanied by threats). The difference between a mere defamer and one who has or pretends to have power to injure the persons to whom he publishes his defamations is always to be borne in mind. The most common illustration of equity interfering to prevent attempted coercion is of proceedings against persons who threaten suits on patents or attempt to make unjustifiable use of court decrees. See the cases well summarized in Asbestos, etc., Co. v. Johns-Manville Co. (C. C.) 189 Fed. 611.

(3) Any endeavor to interfere with the existing contractual relations of a complainant with clients or customers may be enjoined. Of this Keitel is plainly guilty. He has (but not lately) incited complainant's customers to break their contracts. He has done so without any legal excuse and with malice. An injunction against this conduct will be granted. That he has discontinued the practice of late is a matter of no moment. On this hearing he has acknowledged he made a mistake, in the sense that he overstepped the bounds of caution. But he is entirely unrepentant, and complainant is entitled to have its rights embodied in an injunction.

A final decree along these lines will pass, with costs.

TRALICH v. CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Washington, N. D. November 4, 1914.)

No. 2856.

COMMERCE (§ 27*)—SUBJECTS OF REGULATION—EMPLOYERS' LIABILITY ACT—INJURIES TO SERVANT—"INTERSTATE COMMERCE."

Where a complaint for injuries to plaintiff alleged that defendant, in carrying on interstate commerce, employed plaintiff as a laborer with a construction gang, and that while plaintiff was employed in operating a steam shovel in the removal of earth "from the roadbed and tracks" of defendant, and in the repair and maintenance of the tracks and roadbed, which were employed for the movement of defendant's trains in the conduct of its business, he was injured by reason of defendant's negligence, it sufficiently alleged that plaintiff was employed in interstate commerce, within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, § 8657]), and a removal of the cause was prohibited by Act March 3, 1911, c. 231, § 30, 36 Stat. 1096 (Comp. St. 1913, § 1012).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

At Law. Action by Mike Tralich against the Chicago, Milwaukee & St. Paul Railway Company. On motion to remand. Granted.

Ryan & Desmond, of Seattle, Wash., for plaintiff.

George W. Korte, of Seattle, Wash., for defendant.

NETERER, District Judge. This action was commenced in the state court and removed to this court on petition of the defendant.

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

Motion to remand has been made on the part of the plaintiff. The complaint (paragraph 2) alleges:

"That defendant in the carrying on of interstate commerce employed the plaintiff as a common laborer to work upon a construction gang in the repair and maintenance of the tracks and roadbed of the said defendant company, which were employed for the transportation and movement of defendant's trains in the conduct of its business."

And in paragraph 3 that:

"While * * * employed * * * at or near * * * Denton, Montana, * * * operating a steam shovel of the defendant in the removal of earth from the roadbed and tracks of the defendant, * * * he was directed by the foreman in charge of the same to unfasten the hook on said chain which was attached to the side of the car. * * * That while this plaintiff in pursuance of said order * * * had his right hand upon said chain, and was about to unfasten the same from the side of the flat car, the engineer operating the steam shovel carelessly * * * applied the power, * * * moving the same, etc. * * *"

—injuring the plaintiff. The plaintiff further, in paragraph 4, recites:

"That said steam shovel operated by said defendant company was constructed on tracks or rails running lengthwise on an ordinary flat car, which flat car was on and moved back and forth along the tracks and roadbed of the defendant company. That in the operation of said steam shovel the same was moved forward and backward by its own power on said tracks or rails placed on the top of said flat car as necessity and convenience demanded in the removal of the earth and rubbish alongside of the roadbed, and as a part of the equipment thereof there was used and employed a certain heavy iron chain, one end of which was attached to the said steam shovel, and the other end thereof to the edge of the box car or flat car by a heavy iron hook, for the purpose of holding the said steam shovel stationary upon the said flat car when the same was being operated, and that when it was desired by the said defendant's agents and foreman in charge of the operation of the said steam shovel to move the same backward and forward it was necessary to detach the end of the said chain which was fastened to the side of the flat car."

It is contended on the part of the plaintiff that this action is prosecuted under Employers' Liability Act April 22, 1908, 35 Stat. 65, to recover for personal injuries sustained by plaintiff, and that, under the provisions of Act March 3, 1911, 36 Stat. 1094, the action, having been brought in a state court of competent jurisdiction, cannot be removed to the United States court.

The defendant contends that the complaint states a cause of action at common law, and not one embraced within the federal Employers' Liability Act; that the language employed in the complaint shows that plaintiff was a common laborer on a "construction gang," and was working on a steam shovel used in "the removal of earth and rubbish alongside the roadbed," and was not at the time performing a service in interstate commerce; that the test to determine whether an injury to an employé is within the protection of the act is its effect on the course and current of interstate commerce. Was the employé's relation to traffic so close and direct that his injury tended to stop or delay the movement of a train engaged in interstate commerce?

A reading of the complaint, I think, will require an affirmative answer. The language, "while * * * employed * * * operating a steam shovel * * * in the removal of earth *from the road-*

bed and tracks of the defendant," as set forth in paragraph 3, with the allegation in paragraph 2 that plaintiff was employed "in the repair and maintenance *of the tracks and roadbed* * * * which were employed for the transportation and movement of defendant's trains in the conduct of its business," which it is alleged was interstate commerce, I think is conclusive. It is conceded that defendant was engaged in interstate commerce, and it is clear, I think, that plaintiff was employed in the operation of a steam shovel, which was removing earth from the *tracks and roadbed* employed in interstate commerce. This clearly brings the action within the provisions of the Liability Act. The fact that there is no direct allegation that the action is prosecuted under the provisions of the Employers' Liability Act is immaterial. The averments in the pleading determine the applicability of the act. Garrett v. Louisville & N. R. R. Co., 197 Fed. 718, 117 C. C. A. 109; Kelly's Administratrix v. C. & O. Ry. Co. (D. C.) 210 Fed. 602.

The contention that the complaint shows plaintiff to have been engaged in the removal of earth and rubbish alongside of the roadbed is not well taken. The statement in paragraph 4, supra, relied upon by defendant, is merely a description of the steam shovel and manner of operation, and cannot control the allegation that plaintiff was engaged "in the removal of earth from the *roadbed and tracks* of the defendant." The *roadbed and tracks* were instrumentalities of interstate commerce under the allegations of the complaint. The work of maintaining them in proper condition after they had become such instrumentalities is clearly within the act. Jackson v. Railway Co. (D. C.) 210 Fed. 495; Pedersen v. Del., Lack. & West. Ry. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125.

The averments of this complaint are clearly distinguishable from the holding of the court in G., H. & S. A. Ry. v. Chojnacky (Tex. Civ. App.) 163 S. W. 1011. In that case a gardener was injured by the explosion of a torpedo which was concealed in some rubbish upon the premises. This was not taken from the track, nor was the gardener employed on the roadbed or track.

In Ruck v. Railway (Wis.) 140 N. W. 1075, the court merely held that the boiler which had been attached to and used in operating a derrick used on a flat car of a wrecking train, which had been removed and at the time was lying near the car in the roundhouse, was not an instrumentality of interstate commerce, and a person injured in repairing such boiler was not within the act.

In Ill. Central Ry. Co. v. Joseph Behrens, 233 U. S. 473, 34 Sup. St. 646, 58 L. Ed. 1051, decided April 27, 1914:

"At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the state."

This employment was in the yards of New Orleans, and the court held:

"At the time of the fatal injury the intestate was engaged in moving several cars all loaded with intrastate freight from one part of the city to an-

other. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute."

I think a reasonable construction of the language employed in the complaint discloses facts involving a service in interstate commerce, and by provisions of Act March 3, 1911, supra, cannot be removed to this court.

An order remanding the cause may be presented.

THE MIGUEL DI LARRINAGA.

(District Court, S. D. New York. February 9, 1914.)

(Syllabus by the Court.)

1. CONTRACTS (§ 101*)—SHIPPING (§ 102*)—CONTRACTS OF CARRIAGE—VALIDITY—WHAT LAW GOVERNS.

A contract valid where made is valid everywhere, unless contrary to the public policy of the place of performance; and the law of the forum is immaterial, if a contract is valid where made and where it is to be performed. Hence a contract for transportation to Cuba, made in Liverpool and valid by the laws of Great Britain, is presumed to be valid in Cuba, and the fact that, owing to its containing a negligence exemption, it is not valid by the laws of the United States, does not render a vessel, sued here for breach of such a contract, liable for damages.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 455–460; Dec. Dig. § 101;* Shipping, Cent. Dig. § 400; Dec. Dig. § 102.*]

2. EVIDENCE (§ 81*)—LAWS OF FOREIGN COUNTRY—PRESUMPTION.

There is not any presumption that the law of Cuba is the same as the law of the United States. Cuba R. R. Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40, followed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 102; Dec. Dig. § 81.*]

3. SHIPPING (§§ 121, 140*)—NEGLIGENCE—EXEMPTION OF BILL OF LADING—WARRANTY OF FITNESS.

An act of negligence on the part of a competent mate in failing to substitute a new rigging on the mast of a vessel in place of rigging which had become weakened and unsafe during the voyage is an act of negligence, within the negligence exemption of a bill of lading; and the owners, having equipped the vessel with a good cordage and a competent mate, have complied with the warranty of fitness which underlies every bill of lading and takes precedence of the exceptions therein.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 449–451, 466, 493–495; Dec. Dig. §§ 121, 140.*]

4. SHIPPING (§ 141*)—BILL OF LADING—NEGLIGENCE CLAUSE—DEFENSE.

A clause in a bill of lading exempting the shipowner from any injury to the goods arising from "any act, neglect, or default of pilot, master, mariner," etc., is good by the English law; and if the destination of the shipment is not to the United States, nor to any other country by whose laws such clauses are proved to be contrary to public policy, it is a defense to an action in our courts for damage to cargo caused by negligence in handling.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497–499; Dec. Dig. § 141.*]

In Admiralty. Action by the Guantanamo Sugar Company against the steamship Miguel di Larrinaga. Dismissed.

---

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

J. M. R. Lyeth, of New York City, for libelant.
John M. Woolsey and Convers & Kirlin, all of New York City, for claimant.

HOUGH, District Judge. Libelant was consignee and owner of certain heavy machinery, which had been transported on this British steamer from Liverpool to Guantanamo. While one heavy piece was being put ashore at the latter port, a stay broke. This permitted the mast to buckle, and the boom from which the machine hung to settle, so that the hanging piece of metal came down on another machine, to the injury of both. The machinery had been taken aboard at Liverpool in the same way, and with the same stay, mast, and boom. Examination showed the stay to be worn. No recent inspection of it is shown.

Apparently the strength of the stay became impaired during the voyage across the Atlantic. No preventer stays were rigged. There was plenty of wire cordage on board, and the crew could easily have rigged a new stay, or additional stays, if the officers had properly inspected that portion of the standing rigging which parted. The defect was not latent, and was, indeed, obvious.

The bill of lading contains an exception against injury to goods arising from "any act, neglect, or default of the pilot, master, mariners," etc. English law is in evidence, and this clause is valid thereunder.

Libelant's demand for recovery rests on two propositions:

[1, 2, 4] First. The damage was received within the territorial waters of Cuba. The law of Cuba is not shown, therefore it must be presumed to be that of the United States. Under the latter system of jurisprudence any attempted restriction of liability for negligence is unavailing. It was negligent not to inspect the standing rigging; consequently this ship is liable as though the accident had occurred in New York Harbor.

Admittedly this presumption runs counter to the much older and stronger one that a contract valid where made is valid everywhere. If there were no other line of reasoning presented, I should hold that the presumption just referred to overrode that relied on by libelant. But I am also of opinion that, in relation to almost every right of action, libelant's theory is unsound for the reasons sufficiently stated in Cuba R. R. Co. v. Crosby, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40.

[3] Second. The fact of collapse shows that the unloading arrangements of the ship (so far as heavy machinery was concerned) were defective, and were so before the voyage was entered upon; wherefore there was a breach of that implied "warranty of fitness" which underlies every bill of lading, and takes precedence of the exceptions therein. Undoubtedly the facts shown prove negligence, and to draw the line between a breach of the contract of carriage, and a breach of something antedating and yet supporting that contract, is not always easy. Indeed, the same set of facts may show, and have shown, both breaches.

This case is not nearly so difficult as some reported, for the reasonable inference is that the defect causing damage developed after voyage begun, and was the result of occurrences on the voyage. The line of demarcation, however, is well indicated in a case largely relied

on by libelant (The Schwan, L. J. [P. A. & D. Div.] 112 [1909]), and is best presented in the opinion of Lord Gorell.

In that litigation the Schwan was shown to have lost sugar cargo by the inflow of sea water through a peculiar and new-fangled "cock," which was safe if handled by those understanding it; but the ship had gone to sea without any proper instruction being given the crew as to how to use the new invention. Therefore the Schwan was held unseaworthy—i. e., unfit to carry sugar cargo—solely for lack of an instructed crew. It follows that, had the crew been instructed, and a knowing, but negligent, engineer left the cock open, a different result would have followed.

Mutatis mutandis that rule applies here. The Larrinaga had a good mast, good cordage, and a competent mate. The mate did not put the good cordage on the good mast. The owners did all that ordinarily careful and prudent men would have done, and have therefore fulfilled that "absolute undertaking"—which is warranty. McFadden Blue Star Line, 74 L. J. (K. B.) 423.

These considerations render it unnecessary to dwell upon the defense of lack of notice.

Libel dismissed, with costs.

HVOSLET et al. v. UNITED STATES.

(District Court, S. D. New York. May 26, 1913.)

1. COMMERCE (§ 77*)—TAX ON EXPORTS—WAR REVENUE ACT—TAX ON CHARTER PARTIES.

War Revenue Act 1898 (Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 460), imposing a tax on charter parties, is violative of the constitutional provision declaring that no tax or duty shall be levied on any articles exported from any state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 61–70; Dec. Dig. § 77.*]

2. INTERNAL REVENUE (§ 36*)—ACTIONS TO RECOVER DUTIES ILLEGALLY IMPOSED—STATUTES.

Act July 27, 1912, c. 256, 37 Stat. 240, provides that all claims for refunding any internal tax alleged to have been erroneously assessed or collected under the War Revenue Act, or any sums alleged to have been excessive, or wrongfully collected thereunder, may be presented to the Commissioner of Internal Revenue on or before January 1, 1914, and not thereafter; the Secretary of the Treasury being directed to pay out of the moneys of the United States not otherwise appropriated to such claimants as have presented or shall so present and establish such erroneous or illegal collection any sums paid by them, or on their account, or to the interest of the United States, under the provisions of the act. *Held*, that where petitioners paid taxes illegally assessed under the War Revenue Act, the act of 1912 gave them the right to sue the United States under the Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]) on their demand to recover the amount so erroneously paid, as founded on a law of Congress; they not being limited to a suit against the collector.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 82; Dec. Dig. § 36.*]

---

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

3. INTERNAL REVENUE (§ 36*)—WAR REVENUE ACT—TAXES ILLEGALLY COLLECTED—RECOVERY—PAYMENT UNDER PROTEST.

Under Act July 27, 1912, authorizing presentation to the Commissioner of Internal Revenue of claims for illegal taxes assessed and paid under the War Revenue Act, and refundment thereof by the Secretary of the Treasury, it was not essential, to the right of one having paid illegal taxes so assessed to recover the same, that they had been paid under protest.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 82; Dec. Dig. § 36.*]

Action by Frederick W. Hvoslet and others against the United States of America. On demurrer to petition. Overruled.

Haight, Sandford & Smith, of New York City, for plaintiffs.
H. Snowden Marshall, of New York City, for the United States.

NOYES, Circuit Judge. [1] The first question presented is whether the provision of the War Revenue Act of 1898, imposing a tax on charter parties, was constitutional. It is contended that it was unconstitutional as applied to vessels engaged in the export trade because it infringed the provision that "no tax or duty shall be laid on any articles exported from any state." Const. art. 1, § 9. In my opinion this constitutional question is determined by the decisions of the Supreme Court in Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862, and United States v. New York & Cuba Mail S. S. Co., 200 U. S. 488, 26 Sup. Ct. 327, 50 L. Ed. 569. If the War Revenue Act were unconstitutional in imposing a tax on export bills of lading and export manifests, it would certainly have been unconstitutional if it had imposed specifically a tax on charter parties for vessels in the export trade. A charter party is a document by which the cargo space of a vessel is engaged. It enables export articles to be transported. A tax upon it is a burden upon exportation as much as if it were imposed upon the articles carried in the vessel chartered. This conclusion is apparently not questioned by the government. But it is pointed out that the statute does not specifically tax foreign charter parties, but applies to all ships wherever bound, and upon this ground it is urged that the present case should be distinguished from those cited. This contention of the government amounts to this: That while a specific tax on export bills of lading or charters of vessels for the export trade may be unconstitutional, a tax on all bills of lading or all charter parties is valid. I cannot accept this contention. A tax which directly burdens exportation is as much unconstitutional as to exportation when general as when specific terms are used. Constitutional limitations are not to be avoided by generality of language. The case is not like those cited by the government where general taxes on merchandise have been held applicable to articles intended for export. Such articles are subject to the ordinary burdens until they actually become exports. But a charter party of a vessel for foreign trade is a means of export. It has relation only to exports, and it is free from taxation because a tax on it is a tax on exports. The statute as applied to charter parties

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

for vessels used entirely in the export trade from the United States is held to have been unconstitutional.

[2] The second question is whether Act July 27, 1912, c. 256, 37 Stat. 240, upon which the petitioner relies, gives it a right of action against the United States. While the act provides for an extension of time for the presentation of claims and authorizes payment by the Secretary of the Treasury, it does not, in terms, give a right of action in case the Secretary neglects or refuses to pay. But the broad purpose of the statute was to refund to claimants moneys illegally collected from them, and, in my opinion, it should be construed as affording the foundation for a demand against the government. It is accordingly held that the petitioners have a right to sue the United States under the Tucker Act upon their demand as founded upon a law of Congress. Indeed there would be much ground for holding that such right would exist without the 1912 statute. When moneys are wrongfully collected under a law of Congress it may well be that a claim for their return is founded upon a law of Congress. Christiestreet Com. Co. v. United States, 136 Fed. 326, 69 C. C. A. 464. See, also, Dooley v. United States, 122 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074.[1]

[3] The third question is whether the petitioners, in failing to allege that the taxes sought to be recovered were paid under protest, state a cause of action. As a general rule, it is undoubtedly settled that, in order to recover internal revenue taxes illegally exacted, it must be shown that they were paid under protest. But as we have seen, the act of 1912 indicated an intention on the part of Congress to make restitution. It used broad language. It imposed no condition as to protest. It said that "all" claims for taxes illegally assessed might be presented, not merely claims where payment had been made under protest. Moreover, to make it the duty of the Secretary to pay, the claimants after presenting their claims were required to establish only "such erroneous or illegal assessment and collection." The act is, in my opinion, complete in itself and gives claimants a right of action regardless of the requirements in case of a suit under other conditions. See Campbell v. United States, 107 U. S. 407, 2 Sup. Ct. 759, 27 L. Ed. 592; Thacher v. United States (C. C.) 149 Fed. 902.

The remaining contentions of the government in support of the demurrer are regarded as not well founded.

The demurrer is overruled.

[1] Of course these conclusions also serve to negative the government's further supplementary contention that the petitioners' remedy is only against the collector.

THAMES & MERSEY MARINE INS. CO., Limited, v. UNITED STATES.

(District Court, S. D. New York. June 17, 1914.)

COMMERCE (§ 77*)—TAX ON EXPORTS—WAR REVENUE ACT—STAMP TAXES—INSURANCE POLICIES.

War Revenue Act 1898 (Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 461), providing for a stamp tax on policies of insurance, in so far as it imposed such a tax on policies of marine insurance which were necessary incidents of the business of exporting, and themselves constituted exports by virtue of their being sent with other documents to foreign ports, was not a violation of Const. art. 1, § 9, providing that no tax or duty should be laid on articles exported from any state, etc.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 61–70; Dec. Dig. § 77.*]

Action by the Thames & Mersey Marine Insurance Company, Limited, against the United States. On demurrer to petition. Sustained.

See, also, 217 Fed. 685.

This case comes up on a demurrer to a petition, under the Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]), to recover the sum of $5,500, alleged to have been illegally exacted from the petitioner for the payment of stamp taxes on policies of marine insurance underwritten by it. The tax was levied under the War Revenue Act of 1898, which provided that after July 1st of that year there should be levied in respect of the documents thereinafter mentioned taxes as set down in the several schedules. Schedule A provided: "Insurance (marine, inland, fire,): Each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description (including rents or profits), whether against peril by sea * * * or other peril, made by any person, association, or corporation, upon the amount of the premium charged," etc. The theory of the complaint is that this act is unconstitutional because it violated section 9, article 1, of the Constitution: "No tax or duty shall be laid on articles exported from any state." This is the sole question which is raised by this demurrer, for, although the United States raises questions of the jurisdiction of this court under the Tucker Act, yet the decision of Judge Noyes in Hvoslet v. United States, 217 Fed. 680, is conceded to be conclusive in this court at this time. The petition alleges that the plaintiff affixed all the stamps in accordance with the law and the requirements of the Collector of Internal Revenue, and canceled them over a period of time therein stated. Each of the policies effected marine insurance of certain exported products or merchandise, during their transit by sea from the United States to various ports, and the products and merchandise so insured were actually exported from the United States to various ports. The policies themselves were required by the custom and usage of business in the export trade, and they accompanied drafts and bills of lading drawn by the exporter against his consignee.

Everett P. Wheeler, of New York City, for plaintiff.

Kenneth M. Spence, of New York City, for the United States.

HAND, District Judge (after stating the facts as above). The policies of marine insurance in this case may be viewed from two quite separate aspects: First, as necessary incidents of the business of exporting; and, second, as exports themselves, by virtue of the allegation that they were sent along with the bills of lading and the drafts to foreign ports. Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct.

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

648, 45 L. Ed. 862, decided that a tax on a bill of lading was within the prohibition, and the same with respect to manifests was conceded in United States v. N. Y. & Cuba Mail S. S. Co., 200 U. S. 488, 26 Sup. Ct. 327, 50 L. Ed. 569. In Judge Noyes' decision the same ruling was applied to charter parties. Almy v. California, 24 How. 169, 16 L. Ed. 644, applied the same rule to the taxation by a state of bills of lading of gold and silver exported from the state. These cases extend the meaning of the clause beyond the taxation of the exported goods themselves, to the documents which contain the contracts of carriage or the evidence that they are being carried. A marine policy is neither of these; it is a contract to pay a sum of money in the event of their loss, and does not concern their carriage in any respect, except that it presupposes that the exportation will take place. The true rule seems to me to be that the taxation of only such contracts is forbidden as involve in their performance some part of the movement of the exports out of the country, or of such documents as record that movement. The goods themselves do not become exports until their movement begins, Cornell v. Coyne, 192 U. S. 418, 24 Sup. Ct. 383, 48 L. Ed. 504, and it would seem by analogy that documents recording transactions which touch them should not fall within the clause unless the recorded transactions were a part of the same movement, or at least called for it in their complete execution if they were promissory in character. I should regret to base the distinction upon whether the transaction directly or indirectly affected exportation, for that involves a kind of casuistry which generally proves very troublesome in application and conceals the real ground of the decisions.

Nor can I accept the test of whether the tax burdens exportation, provided that the burden is only a part of what goods of the same class bear while within the country. To this Cornell v. Coyne, supra, is a distinct answer, and shows that any language in Fairbank v. U. S., supra, to the contrary was not meant to apply universally. A tax upon articles generally, though some of them may be exported, may have a final economic incidence upon the export, but only along with the rest of its class, and is certainly not what the Constitution was aiming at. Whether such a tax as this, levied only upon policies insuring exports, would be within the clause is quite another matter. To impose burdens upon exports even in such a roundabout way which other goods do not bear may well be within the clause. Coe v. Errol, 116 U. S. 517, 526, 6 Sup. Ct. 475, 29 L. Ed. 715.

In passing I may state that I cannot regard the cases relied upon by the United States and holding that the usual insurance business is intrastate as at all in point. None of those cases involved the insurance of goods in interstate commerce, and Congress may well have control over such contracts. The grant of power over interstate commerce is not to be confused with the clause here in question.

There remains the question of whether the insurance policies as documents are themselves exports. This contention is answered by the second reason given for the decision in Turpin v. Burgess, 117 U. S. 504, 6 Sup. Ct. 835, 29 L. Ed. 988, and by the decision in Cornell v. Coyne, supra, holding that the eventual destination of goods did not make them exports until they began to move. In the case at bar,

though the policies were all along destined for export, the stamps were affixed before they were issued. After delivery, they were sent by the assured, along with the other documents, to foreign countries, but until that time they could, at any time, be recalled, and they remained a part of the general mass of goods in the country.

The demurrer is sustained, and unless the plaintiff amends within 10 days, judgment will be entered dismissing the complaint upon the merits.

THAMES & MERSEY MARINE INS. CO., Limited, v. UNITED STATES.

(District Court, S. D. New York. July 16, 1914.)

COMMERCE (§ 77*)—TAX ON EXPORTS—WAR REVENUE ACT—STAMP TAXES—INSURANCE POLICIES—"EXPORT."

Where a general marine policy is issued covering successive shipments, the assured submitting to the underwriter a declaration showing the cargo and its value when on board, on which the underwriter issues a certificate to cover, which the assured sends to the consignee abroad with the other papers, such insurance and custom of business does not constitute "exports," or a necessary incident to the business of exporting, within Const. art. 1, § 9, providing that no tax or duty shall be laid on articles exported from any state, etc., so as to exempt the insurance from taxation under War Revenue Act June 13, 1898, c. 448, § 25, Schedule A, 30 Stat. 461, providing a tax on policies of insurance.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 61–70; Dec. Dig. § 77.*

For other definitions, see Words and Phrases, First and Second Series, Export.]

At Law. Action by the Thames & Mersey Marine Insurance Company, Limited, against the United States. On demurrer to amended petition. Sustained.

See, also, 217 Fed. 680, 683.

Haight, Sandford & Smith, of New York City, for plaintiff.

H. Snowden Marshall, U. S. Atty., of New York City.

HAND, District Judge. The petitioner has now amended so as to show the following facts: A general marine policy is issued, covering successive shipments. When a cargo is aboard, the assured goes to the underwriter with a "declaration," so called, which shows the cargo and its value which is to be covered on the intended voyage. Upon delivery of this the underwriter issues a certificate to cover, and the assured sends this along with the bill of lading, draft, etc., to the foreign country.

The contention, as I understand it, is that insurance upon goods actually in transit is different from insurance upon goods intended for transit, because a tax upon the first class of goods is within the prohibition, while a tax upon the second is not. I intended no such distinction, and did not before presuppose that the goods insured had not started upon their transit. Indeed, that question was not raised, as I recall, in the first case. Whether it was or not, the point of the decision in my judgment is, not that the contract of insurance does not

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

touch exports, but that it is not a part of their exportation; that is to say, its performance does not involve any part of the transit, nor does it, like a manifest, record the transit. It may be that, if the goods insured are not yet exports, there is a double reason; but the second reason was not what I had in mind.

I said in the other opinion that none of the insurance cases concerned only insurance on goods in transit. In this I was wrong. Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, dealt with a tax upon the business of marine insurance in San Francisco. Some of the marine insurance written in that city is, I suppose, upon coastwise trade to Eureka on the north and Santa Cruz and San Diego on the south; but the immense mass of it must be either to foreign ports or to Oregon and Washington. In any event, no such distinction was taken; but the case went squarely upon the theory that taking insurance upon foreign or interstate trade was not itself foreign or interstate business.

The prohibition against taxing exports has been treated as analogous to the prohibition on the states against regulating interstate trade. It is not, perhaps, necessary to say whether the cases are precisely the same. It is enough that the reasoning in Hooper v. California, supra, presupposes, without expressly deciding, that it is the same, and that if the business was interstate the tax was void. Certainly at that time that was the accepted doctrine.

I need not consider whether there is to-day a zone in which the states may act till Congress intervene, and whether a state might not tax a business which Congress could regulate. Hooper v. California, supra, seems to me directly to support the defendant.

UNITED STATES v. McDONALD.

(District Court, N. D. California, First Division. October 22, 1914.)

No. 15719.

SEAMEN (§ 20*)—WAGES OF DECEASED SEAMEN—DEDUCTIONS—"VERIFIED BY AN ENTRY IN OFFICIAL LOG BOOK."

Rev. St. §§ 4538, 4539 (Comp. St. 1913, §§ 8327, 8328), which provide that on the death of a seaman during a voyage to terminate in the United States the master shall sign an entry in the log book, attested by the mate and one of the crew, containing a statement of the sum due the deceased as wages and the total amount of deductions to be made therefrom, and further requiring him on arrival at the port of destination to render an account and pay the balance of wages due to the shipping commissioner, with the provision that "no deductions claimed in such account shall be allowed unless verified by an entry in the official log book, if there be any," have reference to the entry verified as previously provided, and the shipping commissioner has no authority to allow deductions not so shown.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 86–91; Dec. Dig. § 20.*]

In Admiralty. Suit by the United States against Charles McDonald, master of the schooner Mahukona. Decree for libelant.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for petitioner.

---

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

DOOLING, District Judge. This is a proceeding to compel the master of the schooner Mahukona properly to account to the United States shipping commissioner at this port for the wages of T. Nishimura, a member of her crew who died at Newcastle, New South Wales, during the voyage.

The master endeavors to make certain deductions from the wages admittedly earned by the deceased, but the commissioner, being dissatisfied with the proofs and vouchers furnished, has cited the master to appear in this court to show cause why process should not issue against the vessel to answer for the master's failure to render to him a full, complete, and lawful account, as required by the statutes.

Section 4538, R. S., provides that upon the death of a seaman the master—

"shall * * * sign an entry in the official log book, and cause it to be attested by the mate and one of the crew, containing the following particulars: * * *

"Third: A statement of the sum due to deceased as wages, and the total amount of deductions, if any, to be made therefrom."

Section 4539 provides:

"Fourth: The master shall, in all cases in which any seaman * * * dies during the voyage, * * * give to * * * shipping commissioner an account, in such form as [he] may * * * require, of the effects, money, and wages so to be delivered and paid; and no deductions claimed in such account shall be allowed unless verified by an entry in the official log book, if there be any, and by such * * * vouchers, if any, as may be reasonably required by the * * * shipping commissioner to whom the account is rendered."

The expression "verified by an entry in the official log book," used in section 4539, I take to mean verified as required by section 4538; that is, signed by the master and attested by the mate and one of the crew. No such verified entry was presented to the commissioner in the instant case, and therefore, passing the question as to the right of the master to pay the earnings of a seaman to a third person upon the seaman's order, and the further question as to who is responsible for the expenses of the burial of a seaman dying during a voyage, it is clear that the deductions claimed cannot be allowed by the commissioner, because not verified as required by the statutes above cited. In all cases like the present the statutes must be followed, or deductions will not be allowed.

The items claimed as deductions and resisted by the commissioner are:

Burial expenses	£10.10s.	
Launch hire	10s.	
Amount claimed to have been paid for Ostrich feathers	9.	
Total	£20.	$97.20

These items must be disallowed, for the reasons stated. The master is therefore directed to pay to the commissioner the sum of $205.12, in default of which process will issue against the vessel, as prayed for, for such sum.

In re CURLE.

(District Court, N. D. California, First Division. October 3, 1914.)

No. 7809.

1. BANKRUPTCY (§ 415*) — DISCHARGE — HEARING — ATTENDANCE BY BANKRUPT.

Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 (U. S. Comp. St. 1913, § 9591), providing that a bankrupt shall attend the hearing on his application for a discharge, if filed, requires the bankrupt to attend such hearing, though he may have removed from the district.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

2. BANKRUPTCY (§ 415*)—APPLICATION FOR DISCHARGE—HEARING—ATTENDANCE BY BANKRUPT.

Bankr. Act 1898, § 7, providing that a bankrupt shall not be required to attend for examination at a place more than 150 miles from his home or place of business, does not apply to a hearing on an application for the bankrupt's discharge, so as to excuse him from attending the hearing on such application; he having removed from the district pending the proceedings.

[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 of R. S. Curle.

D. E. von Schenck, for petitioners.

Houghton & Houghton, of San Francisco, Cal., opposed.

DOOLING, District Judge. [1] The question as to whether or not a bankrupt is required to attend the hearing upon his application for a discharge having been presented to the court by the referee herein, it is the judgment of the court that the provisions of section 7 of the Bankruptcy Act require such attendance, and that the bankrupt may not avoid such attendance by removing from the district.

[2] It is also the opinion of the court that, even if the provision that a bankrupt may not be required to attend at a place more than 150 miles from his home or place of business did apply to a hearing upon an application for discharge, the bankrupt could not avail himself thereof, if pending the bankruptcy proceedings he removed from the district.

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

LOVEWELL et al. v. SCHOOLFIELD et al.

(Circuit Court of Appeals, Sixth Circuit. October 9, 1914. On Petitions for Rehearing, December 16, 1914.)

Nos. 2375, 2376, 2377 and 2391.

1. EXECUTORS AND ADMINISTRATORS (§ 502*)—ACTIONS FOR ACCOUNTING BY EXECUTORS—STATEMENT OF ACCOUNTS.

By a will disposing of a considerable estate the same persons were made executors, with a wide discretion both as to the time of settlement and the method of disposing of the assets, and also trustees of property constituting a large part of the residuary estate, which was to be held in trust and the income only paid to a niece of the testator and her children until her youngest child reached majority. Testator was a member of a partnership, a stockholder in several business corporations, and also obligated as surety and indorser for others, all of which delayed the settlement of the estate which had not been closed when the last of the executors died 16 years after the death of the testator. In the meantime they had made considerable advances to the beneficiaries of the trust estate, and also to others of the residuary legatees, all of which was shown in their periodical reports and was known to the probate court. *Held*, that on an accounting between their legal representatives and bondsmen and their successor trustee there was no imperative requirement that their accounts as executors should be stated in advance of or as formally separate from their accounts as trustees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2149-2152; Dec. Dig. § 502.*]

2. EXECUTORS AND ADMINISTRATORS (§ 514*)—ACTIONS FOR ACCOUNTING BY EXECUTORS—PARTIAL SETTLEMENTS AS EVIDENCE.

The executors from time to time filed reports and made settlements with the probate court, as required by Shannon's Code Tenn. § 4031 et seq., which provides that the clerk shall state the accounts of executors and report the same to the court for settlement on notice to persons interested, and that "settlements, when so made and recorded, shall be prima facie evidence in favor of the accounting party." Section 5567 also provides that "settlements of personal representatives and guardians made in the county court in pursuance of law are to be taken as prima facie correct." The accounts of such executors were so stated and reported by the clerk as annual or partial settlements, and approved and recorded. *Held*, that where they were not attacked until many years afterward and after the death of the executors, and apparently all others having a personal knowledge of the facts, they were properly taken as prima facie correct on the accounting, although the record did not show affirmatively the giving of the statutory notice.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2292; Dec. Dig. § 514.*]

3. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—ACTION FOR ACCOUNTING BY EXECUTORS—STATING OF ACCOUNT.

In a suit for an accounting by executors brought after their death, their settlements, made from time to time with the probate court and which under the state statute were prima facie correct, were properly made the basis of the accounting, and where the bill set out a large number of items in such settlements which were criticized, and showed a familiarity with the affairs of the estate, it was not prejudicial error to confine the inquiry to such items.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041-2060; Dec. Dig. §§ 473, 474.*]

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

4. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—ACTION FOR ACCOUNTING BY EXECUTORS—MASTER'S REPORT.

In such a suit the report of the master to whom the cause was referred was not subject to objection because it did not contain a complete statement of the executors' account in debtor or creditor form, where it contained itemized exhibits and schedules which, in connection with the inventory and settlements made by the executors, afforded more complete information than such a statement would have done.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041–2060; Dec. Dig. §§ 473, 474.*]

5. EXECUTORS AND ADMINISTRATORS (§§ 473, 474*)—ACTION FOR ACCOUNTING BY EXECUTORS—MASTER'S REPORT.

On such an accounting it is not an objection to the master's report that it was based in part on the cashbook kept by the executors, who died prior to the suit, which was unimpeached and contained entries of all cash transactions relating to the estate, and was used by the master as explanatory of and supplementary to the executors' settlements.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041–2060; Dec. Dig. §§ 473, 474.*]

6. APPEAL AND ERROR (§ 1022*)—FINDINGS OF MASTER—REVIEW BY APPELLATE COURT.

The findings of a master on an accounting before him, concurred in by the court, should not be disturbed by an appellate court unless clearly wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. § 1022.*]

7. PARTNERSHIP (§ 245*)—REAL ESTATE—CONVEYANCE BY SURVIVING PARTNERS.

A purchaser of real estate, owned by a partnership from the surviving members who had authority under the partnership articles to sell, is not bound to look to the application of the proceeds, but acquires a good title.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 514–518; Dec. Dig. § 245.*]

8. HUSBAND AND WIFE (§ 115*)—PERSONAL ESTATE OF WIFE—AGREEMENT OF HUSBAND TO RETENTION AS SEPARATE ESTATE.

While at common law the personal estate of a wife by the marriage becomes the property of her husband, he is not bound to assert such marital right, but may validly agree, either expressly or impliedly, to her retention of her personal property as her separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 408–412; Dec. Dig. § 115.*]

9. EXECUTORS AND ADMINISTRATORS (§ 93*)—CHARGES ON ACCOUNTING—RENTS.

Executors had no authority to operate at the risk of the estate a plantation in which the estate held a large interest, but are liable for the rental value of such interest.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408; Dec. Dig. § 93.*]

10. EXECUTORS AND ADMINISTRATORS (§ 528*)—LIABILITY OF SURETIES—RENTAL VALUE OF REAL ESTATE.

Under the law of Tennessee sureties on the bond of executors are liable for the rental value of the interest of the estate in land situated in another state, where such interest is personal property and was shown on the executors' inventory.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2375–2394; Dec. Dig. § 528.*]

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

11. TRUSTS (§ 231*) — TESTAMENTARY TRUST — ACCOUNTING BY TRUSTEE — CREDITS.

An executor and trustee under a will, to whom real estate in which both he and the estate had an equitable interest was conveyed as such trustee to be held for the trust estate, *held* entitled on an accounting to credit for the value of his personal interest in the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. § 231.*]

12. TRUSTS (§ 231*)—TESTAMENTARY TRUST—ACCOUNTING BY TRUSTEE.

An executor and trustee under a will who, on the insolvency of a corporation of which he and the estate were stockholders, and which was a large creditor of the beneficiary of the trust, with the consent of the court purchased the account against her *held*, on an accounting as trustee, entitled to credit only for the amount which the claim cost him, and not for the amount of the claim.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 330–335; Dec. Dig. § 231.*]

13. EXECUTORS AND ADMINISTRATORS (§§ 106, 118*)—ADMINISTRATION OF ESTATE—LOANS—LIABILITY OF EXECUTOR.

An executor who, as well as the testator, was a large stockholder in a business corporation *held* not authorized to lend money of the estate to such corporation without security, but not liable for the loss of the stock belonging to the estate through insolvency of the corporation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 433, 472–482; Dec. Dig. §§ 106, 118.*]

14. EXECUTORS AND ADMINISTRATORS (§ 160*)—POWERS—PRIVATE SALE OF CORPORATE STOCKS.

Shannon's Code Tenn. § 3979, requiring executors and administrators to "make sale of the goods and chattels of the deceased to the highest bidder on 10 days notice," if construed to prohibit private sales and to include as goods and chattels corporate stocks, does not control the discretion of executors, given by the will "full and ample authority and power * * * to use their discretion" in the settlement of the estate, and such executors cannot be held liable on account of the private sale of stocks, where they exercised the discretion which a reasonably prudent and intelligent man would have used in the administration of his own affairs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 637; Dec. Dig. § 160.*]

15. EXECUTORS AND ADMINISTRATORS (§ 281*)—ACCOUNTING BY EXECUTORS—CLAIMS PAID AFTER TIME LIMITED BY STATUTE.

Under a statute requiring executors to pay proved claims against the estate within a stated time after issuance of letters testamentary, where claims were paid after such time the presumption is, in the absence of proof to the contrary, that the delay was at the request of the executor, and he is not liable as for an illegal payment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1102–1104, 1106–1115; Dec. Dig. § 281.*]

16. EXECUTORS AND ADMINISTRATORS (§ 494*)—ADMINISTRATION OF ESTATE—EXECUTOR AS ATTORNEY FOR ESTATE—FEES.

Under the laws of Tennessee an executor, acting also as attorney for the estate, may recover compensation for his services in both capacities.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2084–2087; Dec. Dig. § 494.*]

17. EXECUTORS AND ADMINISTRATORS (§ 314*)—TIME OF ACCRUAL OF RIGHT TO DEVISE OR BEQUEST—RESIDUARY LEGATEES.

Where the settlement of the estate of a testator was justifiably delayed through a number of years, owing to the nature of the property

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

and liabilities of the testator, limitation does not run against the claims of residuary legatees to their respective shares during the time of such delay.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274–1297; Dec. Dig. § 314.*]

Appeals from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit in equity by James H. Lovewell, as trustee, and others, against Dudley T. Schoolfield, individually and as executor of the will of W. W. Schoolfield, deceased, and others. From the final decree, appeals were taken by complainants, by Lena Bakrow and Charles Bakrow, her husband, as cross-complainants, by John H. Poston and another, sureties on the executor's bond, and by Dudley T. Schoolfield, individually and as executor, etc. Modified and affirmed.

Wm. M. Randolph, of Memphis, Tenn., for appellants Lovewell and others.

Caruthers Ewing, of Memphis, Tenn., for appellant Hill.

G. J. McSpadden, of Memphis, Tenn., for Mr. and Mrs. Schoolfield.

J. H. Poston, Jr., of Memphis, Tenn., for appellant Poston.

A. W. Biggs, of Memphis, Tenn., for John Wade & Sons.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Louis Hanauer, of Memphis, Tenn., died August 21, 1889, without issue, leaving a will, which is printed in the margin.[1] He was at the time a member of the firm of School-

[1] "I, Louis Hanauer, of Shelby county, Tennessee, do make and declare my last will and testament as follows, viz.:

"Item First. I revoke and annul all former wills by me made.

"Item Second. I direct that any just debts I may owe at the time of my death be paid by my executors as promptly as possible without detriment or sacrifice to my estate.

"Item Third. If, at my death, I am indebted as guardian to Flora and Jacob Hanauer, or either of them, I especially request and direct that interest thereon shall, without fail, be paid them four times a year, so long as any of said indebtedness remains unpaid.

"Item Fourth. I give and bequeath to Walter, Willie and Cora Lowder and their sister Ida (now Hoffman), each the sum of five hundred dollars.

"Item Fifth. I give and bequeath to each of the children of my sister Teresa, the sum of five hundred dollars.

"Item Sixth. I give, bequeath and devise the one-half of all the residue of my estate to my niece, Mary Hampson and her children who may be living at the time of my death, and also those thereafter born to her, she and her children taking equal share and share alike. The property given by this item of my will is to be vested in the trustees hereinafter named, and to be possessed, controlled and managed by them, and only the net income therefrom paid over to Mrs. Hampson, for the support and maintenance of herself and children, and the property interests of said Mrs. Hampson to be her separate estate, free from all control, marital rights and liabilities of her present, or any future husband. Upon the lawful coming of age of the young-

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

field, Hanauer & Miller, wholesale grocers and cotton factors, each partner having a one-third interest. The testator's brother, Jacob Hanauer, then deceased, who had at one time been a member of the firm, left an estate of some value, and two of his children were still under Louis Hanauer's guardianship. The latter was also trustee for the estate of his niece, Mary Hampson (a daughter of Jacob Hanauer, and beneficiary under the 6th item of the will), consisting of upwards of $18,000 personal and an amount of valuable real estate. A few months before the testator's death the copartnership ceased active business, upon the formation of a corporation under the name of the Schoolfield-Hanauer Company. This corporation had a capital stock of $67,000, Hanauer holding $21,000, Schoolfield and Miller

est child of said Mrs. Mary Hampson, then said trustees shall make the proper division of the property given her and them by this item of my will.

"If any of the children of said Mary Hampson shall die before coming of lawful age, his or her share shall go in equal parts to his or her brothers or sisters.

"Item Seventh. My home place on the south line of Kerr avenue, near Memphis, Tenn., I wish to go to the parties named as legatees in the sixth clause of this will, in the proportions and upon the terms, conditions and limitations therein provided and stipulated, as to the property given thereby, and I make it a condition precedent to the vesting or taking effect of the sixth item of this will that said Mary Hampson shall, by proper and sufficient conveyance, duly recorded within sixty days from the probate of this will, convey said homestead place to said trustees, upon the trust terms and limitations aforenamed in the sixth item hereof.

"Item Eighth. All the balance and residue of my estate, real and personal, I give, bequeath and devise to Fanny Lowrance and the legal heirs of my deceased brother, Jacob Hanauer, equally, that is to say, Fanny Lowrance shall take one-sixth thereof, and said heirs of my brother Jacob the remaining five-sixths (5/6) thereof per stirpes, and not per capita, they being given in number, excluding said Mary Hampson, who shall have and take no interest under this item of my will.

"Item Ninth. In case of the failure of Mrs. Hampson to comply with the seventh item of this will, and the condition therein imposed, then it is my wish and direction that the property given in the sixth item hereof shall go and belong to her children, excluding her from any interest whatever therein, and upon the term and limitations in said sixth item named.

"Item Tenth. Any legatee or devisee hereunder taking steps to litigate or contest this will, shall forfeit all benefits thereunder.

"Item Eleventh. I desire and direct that my estate be settled and wound up hereunder as speedily as possible, without injury to, or sacrifice of same, and to this end I give full and ample authority and power to my executors, hereinafter named, to use their discretion in so settling the same, and if necessary to prevent loss or sacrifice, to postpone the payment of the legacies herein given to such time as will prevent same.

"Item Twelfth. I nominate and appoint my friend W. W. Schoolfield and D. H. Poston, of Memphis, Tennessee, as both executors and trustees to execute this will, giving them full power to sell and convey any property to pay off debts, and also whenever they both agree in opinion that it is to the interest of all concerned to do so, and they shall not in any manner be held liable for any errors in the exercise of such discretion.

"They shall also as such trustees, hold, manage and control the legacies of such of the legatees as are minors, during their minority, paying to the beneficiaries only the net income or interest, with power of sale as above defined.

"Signed and sealed at Memphis, Tenn., this 18th day of September, 1888. [Signature, attestation, etc., omitted.]"

each $19,000, the remaining $8,000 being divided between four others. In payment of its capital stock, it took over the stock in trade of the copartnership, which was dissolved by Hanauer's death, Miller and Schoolfield being thereupon the surviving partners, as well as in practical control of the affairs of the corporation. Schoolfield was also one of the executors and trustees under testator's will, which was admitted to probate August 29, 1889. Poston, the other executor and trustee, had been Hanauer's attorney. The executors immediately qualified, and filed an inventory October 2d thereafter. The estate consisted of: (a) Cash in bank, $9,534.42; (b) nearly $6,000 (net) life insurance; (c) one-third of the net assets which should remain after the liquidation of the affairs of the partnership, Hanauer's apparent or book credit therein being $97,859.13; (d) the Kerr avenue homestead mentioned in the seventh item of the will, together with other real estate interests; (e) a considerable amount of personal property, consisting largely of notes, stocks and bonds, carried in the executors' inventory at about $250,000, treating the corporate stocks at par value. The latter included $54,000 in the National Cotton Seed Oil & Huller Company (hereafter called the Cotton Company); $13,500 in the Brush Electric Light & Power Company (hereafter called the Electric Company); and $21,000 in the Schoolfield-Hanauer Company. The Kerr avenue homestead was duly conveyed by Mrs. Hampson to the trustees under the will, as provided by the seventh paragraph thereof, to be held for her benefit and that of her children.

In October, 1890, the executors filed in the probate court their first annual account, and in the same month Mrs. Hampson's husband was, by order of the court, made trustee of his wife's interests formerly held by testator in trust for her. In 1891, Poston, one of the executors died, Schoolfield being thereafter sole executor and trustee. He, in 1891, filed a second annual account, covering transactions both before and after Poston's death, and also filed annual accounts in 1895, 1896, 1898, 1901, and 1903. Each of these accounts purported to contain in detail a statement of all the receipts and disbursements connected with the execution of the will and the administration of the entire estate. The first account showed, among other things, payment of $18,837.18 in discharge of testator's liability as guardian of the children of Jacob Hanauer, payment in full of the money legacies under the fourth and fifth items of the will, amounting to $5,500; payment of debts and liabilities of the testator amounting to $8,304.70, including liabilities of $2,075.29 on guaranty and $878.23 as surety; also $36,195.05 as loans and advances to the Cotton Company and Electric Company. The second report showed, among other items, payments of more than $7,000 to Mrs. Hampson on the testator's liability as trustee, and advances of $9,000 to the legatees, against their distributive shares, under the eighth item of the will. Others of the reports included payments to or for the benefit of the legatees under the eighth item, as well as payments to or for Mrs. Hampson, both on account of the testator's liability to her and as beneficiary under the will. The seventh report showed, among other items, payments

both to Mrs. Hampson and to the beneficiaries under the eighth item, to make good losses on lands and to equalize advances. In 1891, under partition proceedings between the beneficiaries under the sixth and eighth items of the will, certain real estate of the testator, valued at about $18,000, was, by order of the court, conveyed to Schoolfield, as trustee for Mrs. Hampson and her children under the sixth item. So long as the corporation Schoolfield-Hanauer Company did business, collections and disbursements, as well as distributions to the copartners and their representatives on account of partnership affairs, were made through the corporation, which also furnished Mrs. Hampson large amounts of supplies and money, which were used in support of herself and family. It was wound up by insolvency proceedings in 1896, paying 39 cents on the dollar. When it failed it owed the copartnership, as well as Hanauer's estate, and held a large balance of account against Mrs. Hampson, which was transferred to Schoolfield. The capital stock was of course wiped out. Among the assets of the copartnership at Hanauer's death were: (a) The business property on Front street in Memphis, used as a place of business by the copartnership and later by the successor corporation. This property was sold in 1897 by the two surviving copartners, reaching by mesne conveyances the firm of John Wade & Sons. (b) A debt of one Townsend of $1,653.81, which, together with $4,912.84 owing to W. W. Schoolfield, was secured by a trust mortgage upon land in Shelby county, Tenn., which, in 1898, was sold on foreclosure to Mrs. Schoolfield, wife of the executor, trustee, and partner. By her death her son, Dudley T. Schoolfield, succeeded to her interest, and he later conveyed the property to his wife, Edith Brooks Schoolfield. (c) An indebtedness of $18,529.05 from Ferguson & Hampson, the latter being the husband of Mary Hampson. This was secured ratably with an indebtedness from that firm to testator of $17,776.03, the two debts being subject to a purchase-money lien held by testator of $21,114.60 upon Nodena Plantation, so-called, in Mississippi county, Ark. Foreclosure proceedings were pending at testator's death, and in 1891 the premises were sold thereunder to Frank P. Poston and Dudley T. Schoolfield, as trustees, for the benefit of the creditors named, for $45,000, which was less than the total of all the claims. Hanauer's estate was thus the beneficiary under the trust conveyance, except only an apparent interest on the part of Miller and Schoolfield, each in the amount of $4,796.24. In 1897, six years after the foreclosure sale, the beneficiaries under the eighth item of the will conveyed their interests in the plantation to Schoolfield, trustee, to be held by him for Mrs. Hampson and her children, under the sixth item, subject to the amounts due Schoolfield and Miller, which the trustee, together with Mrs. Hampson and her husband, assumed. Miller transferred his interest in Nodena Plantation to Susan Thomas, now Mrs. Norfleet.

Miller died in 1903. Schoolfield died about October 1, 1905, while still executor and trustee, leaving his son, Dudley T. Schoolfield, as his sole heir, devisee, and legatee. A summary of receipts and expenditures by the executors and trustees, based upon the master's re-

port, is shown in the margin.[2] Schoolfield's death thus removed the only remaining executor, trustee, and partner. Upon Schoolfield's death, complainant Lovewell, a son-in-law of Mrs. Hampson, upon application of the latter and her children, through their attorney, was appointed trustee as successor to Schoolfield. No successor executor has been appointed.

Lovewell, as trustee, filed his bill in the court below on April 8, 1907, to obtain an accounting of the administration of the Hanauer

[2] Total Receipts.

Cash in bank at testator's death	$ 9,534 42
Bills receivable collected	24,685 34
Stocks and bonds sold	58,445 92
Notes paid, property sales and sundry sales (including one-third of purchase price of Front street storehouse belonging to firm)	26,187 06
Interest and dividends	22,541 05
Rents collected	10,296 36
Coupons collected	420 00
Receipts from Schoolfield, Hanauer & Co. (not including sale of Front street store)	56,970 62
From Cotton Seed Oil & Huller Company	5,000 00
Tax refund	150 40
Cash (no explanation)	577 00
(Note 1.)	$214,808 17

Disbursements.

Dues and assessments on stock		$ 3,085 76
Hanauer accounts paid		7,425 99
Guardianship liability paid		18,837 18
Surety liability paid		628 23
Bequests under fifth item		5,500 00
Taxes		4,066 89
Real estate maintenance and expenses		2,179 93
Loans to Schoolfield-Hanauer Company	$ 3,000 00	
Loans to Brush Electric Company	19,369 76	
Loans to Cotton Company	32,424 71	
		54,794 47
Rents paid		60 00
Mary S. Hampson personal account	$18,328 13	(Note 3)
Mary S. Hampson advances and payments	9,650 05	
Mary S. Hampson taxes and insurance	3,986 26	
		31,964 44
Beneficiaries under eighth item of will—advances and payments		49,659 57
W. W. Schoolfield, trustee (later charged Mrs. Hampson)		32 53
Miscellaneous (Note 2)		29,699 15
Executors' compensation		5,713 63
Balance cash in hand		1,160 40
		$214,808 17

NOTE 1. The receipts take no account of Nodena Plantation ($35,407.51) held for beneficiaries under sixth item, nor of Kerr Avenue homestead, similarly held, nor of contents of home, etc., nor of some other property, both individual and copartnership, yet undisposed of.

NOTE 2. "Miscellaneous" includes (among other items) five judgments aggregating $12,940.28, attorneys' fees apparently between $8,000 and $9,000, costs of partition cases $659.75, as well as other costs of litigation; also compensation allowed D. H. Poston, after his death, $1,875.00, and amount paid W. W. Schoolfield since last probate court settlement, $1,606.15; the latter two items, added to the $5,713.63 above shown, makes $9,194.78 compensation, including $132.08 allowed Dudley T. Schoolfield.

NOTE 3. The first two items of charge to Mrs. Hampson were in large part applied upon her account with the Schoolfield-Hanauer Company.

estate, the enforcement of the trusts created by the will, and the recovery by the several devisees and legatees thereunder of the sums claimed to be due them upon an account and settlement of the administration and of the trusts created by the will; also an accounting of copartnership affairs and of the administration thereof by the surviving partners, as well as a confirmation of their title to Nodena Plantation against all claims of Schoolfield and Mrs. Norfleet. The beneficiaries under the eighth item of the will filed a cross-bill, asking the same relief, so far as pertinent. The causes were put at issue and reference made to a special master for an accounting, under express directions that the inventory of the executors and the various partial settlements made with the probate court should be taken as prima facie correct, the defendants not to be held for any item not set out in the inventory and settlement, except upon specific allegations of the special items and sufficient proof supporting the same. The master made a comprehensive and painstaking report, embracing detailed schedules and statements of the transactions had by the executors and trustees. The master was of opinion that the sales of the Front street lot and the Townsend property were valid and effective to pass title to the respective purchasers. As to the Nodena Plantation, the master found that the conveyance in trust for the beneficiaries under the sixth item of the will was made for the purpose of equalizing the advances made to the various beneficiaries, and that their shares were all equalized on July 5, 1903, except that Hester Hayes was overdrawn on that date $124.77. He charged the executors, in addition to the $1,160.40 cash on hand, with items amounting to $42,263.24, plus $46,587.39 interest thereon. Charging to complainants Schoolfield's interest in Nodena Plantation, and the unpaid balance of Mrs. Hampson's account with the Schoolfield-Hanauer Company, the master found due Mrs. Hampson and her children $7,772.34, plus encroachments upon the corpus of the estate of $7,028.40. Mrs. Norfleet's claimed interest in Nodena Plantation was not taken into account. The master found the beneficiaries under the eighth item entitled to slightly varying amounts, aggregating $44,924.16. All these awards were exclusive of real estate unsold.

This report was excepted to by all the parties in interest. After its filing Mrs. Norfleet filed a cross-bill, asking enforcement of her claimed rights in Nodena Plantation. Schoolfield also filed cross-bill, asking similar relief, as well as other affirmative relief in connection with the accounting. Both cross-bills were stricken from the files. The master's conclusions as to the sale of the Front Street lot, the Townsend land purchase, equalization between beneficiaries, and interests in Nodena Plantation were undisturbed. Charges made by the master against the executor, aggregating a large amount, were disallowed by the court in whole or in part. The restated account found $27,262.50 due from Mrs. Hampson and her children. The final decree, after such restatement, awarded cross-complainants Hester Hayes, Lena Bakrow, and Belle Hayes recoveries against the executor and the sureties upon the bond of the executor and trustee, aggregating $5,007.44; dismissed the cross-bill as to Jacob Hanauer and

Flora Loeb, holding that their cause of action was barred by the statute of limitations; denied recovery to Fanny Lowrance because she had propounded no claim; dismissed the bill so far as recovery was sought against the administrator of Miller's estate; adjudged the costs (including the compensation of the special master) one-half against complainants in the original bill, the other half in favor of the cross-complainants as against the defendant Schoolfield, executor, and canceled the bond of the executors and trustees upon payment of such costs and the amounts awarded to the various cross-complainants. It also validated and confirmed the title of Wade & Sons to the Front street property, as well as the Schoolfield title to the Townsend land. Mr. Hampson died in 1907; Mrs. Hampson died September 14, 1910; by her will her property went to her children, the youngest of whom attained majority October 24, 1910.

The complainants in the original bill (No. 2375), the complainants in the cross-bill (No. 2376), the sureties on the executors' bond (No. 2377), and Dudley T. Schoolfield, as executor of W. W. Schoolfield (No. 2391) have taken separate appeals.

Complainants urge that the entire basis of the accounting is radically wrong (a) in awarding a single accounting instead of two separate accounts, the one as between all the devisees and legatees on one side and the executors on the other, and a second between Mrs. Hampson and her children on the one side and the trustee or trustees on the other; (b) in limiting the attack to matters specifically set up by complainants; and (c) in giving prima facie effect to the inventories filed in and settlements made with the probate court; also that the master's report is insufficient, because not containing a statement of the complete account in debtor and creditor form, and that it lacks competent foundation, because based in part upon the executor's cash book.

[1] In the absence of special circumstances calling for a different procedure, the normal course would have been for the executors to first pay the testator's debts, including guardianship liability to his brother's children and the legacies under the third and fourth items, to turn over to the new trustee (Hampson) the funds in testator's hands belonging to Mrs. Hampson, and then to divide what remained (excluding the Kerr avenue homestead) into two parts, distributing the one part to the beneficiaries under the eighth item, and holding the other part in trust for Mrs. Hampson and her children under the sixth item, thus keeping the executorship and trusteeship distinct in both dealings and accountings. But completion of administration was necessarily delayed by testator's relations to certain of the corporations in which he was a stockholder, and his contract obligations, as indorser and otherwise, on various matters, as well as the liquidation of the affairs of the late copartnership, including the acquisition of Nodena Plantation. Mrs. Hampson and her children apparently needed, so far as feasible, the current income from their interests in the estate, and the beneficiaries under the eighth item desired payments as speedily as possible. The same persons were both executors and trustees. By the eleventh and twelfth items of the will they were

given wide discretion, both as to the time of settlement and as to the method of disposing of the assets. Before ordinary administration could properly have been closed the trustees began making payments to both classes of beneficiaries, and continued such advancements until the death of the last surviving trustee in 1905, all with the knowledge of the probate court, as shown by reports made up to 1903. Under these circumstances there was no imperative requirement that the master state the executors' accounts in advance of or as formally distinct from those of the trustees. As will be seen later, the accounting had furnished, in our opinion, the beneficial equivalent of separate accountings.

[2] As respects the effect of the probate court settlements: Section 4031 of Shannon's Code requires the clerk of the court to take and state the executor's account after two years from the latter's qualification, and once every year thereafter until the administration is closed. This account is not to be taken until the clerk has given to interested parties certain actual or constructive notice. Section 4034. The clerk is authorized to examine the accounting party upon oath touching his receipts and disbursements. The statute seems to contemplate the presentation of the clerk's report to the court, action of the court thereon, and a recording of the same. Section 4041 provides that "settlements when so made and recorded shall be prima facie evidence in favor of the accounting party." By section 4039, provision is made for attack upon the completeness of the inventory by any interested person at any time before final settlement. Section 5567 also provides that the "settlements of personal representatives and guardians made in the county court, in pursuance of law, are to be taken as prima facie correct." It has been said that it is the final settlement which is made prima facie evidence for the accounting party (Cannon v. Apperson, 14 Lea [Tenn.] 553, at pages 581, 582), but the rule of prima facie correctness has been made to apply to annual settlements.[3]

Each of the executors' accounts was verified by the executors' oath. In the case of each the clerk reported that he had taken and stated "the annual settlement" or "partial settlement," as the case might be, and "that the same is in all things regular and unexcepted to." In each case the record recites the coming on of the case to be heard on the partial settlements of the executors, and the report of the clerk thereon; and:

"It appearing that said settlement is in all things regular, and that no exceptions have been filed thereto, it is therefore ordered that the said settlement be and the same is hereby in all things confirmed, and that the same be recorded in the settlement records of this court."

With respect to the first two accounts, the clerk reported that he had first caused "due and legal notice to be served on all parties interested in the estate of said Louis Hanauer, deceased, of the day on which the same would be stated." The reports on the remaining ac-

[3] Matlock et al. v. Rice, 6 Heisk. (Tenn.) 33, 36, 38; Alvis v. Oglesby, 87 Tenn. (3 Pickle) 174, 183, 10 S. W. 313; Hammond v. Beasley, 85 Tenn. (15 Lea) 618, 620, 627.

counts omit this statement; and in the case of none of them does the record here show any actual proof of service of statutory notice, or whether or not any party interested appeared, although there is nothing in the record negativing such notice, which should perhaps be presumed as against collateral attack. Butterfield v. Miller (C. C. A. 6th Cir.), 195 Fed. 200, 203, and cases there cited at latter page, 115 C. C. A. 152. Several of the Tennessee decisions at least impliedly, and one or more, we think, expressly, recognize the prima facie evidential effect of even an ex parte settlement.[4] Under this state of the Tennessee decisions, and in view of the facts that these settlements were first attacked long after they were made, and after the death of both of the original surviving partners, as well as of both executors and trustees, and, as would appear, of every one having any personal intimate knowledge of the facts, and, further, that vouchers for disbursements made were in large part filed with the reports, we think no error was committed in giving these judicially approved settlements prima facie effect.

[3] Upon the question of pleading: It has been held that on attacking a settlement which is only prima facie correct the complaining party is entitled to a full accounting, without specifying in the bill the items complained of (Turney v. Williams, supra, 7 Yerg. [Tenn.] at page 213; Leach v. Cowan, supra, 125 Tenn. at page 205, 140 S. W. 1070, Ann. Cas. 1913C, 188), yet, as the settlements were prima facie evidence in favor of the executors, they were properly made the basis of the accounting (Matlock v. Rice, supra, 6 Heisk. [53 Tenn.] at page 38; Alvis v. Oglesby, supra, 87 Tenn. at page 183, 10 S. W. 313); and as the suits in question were begun after the death of the parties of whose acts an accounting was sought, and as the bill indicates considerable familiarity with the history of the estate and sets out in great detail items in the accounting criticized, and as all accessible means of information seem to have been in fact presented, and all items which there was shown any disposition to controvert seem to have been inquired into as fully as possible, we think complainant could not have been prejudiced by the requirement that the errors complained of be specified in the pleading.

[4] We see no merit in the criticism that the master's report was not accompanied by a complete statement of the account in debtor and creditor form. The report proper discussed all the important questions presented. At its close the master reported that he had, in obedience to the order of reference, "stated the account from the inventories and partial settlements of the creditors with the probate court, as surcharged by the findings of the master as set forth." The inventories and probate court settlements were already in the record. The report was accompanied by a large number of exhibits and sched-

[4] Matlock v. Rice, 6 Heisk. (53 Tenn.) 33, 38; Turney v. Williams, 7 Yerg. (Tenn.) 172, 210; Snodgrass v. Snodgrass, 1 Baxt. (Tenn.) 157, 160, 161; Hammond v. Beasley, 83 Tenn. (15 Lea) 618, 627; Murray v. Luna, 86 Tenn. 326, 331–332, 6 S. W. 603; Alvis v. Oglesby, 87 Tenn. 174, 183, 10 S. W. 313; Vacarro v. Cicalla, 89 Tenn. 63, 76, 14 S. W. 43; Leach v. Cowan, 125 Tenn. at page 205, 140 S. W. 1070, Ann. Cas. 1913C, 188.

ules, containing not only summaries but itemized statements upon most of the important subjects involved (the latter showing dates, names, and amounts), all amounting to about 47 pages of the printed record. These included a statement of the amount and character of the property received by the executors from the surviving partners, the personal assets of the testator's estate outstanding and undisposed of according to the probate court accountings (both as to those considered good and those regarded worthless), a statement of income and expenditures (both as covered by and since the probate court accountings), a history of the liquidation of stocks, bonds, and other securities, the executors' special account with the estate, schedules of bills receivable paid, of stocks, bonds, and other securities sold, of interest and dividends received, of rents collected, of coupons cashed, of property sales and receipts from the partnership, of miscellaneous disbursements, of testator's debts, dues upon stocks paid, payment of guardian's liability, discharge of taxes on real estate and maintenance thereof, a recapitulation of advancements, payments, and expenditures for accounts of legatees (including insurance and taxes), of loans and advances to various corporations, schedules showing the total remaining equity of each beneficiary under the sixth and eighth items (exclusive of real estate unsold), and how arrived at; also a statement of revenue and expenses relating to the encroachments by Mrs. Hampson upon the corpus of the estate. It is evident that the information so furnished by the master's report, in connection with the inventories and probate court settlements, afforded more valuable information than could have been conveyed by a single, continuous debtor and creditor statement.

[5] The executors' cashbook purports to be a cash account of the executors' transactions. It comprises 61 pages, and extends from August 31, 1889, when it started with a balance in the German Bank to testator's credit (being the item shown on the inventory), until January 4, 1906, a few months following Schoolfield's death, the only entries following which event were an item of cash to Dudley T. Schoolfield, executor, and the bringing down of the cash balance to January 4, 1906. The account was continuous, with numerous strikings of balance, frequently shown as the balance in bank. The cash balance was not struck on the book as of the exact date of the first and second settlements; but in the case of each of the others the balance shown thereby appeared on the cashbook in precisely the same amount, except in one instance with a variation of one cent. The book was evidently kept with scrupulous care, and the balance shown on January 4, 1906, was the amount of cash actually in bank to the credit of the executors. Reports on which probate court settlements were made were evidently made from this cashbook. The master reports that he took the book as a basis, "showing the receipts and disbursements of the executors and trustees" from July 15, 1903 (which was the date of the last partial settlement with the probate court), "as he finds from the deposition of said Schoolfield, and from other evidence in the record, including the cashbook itself, that it reliably shows such receipts and disbursements." The entries since July 15, 1903, are all

on the last four of the 61 pages. We do not understand the book to have been used to override the probate court settlements, but only in confirmation or in explanation and supplement thereof. The rule that the settlements are binding on the executors was not relaxed. When the testimony was taken both executors were dead, as was also Frank P. Poston, who had acted as attorney of the estate since the death of executor D. H. Poston, in 1891, until the death of W. W. Schoolfield in 1905, and "had charge of the accounts and business relating to both trusts under the will," and who had kept the cashbook in part. There were presented check stubs and canceled checks, so far as in the possession of Dudley T. Schoolfield, who appears to have been the only person then living having any substantial knowledge of the situation, and who testified with apparent freedom and fullness with respect to the slight knowledge he had. Due notice of the existence of the cashbook entries was given complainants, a copy thereof being attached to the answer of Dudley T. Schoolfield. Its authenticity is not open to question, and it seems clear, to say the least, that complainants were not prejudiced by its use.

The remaining assignments presented by complainants in the original bill cover a wide range. Besides attacking the sale of the Front street lot and the Townsend purchase, complaint is made that the executors and trustees have not been required to account for all the property inventoried by them, including large items of credits and corporate stocks, or for the use of partnership property and the avails of collections; that, in particular, they should be charged with failure to collect rent on the Front street property during its occupancy by the corporation, and with rent for the Nodena Plantation from 1891 to 1897, when it went into Mrs. Hampson's possession; with loss of the capital stock of the corporation, the failure to collect certain of its accounts, and for debts owing by the corporation to the partnership alleged to have been misapplied, also for disastrous loans made to the Cotton Company and the Electric Company. The charge is also made that the executors were credited with payment of debts barred by the statutes of limitation. Cross-complainants join in the assignments relating to all these matters of complaint. Complainants in the original bill also attack the credit given the executor for Schoolfield's interest in Nodena Plantation. Complainants in the cross-bill also complain that they were denied a separate and distinct accounting relative to sums due them as legatees, of the rejection of the claims of two of the cross-complainants, and for lack of sufficient particulars of the amounts charged as received by cross-complainants. The defendants' assignments, so far as material, will sufficiently appear from the discussion.

[6] Complainants' exceptions to the master's report were all overruled by the court, and as to matters to which they relate we have thus in effect the concurrent findings of master and court, which should not be disturbed unless clearly wrong. See the decisions of this court in Haines v. Bank, 203 Fed. 225, 228, 121 C. C. A. 431; Western Transit Co. v. Davidson, 212 Fed. 696, 701, 129 C. C. A. 232; In re National Pressed Brick Co., 212 Fed. 878, 881, 129 C. C. A. 398.

[7] *The Sale of the Front Street Business Property.* Disregarding forms, the net effect of this transaction was that Schoolfield and Miller, as surviving partners, sold the premises to Mrs. Hill for $13,500. Miller's one-third went to Mrs. Norfleet, as his creditor, Hanauer's share was charged to and accounted for by his executor and trustee, and presumably Schoolfield received his one-third. Mrs. Hill afterwards conveyed to her husband, and they to the firm of John Wade & Sons, who still hold it. The latter paid what we are satisfied was at the time a fair price for the property, all upon the advice of counsel that the surviving partners had full authority to convey. The sale was made with the approval of at least the legatees under the eighth item of the will. Wade & Sons are completely protected; for we have no doubt that the partnership articles, which provided for sale by the survivors of real as well as personal property, according to their judgment, afforded ample authority to make the sale. This being so, the purchasers were not bound to look to the application of the proceeds, even had they not been properly applied. Potter v. Gardner, 12 Wheat. 498, 502, 6 L. Ed. 706; Holden v. Circleville L. & P. Co., 216 Fed. 490, 132 C. C. A. 550, decided by this court June 8, 1914. There was, however, no misapplication of proceeds, for although the surviving partners had the right to hold the entire proceeds of the sale subject to accounting, it was entirely competent for the survivors and the executors to divide up the proceeds of a particular parcel, so long as there remained, as seems to have been the case, ample assets for the payment of all obligations and the adjustment of all balances between partners. In the view we take of the case, it is unnecessary to consider what the situation would have been but for the partnership agreement, nor the questions raised as to the lack of power in Mrs. Hill, as a married woman, to convey to her husband (for both joined in the conveyance to Wade & Sons), nor the question of constructive notice afforded by the abstracts and conveyances.

The Townsend Foreclosure Sale. The land was sold, under foreclosure of the trust deed, for $3,500, which was less than the debt secured to Schoolfield. The master seems to have treated the trust deed as securing ratably the debt to Schoolfield individually and the debt to the copartnership, and disposed of the matter by concluding that there was no evidence tending to show fraud with reference to the sale and transfer of the land by the trustee in the deed and the purchase of the same by Mrs. Schoolfield at the sale, and that there was no evidence tending to show that the executor did not account for the part of the proceeds of the sale due the firm of Schoolfield, Hanauer & Co.

As we construe the trust deed, however, the partnership claim was subordinated to Schoolfield's individual claim, and there was thus nothing to apply on the partnership claim. The substantial question concerns complainants' contention that the conveyance to Mrs. Schoolfield was in effect a conveyance by her husband without consideration and in fraud of creditors, and that the property is thus liable for the satisfaction of whatever balance may be found against Schoolfield on this accounting. We are satisfied that the allegations of actual and purposeful fraud in the conveyance to Mrs. Schoolfield are wholly unsus-

tained; for Schoolfield, though of greatly reduced means, was entirely solvent at the time, and so remained until his death, unless as against such liability as may be established under this accounting; and we have no reason to think that he regarded himself as subject to any liability of this nature. But even if we were to find that the property was conveyed to Mrs. Schoolfield while her husband was insolvent, yet if she actually paid the purchase price, that is the end of the inquiry. The burden is upon complainants to show such nonpayment, and the contrary is presumed from the recitals in the trustee's foreclosure deed. The statement therein that the net purchase price paid the trustee was "applied as a credit upon the note secured by the said trust deed" does not controvert actual payment by the purchaser. Nor is the presumption overthrown by the mere fact that after the death of both Mr. and Mrs. Schoolfield no proof could be found of the latter's actual payment, either by check or otherwise, in view of the testimony of her son, although more or less indefinite, that his mother had personal property of her own.

[8] It is urged, however, that her personal estate became by marriage the property of her husband, and that thus no consideration could have resided in the transfer of money by her to him. It is true that such would be the result of his assertion of marital right, but he was not bound to assert such right (Carpenter v. Franklin, 89 Tenn. [5 Pickle] at page 148, 14 S. W. 484); he could validly agree, either expressly or impliedly, to her retention of her personal property as her separate estate (Snodgrass v. Hyder, 95 Tenn. [11 Pickle] at pages 575–577, 32 S. W. 764); and the testimony that she kept a bank account in her own name and held stocks and funds in another bank, and gave money from time to time to her son, all presumably with her husband's acquiescence, tends to support an implied relinquishment of his marital right (Belford v. Scribner, 144 U. S. at page 504, 12 Sup. Ct. 734, 36 L. Ed. 514). We are satisfied that the decree below reached the correct result regarding this claim.

[9] *The Nodena Plantation.* In 1891, following the foreclosure purchase, the executors and surviving partners contracted with Ferguson for operating the plantation on joint account, Ferguson to have one-half the net profits, the other parties the remaining one-half. Each party to the transaction was to furnish certain equipment or supplies, or both. The supplies were in fact furnished by the Schoolfield-Hanauer Company, which kept an account with the plantation. The cotton raised was to be shipped to the Schoolfield-Hanauer Company for sale. The operation was carried on for five years, resulting in a loss to the Schoolfield-Hanauer Company.

We think the executor had no authority to carry on this business at the risk of the estate; he should have rented the plantation; and we agree with the master and court that the estate is entitled to compensation. It is urged that as the interest of Hanauer's estate was personal, a rental charge would be improper. The court charged interest upon the estate's investment, instead of rental as charged by the master. Both parties agree that the estate's interest was personal, but that, to our minds, is not a sufficient reason for denying rental as such. Had the property been a livery stock or a boat, either of which would be

personal, the propriety of charging rental for actual use of the property could scarcely be doubted. The real question is what rental could reasonably have been obtained therefor. The master found that the plantation was operated at a profit; that the loss resulted from parts of the contract other than rental; that there were about 1,200 acres of cultivated land, and that the rental value was $4,000 per year. The executor was charged with the estate's proportion of that rental, with interest on each year's rental from the first of the succeeding year. The testimony as to rental value is in conflict, ranging from $2 to $7 per acre for cleared land. Hanauer seems to have received and collected $4,000 for its rental in 1889. Cotton culture was depressed from 1891 to 1896; and perhaps $3,600 per year ($3 per acre) is the safer estimate of value. It may be fixed on that basis, including interest as charged by the master. Such rental in fact closely approximates the manager's estimate of profit, viz., $20,000. We think that under the Tennessee statute and decisions the sureties on the executor's bond are liable for the rent, notwithstanding the executor was acting not as executor but as trustee. Porter v. Moores, 4 Heisk. (Tenn.) 16; Lester v. Vick, 2 Heisk. (Tenn.) 476, 479.

[10] It is insisted, however, that the bondsmen are not liable for rent of lands in another state than that in which the administration is had. We see no force in this proposition. It was held, it is true, in Snodgrass v. Snodgrass, 1 Baxt. (Tenn.) 157, 162, that the sureties of an administrator are not liable for the proceeds of property received by him from the sale of his intestate's lands in another state. The reason there given is that the proceeds of the sale of land in Virginia were not assets of the estate in Tennessee, where the administration was granted, but were received in Virginia, and not in the character of administrator in Tennessee. In this case, however, the indebtedness which the plantation later represented was included in the executor's inventory, the foreclosure having been completed after testator's death. We think the plantation, being, as stated, personal property, was plainly Tennessee assets, and within the security of the executor's bond. We may add that the master correctly found that the conveyance of the plantation in the interest of Mrs. Hampson and her children was intended to equalize the advances to the respective beneficiaries up to that date.

[11] The complainants in the original bill criticize the decree for crediting the executor with the amount of Schoolfield's interest in the plantation ($4,796.24, plus interest thereon), and for failing to adjudge that Mrs. Norfleet, as the assignee of Miller's claim, had no title or interest in the plantation. It is contended that the deed made by Dudley T. Schoolfield and Frank H. Poston (trustees under the commissioner's deed of foreclosure) to W. W. Schoolfield, as trustee under the sixth item of the will, conveyed the entire fee of the plantation, thus discharging all the liens and interests theretofore held by the two surviving partners other than Hanauer by virtue of the indebtedness to the firm, which constituted part of the price paid on foreclosure sale; that by the terms of the conveyance to W. W. Schoolfield, trustee, the latter and Miller were to look only to the personal responsibility of Mr.

and Mrs. Hampson; and that, in any event, recovery could not be had in the absence of cross-bill.

We think the executor was rightly credited with the amount of Schoolfield's interest, even if the entire fee was conveyed to him as trustee under the sixth item; for, if so (as we must not be understood as holding), we think it clear that payment of his interest was equitably assumed on behalf of the beneficiaries, rather than left to the personal responsibility of Mr. and Mrs. Hampson; and, this being so, equity requires the enforcement of that assumption. If W. W. Schoolfield so held the legal estate no question of lien or of limitation is involved. If the legal title remained in part in Poston and Dudley T. Schoolfield, trustee, complainants are not prejudiced by the disposition made. The item being treated merely as a credit under the accounting, no cross-bill was required. The beneficiaries under the sixth item having taken the benefit of Hanauer's one-third interest in the firm debt, and having recognized Miller and Schoolfield as entitled to the balance, cannot well be heard to say that Schoolfield should be denied his part because there had been no full settlement of partnership affairs. As to the Miller interest: It is clear that, as he was not a party to the conveyance in question, and as there is no room for claim that he consented to the conveyance of the entire fee to Schoolfield, trustee, in relinquishment or limitation of his rights under the original trust, and as Dudley T. Schoolfield is before the court denying that his conveyance had such effect and recognizing his continued trusteeship for the benefit of Mrs. Norfleet, the decree could not properly adjudge that the entire fee passed under the conveyance to W. W. Schoolfield, trustee, nor quiet complainants' title as against Mrs. Norfleet's claim unless barred by limitation. The court treated Mrs. Norfleet's claim as not within the pleadings or the order of reference, and she has not appealed. As we find no error assigned upon the failure to find her claim barred by limitation, we content ourselves with affirming the decree in the respect under consideration, but without prejudice to such proceeding as either party may take to determine Mrs. Norfleet's rights.

Mrs. Hampson's Account with the Schoolfield-Hanauer Company. This account was opened August 26, 1889, shortly after Hanauer's death. Testator held at his death two notes of Ferguson & Hampson, payable to his order as guardian of Mary S. Hampson, given in 1877 and 1881, respectively, aggregating (principal) $9,623.43. The executor treated these notes, and we think correctly, as uncollectible through the neglect of the testator, and thus as liabilities on the part of his estate to Mrs. Hampson personally. On three separate dates up to and including December 3, 1890, the executor indorsed on these notes an aggregate of $7,138.92, all of which was receipted for by Mr. Hampson as trustee of his wife, and presumably with his wife's approval, the greater part being applied on Mrs. Hampson's account with the Schoolfield-Hanauer Company. May 2, 1895, the balance due on these notes ($12,439.46) was similarly applied upon the account mentioned, and at the same time $4,990.43, as "one-half of interest and dividends collected" upon the assets of the estate, to which Mrs. Hampson was declared entitled under the will for the support of herself and children. The draft for

$12,439.46, as well as the receipt for $4,990.43, were signed by both Mr. and Mrs. Hampson. All these payments to Mrs. Hampson appear on the probate court settlements. They reduced her account with the Schoolfield-Hanauer Company to $13,732.37. On June 2, 1906, when the corporation went into liquidation, the account had increased (including interest) to $24,585.95. With the approval of the court having the liquidation in charge Schoolfield purchased this account, applying the amount thereof upon his large claim against the corporation. This action was taken for the avowed purpose of protecting Mrs. Hampson. All these payments upon account (except the balance last referred to) are included in the items of disbursements made to Mrs. Hampson, appearing on the summary of the executor's receipts and disbursements. The item of $4,990.43 was included in the item of $9,650.05, the bulk of the balance being also applied on the account with the Schoolfield-Hanauer Company, although as to items aggregating $2,881.53 no order therefor by Mr. or Mrs. Hampson is shown. The balance so taken over by Schoolfield was included in making up the balance found in the master's restatement of account to have been overdrawn by Mrs. Hampson.

[12] Complainants object to the payment of the Ferguson & Hampson notes by the executor, and to their application upon Mrs. Hampson's account, for the reasons, among others: (a) That the debt from Ferguson & Hampson did not belong to Mrs. Hampson, she being a married woman, but to her husband; (b) that, Hampson being thus both payor and payee, there was no legal debt; (c) that the testator did not intend to pay the notes, but to extinguish them through the legacy to Mrs. Hampson; (d) that the notes were outlawed before Hanauer's death; (e) that Mrs. Hampson, not being examined separately from her husband, could not rightly direct the application of these notes. These claims are, we think, without merit. Whether the debt was outlawed as against Ferguson & Hampson cuts no figure, because the master's application is based upon the proposition that Hanauer was liable to Mrs. Hampson personally for failing to collect the notes; there is no basis for the claim that testator intended to extinguish the notes by legacy; the liability from Hanauer was to Mrs. Hampson and in a trust capacity, under postnuptial settlement, in which trust the husband was practically the successor, as the notes obviously represented the investment of some of Mrs. Hampson's money. Mr. Hampson, as trustee, participated in carrying out the transaction.

The application of the $4,990.43, as one-half the income of the estate, is criticized for the reasons, among others: (a) That no such income could be paid until the administration was completed and the funds turned over to the trustees; (b) that Mrs. Hampson could not validly contract the indebtedness to the corporation for living expenses; (c) that no attempt was made to apportion income by the executors and trustees in any other instance; and (d) that such income could only be charged out of the one-half covered by the sixth item. But although the executors did not bodily turn over to the trustees the residue above the payments of debts, etc., the same persons were both executors and trustees, and dealt with the beneficiaries under the sixth and eighth

items in the latter capacity, whether so expressed or not, in making the advances against the distributive shares, etc. If the criticism suggested is good, neither Mrs. Hampson nor the beneficiaries under the eighth item had any right to the large sums advanced to both classes, including Nodena Plantation turned over under the sixth item; and to say that it was the duty of Mr. Hampson to support his family ignores the fact found by the master, viz., that Mr. Hampson was without capacity to support them, a condition presumably recognized by the testator in the provision made by the sixth item. To deny Mrs. Hampson the right to use the income of the estate for the support of herself and her children would be pro tanto to nullify the will under which the accounting is asked; Hampson, in fact, as his wife's trustee, approved the application upon the debt in question. It is thus immaterial whether or not the corporation could have enforced collection against Mrs. Hampson as a personal debt. See Flanagan v. Grocery Co., 98 Tenn. 599, 40 S. W. 1079. To the extent that the moneys of the testator's estate applied on the debt of the corporation caused encroachment upon the corpus of the trust estate under the sixth item other considerations pertain, which are not material in this immediate connection. The balance of account held by Schoolfield presents different considerations, but not, we think, controlling. We are satisfied that the indebtedness was incurred on Mrs. Hampson's credit; and, in view of the relations existing between herself, the estate, the corporation, and the executor and trustee under the will, we think it equitable that Schoolfield should be reimbursed, but only for what that account has cost him, which is the extent to which his own recovery from the corporation assets has been decreased by the application of Mrs. Hampson's account on his claim as creditor. We reach this conclusion because the account seems to have been regarded as of doubtful collectibility, for the time being at least.

Schoolfield, the executor and trustee, was also president of the corporation, upon a substantial salary, and the large indebtedness against Mrs. Hampson was the outgrowth of that dual relation. The contracting of the account, and its purchase by Schoolfield, involved to an extent a fiduciary relation. To permit the executor and trustee to recover more than he paid for the account would give him a profit on the transaction, which would be inequitable, notwithstanding his loss in other respects. The beneficiaries likewise have lost through the failure of the corporation.

The Schoolfield-Hanauer Company. A short time before this corporation went into liquidation the executor had advanced to it two sums aggregating $3,000. Repayment had not been made. The corporation also owed the copartnership at the time of liquidation (including interest) $16,630, by reason of undistributed collections on account of the copartnership. In connection with the adjustment of Mrs. Hampson's account with the corporation, the executor had overdrawn Hanauer's third of the last distribution to the extent of $1,303.73. Nodena Plantation owed the Schoolfield-Hanauer Company a balance of $9,345, representing loss from the joint operation of the plantation. The copartnership filed, in the insolvency proceedings, its claim for

$16,630, the executor filing a similar claim for the $3,000 advance, plus $124.85, which the corporation owed Hanauer at his death, plus another account of $192.84, less the $1,303.73 above mentioned. By a compromise made in the liquidation proceeding, one-quarter of the Nodena Plantation account was charged against the copartnership claim, dividends of 39 per cent. being collected on the balance and accounted for by the executors. Another one-quarter of the Nodena debt was charged against the executor's claim, and presumably wiped that out.

As already said, complainants seek to charge the executor with the value of the corporate stock lost, the rental value of the premises during the seven years' occupancy by the corporation, as well as with the indebtedness from the corporation to the copartnership and the executor, respectively.

As to the rent, we think the master rightly charged the executor with one-third the rental value of the premises. It is true the testator's interest in the corporation was large, and there were perhaps adequate reasons for not earlier forcing the corporation into liquidation; but we fail to find that the executor could not, with entire safety to all interests, have enforced collection of a reasonable rental. We think the master's award in this respect should stand. It follows from our conclusion as to the validity of the sale of the Front street property that complainants were entitled to no accounting of rents after sale by the survivors. We think the conclusion that the rents of other partnership real estate had been sufficiently accounted for should not be disturbed.

[13] We are disposed to follow the concurrent action of the master and court which deny recovery on account of the partial loss of the copartnership debt. It does not appear at what time the partnership collections which the account represents were made by the corporation, and immediate liquidation may not have been long anticipated. We think, however, that the executor was not justified in making direct loans to the corporation without security. The corporation was without credit, having no capital beyond its stock in trade, and, from the first, money to operate the business had to be furnished through indorsement of its paper. The executor was not protected by the application of the Nodena account, for, as we have already held, the executor had no right to create that account, and the court's approval of the compromise afforded no protection because based on the executor's consent. The executor should be charged with the $3,000 loaned, plus the indebtedness to Hanauer at his death, which there was ample time to collect in the earlier years of operation, less the item of $1,303.73 before referred to.

The loss of capital stock presents other considerations. The concern was a close corporation. Its stock was not on the market. During the first year or so it appears to have succeeded, and we think the executors could not be charged with lack of care in failing to dispose of it during that period. We are impressed with the view that to have offered Hanauer's stock for sale after the business depression came on would have precipitated the corporation's collapse. While perhaps nothing has been gained by postponing liquidation, we cannot say that

the stock value was lost thereby. The executor should therefore not be charged with this loss.

Brush Electric Light Company Stocks, Bonds, and Advances by Executors. As shown by the inventory, Hanauer owned $13,500 stock and $1,000 bonds of this company. At the time of his death the company was insolvent, as shown by the testimony of its president, Carnes, and "at the end of their road." Hanauer and three other stockholders were indorsers upon notes of the company, which had also an outstanding series of bonds. Certain of the stockholders entered into a contract whereby the Brush Company's property should be conveyed to a new company free from debt, except the bond issue, and a new site furnished, stock in pro rata amount in the new company to be taken for that in the old; the old site to be turned over to the stockholders referred to. Hanauer was represented in this contract, and we are satisfied that it was made in his lifetime, and that he was personally a party to it. At his death this Electric Company stock seems to have been deposited with one Smith, in connection with that of other stockholders, to secure the agreement above stated. It also appeared in the inventory that the deposit was "for security on loans made by the company upon which he [Hanauer] was indorser with other stockholders." Carnes testified that the stockholders were to get no return for the moneys paid by them to discharge the debts; and, although he did not seem to remember the extent of the debts when the contract was made, yet, in view of his testimony that but for the contract the company must have gone into receivership, and inasmuch as he himself, although less interested than Hanauer, seems to have paid $6,600 on account of his liability, the debts must have been considerable. Between December 19, 1889, and October 6, 1890, the executors made the payments referred to in the summary of disbursements as "loans to Brush Electric Company, $19,369.76." These payments are challenged as unauthorized loans, and, even if justified, as chargeable to the executors because not collected back. All the advances in question appear in the probate court settlements, as well as on the executor's cashbook. We think it fairly inferable that all the items (unless to the extent of $5,000) were paid on account of Hanauer's original liability under either indorsements of paper or the contract with the new electric company referred to. The $5,000 mentioned seems to have been advanced in four equal installments to the new company, two expressly appearing to be for building new plant, one for "bldg. under contract," and one as "advanced that company." The contract with the new company was not found, but it was Carnes' recollection that the new company was to build the new plant, and take payment therefor in bonds at 85 cents. The old site is said to have been taken by the selling stockholders from the old electric company "for so much money * * * toward the liquidation of outstanding indebtedness." The executors' inventory included 20 shares Memphis Gas Light Company stock, $2,000. No Memphis Gas Light Company bonds there appear. The estate is, however, given credit in the probate court settlements for $2,700 proceeds Electric Light Company bonds; $4,030 for proceeds of sale $6,500

bonds of Memphis Light & Power Company; $3,000 as proceeds of sales of $12,000 of stock in "Mfs. L. & P. Co." We are satisfied from the fuller indorsements in the executors' cashbook, and from testimony, that these items represented the sale at 25 cents on the dollar of the Memphis stock received in exchange for Brush Company stock, of $3,000 Memphis first mortgage bonds at 90, and $6,500 second mortgage bonds at 62 cents, that the prices so received were the fair market value, and that the stock and bonds so sold were those received by the executors in some way in connection with the dealings with the new company, including the exchange of Brush Company securities and claims, and probably advances for building new plant. Schoolfield sold his own stock at the same price and at the same time that Hanauer's was sold. No credit, however, appears on account of the $2,000 Memphis stock mentioned in the inventory, which does not seem to have been sold. The master found that at one time it had a market value of 42½ cents, but that the executors were not chargeable with failure to sell it. No charge was made against the executors on account of these various stocks, except to the extent to which the estate was found to have realized. Neither this action nor the credit given on account of the loans and advances were disturbed by the court. As it is not clearly shown that the wrong conclusion was reached by the court and master, we concur in the disposition made below.

Cotton Company Matters. This company had a capital stock of $1,000,000, issued as fully paid; in fact but a small percentage had been paid in. Hanauer held $54,000 of the stock, and was its president at the time of his death. Its capital was procured by loans from banks in Memphis and in one or more other places, upon indorsement by more or less of the stockholders, by agreement between whom each of a large number agreed to share, as between themselves, certain fractions of the net loss or liability, Hanauer's share being 1-11. At the time of his death he seems to have been indorser on as much as $100,000 of this paper. The company was then solvent so far as shown by its books, but its stock was speculative and had no real market value, properly speaking; the stock value consisting largely of patent rights on delinting machinery, etc. The master found, and we think properly, that the company was in fact insolvent when Hanauer died. Within two years following Hanauer's death his executors advanced to or for the benefit of the company $31,000. Certain other stockholders also made large advances. Complainants seek to charge the executors with the loss of Hanauer's capital stock, which was never realized upon, as well as the $31,000 so advanced. The master and the court held the executors not liable for the stock; the master charged the executors with over $14,000 of the $31,000 advanced, the court overruling the master in this latter respect. We think it clear that the executors should not be charged with the stock. The question of the loans charged up by the master is not so clear, but we are disposed to agree with the court. The basis of charging the item of $3,500 to the executor is that the item is not on the cashbook and is not accounted for. As we construe the record, the item was never in fact credited to the executor. We understand, however, that the charge was not in fact

stricken out in the master's final restatement of the account. The reasons for both these last conclusions are stated in the margin.[5]

The basis on which the master charged the other items to the executors is that there is nothing to show that they were anything but straight loans, and that the executors did not claim otherwise. It is true that neither the cashbook nor the executors' reports show that these advances were on account of Hanauer's liability, but it must be remembered that the accounting was had after the parties having immediate knowledge were dead; and while the question is not free from difficulty, we are inclined to the view that the action of the master failed to give due credit to the prima facie effect of the probate court settlements. Schoolfield was a large stockholder, and Poston, as Hanauer's representative, also took part in the corporate affairs. Every reasonable effort seems to have been made to save the concern from ruin, but without success. A fire in 1894 consumed the plant, and, as it turned out, the company's debts were about $200,000 more than its assets. Several other stockholders lost heavily, at least one much more than the Hanauer estate, and several were rendered bankrupt or insolvent. We are disposed to think that these facts, in connection with the probate court settlements, raise a presumption that the advancements in question represented in substance, directly or indirectly, the fulfillment of the obligations so incurred by Hanauer and existing at his death; having in mind the probability that certain of the indorsers proved uncollectible in part at least. We think the record fairly justifies the inference that in making the advancements and carrying the stock until the company's failure the executors used their best business judgment, and took the course followed by prudent stockholders representing their own investments. Whether or not anything was saved by the course taken, we are satisfied nothing was lost by it.

It results from what has been said earlier in this opinion that complainants in the cross-bill have had the substantial equivalent of a separate and distinct accounting relative to the sums due them as legatees under the eighth item.

It is also urged that stocks and bonds in large amounts were sold by the executors at sums below their real value; that many of the securities sold should not have been sold at all, as not needed for the payment of debts and expenses, but should have been kept as permanent investments, for assignment to the beneficiaries under the sixth

[5] But one item of $3,500 was included in the $36,195.05 credited the executors in first annual settlement. R. 496, 1793. This one item ($3,500) was included in making up balance of $5,010.30, September 1, 1890. R. 497. It was on the cashbook (R. 137), and helped make up the balance of $4,999.42, September 2, 1890 (R. 143), which varies from the probate court balance only in including item of $10.88, September 2, 1890. Had there been included a second $3,500, the balance shown on probate court record and cashbook could not have thus harmonized. The court, therefore, correctly ordered the charge to the executors stricken out. This was not done as to the principal ($3,500). R. 1490. The reason given was that the item was already allowed in the cash balance. This we think is a mistake. The cash balance used in making up the master's special account was $1,160.40 (R. 988), which included but the one item of $3,500 actually paid, the resulting balance to be distributed, $153,759.90 (R. 988) being included in the master's restated account (R. 1488).

and eighth items, and that certain stocks, if to be sold at all, should have been sold earlier, when, it is urged, a higher price could have been obtained. In this connection it is insisted that the stocks were inventoried at par, and that the burden of sustaining sales below par is upon the executors. But this argument overlooks, not only the prima facie effect of the probate court settlements, but, we think, misconceives the basis of the inventory. This, it is true, contains the statement, "and the stocks and bonds herein inventoried are at their face value." But this could scarcely have been intended as an appraisal at such value, for not only was there no formal appraisement of any property in the inventory except a few hundred dollars worth of personal effects at testator's residence, but the inventory contained many stocks worth, and doubtless known to be worth, at the time much more than par, one stock actually selling at about six times its face, and, on the other hand, it included stocks at the time considered worthless or worth much less than par; for practically contemporaneously with the filing of the inventory a copy thereof was furnished to the representatives of the beneficiaries under the eighth item, containing the executors' notations on many of the stocks, such as "good," "worthless," "nominal," "quoted 50 cents," "good—110 bid," "probably about at 5 cents," "130–135," "600," etc.

[14] Again, section 3979 of Shannon's Code is invoked, which requires the executor "to make sale of the goods and chattels of the deceased to the highest bidder, on ten days' notice of the time and place of sale," as forbidding private sales. Whether the Supreme Court of Tennessee has construed this statute as including corporate stocks in the terms "goods and chattels" we are not advised; but we think it not controlling of the executors' discretion under the will in question, and inapplicable to an estate held under such trusts as exist here. Moreover, upon the evidence in this record as to the value of the stocks sold, so far as given, there is reason to believe that the stocks brought a better price at private sale than could have been realized by an auction sale under the statute. We are satisfied that the great bulk of the sales of stocks and bonds were made at their fair market value, and all in the exercise of the discretion which a reasonably prudent and intelligent man would have used in the administration of his own affairs. This we conceive to be the applicable test. Mickel v. Brown, 63 Tenn. (4 Baxt.) 468.

Many of the stocks held by the testator were more or less speculative in character. Before ordinary administration could well be completed a commercial stringency began which continued with greater or less force for several years, and which presumably affected Memphis as much as the country generally, and perhaps in some ways more, on account of the depression of the cotton industry. These facts doubtless contributed materially to the losses and disappointments occasioned the estate, both in respect of realizing on investments and in the subjection to payment upon collateral liabilities. We have found nothing in the record which impugns the integrity and good faith of the executors in their dealings with the administration of the estate. We think it makes no difference that certain of the stocks may have been sold for purposes of payment to the beneficiaries under the sixth and eighth

items. Such sales may properly be regarded as made by the trustee and within the discretion vested by the will.

Without discussing each of a large number of individual items involved, we content ourselves with saying that we have carefully considered them all, and that, under the application of the rules stated in this opinion, the conclusions of the master and court should not be disturbed except in the instances to which we shall refer.

The contention that large sums shown by the executor's settlements and cashbook to have been realized, or which were stated by the master in his report to be chargeable to the executors, were not in fact so charged rests upon misapprehension of the master's accounts and schedules. It is enough to say that, as we understand these accounts and schedules, every item so charged the executors in their reports, or on the cashbook or allowed by the master, was so charged by that officer either by inclusion in the accounting which resulted in the cash balance of $1,160.40 against the executors, before referred to, or by addition to that cash balance through which the ultimate rights and liabilities of the parties were reached.

Cotton Exchange Building Company Stock. This stock had a par value of $500. There was testimony that it was worth 70 to 75 cents. The master held it not accounted for, and charged the executor $375 and interest. This action was excepted to on the ground that the stock was sold September 13, 1889, for $445, and erroneously accounted for as "cotton exchange membership." The exception was sustained, and we think erroneously. There was proof that the membership also had value, and if the stock was accounted for, the membership was not. Moreover, while in the copy of inventory furnished by the executor the stock bore the latter's notation "50 to 60 cents," the membership was minuted "sold $445.00" (no value being carried out in the original inventory). The order sustaining the exception should be reversed, and the master's action affirmed.

Personal Property at the Kerr Avenue Homestead, $842.15. We think the master and the court properly charged this item to the executor. It was the one class of inventoried property actually appraised. The executors apparently understood it had to be accounted for, and this result is not impeached by the alleged fact that it remained in the homestead and so was used by the beneficiaries under the sixth item. The fact that it was not specified in the bill cannot be held fatal. The master took the proof apparently without objection, and it would have been open to the court upon exception to amend the order to meet the proofs.

[15] It is urged that under sections 4012 and 4481 of Shannon's Code claims of resident creditors could be paid only within 2½ years, and claims of nonresident creditors only within 3½ years after letters testamentary are granted, and that the executors had no right to sell to meet claims not paid until after those dates, and were not entitled to credit for payments so delayed. But in the absence of proofs to the contrary, the presumption is that the delay beyond the statutory period was at the request of the executor. Alvis v. Oglesby, 87 Tenn. (3 Pickle) 172, 10 S. W. 313; Allen v. Shanks, 90 Tenn. (6 Pickle) 359, 16 S. W. 715. In this case the presumption is not only not overthrown,

but is confirmed. Section 4015, providing for payment to the state treasurer of unclaimed estates, has plainly no relation to the estate and will under consideration.

Taxes and Insurance Paid for Residuary Legatees and Beneficiaries. The payments are shown by the cashbook and by the settlements, except (as to the latter) a few payments made after the 1903 settlement. There is nothing to impeach the presumption afforded by the settlements, and we are satisfied that the payments were all in fact made as claimed. As to the advances for the legatees under the eighth item, it is immaterial that the executors, as distinguished from the trustees, were not concerned in the payment of taxes on lands belonging to the beneficiaries, for the record amply supports the inference that the payments were made with the knowledge and approval of these legatees, and were properly treated as advancements on account of their distributive shares of the estate.

The advancements made to Mrs. Hampson stand on a materially different footing only so far as they affect the question of encroachment on the corpus of the estate.

We see no merit in the suggestion that the question of equalization between beneficiaries was not referred to the master. It was necessarily involved in the accounting. Nor do we think there is force in the point that the executors had nothing to do with the equalization, but that this duty belonged to the trustees, in connection with the division of the residue after the payment of debts, etc.; for the executors were also the trustees and were acting in a double capacity. Adams v. Gleaves, 10 Lea (Tenn.) 367, 384; Porter v. Moores, 4 Heisk. (Tenn.) 16.

Compensation to Executors and Attorney's Fees. These allowances are criticized on several grounds. The contention that no allowance for services and expenses not rendered or incurred within two years after administration granted can validly be made the executors (Shannon's Code, § 4047) is disposed of by the construction put upon that statute as being directory merely. Willeford v. Watson, 12 Heisk. (Tenn.) 476; Murgitroyde v. Cleary, 16 Lea (Tenn.) 539, 546. The objection that the surviving partner is not entitled to compensation for settling the affairs of the copartnership is answered, and we think correctly, by the master, that it does not appear that any of the credits allowed Schoolfield, executor, were for services rendered with reference to the partnership assets until after the same had been turned over to the executors, and by them held and managed with the remaining assets of the estate.

[16] The proposition, assuming it to be correct, that the statute contemplates the fixing of the executors' compensation only at the end of administration is not controlling. The master found that the probate court had allowed compensation on the basis of 5 per cent. commission, and made his subsequent allowances at that rate. We think that, in view of the difficulties connected with the settlement of the estate, and the attention apparently given to it by the executors, the allowance made is not unreasonable. Our attention is called to nothing in the record which we think seriously impugns the reasonableness of the attorney's fees paid. It is perhaps not clear whether the compensation

allowed D. H. Poston's estate after his death was for services as executor merely or as attorney (see summary of receipts and disbursements printed in note to this opinion), but an executor acting as attorney may also recover compensation as such. Fulton v. Davidson, 3 Heisk. (Tenn.) 614, 643.

[17] We are satisfied to affirm the action of the master and court with respect to the allowances both as to executors' compensation and on account of attorney's fees.

The contention that the claims of Flora Loeb and Jacob Hanauer are barred by limitation rests upon the proposition that their rights of action accrued at the respective dates when these claimants reached the age of 21 years, viz., in 1889 and 1893, respectively. But in view of the fact that distribution was not to be had until completion of administration, if we have properly concluded that such completion was rightly delayed to the extent it was, and so as to protect the executors from liability therefor, we are unable to see why the claimants are not likewise protected against the barring of their claims for the residue after administration completed. Schoolfield died in 1905. The bill was filed in 1907. As late as 1903, as shown by the probate court settlements and cashbook, payments of taxes were made for the account of these beneficiaries, as well as amounts paid them in equalization of their shares to that date.

Complaint is made that there has been no accounting respecting firm assets. The record shows: That on April 1, 1889, the credits of the various partners, as appearing upon the firm books, were as follows: Schoolfield, $96,752.07; Hanauer, $97,859.13; Miller, $75,930.42. That between that date and June 3, 1896, the partners received such amounts as to leave the following credit balances: Schoolfield, $35,-695.99; Hanauer, $37,770.98; Miller, $36,495.90. These three partnership accounts seem to have represented the entire assets of the firm. Whether the assets so represented included the Ferguson & Hampson account afterwards merged in the sale of Nodena Plantation is not clear.

The master reported the amount of cash received by the executor from the surviving partners and the amount of rents collected from partnership realty. He reported as still on hand and undisposed of two parcels of described real estate in Shelby county, Tenn., and that Miller had made such conveyance upon receipt of his interest in those lands as that Schoolfield and the Hanauer estate owned the parcels in equal shares. He also reported that the lands in which Hanauer's estate was interested in Alabama and Arkansas are so vaguely described that definite and clear report could not be made as to what had been sold and what parts, if any, remained; that a large part of the assets of the firm had been accounted for in various partial settlements by the executor with the probate court; that some of the firm's books could not be found; that he was unable to make any findings as to the assets that remained as shown by the firm ledger, nor to equalize the partners, so far as the Hanauer estate is concerned, and found that all the accounts shown on the trial balance taken from the firm's ledger are worthless, except what has been accounted for through the probate court.

There is no suggestion that the firm still owes any debts, nor have we been cited to any testimony throwing any light upon the accounting as between the partners, except as shown by what we have already stated. Taking into account the division of the proceeds of sale of the Front street store and the treatment of the Nodena Plantation matters, the partnership affairs have presumably been regarded as requiring no further settlement, except to the extent of adjusting the balances between partners upon the basis which this record permits, and of providing for the sale of the remaining assets, so far as necessary, to effect such distribution and adjustment. It seems proper that the decree should formally determine the equalization as shown by the account balances referred to, and provide, so far as necessary, for enforcing, against remaining assets, the balances mentioned, as well as all other recoveries on account of partnership matters.

Dudley T. Schoolfield, executor, complains that the decree does not direct that he recover against Mrs. Hampson's executor and the other complainants the amount found by the master's restated account to be owing by them. As we construe the record, the order of the court on the master's restated account has the effect of establishing the result of the accounting as between the parties. The cross-bill filed by the executor was dismissed as unnecessary, or, if necessary, as brought too late, being filed after the master's report upon the accounting. We think the decree should show the final state of the account and direct recovery accordingly, except that it should not invade the possession of assets under the jurisdiction of the probate court for the purpose of administration. Waterman v. Canal-Louisiana Bank, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80; Eddy v. Eddy (C. C. A., 6th Cir.) 168 Fed. 590, 93 C. C. A. 586. What the balance in favor of either party may be depends upon the restatement of the account under the rules we have laid down in this opinion. In determining rights as between defendants and Mrs. Hampson's children, the ultimate beneficiaries under the sixth item, we think the latter entitled to recover the amount of encroachments (if such shall prove to have been created) upon the principal of the estate otherwise apportionable to the children in question, and resulting from payments to Mrs. Hampson of funds chargeable only to income. We do not think the case is brought within the rule invoked that where the will evidences an intent to provide an income sufficient for the support of the beneficiaries, the principal may be encroached upon in case the income is palpably insufficient for such support. Lenow v. Arrington, 111 Tenn. 720, 723, 69 S. W. 314. Assuming (but not deciding) that the will contemplated encroachments upon the principal where necessary for support, and assuming that Mrs. Hampson had no income from the real estate belonging to her or to the trust estate (except the use of the Kerr avenue homestead), we cannot say that she needed to encroach upon the principal of the trust. In the seven years between testator's death and the failure of the Schoolfield-Hanauer Company about $18,000 of her individual personal estate, as well as about $5,000 representing claimed income from her net interest in the testator's estate, were applied upon her account with the Schoolfield-Hanauer Company (and thus in effect applied to the support of herself and children), to say nothing of the large balance

on account left standing against her. Of course, no encroachments could result from conveyances to the trustee, under the sixth item, of Nodena Plantation, the Kerr avenue homestead, the real estate allotted under partition proceedings, or from the application of Mrs. Hampson's property, held independently of the will, upon the Schoolfield-Hanauer account or otherwise.

It appearing that Miller's administrator received no assets and understands that the estate has none, complainants were not prejudiced, as the record now stands, by the dismissal of the bill as to the administrator.

The master relieved the executor and trustee from interest on funds of the estate in his hands from time to time and in bank at his death; as to the first, because very little was on hand at a time, and the account was active; as to the latter, because complainant could have had a successor trustee appointed without delay. We are content to approve this course as to the balances shown by the executor's accounts as in his hands, without, however, affecting the subject of interest upon special items otherwise directed by this opinion.

To discuss each of the large number of propositions presented by counsel would unwarrantably extend this opinion. We have, however, considered them all, and have omitted reference to none involving, as we think, prejudicial error.

The decree of the district court is affirmed as concerns John H. Wade & Sons' title to the Front Street lot and Edith Brooks Schoolfield's title to the Townsend land, with costs of this court in favor of those appellees, as well as Mr. and Mrs. Norfleet, against complainants and cross-complainants. In other respects the decree should be modified to the extent only we have indicated.

The record will be remanded to the district court, with directions to take further proceedings not inconsistent with this opinion.

Complainants and cross-complainants will recover the costs of this court against appellees other than Wade & Sons, Edith Brooks Schoolfield, and Mr. and Mrs. Norfleet.

On Petitions for Rehearing.

Rehearing is asked by Dudley T. Schoolfield and Mrs. Norfleet, and by John H. Poston and Mrs. Hill as sureties on the executor's bond. One point, perhaps, requires specific mention. By our opinion, Mr. Schoolfield was allowed credit on the accounting for $4,796.24, with interest thereon, as his share of the foreclosure sale price of Nodena Plantation. We are asked to determine definitely the interests of Mr. Schoolfield and Mrs. Norfleet in the plantation, and to declare each of those parties entitled to a share of the property and to an accounting for profits. Our opinion, at least impliedly, determines Mr. Schoolfield's rights as limited to the accounting credit stated. To this we adhere.

Even were we to disregard his failure to claim in this suit an interest in the plantation, except by cross-bill (which was dismissed by the court below) filed after the coming in of the commissioner's report under the order for accounting, we think the relief directed by our opin-

ion all he is entitled to, in view (if for no other reason) of the transaction evidenced by the conveyance by Schoolfield and Poston, trustees, to W. W. Schoolfield, trustee under the sixth item of the will, of all title and interest vested in the trustees under the commissioner's foreclosure deed, and W. W. Schoolfield's participation in such conveyance. Nor is it maintainable that the value of the testator's interest in the plantation was regarded as $70,815.02, instead of $35,407.51. The former figure is far in excess of the entire advances to the beneficiaries under the eighth item, as shown by the schedule of trustee's receipts and disbursements contained in our opinion; while the latter amount, added to the amounts advanced for Mrs. Hampson's account (aside from the so-called personal account representing the testator's liability to her), is but a few hundred dollars less than advanced to the beneficiaries under the eighth item.

The five years' rent of plantation, with interest, was intended to be applied, as the master applied his award on his account, for the benefit of both classes of beneficiaries, and not against the item of $21,114.60.

Mrs. Norfleet's claim was not considered by the court below, and she has not appealed. The decree was affirmed without prejudice to her rights. We cannot properly go further.

All the other points raised are covered by our decision. A careful consideration of the arguments advanced fails to convince us that the decision is wrong.

The petitions for rehearing are denied.

SOUTHERN PINE LUMBER CO. v. CONSOLIDATED LOUISIANA LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. October 5, 1914.)

No. 2490.

PUBLIC LANDS (§ 173*)—TEXAS SCHOOL LANDS—LANDS SUBJECT TO SALE—CONSTRUCTION OF STATUTE.

Act Tex. April 15, 1905 (Laws 29th Leg. c. 103) § 8, providing for the sale by the Commissioner of the General Land Office of public lands of the state set apart by prior statutes to the public school fund, does not authorize the Commissioner to place upon the market or sell lands claimed adversely to the state and to the school fund in good faith under Spanish or Mexican grants until the controversy between the state and the claimants has been adjudicated in favor of the state.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 544–551; Dec. Dig. § 173.*]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Action at law by the Consolidated Louisiana Lumber Company against the Southern Pine Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed.

This suit was brought by the Consolidated Louisiana Lumber Company, hereinafter referred to as the Consolidated Company, a Louisiana corporation, against the Southern Pine Lumber Company, a Texas corporation, here-

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

inafter designated the Southern Company, to recover damages for the alleged wrongful conversion of timber cut, removed, and appropriated by the latter company from seven surveys of land situated in Trinity county, Tex., located and patented under a file made by Robb Stevenson, July 5, 1905, on top of the south league of the Jose A. Sepulveda grant, under which the Southern Company claimed title and the right to cut and remove the timber in question. The Southern Company filed a cross-action, making Henry B. Fall defendant; but, in view of the disposition made of the case, the cross-action becomes a matter of little importance.

Stevenson sought to purchase the land and timber thereon under and by virtue of section 8 of an act of the Texas Legislature, approved April 15, 1905. Session Acts, p. 159, c. 103. Under this file a survey was made by the county surveyor of Trinity county September 18, 1905, embracing 4,287½ acres and covering the south Sepulveda league, that was afterwards subdivided into the seven tracts in controversy. The surveyor's report showed a list of settlers, naming 19, who had improvements and inclosures on scrap school land known as the Sepulveda south league in Trinity county. On June 30, 1906, the county surveyor filed in the General Land Office at Austin field notes of the seven surveys, and on September 1, 1906, the Land Commissioner notified Stevenson that a survey had been made and that he had the right for 60 days to purchase the land and timber. Thereafter, Stevenson having made application to purchase the land and timber, and having complied with the statute as to the payment of the purchase money and in other respects, patents were issued to him in the name of the state for each of the surveys.

The record discloses that the Consolidated Company exhibited a chain of conveyances from Stevenson to itself, conveying the said several surveys with the timber thereon and all causes of action and claims for damages on account of cutting timber or committing other trespasses thereon. The Southern Company in defense relied upon a grant that had been issued to Jose Antonio Sepulveda upon a concession, made by Jose A. Saucedo (sometimes written Sancedo), a political chief of Mexico, in 1824, and afterwards confirmed by him in 1826. The Sepulveda concession was for two leagues of land, one to be located on San Pedro creek and the other on the Cochino; but, because one of the leagues applied for conflicted with the survey of Daniel McGulen, the alcalde, by virtue of an agreement between the interested parties, placed Sepulveda in possession of two leagues on the Cochino creek.

For a better understanding of the questions involved, the following substantially correct statement of the case by the Southern Company is here inserted:

"As shown by copy of the grant hereinbefore set out, Jose A. Sepulveda made application to the honorable political chief of the province of Texas, June 1, 1824. On July 20, 1824, Jose Anto. Saucedo acted on the application for two leagues of land and passed it to the alcalde of Nacogdoches, with instructions to see if the land was vacant, and, if so, 'to grant to the petitioner, Jose Antonio Sepulveda, and put him in possession, in the name of the government of the Mexican federation, of the two leagues that he solicits,' etc. On January 3, 1826, Sepulveda addressed another communication 'to the Honorable Chief of the Department of Texas,' complaining because one Daniel McGulen had prevented his being placed in possession of one of the leagues. Thereupon Saucedo entered the following order: 'San Fernando de Bexar, February 15, 1826. Considering that the interested party obtained through competent authority an order to be put in possession of the two leagues treated of in the foregoing petition, the alcalde of Nacogdoches should not have placed Daniel McGulen in possession of that which is situated at San Pedro. Therefore, pass to the present alcalde of that town, in order that he may have it vacated and put the petitioner in possession of the said two leagues in accordance with the decree of the political chief of this province. [Signed] Saucedo. [Rubric.]'

"Based on these orders, Luis Procela, the citizen constitutional alcalde of Nacogdoches, placed Sepulveda 'in possession of two leagues of land which according to said decrees he orders to be granted to said Sepulveda, one on San Pedro creek and the other on said Cochino; and for the reason that Daniel McGulen was already settled at San Pedro, having built houses and made

fields, the two parties saw fit to agree that there be given to said Sepulveda the two leagues together on the Cochino creek, so as to avoid all discord that could have been between them. The said agreement having been had, I began to extend the first measurement from said creek course to the south, where 10,000 varas were completed and a white oak with sufficient marks was set as a landmark; then extended the course to the west, where 10,000 varas was completed and a white oak was set as a mark; then running the same measurement, course north, 10,000 varas were completed, where adequate signs were placed; then running the same measurement, course east, 10,000 varas were completed to where we commenced—it being contiguous on all sides with vacant lands.' The alcalde placed Sepulveda in possession of said land, according to the grant, on the 16th day of March, 1826.

"Jose A. Sepulveda conveyed his grant to Samuel Maas by deed dated September 7, 1838, for a recited consideration of $5,000. Samuel Maas in turn conveyed by quitclaim deed to Jesse Duren and Daniel Daly, July 13, 1857, said two leagues, reserving out of the same the following tracts: 'Covered by several land certificates or headright claims known as the Alexander Henry claim, consisting of two-thirds of a league and one labor, for which patent was obtained for M. Seeligson and Maas, August 3, 1847; also the John Appleman claim, consisting of seven and one-third labors, patent obtained July 3, 1847; also Jacob Buhl.' Said Henry Appleman, and Buhl surveys were in partial conflict with the north league of said Sepulveda grant.

"Jesse Duren and Daniel Daly, and those holding under them, made numerous conveyances of portions of the south league of the Sepulveda grant, it being the portion covered by the Stevenson surveys in controversy, to a number of people, who put their deeds of record, paid taxes, and established their homes thereon; many living thereon for periods ranging from 10 to 50 or 60 years. It is not material here to trace their titles. It was admitted by plaintiff 'that the defendant Southern Pine Lumber Company had acquired, before file was made by Robb Stevenson on the surveys in controversy, to a number of people, who put their deeds of record, paid taxes, and established their homes thereon; many living thereon for periods ranging from 10 to 50 or 60 years. It is not material here to trace their titles. It was admitted by plaintiff 'that the defendant Southern Pine Lumber Company had acquired, before file was made by Robb Stevenson on the surveys in controversy, whatever title Daniel Daly and Jesse Duren had to the timber which was in controversy, acquiring the same through a number of mesne conveyances, and that some of the deeds to the Southern Pine Lumber Company conveyed land and some timber on it, as set out in the defendant's answer.' It was further admitted 'that there are all told something over one hundred and twenty-five deeds in the chain of title set up by defendant to the various tracts of land and timber claimed by it, which have been from time to time filed and placed of record in Trinity county, Tex., at dates ranging from 1858 or 1859 to the present, but the bulk of them being placed of record since 1873. The intent of this admission is not to admit that the defendant in fact acquired title through this deed, but is to admit that they acquired whatever title Jesse Duren and Daniel Daly had to the land in controversy.'"

As disclosing the state's recognition of the Sepulveda grant, the statement of the Southern Company proceeds:

"As shown by the depositions of J. T. Robinson, Commissioner of the General Land Office, the Sepulveda two-league survey is delineated on the map of Houston county of 1841, the map of Houston county of 1858 and 1859, the map of Trinity county of 1862, the map of 1868 and 1877, the map of 1882, the map of 1896, and the present official map. He testified in part as follows: 'There is a map in this office bearing the following title: "A Map of Houston County" (copied from a map by George Aldrich by H. L. Upshur, draughtsman General Land Office, 1841). The J. A. Sepulveda title appears delineated on this map.' * * * 'The next map upon which I find the J. A. Sepulveda title delineated is that of Houston county of 1858 and 1859, by C. C. Stremme.' 'The next map upon which I find the J. A. Sepulveda title delineated is that of Trinity county, which according to its title was compiled by J. Browne in May, 1862, and drawn by R. Ricchel in June, 1862.' 'The next map upon which I find the J. A. Sepulveda title delineated is a tracing labeled "Houston County, December, 1877."' 'The next map upon which I find said J. A. Sepulveda title delineated is that of Houston county, dated October, 1868.' 'The next map upon which I find the J. A. Sepulveda title delineated is that of Trinity county, of date 1882.' 'The next map upon which I find the J. A. Sepulveda title delineated is the present map of Trinity coun-

ty, dated August 10, 1896, by Hill.' 'Said Sepulveda title is also delineated on the present official map of Trinity county of September, 1905.'"

The following correspondence between Messrs. Nunn & Nunn, Attorneys at law, and the Commissioner of the General Land Office, is disclosed by the record:

"Crockett, Texas, October 17, 1902.

"Hon. Charles Rogan, Austin, Texas—Dear Sir: You will please furnish us at your earliest convenience with information as to when the J. A. Sepulveda two-league grant of land in Trinity and Houston counties was first put upon the maps in your office, and also, if you can, explain why this grant for two leagues of land, with measurements embracing four leagues, should be put upon the map at all. Of course, it was done before you entered office; but we suppose an examination of the papers there will give us some information on this subject. We should like to know by what surveyor and at whose instance and when this map was made showing this land to be located. We do not think their lines could ever be located by the grant, and we must think that there has been some mistake about this matter.

"Yours truly, Nunn & Nunn."

To which the Land Commissioner replied as follows:

"Messrs. Nunn & Nunn, Crockett, Texas—Dear Sirs: Replying to yours of October 17th last, would advise that the two leagues of the J. A. Sepulveda appear on all the old maps of Trinity county in this office, and on map of 1862 the claims appear as four leagues. As to when same was plotted on the maps of this office we are unable to state. The Spanish translator will give you such information as he may have as to the whole. The application of Sepulveda was dated June 1, 1824; the cession of two leagues, July 2, 1824; the second application, January 21, 1826; the second cession, or confirmation of the first, on the 19th of February, 1826; active possession of final title, March 15, 1826. In the meantime the colonization laws were passed March 14, 1824, which restricted headrights of this class to one league. The southern league having remained without adverse location on the maps of this office, being in the form of a square, and on the original survey, will not be disturbed after so many years, but will be presumed to be the one chosen by the owner and acquiesced in by the government. The corresponding clerk who has charge of this character of work has been sick, which caused a delay in answering your letter.

"Very respectfully, Charles Rogan, Commissioner."

On April 25, 1862, the Commissioner addressed a letter, of which the following is a copy, to Hon. George F. Moore:

"George F. Moore, Esq., Nacogdoches—Dear Sir: Yours of the 15th inst. has been received. Contents noted. As there is no evidence of the title of Jose Antonio Sepulveda having been declared invalid by the courts, we will have to respect the title and not issue patent for any surveys that may have been made upon the land.

"Yours very respectfully, S. Crosby."

It is further shown by the record that the Sepulveda grant has been included as a titled grant in the abstracts of titled lands, published under authority of laws of the state; that taxes have been paid for a great number of years on parts of the land by several parties; that numerous claimants have asserted title under the Sepulveda grant by buying and selling lands and placing deeds upon the records; and that the state has issued a number of patents calling for the boundaries of the Sepulveda survey.

Upon the trial of the cause the court gave the following peremptory instruction in favor of the Consolidated Company:

"The court charges you as a matter of law that the plaintiff has established the fact that it was the owner of the timber in controversy, and that the defendant had no title thereto. You are, therefore, instructed to find a verdict for the plaintiff for the value of the timber cut and removed by the defendant from the land in controversy, and the amount of your verdict must be determined from the evidence before you under the instructions which the court will submit for your guidance."

Under the instructions of the court the jury returned a verdict for damages in favor of the Consolidated Company, and also gave damages to the Southern Company against Fall on the cross-action, and judgment was accordingly rendered thereon. To the instructions of the court the Southern Company duly excepted, and prosecutes error to reverse the judgment.

Cone Johnson, of Washington, D. C., J. M. Edwards, of Tyler, Tex., George C. Greer and Ben B. Cain, both of Dallas, Tex., R. O. Kenley, of Groveton, Tex., and Johnson & Edwards, of Tyler, Tex., for plaintiff in error.

E. W. Townes and Thomas H. Ball, both of Houston, Tex., T. N. Jones, of Tyler, Tex., W. D. Gordon, of Beaumont, Tex., and L. A. Carlton, of Houston, Tex., for defendant in error.

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

MAXEY, District Judge (after stating the facts as above). It is a well-recognized principle of law that, in actions of trespass to try title, the plaintiff must recover upon the strength of his own title. If, then, the Consolidated Company exhibited a valid title in itself to the timber and land in controversy, the judgment was right. But if, on the other hand, the title relied upon by it was invalid, the judgment was wrong. We are thus brought to a consideration of the question of the validity or invalidity of the title exhibited by the Consolidated Company, and upon its solution will depend the result of the present suit.

To solve the question it becomes necessary to ascertain whether the Commissioner of the General Land Office of Texas had authority to place the land upon the market for sale and to issue patents to Stevenson; it being conceded that, if the authority existed, the patents passed an indefeasible title to Stevenson and to his remote vendee, the Consolidated Company.

The question suggested was directly raised by the Southern Company in the following requested instruction, which was refused by the trial court:

"The evidence in this case shows that the land and timber in controversy was not on the market subject to sale by the Commissioner of the Land Office at the time the applications were made to purchase the same, nor at the time the land or timber was awarded to Stevenson, nor at the time the timber deeds were executed or the patent to the land issued, and the act of the Commissioner in attempting to sell the land and timber was without authority of law and passed no title to the plaintiff, and the plaintiff cannot recover in this case, and you will find a verdict for the defendant."

It has been shown in the statement of the case that Stevenson made the purchase of the land and timber under section 8 of the Act of 1905, and it clearly appears that, in making his purchase, he complied with the provisions of the act. If the Land Commissioner had authority to place the land upon the market and sell the same, Stevenson's title was unassailable. Did he have such authority?

After carefully considering the question we have reached the conclusion that he did not have the authority claimed. Generally speaking, it may be said that he was invested with authority to sell the lands

belonging to the school fund as provided by the act of 1905; but where lands were held, occupied, or claimed by any person, association, or corporation adversely to the state, or to such fund, they formed no part of the school fund until their recovery by the state in a suit instituted by the Attorney General. Section 8, Act Feb. 23, 1900. See Session Acts 1900, First Called Session, pp. 33, 34. And we think this is especially true in respect of lands held or claimed by persons adversely to the state and to the school fund under Spanish or Mexican titles, since it is expressly provided in section 8 of the act of 1905:

"That land heretofore or hereafter recovered by the state from claimants holding or claiming same under Spanish or Mexican titles shall be considered as vacancies disclosed by the official maps, and the person who in good faith so held or claimed such land under the claim aforesaid shall have a prior right for ninety days after the taking effect of this act, or after the date of final recovery of such land hereafter, to file on and purchase four sections of six hundred and forty acres each for cash," etc.

In 1904 a similar question was passed upon by the Supreme Court of Texas in Juencke v. Terrell, Commissioner, 98 Tex. 237, 239, 82 S. W. 1025, 1026, in which was construed section 6 of the act of 1900. The reasoning of Mr. Chief Justice Gaines applies with peculiar force to the present case, and the opinion is inserted in its entirety:

"This is a motion for leave to file a petition for a writ of mandamus against the Commissioner of the General Land Office. The facts relied upon for the grant of the writ, briefly stated, are as follows: In the year 1904 the relator, desiring to purchase a tract of 640 acres of land in Liberty county under the act of April 15, 1901, amendatory of the sixth section of the act of February 23, 1900, which set apart the unappropriated public domain of the state to the public school fund and provided for its sale, filed his application to purchase, caused a survey to be made by the surveyor of the county, and the application and field notes to be returned to the Land Office. For the purposes of this opinion it may be assumed that all the requirements of the statute were complied with. The Commissioner refused to approve the field notes, and to classify and value the land, and to place it upon the market, because the survey was 'in conflict with what appears to be a prior and incomplete grant of a league of land made by the governments of the states of Coahuila and Texas to Phillip P. Dever.' The petition further alleges, in substance, that R. M. Vaughan and F. P. Works claim to be owners of, or to have some interest in, the tract sought to be purchased, and that they claimed under the incomplete grant before mentioned.

"We are of the opinion that, where there is a dispute as between the state and another party as to the title to a tract of land, the Commissioner cannot be compelled to make a sale. It is hardly within the scope of his functions or duties to pass upon titles in such cases; and we should be reluctant to hold that the Legislature intended to impose such duty upon him, in the absence of language in the statute showing clearly that intent. It is known that at the date of the original act which appropriated these lands to the school fund there were many large bodies of land lying in the state held by persons who asserted title thereto, and whose titles had never been adjudicated and were not conceded. It is unreasonable to suppose that the Legislature intended to put such lands upon the market for sale, and thus to turn loose upon the courts a flood of litigation as between the purchasers and the adverse claimants. On the contrary, we think that the purpose of the Legislature with reference to them is shown by the eighth section of the act. That section in part is as follows: 'When any of the lands described in this act, or any of the other public lands of the state held or owned by any fund, or any land in which this state or any such funds have an interest, are held, occupied or claimed by any person or association or corporation, adversely to the state, or to such fund, it shall be the duty of the Attorney General to

institute suit therefor,' etc. From this we think it is to be inferred that the policy of the Legislature in reference to lands which were claimed by third parties was first to establish its title before putting them upon the market for sale, and that it was not intended that they should be sold until the controversy between the state and the claimants had been adjudicated.

"The present Constitution contains this provision: * * * 'All genuine land certificates heretofore or hereafter issued shall be located, surveyed or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the General Land Office; or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him.' Const. art. 14, § 2. This provision does not prohibit the Legislature from providing for the sale of such lands; but it very clearly evinces the policy of the state not to encourage litigation by permitting the acquisition from the state of lands which appear upon the official records, or by actual occupancy, to be claimed adversely to it. It should not lightly be assumed that the Legislature intended to depart from that policy.

"Our conclusion is that section 6 of the act under construction applied only to such lands as appeared upon the maps and records of the General Land Office not to be claimed by other parties and to such as had been adjudged to the state, if ever so claimed."

In view of the fact that the south league of the Sepulveda grant, the land involved in the present controversy, has been claimed adversely to the state since 1824; that it has been for more than half a century delineated upon the maps of the Land Office, and regarded by that office, or by some of its incumbents, as a valid grant; that there are, and have been for a number of years, numerous persons residing on the land, paying taxes and claiming under the Sepulveda title; and in view of other pertinent facts appearing in the statement of the case—it is, repeating the language of the Supreme Court, "unreasonable to suppose that the Legislature intended to put such lands upon the market for sale, and thus to turn loose upon the courts a flood of litigation as between the purchasers and the adverse claimants." We are firmly impressed with the conviction that it was the intention of the Legislature, as manifested by the acts to which reference has been made, to reserve from sale lands claimed adversely to the state and to the school fund in good faith under Spanish or Mexican grants, "until the controversy between the state and the claimants has been adjudicated" in favor of the state. In the absence of such adjudication the lands could not be legally placed upon the market for sale; and it follows that the act of the Commissioner in selling the land in question to Stevenson was against the law, and hence without validity.

We are unable to give our assent to the suggestion, made by the Consolidated Company, that the Legislature intended, either by the act of 1905, or by any subsequent legislation, to change or in any manner to modify the rule announced in Juencke v. Terrell.

It is further stated by counsel in their brief that the question here involved was determined in favor of the Consolidated Company by the Attorney General and Land Commissioner, and that the practical construction of those two officials is of great weight, and should be so regarded by a United States court in construing a state statute. In this connection counsel refer to G., H. & S. A. Ry. Co. v. State, 77

Tex. 367, 12 S. W. 988, among other authorities. In 77 Tex. at page 388, 12 S. W. 995, it was said by the court:

"But when, as in this case, seven successive Legislatures have through a period of 13 years acted upon a given construction of the Constitution; when the department intrusted with the immediate administration of the land system of the state has uniformly concurred in that construction, and when successive Governors of the state, eminent for their patriotism and intelligence (more than one of them having first served with distinguished success in this court), have approved it, we feel that nothing less than an absolute conviction that they have all been wrong would justify us in so deciding."

The principle announced is a salutary one, and would be readily applied in the present case, if the facts here involved were in the slightest degree similar to those appearing in the case cited. Without discussing the testimony, we deem it only necessary to say that the principle is wholly inapplicable to the case at bar.

Having reached the conclusion that the title of the Consolidated Company is without validity, and hence that that company must fail in the suit, it becomes unnecessary, as it would be improper, in the absence of real parties in interest, to determine whether the south league of the Sepulveda is a subsisting valid grant. Upon that question, therefor, we intimate no opinion.

In view of the foregoing, we are of the opinion that the trial court erred in refusing to give the instruction requested by the Southern Company, and for the error thus committed the judgment against that company and Fall should be reversed, and the cause remanded for a new trial. And it is so ordered.

NOTE BY THE COURT.—Some days prior to his death, Judge SHELBY communicated by letter his concurrence in the foregoing opinion.

HOCKING VALLEY R. CO. v. NEW YORK COAL CO.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1914.)

No. 2453.

1. LIMITATION OF ACTIONS (§ 35*)—PENAL STATUTES.

Rev. St. Ohio, § 3373–1, requiring railroad companies to extend to all, without discrimination, equal opportunities and facilities for receiving and shipping freight of the same class, and declaring that a railroad failing to do so shall be liable in a civil action to the party injured for the damages sustained, but that the recovery in any such action shall not be less than $500, is not a penal statute, within Gen. Code Ohio, § 11225, providing a limitation of one year for an action "on a statute for a penalty or forfeiture"; the right of action being given only to the injured party, and being purely remedial, and this notwithstanding the minimum recovery provided.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158–167; Dec. Dig. § 35.*]

2. LIMITATION OF ACTIONS (§ 34*) — STATUTE APPLICABLE — STATUTORY LIABILITY.

If an action is on "a liability created by statute other than a forfeiture or penalty," for which Gen. Code Ohio, § 11222, provides a six-year limitation, it is controlled by such section, and not by section 11224, providing a four-year limitation for an action for "an injury to the rights of plaintiff not arising on contract."

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151–157; Dec. Dig. § 34.*]

3. LIMITATION OF ACTIONS (§ 34*)—"LIABILITY CREATED BY STATUTE."

A "liability created by statute," within Gen. Code Ohio, § 11222, prescribing a limitation for an action on such a liability, is one which would not exist, but for the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151–157; Dec. Dig. § 34.*

For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

4. LIMITATION OF ACTIONS (§ 34*)—LIABILITY CREATED BY STATUTE—SWITCHING FACILITIES.

The duty of a railroad company to give shippers equality of switch track connections did not exist at common law; so that an action under Rev. St. Ohio, § 3373–1, for failure to do so where the railroad has given such facility to another shipper of freight of the same class, is one on a "liability created by statute," within Gen. Code Ohio, § 11222, prescribing a six-year limitation of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151–157; Dec. Dig. § 34.*]

5. COURTS (§ 365*)—STATE AND FEDERAL COURTS—COMMON LAW.

A federal court is not bound by the decision of a state court as to what the common law is.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. § 365.*

Conclusiveness of judgment between federal and state court, 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.]

6. APPEAL AND ERROR (§ 193*)—NONOBJECTION TO PLEADING—INDEFINITENESS.

Failure of the petition, in an action under Rev. St. Ohio, § 3373–1, for denial by defendant railroad company to plaintiff of a switch track con-

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

nection, when it had given one to another shipper of freight of the same class, to specify such other, is mere matter of indefiniteness, for which the court, by provision of Gen. Code Ohio, § 11336, may require amendment, but of which defendant, failing to ask for such specification, may not complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226–1238, 1240; Dec. Dig. § 193.*]

7. APPEAL AND ERROR (§ 1035*)—HARMLESS ERROR—THEORY OF TRIAL.

The petition and proof making a case under the first clause of Rev. St. Ohio, § 3373–1 (that is, that defendant railroad company denied plaintiff a switch track connection, when it had given one to another shipper of freight of the same class), it is immaterial that the case was tried as one under the second clause, which contains the additional element that defendant was interested in the freights of the other shipper, though this be not stated by the petition or shown by the evidence; the measure of damages not being different, and the trial court having substantially reduced the recovery, presumably to what it considered not unreasonable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4031; Dec. Dig. § 1035.*]

8. COMMERCE (§ 13*)—REGULATION—STATE AND FEDERAL STATUTES.

The Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [Comp. St. 1913, § 8565]) having no application to intrastate commerce, state statutes regulating commerce are void only so far as they affect commerce of an interstate nature.

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

9. COMMERCE (§ 89*)—DISCRIMINATION BY CARRIER—SUBMITTING CLAIM TO INTERSTATE COMMERCE COMMISSION.

The petition, in an action under Rev. St. Ohio, § 3373–1, for denial by defendant railroad company of a switch track connection, when it had given one to another shipper of freight of the same class, not alleging that plaintiff had been denied the connection with respect to interstate freights, and the evidence not showing this, or even that plaintiff was engaged in interstate transportation, it was not necessary to maintenance of the action that plaintiff should have submitted his claim to the Interstate Commerce Commission.

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

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action by the New York Coal Company against the Hocking Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lawrence Maxwell, of Cincinnati, Ohio, for plaintiff in error.

Judson Harmon, of Cincinnati, Ohio, and L. G. Addison, of Columbus, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. The New York Coal Company sued the Hocking Valley Railroad Company to recover damages for the withholding from January 12, 1903, to November 29, 1904, of certain switching connections between plaintiff's mine and the Snow Fork branch of defendant's road, in Hocking county, Ohio. Defendant demurred on the ground that the action was barred by the statutes of lim-

itation, and that the petition stated no cause of action. The demurrer was overruled, defendant answered, its pleas of the statutes of limitation were demurred to, and demurrer sustained. On trial, plaintiff recovered verdict and judgment.

The questions involved, aside from rejection of the two defenses mentioned, will sufficiently appear in the course of this opinion. The petition rested defendant's alleged duty upon the "laws of the United States" as well as the Ohio statutes. The court below has throughout treated the action as based solely on section 3373–1 of the Revised Statutes of Ohio, which is printed in the margin.[1]

In support of its plea of limitation defendant invokes section 11225 of the General Code of Ohio, which provides a limitation of one year to an action "upon a statute for a penalty or forfeiture," as well as section 11224, which requires an action for "an injury to the rights of the plaintiff not arising on contract" to be brought within four years. The suit was brought January 9, 1909. If either of the two statutes mentioned applies, the action was barred. If, however, the action is upon "a liability created by statute other than a forfeiture or penalty," and so falls within section 11222, which allows six years for beginning suit, the action was begun in time.

[1] We think it clear that section 3373–1 is not a penal statute within the limitation laws of Ohio. It provides no penalty or forfeiture at the instance of, or for the benefit of the public. The right of action is given only to the injured person, and is purely remedial in nature. Huntington v. Attrill, 146 U. S. 657, 667, 668, 13 Sup. Ct. 224, 36 L. Ed. 1123; City of Atlanta v. Chattanooga Foundry & Pipe Works (C. C. A., 6th Cir.) 127 Fed. 23, 28, 29, 61 C. C. A. 387, 64 L. R. A. 721; Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241; affirming the case last cited. It is not rendered penal by the fact that it provides a minimum recovery of $500 "for any violation of this section," or, as expressed in Railway Co. v. Wren, 78 Ohio St. 137, 84 N. E. 785, "if discrimination be proved." Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, is directly in point. The statute there involved related to infringement of copyrights on dramatic compositions, and provided for the assessment of damages "at such sum, not less than one hundred dollars for the first, and fifty dollars for each subsequent performance, as to the

[1] "(3373–1.) Section 2. [Railroad companies must furnish equal facilities to shippers of same class; damages.] It shall be the duty of all railroad companies and of all persons operating a railroad, to secure and extend to all persons, companies and corporations, the same and equal opportunities and facilities for receiving and shipping freights of all kinds, of the same class (and the same and equal opportunities and facilities for receiving and shipping freights of all kinds of the same class), that such railroad company or the person operating such railroad, extends to, has used or enjoys, of and concerning freights owned by such railroad company, or the person operating such road or any of the officers or stockholders therein, or in which it, they or either of them have any interest and any railroad company or person operating any railroad failing to comply with or observe the provisions or requirements of this section, shall be liable in a civil action to the party injured for the damages sustained, but for any violation of this section the recovery in any such action shall not be less than five hundred dollars."

court shall appear to be just." The court said (175 U. S. 156, 20 Sup. Ct. 65, 44 L. Ed. 109):

"Where the statute provides in terms, as the one before us does, for a recovery of damages for an act which violates the rights of the plaintiff, and gives the right of action solely to him, the fact that it also provides that such damages shall not be less than a certain sum, and may be more, if proved, does not, as we think, transform it into a penal statute."

The authority of the cases cited is in no way weakened by anything said in Parsons v. Chicago & Northwestern Ry. Co., 167 U. S. 447, 455, 17 Sup. Ct. 887, 42 L. Ed. 231, which was a case arising under the Interstate Commerce Act. Indeed, a statute may be penal as to one party and remedial as to another. Brady v. Daly, supra, 175 U. S. at page 155, 20 Sup. Ct. 62, 44 L. Ed. 109.

[2, 3] It is also clear that the four-year limitation (section 11224) does not apply, if the action is upon "a liability created by statute other than a forfeiture or penalty." Seymour v. Railway Co., 44 Ohio St. 12, 17, 18, 4 N. E. 236. Under section 11222 a liability created by statute is "a liability which would not exist but for the statute." Hawkins v. Furnace Co., 40 Ohio St. 507, 515.

[4, 5] The District Judge, in his opinion upon the demurrer to plaintiff's petition, followed the construction of section 3373–1 which he regarded as adopted in Railway Co. v. Wren, supra, viz., as imposing upon railroad companies a two-fold obligation, in requiring them to extend to all persons: First, the same and equal opportunities and facilities for receiving and shipping freight of all kinds *of the same class;* and, second, the same and equal opportunities and facilities for receiving and shipping freight of the same kind and of the same class *with respect to freights which it, or any of its officers or stockholders, own or are interested in.* We shall, for convenience, speak of these two requirements as the first and second clauses respectively.

Defendant denies that the statute was so construed in the Wren Case, and contends that the second clause adds nothing to the first, "except to emphasize the intent of the Legislature that opportunities and facilities concerning freights of which the company or any of its officers or stockholders are the owners, or in which they have an interest, are not to be excepted." The syllabus, which contains the authoritative decision of the court, states that:

"1. It is the duty of a railroad company both under the common law, and by statute in this state—section 3373–1, Revised Statutes—to extend to all persons, without favoritism or discrimination equal opportunities and facilities for receiving and shipping freights of all kinds of the same class."

If the broad right of action mentioned in the syllabus, or contained in the first clause, was one created by statute, it is immaterial to the question of limitation which of the two constructions is followed, that adopted by the court below or that of defendant. Plaintiff's substantial grievance, as submitted to the jury, is that it was denied a switching connection from its mine to defendant's railroad, whereby coal in car load lots could be shipped from the mine to and upon defendant's main line of railroad, although such connection had been given to the Buckeye Coal & Railroad Company under similar conditions and with respect to the same class of freights. The question is whether the as-

serted obligation to furnish "the same and equal" switch track connections existed at the common law, or whether it is merely a creature of the statute invoked.

At the common law railroads were obligated to furnish equal opportunities and facilities for shipping freight to the extent, at least, of carrying for all who applied, in the order of application, and at reasonable rates; the weight of authority in this country being in favor of equality of charge to all for similar services (Interstate Commerce Commission v. B. & O. R. R. Co., 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699); although it was said by Mr. Justice Brewer, in Parsons v. C. & N. W. R. R. Co., supra, 167 U. S. at page 455, 17 Sup. Ct. 887, 42 L. Ed. 231, that equality of charge was not required. See, to the same effect, Great Western Ry. Co. v. Sutton, 4 Eng. & Irish App. 226, 257. But the liability here in question is not merely to receive and ship freight. It is to make a switching connection whereby the railroad company would be required to operate an additional switch, with its attendant dangers and delays to its other traffic, and would be compelled either to run its own engines and cars over a piece of track which it had neither constructed nor accepted, or to permit the mine owner to operate cars onto and over the railroad company's tracks.

No authorities have been cited, and we have found none, directly asserting the common-law existence of this obligation. Railway Co. v. Larabee, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352, cited by defendant, is readily distinguished in that no obligation to create a new connection was there involved, but only the hauling of traffic over existing tracks. The railroad company was merely compelled to give the Larabee Company the same services which it had previously given without objection. Nor does Railway Co. v. Wren, supra, in terms declare a common-law duty to give equality in switching connections. The court does say that the first clause of the statute is merely declaratory of the common law, but even that proposition was not involved in the case. Moreover, the specific obligation there in question related only to the furnishing of cars to shippers, and the question presented here was not mentioned.

Of course, this court is not bound by the decision of a state court as to what the common law is. The authorities, so far as they have come to our attention, are, at least inferentially or by analogy, opposed to the common-law existence of this obligation. Thus, in United States v. D., L. & W. R. R. Co. (C. C.) 40 Fed. 101, Judge Wallace, in a case at circuit involving the obligation of a railroad company under the Interstate Commerce Act to transport cattle in cars of a special construction belonging to a transportation company, held that it was "no part of the common-law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike." In Wisconsin, etc., R. R. Co. v. Jacobson, 179 U. S. 287, 296, 21 Sup. Ct. 115, 45 L. Ed. 194, Mr. Justice Peckham said that at common law the courts would be without power to make the order which was made in that case, which required two railroads to provide at an intersecting point facilities, by track connections, for transferring cars between the tracks of the respective companies, with equal facilities for interchange of

cars and traffic between, and the receiving, forwarding, and delivering of cars and property to and from, the respective lines. See, also, statement of Mr. Justice Brown in Interstate Commerce Commission v. B. & O. Ry. Co., supra, 145 U. S. at page 275, 12 Sup. Ct. at page 847, 36 L. Ed. 699, that the common law demanded of carriers "little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable." In Atchison, T. & S. F. R. Co. v. D. & N. O. R. Co., 110 U. S. 667, 674, 4 Sup. Ct. 185, 28 L. Ed. 291, it was said that a constitutional provision forbidding railroads to make *undue or unreasonable* discriminations in charges or facilities for transporting freight or passengers, or to give any preference in furnishing cars or motive power, imposed obligations no greater than at common law. But it could not have been meant to assert the existence at common law of a right to compel *equality* in switching connections; for, although it is also said in the case just cited that the railroad company was prohibited both by the common law and the Constitution of Colorado from *discriminating unreasonably* in favor of or against other railroad companies seeking to do business on its road, it was held that the constitutional provision giving every railroad company the right to connect with any other road, did not, without statutory aid, give the right to a business connection; Chief Justice Waite saying (100 U. S. 682, 4 Sup. Ct. 192, 28 L. Ed. 291), that the common law and constitutional prohibition against unreasonable discrimination for or against another company seeking to do business on its road "does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place." The Chief Justice further said (110 U. S. 680, 4 Sup. Ct. 191, 28 L. Ed. 291):

> "At common law, a carrier is not bound to carry except on his own line, and we think it quite clear if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ."

In Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791, it was held that railroad companies were not bound to furnish, in the absence of statute, to all independent express companies equal facilities for doing an express business upon their passenger trains. In the cases, so far as we have discovered, in which railroads have been held obligated to make connections for the passage of cars over their tracks, or to run their cars over the tracks of others, or to permit other carriers to use their wharves or other terminals, there have existed direct statutory requirements to such effect, many of the cases denying the existence of obligation otherwise. See, for illustration, Railroad Co. v. Minnesota, 186 U. S. 263, 22 Sup. Ct. 900, 46 L. Ed. 1151; Mich. R. R. Commission v. Mich. Central R. R. Co., 168 Mich. 230, 132 N. W. 1068; Stockyards Co. v. L. & N. Ry. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565; L. & N. Ry. Co. v. West Coast, etc., Co., 198 U. S. 483, 25 Sup. Ct. 745, 49 L. Ed. 1135; L. & N. Ry. Co. v. Stockyards Co., 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441; Grand Trunk Ry.

Co. v. Mich. R. R. Commission, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310; Vincent v. C. & A. R. R. Co., 49 Ill. 33; People v. C. & N. W. Ry. Co., 57 Ill. 436.

It is difficult to find basis for a greater obligation on the part of a railroad company to give a switch track connection to a shipper than to another railroad company, especially as the latter is engaged in public transportation, while the former may not be. Judge Taft, speaking for this court in Jones v. Newport News & M. V. Co., 65 Fed. at page 738, 13 C. C. A. 95, in denying the common-law obligation of a railroad company to continue a switching connection actually in use for a period of years, said:

"It may safely be assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public."

If the obligation here in question existed at all at common law, it was too shadowy to be of practical value; and its express imposition by state statutes, as well as to a limited extent by the Interstate Commerce Act, evidences a legislative belief in its nonexistence otherwise. Indeed, even the Interstate Commerce Act does not command strict uniformity of treatment with respect to facilities of shipment, but forbids only undue or unreasonable preference. (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. L. 380 [Comp. St. 1913, § 8565]) Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 219, 16 Sup. Ct. 666, 40 L. Ed. 940. It was not until June 29, 1906, that Congress attempted express regulation of switching connections; and even then the requirement was made subject to the limitations that the connection is reasonably practicable, can be put in with safety, and "will furnish sufficient business to justify the construction and maintenance of the same." (Act June 29, 1906, c. 3591, 34 Stat. 585 [Comp. St. 1913, § 8563]); Winters, etc., Co. v. Chicago, M. & St. P. Ry. Co., 16 Interst. Com. R. 587; Judson on Interstate Commerce, § 158. And in Interstate Commerce Commission v. D., L. & W. R. Co., 216 U. S. 531, 537, 30 Sup. Ct. 415, 417 (54 L. Ed. 605), Mr. Justice Holmes, in speaking of the switch connection amendment referred to, said:

"The statute creates a new right not existing outside of it. Wisconsin, Minn. & Pac. R. Co. v. Jacobson, 179 U. S. 287, 296 [21 Sup. Ct. 115, 45 L. Ed. 194]"

As evidencing the strict construction of the 1910 amendment to this provision of the Interstate Commerce Act, see United States v. B. & O. S. W. Ry. Co., 226 U. S. 14, 19, 33 Sup. Ct. 5, 57 L. Ed. 104.

[6] We therefore think that the action, whether regarded as brought under the first or second clause of the Ohio act, is equally "upon a liability created by statute." We may add that the mere failure to specify the Buckeye Company as the corporation, or one of the corporations, receiving the alleged discriminatory switching connections, was merely matter of indefiniteness and was not fatal; for defendant had the right to ask such specification, and, failing to do so, cannot complain of its lack. See Gen. Code Ohio, § 11336. No complaint of this nature is presented by defendant's brief.

[7] The petition, in our judgment, sufficiently states a case under the first clause of the statute, and there was thus no error in overruling the demurrer. The case was tried, however, as one arising under the second clause, viz., on the theory that defendant was interested in the freights of the Buckeye Company, and it is strongly urged, not only that the petition does not allege such interest, but that there was no evidence tending to show it. The petition alleges that defendant and its officers, directors, and stockholders were "interested in and were owners of the stock of corporations owning and operating coal mines," which were given switching connections with defendant's road. Manifestly, the statutory term "freight owned" refers to what is carried as freight, which in this case was coal. The result of the decisions of the Supreme Court in United States v. Delaware & Hudson R. R. Co., 213 U. S. 403, 415, 29 Sup. Ct. 527, 539 (53 L. Ed. 836), and United States v. Lehigh Valley R. R. Co., 220 U. S. 257, 272, 31 Sup. Ct. 387, 55 L. Ed. 458, would seem to be that the words "any article or commodity. * * * which it may own in whole or in part, or in which it may have any interest, direct or indirect," found in the commodities clause of the Hepburn Act, do not embrace the interest of a carrier in a bona fide producing corporation, as the result of the carrier's mere ownership of stock therein, yet do embrace such carrier's interest where the latter so exerts its power as a stockholder in a producing corporation to so commingle the affairs of both as necessarily to make them practically indistinguishable, and thus to make the two corporations practically one for all purposes.

In the instant case, as submitted to the jury, defendant's liability was made to depend upon a finding that it had so used its power as a stockholder in the coal company as to make the latter virtually a mere dependency or department of the railroad company. On a careful review of the evidence, we are of opinion that it fairly tends to support such finding. Nevertheless the question remains whether the petition sufficiently alleges the situation so found to exist, and unless it is apparent that failure to so allege could not reasonably have prejudiced defendant, it would be our duty to consider the question of pleading. But if we have rightly concluded that the petition states a case under the first clause, and that the liability declared thereby is "a liability created by statute," it would seem immaterial whether a case under the second clause was either alleged or proven; for, eliminating defendant's alleged interest in the Buckeye Coal Company, the same facts relied upon as giving (and necessary to create) a right of action under the second clause of the statute would equally give such right under the first clause, since the first clause, which requires that all shippers shall have the "same and equal opportunities and facilities" for shipping freights of all kinds, would be violated by refusing to plaintiff a switching connection given to another shipper under the same conditions and for the shipment of the same kind of freight, whether or not defendant had any ownership of or interest in the coal of such other shippers.

There is thus no inconsistency between the acts proved or sought to be proved by plaintiff and the acts necessary to support recovery under the first clause, and we have no difficulty in holding that the proofs tended to show a violation of the first clause of the statute. It there-

fore cannot, we think, reasonably be supposed that the jury, which found a verdict for plaintiff under the second clause, would not have similarly found under the first, or that defendant could have been prejudiced by a submission of the case according to plaintiff's contention (possibly made under stress of the defense of limitation) that defendant was interested in the Buckeye Company's freights (so making defendant's liability depend upon a finding of such interest), unless it is reasonably to be apprehended that the jury might have failed to find a verdict, or would have found a smaller verdict, on a theory involving only general discrimination, if uninfluenced by testimony of special discrimination in favor of a dependency of the railroad company. It does not appear that plaintiff's measure of damages would legally be affected by defendant's actual relation to the Buckeye Company. However, it is not denied that defendant was a stockholder in that company, and the difference, so far as its effect upon the verdict is concerned, between such relation and the claimed departmental relation is not well defined. As a practical proposition, it would seem likely that such stockholding relation would have appeared, had recovery been confined to the first clause; but, whether so or not, we would scarcely be justified in ordering a new trial on a vague suspicion that the verdict might have been different, had the proof of an admitted relation not appeared. The evidence that defendant extended to other shippers than the Buckeye Company switching connections denied to plaintiff, in the freight of which other shippers there was no proof that defendant was interested, would have been equally admissible under the first clause. Moreover, the court reduced the actual recovery substantially below the verdict, and presumably to an amount which it considered not unreasonable. We are thus constrained to think it unnecessary to determine whether the petition sufficiently alleged defendant's interest in the Buckeye freights.

It is urged that the action cannot be maintained because plaintiff did not submit its claim of alleged discrimination to the Interstate Commerce Commission. We are not impressed with this contention. The Interstate Commerce Act has no application to intrastate commerce (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 457, 155 U. S. 3, 14 Sup. Ct. 1125, 38 L. Ed. 1047); and it follows that state statutes regulating commerce are void only so far as they affect commerce of an interstate nature. We think the District Judge rightly held that the petition did not allege that plaintiff had been denied the connection with respect to interstate freights; and we have been cited to no testimony tending to show such claim upon the trial, or even that plaintiff is engaged in interstate transportation. For these reasons, if for no other, we think the Interstate Commerce Act has no application to the present action.

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

INTERNATIONAL HARVESTER CO. OF AMERICA v. CARLSON.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4049.

1. BANKRUPTCY (§ 415*) — APPLICATION FOR DISCHARGE — HEARING — LOST RECORD—POWER TO SUPPLY.

Where an order of the bankruptcy court extending the time within which a bankrupt might file exceptions to the report of a special master on objections to the bankrupt's discharge had never been entered of record, and had been lost or destroyed, the court had power to supply the record at a subsequent term.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

2. BANKRUPTCY (§ 415*)—APPLICATION FOR DISCHARGE—REFERENCE.

While applications for a discharge may be referred to the referee in bankruptcy to ascertain and report the facts, such reference is not by consent, and the report of the referee is advisory only; it being the court's duty to pass on the issue whether exceptions are filed to the report of the referee or not.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

3. BANKRUPTCY (§ 415*)—DISCHARGE—REFERENCE—HEARING.

Under Bankr. Act July 1, 1898, c. 541, § 14, subd. "b," 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (Comp. St. 1913, § 9598), imposing the duty of passing on a bankrupt's petition for discharge solely on the district judge, the fact that the judge has sent specifications of objection to a referee for hearing does not absolve him from the duty of passing on the issues raised and exercising an independent judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

4. BANKRUPTCY (§ 22*)—PROCEDURE—EQUITY RULES.

General equity rules may be looked to for analogies in the performance of the administrative work of courts of bankruptcy, but cannot be applied in such courts as rules of court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. § 22.*]

5. BANKRUPTCY (§ 407*) — DISCHARGE — OPPOSITION — GROUNDS — "MATERIAL STATEMENT."

The term "material statement," as used in Bankr. Act 1898, § 14, as amended, providing for refusal of a discharge in case the bankrupt has obtained money or property on credit, on a materially false statement in writing made to obtain credit, means not a blank nor an inference from a blank, but a direct statement, either positive or negative, which is false; and hence a discharge could not be successfully opposed on that ground, because a schedule of liabilities in a financial statement made by the bankrupt in order to obtain credit was left entirely blank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

6. BANKRUPTCY (§ 407*) — DISCHARGE — OPPOSITION — FALSE STATEMENT — "FALSE."

After a bankrupt, who was a farmer, had purchased a farm machinery business, an objecting creditor made an agency contract with him, and in connection with the negotiations obtained from him a financial statement. The bankrupt testified that he made a full disclosure to the agent, and that he depended on him to enter the facts on the statement according

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

to such disclosure, and signed the statement without reading it. *Held* that, though the statement was inaccurate, it was not "false," so as to bar the bankrupt's discharge, under the rule that a statement, to be available for this purpose, must be knowingly and intentionally untrue.

[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, First and Second Series, False.]

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

In the matter of bankruptcy proceedings of George Carlson. From an order overruling objections to the bankrupt's discharge, filed by the International Harvester Company of America, it appeals. Affirmed.

George Wambach, of Des Moines, Iowa, for appellant.

Frank Wisdom, of Bedford, Iowa, for appellee.

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

AMIDON, District Judge. This is an appeal from an order granting a discharge in bankruptcy. The facts are briefly these:

The bankrupt, George Carlson, had been a farmer all his life prior to the year 1909. In the fall of that year he bought out the farm machinery business of a man by the name of Ledgerwood, of Blockton, Iowa. Ledgerwood had been a local agent of the International Harvester Company. A few days after the sale a general field agent of that company applied to Carlson to continue the agency, and entered into a contract with him to supply him certain farm implements. In connection with these negotiations the agent asked Carlson for a financial statement. This statement was made on a form of the company. Carlson himself knew nothing about commercial business. He answered questions put to him by the agent, and the agent filled out the statement. The agent testified that when it was finished he turned it round to Carlson and said: "There it is just as you gave it to me. He looked at it a moment or two, and then signed it." Carlson testified that he did not read the statement, but that he told the agent fully his financial condition, the amount of his property, and the debts he owed. Carlson afterwards became a voluntary bankrupt, and the International Harvester Company filed objections to his discharge, based upon the above statement, alleging that it contained materially false statements.

The petition for discharge and specification of objections were referred to the referee to take the evidence and make findings of fact and recommendations to the court. Testimony was taken by the referee, and he made his report in writing on the 11th day of March, 1913, recommending that the petition for discharge be denied. On the 17th of April, more than 20 days after the filing of the report, the bankrupt filed his exceptions thereto. On the 2d day of May, 1913, the objecting creditor filed a motion to strike the exceptions upon the ground that the same were not filed within the time required by equity rule 66. This motion and the matter of the bankrupt's discharge were brought on for hearing before the court on the 22d day of August, 1913. The court

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

made an order on that day denying the motion and sustaining the exceptions, and reciting in the body of the order that "the court had extended the time to said bankrupt in which to file his exceptions." The order also granted the bankrupt his discharge. At the time this order was made there was nothing of record showing that the time for filing exceptions to the referee's report had been extended. The present appeal was perfected on the 26th of August, 1913. November 5, 1913, the court, on motion of bankrupt's attorney, and without notice to the objecting creditor, made a nunc pro tunc order reciting that the same was based on personal knowledge of the judge, as follows:

"It is hereby ordered this day, as of date March 22, A. D. 1913, that said George Carlson have until April 16, A. D. 1913, within which time to make and file his exceptions to the report of H. H. Whitaker, special master, upon the application of said bankrupt for his discharge for the reason that such order was in fact made on the 22d day of March, 1913, in writing, but not reduced to record. This order is now granted for the purpose of showing the true facts of the case."

By a supplementary record this order and the facts relevant thereto were brought before this court.

This order was made at a term subsequent to the term at which the order which it purports to supply was entered.

[1] It is first objected that the trial court had no power to make the order of November 5, 1913. In the motion it was pointed out that the original order had never been entered of record and had been lost or mislaid. We think the court had power to supply this record at a subsequent term. Its authority to do so is supported by decisions of the Supreme Court and of this court. In re Wight, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; Groton Bridge & Mfg. Co. v. Clark Press Brick Co., 136 Fed. 27, 68 C. C. A. 577; In re Welty (D. C.) 123 Fed. 122.

[2-4] We do not consider the making of this order as at all important, however. The bankruptcy law (section 14, subdivision "b") imposes the duty of passing upon a bankrupt's petition for discharge solely upon the district judge. Subdivision 3 of rule 12 of the Supreme Court to carry the bankruptcy act into effect emphasizes this duty. Referees in bankruptcy have no power to hear such petitions. Such an application may be referred to the referee "to ascertain and report the facts." Such a reference, however, is not by consent, and the report of the referee can be treated as advisory only. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 277, 32 L. Ed. 695; Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; In re Holden, 203 Fed. 229, 121 C. C. A. 435; In re Swift (D. C.) 118 Fed. 348. The duty of the court to pass upon the issue cannot be shifted by such a reference, nor can the duty of the court be dependent upon the filing of exceptions. Orderly practice would require that such exceptions be filed, but the omission to do so is not jurisdictional. When the question of the discharge is brought before the District Court the issue is made up of the specifications of objection to the discharge, and the bankrupt's answer thereto, and not by the report of the referee and exceptions thereto. We are of the opinion, therefore, that it was the duty of the District Judge to hear the cause and exercise an independent judgment thereon. When the referee's report was brought to his notice, he was then,

for the first time, called upon to perform his duty of deciding whether the petition for discharge should be granted or denied. If the filing of exceptions to the master's report would aid him in the performance of this duty, he had ample authority to require such exceptions to be filed, or to consider such exceptions though they were filed late. Counsel for the objecting creditor insists that rule 37 of the bankruptcy rules makes the general equity rules prescribed by the Supreme Court applicable to proceedings in bankruptcy, and that by equity rule 66 (198 Fed. xxxvii, 115 C. C. A. xxxvii) the time for filing exceptions to the report of masters is fixed at 20 days. We do not think that the general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies, but not as rules. The Supreme Court itself has fixed the rules to govern courts of bankruptcy. To hold that the District Court was bound by the report of the referee, because exceptions were not filed within 20 days, would deprive that court of its duty both under the bankruptcy law and the rules of the Supreme Court to pass upon the question of the bankrupt's right to his discharge.

[5] Coming to the merits of the case, we are clearly of the opinion that the decision of the District Court granting the bankrupt his discharge was right. The evidence fails to show that bankrupt made "a false statement in writing." His financial statement under the head of "Assets" states that his stock of goods is worth $1,000, and that he had cattle, hogs, horses, and implements on the farm of the value of $2,500. Under the heading of "business liability" there are numerous subheads such as, "Owing for Merchandise, Notes or Accounts Past Due," "Owing to Banks," "Borrowed Money Other than Bank," "Taxes, Rent, or Other Bills Payable," etc. Opposite these various items is a column for the insertion of the proper amount. This schedule of liabilities is left entirely blank in the statement, and it seems to be contended that because of these blanks the bankrupt states that he owed nothing that could properly come under either of these heads; whereas, in fact, the evidence shows that he was indebted in considerable sums under each head. We do not think that an omission constitutes a "material statement," within the meaning of section 14 of the Bankruptcy Act. There is nothing in any other part of the form which declares that blanks unfilled are to be construed as representing that nothing is owing under the heading. A "material statement" means not a blank, nor an inference from a blank. There must be a direct statement, either negative or positive, which is false, to justify the denial of the bankrupt's discharge.

[6] Again, even adopting the theory of appellant, the statement was not "false." The bankrupt testifies that he made a full disclosure to the objecting creditor's agent, and depended upon that agent to enter the facts according to such disclosure. The bankrupt signed the statement without reading it, and probably without being able to understand its provisions. To be a ground for denying the discharge the written statement must be knowingly and intentionally untrue. Gilpin v. Merchants' National Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023. We do not mean by this that a person who makes a statement in writing for the purpose of obtaining credit shall not be held

responsible for such statement. In such a case negligence easily passes over into fraud. The maker of the statement is bound to know that it will be relied upon and bound to exercise an honest judgment to state his business condition truthfully. But if he is misled into signing an untrue statement by the creditor's own agent, in whom he had a right to rely, the statement is not "false" within the meaning of the statute. Furthermore, to allow the creditor to use such a statement to defeat a bankrupt's discharge would permit it to take advantage of its own wrong.

The decree of the trial court is affirmed.

LUXURY FRUIT CO. et al. v. HARRIS.

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

No. 2645.

BANKRUPTCY (§ 48*)—POWER OF COURT—UNAUTHORIZED COMPOSITION.

Orders made by a court of bankruptcy in proceedings against a bankrupt corporation, without notice to the corporation or its creditors, or their consent, directing that, on payment into court by a stranger to the proceedings of a sum named, to be used in payment of the claims of unsecured creditors which had been proved up to that time, and costs and fees, the proceedings should stand dismissed and the trustee discharged, and the person making such payment should be subrogated to the rights of the creditors paid, *held* without authority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 47; Dec. Dig. § 48.*]

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

In the matter of the Luxury Fruit Company, bankrupt. On petition by W. C. Wright, trustee, to revise orders of the District Court in favor of William Henry Harris. Reversed.

The Luxury Fruit Company was adjudged a voluntary bankrupt March 31, 1914. A receiver was appointed for its estate, which consisted principally of a peach orchard, upon which the crop was rapidly maturing. A meeting of creditors was had, and a trustee elected. The respondent Harris had been a tenant of the bankrupt and while in possession as tenant of the company's property had undertaken to have the property sold and himself become the purchaser. This sale was attacked as fraudulent by the company. Harris interfered with the trustee in his management of the property to such an extent that the trustee brought a rule for contempt against him. This was heard before Hon. William B. Sheppard, judge presiding, and an order was passed enjoining Harris from interfering with the trustee, and directing the trustee to file a plenary suit against Harris to remove the cloud upon the title to the property of the bankrupt in his possession. This plenary suit in equity was filed within the time fixed by the order.

Harris applied to the court for a modification of the order passed on the rule for contempt, praying that he should be authorized to give bond in the sum of $5,000, and the property should be turned over to him pending the trial of the plenary suit. At the same time the First National Bank of Fort Valley, claiming to be a secured creditor and to hold certain of the stock of the company as collateral, filed a petition attacking the adjudication in bankruptcy and praying the court to vacate the order adjudging the company a

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

bankrupt, and the election of a trustee, and to dismiss the proceedings. In this petition the bank offered to pay certain of the unsecured debts scheduled by the bankrupt and to satisfy another debt by the surrender of a note which it claimed to hold against the creditor. It made no offer to pay the expenses or costs of the bankruptcy proceeding. A hearing was had, and the court passed an order, April 25th, as follows:

"In the United States District Court for the Southern District of Georgia.
"In the Matter of Luxury Fruit Company, Bankrupt.
"Petition of First National Bank of Fort Valley.

"This cause coming on to be heard upon the petition of the First National Bank of Fort Valley, Ga., a stockholder in said Luxury Fruit Company, alleged bankrupt, and it appearing from the record that the adjudication was made upon a petition which did not disclose that said petitioner was a corporation or individuals, or that the petition was duly authorized by said corporation, and upon consideration thereof, it is ordered that said petitioner have ten days from date hereof to amend said petition as it may be advised, and upon failure to amend in said time said petition shall stand dismissed and the adjudication thereon revoked.

"And it further appearing to the court that an offer of compromise is made by W. H. Harris to pay all unsecured creditors in full of all claims and demands and costs of administration, except attorney's fees, it is further ordered that the referee, upon deposit by said Harris of a sum in cash sufficient to pay all unsecured claims against said estate, and the costs of administration to the date of said compromise, the said referee shall give ten days' notice to said creditors of said compromise offer, and upon said meeting being held after said notice and acceptance, the referee is directed to pay to said unsecured creditors the amounts of their claims and the costs of administration as provided by law, which said payments shall subrogate said Harris to all the rights and claims of said unsecured creditors against said bankrupt, whereupon the petition in bankruptcy shall be dismissed.

"It is further ordered that the restraining order heretofore granted be and the same is hereby continued in full force and effect until the provisions of this order are fully determined and carried out, but that said W. C. Wright, trustee be and he is hereby directed to enter into bond to Wm. H. Harris in the sum of $12,000, conditioned as trustee of said estate, to indemnify said Harris against all damage which he may sustain by reason of the issuance of this injunction and any misconduct of said Wright, as trustee, under and through said restraining order.

"It is further ordered and adjudged that this order shall not prejudice the Luxury Fruit Company in any right of action commenced or to be instituted by it to set aside and vacate the title to said property acquired by Harris under and by virtue of any foreclosure proceedings instituted by him.

"Ordered and adjudged this the 25th day of April, A. D. 1914.
"Wm. B. Sheppard, Judge."

Within the time provided by the order the bankrupt amended the original bankruptcy petition, so as to meet the objections raised by the petition of the First National Bank, and this amendment was allowed. The trustee also filed the bond, conditioned as provided in the order, with surety, which was approved. No deposit was made by Harris and no notice given to creditors. On May 4th, without any additional pleadings being filed, and without notice to parties or creditors, the judge, apparently on his own motion, passed an order as follows:

"In the United States District Court for the Northern District of Florida.
"In the Matter of Luxury Fruit Company, Bankrupt.
"Wm. C. Wright, Trustee, v. William Henry Harris.

"This cause coming on to be further heard and considered upon the application of William Henry Harris for a compromise in the said cause, it is ordered that, upon a deposit with the referee of this court by the said Harris of the sum of sixteen hundred seventy-one dollars and ninety cents ($1,671.90)

to cover the amount of unsecured claims proved against said estate of said alleged bankrupt, and the further sum of two thousand five hundred dollars ($2,500.00) as a deposit to cover the reasonable cost of administration hereafter to be heard and determined, and to be fixed as the court may be advised, the reasonable commissions to be allowed the trustee, as well as actual operating expenses to be proved, together with a reasonable attorney's fee, including the costs and commissions of the referee and clerk to be hereafter ascertained and allowed, and upon the above provisions being carried out the trustee herein shall stand discharged and the petition dismissed.

"Done and ordered this the 4th day of May, A. D. 1914.

"Wm. B. Sheppard, Judge."

This petition seeks to superintend and revise the orders of April 25 and May 4, 1914.

The Errors Assigned.

Briefly stated, the 21 assignments of error may be summarized as follows:

First. The order of April 25th is contrary to the Bankruptcy Act and the practice prescribed in bankruptcy cases, and is erroneous:

(a) Because it provided for an irregular composition, not in accordance with the statute, in that the composition was to be made by a third party, not even a creditor, and not by the bankrupt; the bankrupt alone being authorized to submit an offer of composition.

(b) Because no offer of composition or compromise was submitted by Harris, the only offer being by the First National Bank, and that upon entirely different terms from those provided in the order.

(c) Because the compromise was for the benefit of Harris, who was not even a creditor, but with whom the trustee was litigating the title to certain property of the bankrupt without regard to the rights or interest of the bankrupt or any of its creditors.

(d) Because said order provided for the subrogation of Harris to the rights of the creditors whose claims he should take up, without regard to the rights or interest of the bankrupt or of the creditors; no such subrogation being authorized by the Bankruptcy Act.

(e) Because said order wholly disregarded the rights of the secured creditors or of any unsecured creditors who might thereafter prove their claims within the time allowed by law.

(f) Because the procedure provided in the order is wholly unauthorized by the Bankruptcy Act and the general orders promulgated by the Supreme Court.

(g) Because said order, in so far as the same required the giving of a bond by the trustee, is entirely unauthorized by law; the trustee having been directed to bring a plenary suit to cancel a cloud upon the title to the property of the bankrupt in his possession.

(h) Because said order was not in any particular authorized by the pleadings.

Second. The order of May 4th was erroneous:

(a) Because it provided for an unauthorized compromise by a person not a party to the record, save as a defendant in a rule for contempt.

(b) Because there were no pleadings whatever to support said order.

(c) Because the order was passed without regard to the wishes, rights, or interest of the bankrupt or any of its creditors, secured or unsecured.

(d) Because the sums fixed by the court, upon the payment of which the bankruptcy petition was ordered dismissed, were wholly insufficient to pay the unsecured claims and the costs and expenses of the bankruptcy administration.

(e) Because said order provided for the dismissal of the petition and the discharge of the trustee without notice to creditors; such notice being expressly required by sections 58 and 59g of the Bankruptcy Act.

(f) Because the procedure provided in said order is wholly contrary to the provisions and requirements of the Bankruptcy Act.

Orville A. Park and Geo. S. Jones, both of Macon, Ga., for petitioners.

John R. L. Smith, of Macon, Ga., opposed.

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

PER CURIAM. The orders we are called upon to review were intended apparently to effect a compromise by which the real estate scheduled by the bankrupt corporation would be delivered to the claimant, Harris, upon his paying the costs of court, including the costs of administration by the trustee and attorney's fees, and providing for the payment of unsecured creditors who up to that time had proved their claims, and to result in a discontinuance of the bankrupt proceedings.

The order of April 25th provided that the offer of Harris to pay all unsecured creditors and costs of court and costs of administration, except attorney's fees, should be referred for consideration and acceptance to a meeting of creditors after ten days' notice, which looks somewhat to the composition which is provided for in the Bankruptcy Act; but the subsequent order of May 4th practically vacates the order of April 25th in this respect, dispensing with the creditors' meeting and providing that on compliance by Harris in making deposits to the amount of $4,171.90 the trustee shall stand discharged, and the petition in bankruptcy be dismissed. From our examination of the case, we find no law or authority for either one of the orders. Each seems to be amenable to nearly all the objections urged in the assignment of errors.

It is therefore ordered that the petition to superintend and revise herein be granted, and that the orders of April 25, 1914, and May 4, 1914, in the court below, be reversed; costs to be paid by the respondent.

In re DI COLA.

(Circuit Court of Appeals, Third Circuit. November 10, 1914.)

No. 1860.

BANKRUPTCY (§ 272*)—TRUSTEE—SETTLEMENT OF ACCOUNTS.

A trustee in bankruptcy and his counsel, after a successful prosecution of the bankrupt and others for concealing property of the estate, made a settlement by which the defendants restored the property and also paid a sum in cash to be used in paying the cost of the criminal case, including attorney's fees and also the expenses of administration of the estate, and the money was so used by the attorneys with the knowledge of the creditors. *Held* that, while such money belonged to the estate, to be held and accounted for by the trustee as other property, it was within the discretion of the court to refuse to surcharge his account further than to deny him credit for any part of the expenses of administration.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573; Dec. Dig. § 272.*]

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Pennsylvania, in Bankruptcy; James S. Young, Judge.

In the matter of Vincent Di Cola, bankrupt. On petition to revise an order settling the accounts of the trustee. Affirmed.

---

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

Albert Y. Smith, of Pittsburgh, Pa., for petitioner.

Edw. Y. Breck, of Pittsburgh, Pa., for excepting creditors.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This is a petition to revise an order made by the late Judge Young in the District Court for the Western District of Pennsylvania, distributing a fund in bankruptcy. The facts upon which the order is based are found by the learned judge, and in this proceeding are to be taken as true. His opinion—which has not been reported—is as follows:

This case comes before us upon the report of the referee and exceptions thereto by the creditors and by the trustee. The history of this bankruptcy proceeding is necessary to an understanding of the case.

The trustee, having received information that Di Cola, the bankrupt, had concealed his assets, the trustee, through his attorneys, brought prosecutions against Di Cola and his confederates, Ciauri and Blandi, in the court of quarter sessions of the county of Allegheny, in this district, and they were found guilty. Thereupon the defendants, on March 8, 1911, delivered to H. E. Brooks, Jr., the trustee in bankruptcy, and to John N. Piatt, his attorney, certain goods and merchandise and the sum of $2,500 in cash, this delivery being evidenced by the following writing:

"We, H. E. Brooks, Jr., trustee in bankruptcy of the estate of Vincent Di Cola, and John N. Piatt, attorney, do hereby certify and declare that we have this day received bill of sale from Giacomo Blandi, A. Morturano Blandi, and Vincenzo Ciauri for the goods, wares, merchandise, etc., contained in the store rooms and buildings situate at No. 401 and 403½ Larimer avenue, and at the corner of Laurel and Edmund streets, Pittsburgh, Pa., and of the goods held in storage in the Steubenville Transfer & Storage Company, in the name of G. Blandi, together with the sum of twenty-five hundred dollars ($2,500.00) in cash, to be returned, however, to the said Giacomo Blandi, A. Morturano Blandi, and Vincenzo Ciauri, in the event of the court of quarter sessions of Allegheny county in certain proceedings therein pending between the commonwealth of Pennsylvania and Vincent Di Cola et al., refusing or failing to suspend sentence of imprisonment upon the above-named parties, upon payment of costs.

H. E. Brooks, Trustee.

"John N. Piatt, Attorney.

"Witness: William A. Jordan,

"March 8, 1911."

The purpose of this transaction is shown by the evidence to have been to induce the creditors to consent to leniency being extended to the defendants by the court of quarter sessions. The defendants were treated by the court with such leniency that the trustee and his attorneys were allowed to retain the goods and money. It appears from the evidence that the $2,500 (to be exact, $2,495) was received by Piatt, attorney for the trustee, who did not pay it over to the trustee, but deposited it to his own account and distributed it by paying to the trustee $500 thereof, and the balance to certain expenses to detectives, witnesses and others, including the counsel fees to himself and associate in the criminal proceeding. This conduct on the part of Piatt and the trustee presents an unusual and, we hope, a very rare state of affairs in the administration of bankrupts' estates.

Let us clearly state at the outset that the trustee owed the duty to the creditors of securing for them the assets of the bankrupt. It was his duty to investigate, to find and secure the assets, and to use the law to aid him. He was authorized to and did employ attorneys to advise and assist him in the performance of his duties, and these attorneys owed to him and to the court of which they were officers the duty of advising and assisting him in securing the assets. The duty of each was plain. The trustee and his counsel evidently misunderstood their relation to the bankruptcy case, and when the

settlement after conviction of the criminal case was proposed, they undoubtedly regarded the settlement as to the $2,500 as having nothing to do with the bankruptcy proceeding, for they submitted to the creditors the proposition of settlement, fully informed them that the goods surrendered were to go to the trustee for sale and the fund arising therefrom to be distributed by the trustee to the creditors, and the $2,500 to be used for the expenses of the criminal proceeding, including the attorney's fees of Piatt and his associate, Stein, and the expenses of the administration of the bankrupt's estate, so that the proceeds of the stock of goods surrendered might go to the creditors free of the expenses of administration. The evidence shows that not only was this all represented to the creditors, but to the court of quarter sessions when the defendants were called for sentence. The evidence before the referee clearly shows this, and also that that was still their belief at the time of the hearing before the referee. We may conclude, therefore, that the creditors, the trustee, and the counsel for the trustee had the erroneous belief that they might receive the $2,500 from the defendants, consider it as a fund separate from the estate, and apply it to the expenses of prosecution and to the expense of administering the general estate of the bankrupt without bringing it into court as part of the estate, where the expenses might have been investigated and paid. How they could have had such a belief is difficult to understand, when we consider that the trustee—in unearthing the concealed goods, in his investigation thereof, in his efforts to punish the fraudulent debtor and his associates for the concealment of the goods, in his negotiations for the settlement and leniency with the defendants—was acting as the representative of the estate, and was using all the weight that he had as such representative and of the creditors back of him in the prosecution and subsequent efforts at settlement. The receipt of the trustee and his attorney makes no distinction between the goods surrendered and the cash. Fairly considered, why should a part of the consideration, to wit, the goods, be regarded as belonging to the estate, and the other part, to wit, the money, $2,500, be not so regarded? The evidence clearly shows that the creditors, the trustee, and attorneys for the trustee had the erroneous belief that assets belonging to the estate could be partly distributed by the consent of the creditors. The assets of the bankrupt, from whatever source derived, belong to the estate, must be collected by the trustee for the estate and accounted for by him to the court. The $2,500 cash was part of the estate clearly to be accounted for by the trustee, and primarily liable for expenses, those expenses to be determined upon a proper hearing after the money had been accounted for and the expenses passed upon. This court unqualifiedly condemns any attempt on the part of the receivers, creditors, or attorneys in a bankruptcy proceeding to dispose of any part of the bankrupt estate except in the manner prescribed by the Bankruptcy Act, and that is by bringing into the hands of the officers having charge of the estate all the assets thereof, by the filing of accounts showing on the one side the money received and on the other the credit claimed.

While the referee was of opinion that this money was part of the bankrupt estate, he refused to surcharge the trustee with it because it did not come into his hands, but was received and distributed by Piatt in paying the expenses of the criminal case. We cannot escape from the conclusion that the trustee ought not to be surcharged with this sum. It is true he was negligent in not commencing appropriate proceedings to recover the money from his attorney. He was probably placed in a position where he did not realize his duty in this respect. His attorneys, and the creditors, as shown by the evidence, as we have found, both seem to have regarded the $2,500 paid by the defendants in settlement of the criminal cases as a fund to be used in paying the expenses of those cases and of the administration of the estate, so that the money realized from the sale of the bankrupt's assets would be undiminished by any costs of administration such as trustee's commission and attorney's fees. We can well understand that a trustee placed in this position would not be vigilant to see that the money passed through his hands, but would allow the money to be used for the purpose for which his attorneys, with the knowledge of the creditors, intended to use it. The attorney for the trustee should have paid over to the trustee the $2,500, and it should

have been accounted for by the trustee, and the expenses and attorney's fees claimed as a credit to be passed upon by the court. Unfortunately, by the conduct of Piatt in keeping this money and distributing it, this court is prevented from administering that part of the estate at this time. The attorneys for the trustee, the trustee himself, and the creditors, having, as we have seen, erroneously treated the $2,500 as a fund to be used in paying the expenses of the criminal proceeding and the general expenses of administration, and the trustee by not compelling Piatt to deliver the $2,500 to him, and Piatt by not delivering the money to the trustee, having made it impossible to make that sum a part of the estate, we must, for the purposes of this case, consider whether or not the trustee has claimed credit in his account for expenses that should have been paid out of this fund of $2,500. Let us examine the evidence and see what expenses were to be paid out of this fund.

Stein, on page 4 of the testimony, says: "Many offers of settlement were made, the result of which was that all the creditors were called to my office on April 5th. There were probably 30 creditors present in person or by counsel, and it was explained to them that the bankrupt was willing to turn over all the goods that we claimed had been fraudulently moved, and would also pay the sum of $2,500 in cash to be used in defraying all the expenses the creditors had been put to, so that the goods, when sold, would go to the creditors without any deductions whatsoever."

And again, on page 186: "After the receipt of the money, it was fully explained in my presence at several meetings of the creditors in my office that this money was to be used, in case of a light or suspended sentence on the defendants, to pay all the expenses connected with the criminal proceedings for which the trustee had obligated himself to pay; and in addition to paying all such expenses, the trustee also was to pay all the expenses connected with the bankruptcy proceedings, and every other item of expense connected with all the cases."

Piatt, on page 160, testifies: "The idea was to execute a receipt acknowledging that the three stores' contents, and the goods of Steubenville were to be held by Brooks in escrow, pending the prosecution of the criminal charges in criminal court, and the $2,495 was placed in my hands to pay the fees of the attorneys in the criminal proceedings, and also in the bankruptcy proceedings and cover all the costs of the estate."

Mr. Rodgers, an attorney for a creditor, on page 146, testifies: "We finally signed it on the representations made by Mr. Brooks and by his counsel to us all there that he had $5,300 for distribution to the creditors of the estate; that the entire expenses were to be paid out of a fund of $2,500 which had been raised by the defendants in the criminal prosecution and paid in addition for that purpose."

It is thus conclusively shown that all the expenses of the administration were to be paid from this fund. The creditors had contributed $945 to be used in the prosecution, and that and the $2,500, a fund of $3,445, was in the hands of the trustee and attorneys to pay all the expenses.

We now turn to the account of the trustee to determine whether or not credits are claimed for expenses that should have been paid from the $2,500, and we find that the trustee has claimed credit for $2,610.39 for expenses of administration. The trustee and his attorneys having undertaken to pay those expenses out of the $2,500 received from the bankrupt, they should be held to that and no expenses should be charged against the estate, so that the fund of $4,376 shown on the debit side of the account may go to the creditors undiminished by expenses.

As this will result in the trustee being surcharged with all those expenses, $2,610.39, he is entitled to have returned to him by his attorneys two-thirds of the $2,610.39, less $500 already received by him from Piatt, and the sum of $1,024.51 disallowed by the referee, or the sum of $723.92. That there will be no hesitation on the part of the attorneys to make this payment, we conclude from the testimony of Mr. Stein, who, on page 187, testified: "I want it distinctly understood that the fee to myself, Mr. Piatt, and Mr. Brooks was to be one-third of whatever would be remaining after all the administration expenses were paid. If Mr. Brooks proves that he has any additional expenses, I want it understood that Mr. Piatt and I pay two-thirds of it."

The trustee must be surcharged with all the items on the credit side of his account, leaving the balance for distribution, the amount shown on the debit side of his account, namely, $4,376.

We are not to be understood as giving countenance to the practice exemplified by this case of allowing any portion of the estate to be administered except in the way prescribed by the Bankruptcy Act, and that is by accounting for all the assets on the one side and the expenses on the other, and it is only because the trustee and his attorneys, with the consent of the creditors, have put the case in the present condition that, in order to do equity among all the persons interested, we have disposed of the case in accordance with the plan adopted by the parties as shown by the evidence.

Distribution was thereupon directed, and the controversy has now been brought to this court by the petition under consideration.

Upon the foregoing facts, we find no error that needs correction, and accordingly the order is affirmed.

NEW YORK & PHILADELPHIA COAL & COKE CO. v. MEYERSDALE COAL CO.

(Circuit Court of Appeals, Third Circuit. November 10, 1914.)

No. 1878.

1. CORPORATIONS (§ 433*)—CONTRACTS—AUTHORITY OF OFFICER.
   Where correspondence relating to a contract for the sale of coal was signed in the name of a coal company by its secretary, who was also described on the letter head as treasurer and general manager, such evidence was sufficient to take the question of his authority to make the contract on behalf of the company to the jury in an action for its breach.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1706, 1719, 1738, 1744; Dec. Dig. § 433.*]

2. SALES (§ 32*)—OFFERS AND ACCEPTANCE BY CORRESPONDENCE—REQUISITES AND VALIDITY.
   Correspondence between a coal company and a prospective customer, which showed a complete meeting of minds upon all of the terms of a contract for the future delivery of coal, *held* to constitute a binding contract, although a formal contract embodying such terms, submitted by the purchaser, was not executed by the seller.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 59; Dec. Dig. § 32.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by the New York & Philadelphia Coal & Coke Company against the Meyersdale Coal Company. Judgment for defendant, and plaintiff brings error. Reversed.

Henry W. Hardon, of New York City, for plaintiff in error.

E. C. Higbee and Sterling, Higbee & Matthews, all of Uniontown, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The plaintiff in this suit, a New Jersey corporation doing business in New York City, is seeking to re-

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

cover damages from the Meyersdale Coal Company, a Pennsylvania corporation mining bituminous coal in the western part of the state. The statement of claim asserts that a contract to deliver coal was made by correspondence in August, 1912, while the principal defense is a denial of the contract. The trial judge sustained the defense and entered a compulsory nonsuit, refusing a subsequent motion to set it aside. Under the Pennsylvania practice such a motion is necessary before a writ of error can be taken.

The facts are as follows:

Early in August, 1912, a representative of the plaintiff called upon the defendant in Pennsylvania, and had some conversation concerning a proposed contract for the sale of coal. On August 9th the defendant wrote the following letter:

"Meyersdale, Pa., Aug. 9, 1912.

"New York & Phila. Coal & Coke Co., Produce Exchange Building, New York, N. Y.—Gentlemen:

"We had a very pleasant call this morning from your representative, Mr. Burrows, and made him a quotation on contract for deliveries to run to April 1, 1913, at $1 per gross ton, f. o. b. cars our mine, on our Stauffer No. 1 coal This to be shipped at the rate of from 2,000 to 2,500 tons per month.

"Trusting that this quotation will meet with your approval, and that we will be favored with your order, which will receive our prompt and careful attention, we are,

"Very truly,

Meyersdale Coal Co.,
"W. T. Hoblitzell, Secretary."

To this letter the plaintiff replied on August 13th:

"Your letter of the 9th instant was duly received by us, and we note its contents.

"We have to-day taken the matter up with our Mr. Burrows, and have decided to accept your offer for 2,500 tons per month of your Stauffer No. 1 coal from August 15, 1912, to March 31, 1913, at the price of $1.00 per ton of 2,240 lbs. f. o. b. cars at the mine. You can commence shipment on this contract on Thursday next, the 15th instant, which will mean that for the last half of August you will have to send us 1,250 tons. Please, until further notice, consign the coal to us at the St. George coal piers, Staten Island, N. Y. You understand that we wish the monthly shipment spread over each month, and by that we mean not to ship any large amount on one day and then not ship any more for a long time. We will in the course of a few days make up the form of contract covering this purchase, and send it to you, and in the meantime this letter will be sufficient authority for you to go ahead with shipments.

"Please do not forget that when our Mr. Burrows was at your Stauffer mine on Friday last he saw that the coal was by no means as clean as it should be, and so reported it to your Mr. W. T. Hoblitzell, and he promised that he would do his utmost to have the coal made cleaner, which we trust will be done, as dirty coal is of no use in our business."

On August 16th the plaintiff wrote again, saying:

"We wrote you last on the 13th instant, and have not since received any of your esteemed favors.

"We herewith hand you the contract for the 18,750 tons of Stauffer No. 1 coal that we have bought from you, and will be glad if you will sign it and return one of the copies to us. We have made this contract to read the same as our contracts with others, and we have no doubt you will find it satisfactory."

In this letter of August 16th the following writing was inclosed:

"This contract made this thirteenth day of August, 1912, by and between the Meyersdale Coal Company, of Meyersdale, Pa., hereinafter called the seller, and the New York and Philadelphia Coal and Coke Company, of New York, N. Y., hereinafter called the buyer. The seller agrees to sell, and the buyer agrees to buy, 18,750 tons, of 2,240 pounds, of Stauffer No. 1 bituminous coal from the seller's mine at Listie, Pa., for 7½ months, beginning on August 15 or 16, 1912, and ending on March 31, 1913, on the following terms and conditions:

"Price to be $1 per ton of 2,240 pounds free on board cars at the mine.

"The seller is to deliver and the buyer is to take 2,500 tons of 2,240 pounds monthly during the term of this contract, excepting during the last half of August, 1912, during which period the seller is to deliver and the buyer is to take 1,250 tons of 2,240 pounds.

"Payments are to be made by the buyer mailing its check to the seller at Meyersdale, Pa., not later than the 20th day of each month for all the coal shipped it from the mine during the previous month.

"Railroad weights are to govern all payments.

"The seller agrees to do its utmost to keep all the coal delivered to the buyer under this contract as clean as possible.

"It is hereby agreed that if the seller should at any time during the life of this contract desire to directly or indirectly sell, lease, transfer, or in any other way dispose of its Stauffer mine at Listie, Pa., or the coal therein, it can only do so provided it can make arrangements for this contract to be carried out in all its terms and conditions to its end on the 31st day of March, 1913.

"The parties to this contract are not to be held responsible for failure to deliver or receive the coal in case of strikes or accidents, failure or delay of transportation facilities, or other causes beyond their control, both at the mine, and at tidewater or other places.

"Accepted: Accepted:

.....

"New York & Philadelphia Coal & Coke Co.,
"[Signed] Robt. H. Burrows, Treasurer."

It will be observed that certain terms are proposed by this writing that had not yet appeared in the correspondence, and accordingly the letter and the writing taken together must be regarded as a new offer. With the exception of one term, the defendant accepted this offer on August 19th in the following letter:

"Your favor of August 16th received, with contract inclosed. In reply we note that you have made this contract to read as from August 15th. Owing to the shortage of cars that we have had during August and on account of some orders that we have had on hand, it is necessary for us to ask that you make this contract to read from September 1st, at a monthly rate of 2,500 tons to March 31st, 1913.

"If it is at all possible for us to do so, we will make up the tonnage as from August 15th, but do not want to bind ourselves up for any shipments before September 1st, as it is going to take us until that time to clean up orders that we have on hand.

"Kindly advise if this will be satisfactory.

"Very truly, Meyersdale Coal Co.,
"W. T. Hoblitzell, Secretary."

On August 20th the plaintiff agreed to the proposed change of date from August 15th to September 1st, saying:

"We have your letter of yesterday and note its contents. It is quite agreeable to us to make the contract to read from September 1, 1912, at the monthly delivery of 2,500 tons to March 31, 1913, as you request. We now therefore hand you the contract drawn up covering this period of seven months,

and ask that you will kindly sign the same and return one copy to us, and also please return us the two other forms that we sent you.

"If you will find it convenient to send us any of your Stauffer coal during the balance of this month at the price of $1 per ton of 2,240 pounds f. o. b. cars at the mine, you can do so as a separate deal from the contract, and you can send it to St. George coal piers, N. Y.

"Did you receive our letter of the 13th of this month, as we have had no acknowledgment of it from you."

The price of coal began to rise early in September, and (whether for this or for some other reason) the defendant made no deliveries. On February 15, 1913, the plaintiff brought a suit in equity in the Western district of Pennsylvania, and on June 24th this was transferred by Judge Young to the law side of the court. In the Court of Appeals there was some dispute whether the agreement (if made at all) was an entire contract, and whether the suit had been prematurely brought because the bill in equity was filed before April 1st. Naturally this question was not considered in the District Court, recovery being denied on other grounds; and we need only say briefly that, if the contract was made, the plaintiff was entitled to recover damages in some amount, leaving the proper measure to be determined at another trial.

[1] The principal defenses were: (1) That W. T. Hoblitzell had no authority to make the contract; and (2) that, even if he had such authority, no contract had actually been made, that nothing except negotiations had passed between the parties, and that the contract was not to come into existence until the writing should be signed. On the question of Hoblitzell's authority, we think the plaintiff made out a prima facie case. The letters are not signed by him as an individual, but are signed in the defendant's name, authenticated by Hoblitzell as secretary; and moreover there was evidence that on the letter head of the defendant's communication of August 19th (which was proved by the introduction of a copy, the original having been lost) Hoblitzell was described, not only as secretary, but also as treasurer and general manager. This was sufficient evidence to go to the jury on the question of his authority to bind the defendant.

[2] But in both courts the stress of the dispute was laid on the language of the letters themselves, and it is upon this that the decision of the learned trial judge is put. The force of his argument must be admitted, but we are obliged to disagree with his conclusion. As we read the letters, they show a complete meeting of minds upon all terms of the contract, and we regard the signing of the suggested form merely as a desirable convenience and not as a condition precedent. The plaintiff's letter of August 16th, with the inclosed writing, stated definitely the terms on which the plaintiff was willing to make the contract, and to these terms the defendant agreed on August 19th, making the single exception that the time for initial delivery should be changed. This was a counter proposition; but it dealt with one term only, and when the plaintiff agreed to the change the contract was complete, and nothing more was needed to bind both parties. We do not find in the letters the intention of either party not to be bound until a formal writing had been signed, and in this respect the case differs essentially from several decisions that have been cited.

Further discussion seems to be needless. No term was left unsettled; everything had been agreed upon, either expressly or by plain implication or reference; and we see no sufficient ground for supposing that the execution of a formal writing was made a condition precedent to the taking effect of the contract. Many authorities on this subject will be found in 9 Cyc. 288, note 99, in 7 A. & E. Ency. 140, notes 1 and 2, and in 29 L. R. A. 431, note to Sanders v. Pottlitzer, etc., Co.

The judgment is reversed, and a new venire is awarded.

LOUISIANA EXCURSION CO. v. GIDIONSEN et al.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4059.

ADMIRALTY (§ 118*)—REVIEW ON APPEAL—FINDINGS OF FACT.

A finding of fact made by a court of admiralty on conflicting evidence is presumptively correct, and will not be reversed by the appellate court, unless the record clearly shows by the weight of the evidence that it is erroneous.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794; Dec. Dig. § 118.*

Appealable orders and decrees in admiralty, see note to In re Oceanic Steam Navigation Co., 124 C. C. A. 348.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in admiralty by the Louisiana Excursion Company against A. Gidionsen, Henry Scherf, and the steamer Belle of the Bends. Decree for respondents, and libelant appeals. Affirmed.

Paul A. Sompayrac and William H. Byrnes, Jr., both of New Orleans, La., for libelant.

William F. Woerner, of St. Louis, Mo., and Campbell Cummings, of Jefferson City, Mo., for appellee Gidionsen.

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

SANBORN, Circuit Judge. The appeal in this case presents the single question whether or not the court below correctly decided questions of fact upon conflicting testimony. The Louisiana Excursion Company filed its libel in admiralty against Henry Scherf, H. Gidionsen, and the steamer Belle of the Bends, and asked a decree that Scherf and Gidionsen pay it $6,000, part of the purchase price of the steamer, and that the steamer be condemned and sold to pay that amount. The averments of the libel were that Scherf and Gidionsen bought the boat of the libelant for $4,000 paid by Gidionsen and a note of $6,000 made by one Brunner, which purported to be secured by an assignment of rents to accrue from certain real estate in St. Louis, and that Scherf and Gidionsen induced the libelant to make the sale by false representations that the assignment of the rents and certain insurance policies

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

on the real estate amply secured the payment of the note, when in fact there was a prior assignment of the rents, a part of the improvements on the land had been condemned by the city of St. Louis, the remainder was condemned within two months after the sale, the premiums on the insurance policies had not been paid, and the policies were canceled. There was a decree pro confesso against Scherf, and the case proceeded to answer and trial against Gidionsen.

His answer was a denial that he participated in the purchase of the steamer of the libelant, or in any representations that the assignment of the rents and the insurance policies well secured the Brunner note, and an assertion that the facts relating to the transaction were these: Scherf controlled the Brunner note and the assignment of the rents in question, and had tried to purchase the steamer of the libelant about a month before May 12, 1912, when the sale was made. At that earlier date the president of the libelant and its broker, who resided in New Orleans, came to St. Louis, spent several days and examined the security offered by the assignment; but the negotiation failed because Scherf could not raise the money to make the payment of cash required. A few days before the sale Scherf applied to Gidionsen for a loan on the security of the steamer, and he went with Scherf to New Orleans to examine the boat, which was lying there, and agreed to loan $4,000 upon it. He made the loan, paid the $4,000, and took as his security the assignment of two prior notes for $1,500 and $12,000, respectively, which were secured by mortgages on the steamer, the payment of which had been previously assumed by the libelant, and for this payment of $4,000 and the Brunner note and the assignment of the rents of the St. Louis real estate the libelant sold and conveyed the steamer to Scherf by a bill of sale which expressly recited that the note of Brunner was secured on property in St. Louis and "not resting on the boat." Scherf employed Gidionsen to take the steamer to St. Louis and promised to pay him any necessary expenses of the trip when he arrived there. The steamer broke down on the way, and Gidionsen was compelled to spend about $3,500 to repair her and get her to St. Louis. He drew on Scherf for the money, but Scherf did not pay the drafts, and after Gidionsen's arrival at St. Louis Scherf said he could not pay the expenses and the prior liens held by Gidionsen, and made a bill of sale of the steamer to the latter.

The evidence is uncontradicted that Gidionsen had no interest in the St. Louis real estate, the rents therefrom, or the Brunner note, and that he did not participate in the negotiation with the president of the libelant or its broker at St. Louis, that he never met either of them until he arrived in New Orleans about the time of the sale, and that he had never examined the St. Louis property, as they had, with a view of making a loan on the security of its rents. All the written evidence of the transaction is consistent with the statement of it made by Gidionsen in his answer, and that statement is supported by his testimony at the trial. The record contains some scraps of testimony, some disconnected incidents, tending to raise a suspicion that the interest of Gidionsen in the sale was greater than that of a secured creditor, but nothing to prove that charge, and it contains no evidence that at the time of the sale to Scherf, or at any time before he incurred the expenses of

the trip to St. Louis, he had any knowledge or intimation that the assignment of the rents did not amply secure the payment of Brunner's note. A recital of the testimony of the various witnesses might demonstrate this, but it would be futile. Suffice it to say that each of the members of the court has carefully read all the evidence in the case. The finding of the court below is supported by the legal presumption that its decision of questions of fact upon conflicting testimony was right, unless the record clearly shows that it was erroneous, by the writings and by the weight of the evidence, and this court is unanimous in its conclusion that it should be sustained.

Let the decree in favor of Gidionsen be affirmed.

THE ELENORE.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1914.)

No. 2490.

ADMIRALTY (§ 118*)—REVIEW ON APPEAL—FINDINGS OF FACT.

Where the determination of a suit in admiralty for personal injuries depends upon questions of fact, as to which the evidence is conflicting, and all or most of the testimony was taken in open court before the trial judge, who also had the opportunity to observe the physical condition of libelant, which was a material fact, his decree will not be disturbed by an appellate court, unless there is a decided preponderance of evidence against it.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794; Dec. Dig. § 118.*

Appealable orders and decrees in admiralty, see note to In re Oceanic Steam Navigation Co., 124 C. C. A. 348.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit in admiralty by Tom Jenkins against the steamboat Elenore and Robert E. Lee, managing owner and executor of the estate of James Lee, deceased. Decree for libelant, and respondents appeal. Affirmed.

Ralph Davis, of Memphis, Tenn., for appellants.

E. G. Bell, of Memphis, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This is an appeal from a decree awarding damages ($2,000) in favor of Jenkins against the steamboat Elenore, and Robert E. Lee (managing owner and executor of the estate of James Lee, deceased), appellants, and declaring a lien upon the Elenore and its equipment to secure recovery. After the decree was entered, Jenkins died, and the suit was revived in the name of his administrator, the North Memphis Savings Bank. The suit was for personal injuries, and the allegations of the petition in substance were: That during a period of extremely cold weather (January 6 and 7, 1912) and while Jenkins was serving as a roustabout on the Elenore, certain of its controlling

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

officers and men forbade Jenkins to enter and prevented him from entering any of the heated portions of the boat; that in consequence his fingers were so severely frozen as permanently to unfit him for work; and that this occurred in the course of one of the regular round trips of the boat, on the Mississippi river, between Memphis and Butler's Landing. A marked change in the weather took place after the boat left Memphis; the temperature falling to two degrees below zero. The case was tried before Judge McCall, without the intervention of a jury. The testimony of all the witnesses was taken before the court, except that of the captain of the boat, which was by deposition. Jenkins testified positively that he was excluded from the heated parts of the boat; and the men in charge testified positively that he was not, stating that all the roustabouts, four in number, were given express permission to enter those parts and keep themselves warm and comfortable. There is, however, no substantial dispute of the facts that Jenkins' fingers were frozen during the trip in question; that portions of the flesh at the ends of the fingers subsequently sloughed off; and that he was thereby permanently disabled. Admittedly a certificate was given to Jenkins by the captain of the Elenore on the day after the trip was completed, which entitled Jenkins to enter the marine hospital in Memphis. He was first treated in the uptown office of the hospital, and later in the hospital, but only for a comparatively short time. The condition of his fingers was testified to by Jenkins and his mother and by the physician who attended him for several months after the occurrence. Above all, at the time of the trial, Jenkins' fingers showed unmistakable signs of injury from freezing. It seemed incredible to the learned trial judge that Jenkins would have neglected opportunities for relief from such extreme effects of cold weather, if permission to enter the heated portions of the boat had really been given. The judge saw and heard the witnesses (except the captain), and at times interrogated them. He saw the man's fingers and heard the physicians explain the significance of their appearance. Such opportunities always afford distinct advantage in determining the value of testimony; and, unless there is a decided preponderance against a decree or judgment rendered under such circumstances, the rule in this court is not to disturb it. Monongahela River Consol. C. & C. Co. v. Schinnerer, 196 Fed. 375, 379, 117 C. C. A. 193; In re Snodgrass, 209 Fed. 325, 326, 126 C. C. A. 251; Carey v. Donohue, 209 Fed. 328, 333, 126 C. C. A. 254. The evidence, as it appears in the record, does not warrant a departure from this rule.

The decree is affirmed, with costs.

GEORGIA & F. RY. CO. v. BROTHERHOOD OF LOCOMOTIVE ENGINEERS et al.

(Circuit Court of Appeals, Fifth Circuit. October 30, 1914.)

No. 2689.

1. ARBITRATION AND AWARD (§ 73*)—CARRIERS AND EMPLOYÉS ACT—REVIEW OF AWARD.
   Under Arbitration Act July 15, 1913, c. 6, § 8, 38 Stat. 107 (Comp. St. 1913, § 8673), which authorizes a review of the award by the District Court on exceptions "for matter of law apparent upon the record," an award is subject to exception only on some ground which affects the jurisdiction, right, or authority of the arbitrators to make the same.
   [Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 368–398; Dec. Dig. § 73.*]

2. ARBITRATION AND AWARD (§ 73*)—CARRIERS AND EMPLOYÉS ACT—REVIEW OF AWARD.
   Such review can only extend to questions affecting the legality of the proceedings or the conclusiveness of the award, and views expressed by the arbitrators or reasons given for their decision are immaterial.
   [Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 368–398; Dec. Dig. § 73.*]

3. APPEAL AND ERROR (§ 4*)—CARRIERS AND EMPLOYÉS ACT—DECISION OF DISTRICT COURT—MODE OF REVIEW.
   The decision of a District Court on exceptions to the award of arbitrators rendered under Arbitration Act, § 8, is reviewable in the Circuit Court of Appeals by appeal.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8–21; Dec. Dig. § 4.*]

Appeal from the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

Arbitration proceeding between the Georgia & Florida Railway Company and Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen. On appeal by the Railroad Company from decision of District Court (215 Fed. 195) on exceptions to award. Affirmed.

Wm. H. Barrett, of Augusta, Ga., for appellant.

Henry C. Roney, of Augusta, Ga., for appellees.

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

PER CURIAM. This is an appeal from the judgment of the District Court overruling the exceptions to an award made in arbitration proceedings under the act of Congress providing for mediation, conciliation, and arbitration in controversies between certain employers and their employés, approved July 15, 1913. The case is brought also to this court by writ of error, as the appellant apprehended that the word "appeal" might have been employed in the *generic* sense, and that the writ of error was the sole method of review. The case is submitted on both the appeal and writ of error.

The errors assigned in this court are: First, because each and all the exceptions filed by the said defendant the Georgia & Florida Rail-

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

way Company to the award of the arbitrators are founded upon errors of law apparent upon the face of the record in such arbitration proceedings; second, because the errors of law apparent upon the face of the record, to which exceptions can be filed in such arbitration proceedings, are not confined to such errors of law as make the arbitration proceedings void ab initio, but extend to any substantial error of law appearing upon the face of the record in such proceedings.

[1] I. We have carefully considered the record and the briefs and arguments of counsel, and conclude that the exceptions filed in the District Court were properly overruled. In deciding the case, the district judge, in a very elaborate opinion, held that the alleged errors presented by the exceptions were questions of mixed law and fact, and not pure questions of law, and that the award was not assailed on any ground that would void it for lack of jurisdiction, or on any ground for setting aside the common law of arbitration, in that it is not pretended that it is not a legally constituted board of arbitration, or that the statute under which it is organized was invalid; or that the board traveled beyond the scope of the matters properly submitted by agreement of parties. As we read the exceptions filed in the lower court, they refer to and are based upon the declarations of the chairman and opinions of the arbitrators upon questions of law not necessarily affecting the award made.

[2] II. The second assignment of error seems to relate to questions of law not affecting the legality of the arbitration proceedings or the conclusiveness of the award. The case shows that the arbitrators complied with all the requirements of section 7 of the controlling Act of Congress (Comp. St. 1913, § 8672) and heard all the evidence, statements, and arguments offered by the parties, and made their award. If, in addition thereto, the arbitrators gave reasons for their award, and therein expressed views as to questions of law or fact more or less involved in and connected with the matters in controversy, it is immaterial. The award was signed by all the arbitrators, although one excepted as to a part thereof, and, whether the reasons given were sound or unsound, they in no way vitiated the effect or legality of the award. In the law under which the arbitration was held the duties of the arbitrators are clearly defined and it is expressly provided that:

"In its award or awards the said board shall confine itself to findings and recommendations as to the question specifically submitted to it or matters directly bearing thereon."

The arbitrators are called to find and make an award, and are not called to give reasons or arguments on either law or the facts.

[3] We think the case was properly brought to this court by appeal. See Story v. Black, 119 U. S. 235, 7 Sup. Ct. 176, 30 L. Ed. 341; Idaho & Oregon Land Co. v. Bradbury, 132 U. S. 514, 10 Sup. Ct. 177, 33 L. Ed. 433.

The judgment of the District Court is affirmed.

The writ of error is dismissed.

UNITED STATES ex rel. STATE OF LOUISIANA v. BOARMAN, Judge.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1914.)

No. 2636.

1. COURTS (§ 365*)—PROCEEDING BY STATE TO COMPEL ALLOWANCE OF APPEAL.

A state, which by the decision of its own Supreme Court has no real or beneficial interest in lands in controversy in a suit in a federal court, *held* not entitled to maintain a proceeding for a writ of mandamus to compel the allowance of an appeal from the decree therein on behalf of one of its levee districts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. § 365.*

Mandamus in aid of appeals, see note to Lewis v. Baltimore & L. R. Co., 10 C. C. A. 450.]

2. APPEAL AND ERROR (§ 148*)—RIGHT OF REVIEW—PERSONS ENTITLED.

One who is not a party to a record and judgment is not entitled to an appeal therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 925–932; Dec. Dig. § 148.*]

Petition, on relation of the State of Louisiana, for mandamus and certiorari to Aleck Boarman, Judge of the United States District Court for the Western District of Louisiana. Rule to show cause discharged.

Ruffin G. Pleasant, Atty. Gen. of Louisiana, of New Orleans, La., for petitioner.

Edgar H. Farrar, of New Orleans, La., and Henry Bernstein, of Monroe, La., opposed.

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

PER CURIAM. The application for a mandamus and certiorari to the judge of the Western district of Louisiana to allow an appeal on the part of and in behalf of the state of Louisiana from a decree rendered in the District Court of said district in the case entitled "Board of Levee Commissioners of the Tensas Basin Levee District v. Tensas Delta Land Company, Limited," is denied.

[1] 1. Under the decision of the Supreme Court of the state of Louisiana, reported in State v. Tensas Delta Land Co., Ltd., 126 La. 59, 52 South. 216, the Supreme Court of the state on full consideration decided that the state was without real or beneficial interest in the lands in controversy, and this decision is controlling in this court.

[2] 2. "One who is not a party to a record and judgment is not entitled to an appeal therefrom. Bayard v. Lombard, 9 How. 530 [13 L. Ed. 245]; Indiana R. Co. v. Liverpool, London & Globe Ins. Co., 109 U. S. 168 [3 Sup. Ct. 108, 27 L. Ed. 895]; Ex Parte Cockcroft, 104 U. S. 578 [26 L. Ed. 856]." In the Matter of Leaf Tobacco Board of Trade of the City of New York, Petitioner, 222 U. S. 578, 581, 32 Sup. Ct. 833 (56 L. Ed. 323).

Rule discharged.

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

YARYAN NAVAL STORES CO. v. B. BORCHARDT CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1914. Rehearing Denied December 4, 1914.)

No. 2669.

1. CREDITORS' SUIT (§ 47*)—MOTION TO DISMISS—ESTOPPEL.
A creditors' suit will not be dismissed, on the ground that complainant had an adequate remedy at law, after defendant has answered, admitting the indebtedness and equities of the bill, and consented to the appointment of receivers, who have incurred obligations and large expenditures.
[Ed. Note.—For other cases, see Creditors' Suit, Dec. Dig. § 47.*]

2. BANKRUPTCY (§ 20*)—CONFLICTING JURISDICTION OF COURTS.
A creditors' suit, looking to the liquidation of the affairs of a corporation, instituted more than six months prior to a voluntary bankruptcy proceeding by the corporation, is not necessarily affected by such proceeding.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

Appeal from the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

Creditors' suit in equity against the Yaryan Naval Stores Company. From the decree obtained by the B. Borchardt Company and James S. Brailey, Jr., receivers, defendant appeals. Affirmed.

See, also, 206 Fed. 366.

Bolling Whitfield, of Brunswick, Ga., for appellant.

Max Isaac, Joseph W. Bennet, F. E. Twitty, and Millard Reese, all of Brunswick, Ga., and A. H. Heyward, of Macon, Ga., for appellees.

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

PER CURIAM. [1] Where months after a creditors' bill has been filed, and the defendant has appeared and filed an answer admitting the indebtedness to the complainant and all the equities set up in the bill, and consented to the appointment of receivers, and where under orders of court receivers have entered upon the administration of the property of the defendant, incurring obligations and large expenditures, it is too late to urge that, inasmuch as the complainant's claim has not been reduced to judgment, the suit should be dismissed because the complainant had an adequate remedy at law. See Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113; Brown v. Lake Superior Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934. And see Fed. Rep. Dig. vol. 7, Eq. § 53.

[2] Inasmuch as the equity proceedings looking to the liquidation of the affairs of the Yaryan Naval Stores Company were instituted more than six months prior to the alleged voluntary bankruptcy proceedings, wherein it is claimed the Yaryan Naval Stores Company was adjudicated a bankrupt, the proceedings in the District Court in this

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

case were not necessarily affected. See Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; Metcalfe v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Eyster v. Gaff, 91 U. S. 521, 23 L. Ed. 403; In re Heckman, 140 Fed. 859, 72 C. C. A. 8 (C. C. A. 9); Sample v. Beasley, 158 Fed. 607, 85 C. C. A. 429 (C. C. A. 5).

On the record we find no reversible error in the proceedings of the lower court. The decree appealed from appears to have been regularly rendered in due course of proceedings, and the same is affirmed.

ERIE BAKING CO. v. HUBBARD MILLING CO

(Circuit Court of Appeals, Third Circuit. November 10, 1914.)

No. 1847.

SALES (§ 384*)—BREACH OF CONTRACT—GOODS TO BE MANUFACTURED—DAMAGES.

Plaintiff contracted to sell and deliver to defendant 10,000 barrels of flour to be manufactured. Plaintiff purchased wheat from which to make the flour, but after the first shipment defendant wrongfully refused to accept further deliveries. In the meantime wheat had declined in price. *Held* that, upon such facts, the usual measure of damages for breach of sale contracts would not compensate plaintiff, which was entitled to recover the amount of the decline in the value of the wheat between the time it was bought after the making of the contract, and the breach of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. § 384.*

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

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by the Hubbard Milling Company against the Erie Baking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

T. A. Lamb, of Erie, Pa., for plaintiff in error.

Alexander J. Barron, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. In this suit the Hubbard Milling Company, of Minnesota, charged the Erie Baking Company, of Pennsylvania, with breaking a contract made in September, 1910, to accept 10,000 barrels of flour at an agreed price. Deliveries were to be made during the five months immediately following, and the flour was to conform in quality to a specified standard. Of the first installment 750 barrels were shipped, accepted, and paid for, but (although they were tested and accepted) the Baking Company declared itself not satisfied with the quality, and on October 24th announced its refusal to go on with the contract. The principal dispute at the trial was over

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

the quality of the 750 barrels, and the verdict of the jury has settled that question in favor of the Milling Company.

The only controversy upon this writ of error is about the proper measure of damages. At the time the contract was made the Milling Company did not have the flour on hand, so that the parties agreed, not upon the sale of an article already made, but upon the manufacture and sale of an article not yet in being. For the breach of such a contract it is apparent that the measure of damages generally applied —namely, the difference between the price agreed upon and the market price at the time of breach—may not properly compensate the manufacturer, and in that event another measure that will compensate him should be applied. What the measure is to be will depend on the facts of the particular case. The evidence here shows that the Milling Company went into the market immediately upon the making of the contract and bought wheat for future delivery in sufficient quantity to meet its obligation, and when the Baking Company unlawfully broke the contract this raw material was either in the Milling Company's possession or was to be delivered under agreements that had already been made and were only awaiting execution. When the cancellation of the contract was announced, the price of wheat had gone down, and for this loss—9½ cents a bushel—the Baking Company was properly charged. The verdict is simply for this amount with some further deduction.

But in the charge of the court the jury were instructed that the plaintiff was entitled to recover, not only the loss referred to, but also the profit that the plaintiff would have made if the contract had been fully completed and all the flour had been manufactured. This instruction is specially attacked as erroneous, and much of the oral argument was devoted to this subject. On the present record, however, the question is academic, and we do not feel bound to discuss it. The verdict made no allowance for profits, and the defendant has therefore suffered no injury, even if the instruction complained of were erroneous—a matter about which we intimate no opinion whatever.

The measure of damages in similar cases is considered in a note to Gardner v. Deeds, 4 L. R. A. (N. S.) at page 740, where many decisions are collected. A later reference is Ridgeway, etc., Co. v. Penna. Cement Co., 221 Pa. 160, 70 Atl. 557, 18 L. R. A. (N. S.) 613.

The judgment is affirmed.

SCHIEBEL TOY & NOVELTY CO. v. CLARK (three cases).

(Circuit Court of Appeals, Sixth Circuit. October 16, 1914.)

Nos. 2443–2445.

1. PATENTS (§§ 129, 202*)—SUIT FOR INFRINGEMENT—TITLE TO SUPPORT—DEFENSES.

Where receivers appointed in a suit for dissolution of a partnership sold the assets of the firm, including patents, and by direction of the court assigned the same to the purchaser, which assignment was recorded, the partner who instituted the suit, and at whose instance the

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

sale was made, when sued for infringement of one of the patents, cannot deny the title of the purchaser; nor can he deny the validity of the patent, although he may deny infringement, and in aid of such defense invoke the prior art.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186, 281–289; Dec. Dig. §§ 129, 202.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LOCOMOTIVE TOY.

The Clark patent, No. 676,420, for a friction-driven locomotive toy, which is an improvement on the device of a prior patent, discloses invention, and while, in view of the prior art, and especially of such patent, it is entitled to only a limited range of equivalents, it is not restricted to the specific form preferred in the specification; also *held* infringed.

3. PATENTS (§ 165*)—INFRINGEMENT—CONSTRUCTION OF CLAIMS.

The rule which ordinarily confines a patentee to the language he has used in stating his claims is not so hard and fast as to permit appropriation by another of the essence of his invention, merely because he has employed fit words to apply his invention to an earlier one, upon which it is an improvement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

4. PATENTS (§ 328*)—VALIDITY—LOCOMOTIVE TOYS—PRIOR USE.

The Turner patents, No. 930,107, for a racer automobile toy, and No. 930,633, for an engine locomotive toy, *held* void for prior public use and sale of the devices more than two years before the applications were filed, with the consent of the patentee.

5. COURTS (§ 300*)—FEDERAL COURTS—INCIDENTAL JURISDICTION—INFRINGEMENT SUITS.

Where, in a suit for infringement, the patents in suit are adjudged void, and the parties are both citizens of the same state, the court is without jurisdiction to determine a cause of action alleged for unfair competition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 847, 850; Dec. Dig. § 300.*

Jurisdiction of federal courts in suits relating to patents, see note to Bailey v. Mosher, 11 C. C. A. 313.]

6. PATENTS (§ 26*)—"INVENTION"—COMBINATION.

"Invention" may consist of old elements so combined as to co-operate and produce a new and useful result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*

For other definitions, see Words and Phrases, First and Second Series, Invention.]

Appeals from the Circuit Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Three suits in equity by the Schiebel Toy & Novelty Company against David P. Clark. Decrees for defendant, and complainant appeals. Reversed as to one case, and affirmed as to two cases.

Wm. R. Wood, of Cincinnati, Ohio, for appellant.

H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

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

WARRINGTON, Circuit Judge. These three suits were for alleged infringements of particular letters patent, and, in addition to the usual features of such cases, issues growing out of the dissolution of a copartnership and sale of its assets, also concerning alleged unfair competition, were involved. As far as necessary, these issues will be noticed as we progress. The patents in suit relate to improvements in toys of the type known as locomotive toys.

The first suit involved letters patent No. 676,420, dated June 18, 1901, and issued to the appellee, Clark. The patent covers a friction-driven device designed for the operation of toys in the forms of locomotives, automobiles, and the like.

The infringement complained of in the second suit concerns letters patent No. 930,107, issued August 3, 1909, in the name of John C. Turner, assignor, to the plaintiff. The invention was designed to provide a toy "preferably representing a racer automobile, in which the body is struck up from a single blank."

The third suit charged infringement of letters patent No. 930,633, issued August 10, 1909, in the name of John C. Turner, assignor, to the plaintiff; and the patent was intended for "an engine locomotive toy wherein the boiler, cab side walls, fire box side walls, and boiler support are struck up from a single sheet of metal and bent into shape."

The devices in issue in these last two suits were designed as bodies, automobile and locomotive, for the friction-driven device involved in the first suit. The suits were all between the same parties, were tried together, and passed upon in one opinion below. The decree in the first suit was based upon noninfringement, and in each of the other suits upon invalidity of the patent in issue. The appeals were argued and submitted as one cause here, and will be disposed of in this opinion.

[1] 1. *The Clark Patent in Suit.* It is contended that plaintiff has no title to the Clark patent and cannot maintain suit upon it for that reason; also that Clark may contest its validity. D. P. Clark & Co. in name, with some changes in membership, was engaged as a copartnership in the toy business at Dayton, Ohio, from 1897 to 1909. In February, 1904, D. P. Clark and William E. Schiebel became equally and solely interested in the firm, and continued the business under the old name until dissolution, which will be explained later. Clark and Schiebel each secured letters patent upon certain devices designed by them respectively; and they entered into an oral agreement, and carried it out at least in part, to transfer their patents to the firm. On May 18, 1904, Clark transferred to the firm a number of his patents—including the patent now under consideration, No. 676,420—and this transfer was two days later recorded in the Patent Office.

Differences arose between the partners, and in December, 1908, Clark commenced a suit against Schiebel in the common pleas court of Montgomery county, Ohio, for the dissolution of the partnership and sale of its assets. He alleged that the company was engaged in a large and profitable business in the manufacture and sale of novelties and toys;

that it possessed "a number of copyrights and patents issued to it by the United States," a valuable good will, and assets of about $75,000 above its liabilities; that the assets were of "far greater value when taken together than if separated," and should be sold as an entirety, and the proceeds divided between the partners. The prayer was that the partnership "be adjudged dissolved, and a receiver of the property and good will be appointed, with power to dispose of the same." Clark made and signed the required verification to the petition. Two receivers were appointed; and, under orders of the court, the firm assets, which included the patents, good will, and the right to use the firm name, were sold to plaintiff in the instant suits as the successful bidder. The sale was confirmed, and the receivers were ordered among other things to assign the patents to the purchaser, and "to do and perform all other acts and things necessary and proper to convey and transfer to and vest in said purchaser all the property, assets, and interests so sold." On March 26, 1909, the receivers executed and delivered a written transfer to the plaintiff, embracing the letters patent now in question, No. 676,420; and this transfer was recorded in the Patent Office April 1, 1909.

It is claimed that the legal title to the patent then stood in the name of D. P. Clark & Co.; but we need not pass upon this claim, for, conceding it, and also that under section 4898, U. S. Rev. Stat. (Comp. St. 1913, § 9444), the formal course in the state court would have been to have the firm join in the execution of the transfer (Ball v. Coker [C. C.] 168 Fed. 304, and citations), still the insistence would be unavailing. In disposing of the suit to dissolve the firm and wind up its business, the state court was in the exercise of its chancery powers and jurisdiction, and the members of the firm could have been compelled to execute a formal assignment, either themselves, or, in default, by some suitable person appointed by the court. Ager v. Murray, 105 U. S. 126, 127, 132, 26 L. Ed. 942. Moreover, the sale was voluntary, not involuntary. Schiebel is president of the plaintiff company, and is not questioning the receivers' transfer of the patent. As we have seen, these receivers were the official instrumentality sought by Clark for disposing of the firm assets; and Clark received and now enjoys the benefits of his full share of the sale proceeds. It results that at least the equitable title to the patent passed to plaintiff; and Clark's reliance upon an outstanding naked legal title is in effect a claim that he may have the benefits of both the patent and the money he received for it. This cannot be assented to, and, for the purposes of this suit, he will not be heard to deny plaintiff's title.

It follows that Clark is estopped from denying the *validity* of the patent, either for lack of novelty or utility, or by reason of anticipation through prior inventions; but this does not prevent him from denying infringement. Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 91, 39 C. C. A. 426 (C. C. A., 6th Cir.); Babcock & Wilcox Co. v. Toledo Boiler Works, 170 Fed. 81, 84, 95 C. C. A. 363 (C. C. A., 6th Cir.); Fishel-Nessler Co. v. Fishel & Co., 204 Fed. 790, 791 (C. C. A., 2d Cir.). In aid of the denial of infringement, Clark may invoke the prior art (Noonan v. Chester Park Athletic Club Co.,

supra; Leather Grille & Drapery Co. v. Christopherson, 182 Fed. 817, 822, 105 C. C. A. 249 [C. C. A. 9th Cir.]); for the effect of this is simply to define the thing sold, and so to ascertain definitely whether it has been infringed or not. As the late Mr. Justice Lurton said in the Noonan Case, 99 Fed. 91, 39 C. C. A. 426, respecting the admissibility of the state of the art involved, it enables the court to see—

"* * * what the thing was which was assigned, and thus determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume against an assignor, and in favor of his assignee, anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger."

And this court again had occasion to declare the rule in United States Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 C. C. A. 614, decided June 30, 1914; Judge Denison saying:

"While a patentee assignor may, when made a defendant, litigate the scope of his patent and have it judicially construed according to its true extent (Noonan v. Chester Co. [C. C. A., 6th Cir.] 99 Fed. 91, 39 C. C. A. 426; Smith v. Ridgeley, 103 Fed. 875, 43 C. C. A. 367 [C. C. A., 6th Cir.]), the courts * * * will not, in a doubtful case, construe it so narrowly as to make it worthless. * * * They will be inclined, so far as the record permits, to make its exclusive right a real and valuable thing. Alvin Co. v. Scharling (C. C.) 100 Fed. 87."

[2] What, then, is the Clark patent in suit, and is it infringed? It is a combination patent, and purports to be "in the general nature of an improvement upon the structure set forth in letters patent No. 593,174, granted November 2, 1897, to Clark & Boyer, as assignees of Israel D. Boyer and Edith E. L. Boyer," and called in this litigation the Boyer patent; and this reference will be found helpful in distinguishing between old and new elements of the patent in suit. The Clark structure, as described in the specification and drawings, consists of a truck frame, composed of side members having preferably an arched form and joined at their ends by transverse members, mounted between two sets of running wheels with parallel axles; and as thus far described is similar in appearance to a miniature open road wagon, except that all the running-wheels are of the same diameter and the fore and aft sets are brought into close proximity at their rims. The axles pass through slots extending from the bottom, at points near the ends, of each side member of the truck frame; and when this frame is lifted, the axles of the running-wheels are held within the slots by a wire frame which passes under each axle and extends over the end bars of the truck frame. The slots are of such depth as to prevent contact between their upper ends and the axles, and the outer side walls of the slots incline toward each other. Mounted in the angles formed by the rims of the two sets of running-wheels is a floating axle carrying an inertia-wheel midway of its length. The ends of this axle impinge on the running-wheels at a very acute angle; "its line of movement" in the language of the specification "being parallel to a tangent to said wheels." At the center, and on the inner surface of each side member of the truck frame, an anti-friction roller

is so maintained as to present a rolling contact with the upper surface of the floating axle. It is to be observed (though it is not distinctly provided for in the specification) that the floating axle necessarily and in practice passes through ample openings made in the side members of the truck frame immediately under such anti-friction rollers. Thus the weight of the truck frame is removed from the axles of the running-wheels, is carried by the floating axle, and the frictional resistance to the rotating movement of the axles of the running-wheels is materially reduced; and, besides, the combined weights of the truck frame, the inertia-wheel, and its axle, press upon the peripheries of the running-wheels. Stated otherwise, and in language of the specification, the floating axle is supported at each end on "a three-point bearing composed of the running-wheels and the anti-friction rollers on the truck frame," and so has only "rolling contacts." Further, the specification states:

"Owing to the inclination of the outer walls of the slots in which the running-wheel axles are mounted downward pressure applied to the truck frame will cause the running-wheel axles to be moved toward each other and press more firmly against the inertia-wheel axle," which results in "a biting action" and "still further enhances the effectiveness of the contact between the parts."

After stating that the truck frame may serve as a support for any suitable vehicle body, the specification proceeds:

"The toy is operated by placing it upon a suitable surface and moving it over the same while pressure is applied to the truck frame. In this manner motion is imparted from the running-wheels to the inertia-wheel, and when the pressure is removed and the toy released the inertia-wheel will in turn impart movement to the running-wheels and cause the toy to move over the surface on which it is placed."

And the results attained are stated to be a "much longer operative period and a higher initial speed when the toy is released for automatic operation." While not limiting himself to the "precise details of construction" so described, but stating that "it is obvious that they may be modified without departing from the principle" of his invention, the patentee makes three claims, which appear in the margin.[1]

It is important now to give some consideration to the state of the

[1] "1. In a locomotive toy, the combination, with two pairs of running-wheels having parallel axles, of a truck frame vertically movable relatively thereto, and provided with bearing-rollers, and an inertia-wheel having a floating axle, said axle having a three-point bearing at each end between the running-wheels and the truck-frame rollers, the weight of the truck frame being supported on said inertia-wheel axle, substantially as described.

"2. In a locomotive toy, the combination, with two pairs of running-wheels having parallel axles, of a truck frame having slots, the bearing-walls of which are inclined to force the truck-wheels laterally toward the inertia-wheel axle when the truck frame is depressed, and an inertia-wheel having an axle bearing upon the peripheries of the running-wheels, substantially as described.

"3. In a locomotive toy, the combination, with two pairs of running-wheels having parallel axles, of a truck frame vertically movable relatively thereto and having bearing-rollers and slots, the bearing-walls of which are inclined to force the truck-wheels toward each other, and an inertia-wheel provided with a floating axle bearing at its ends between the peripheries of the running-wheels and the truck-frame rollers, the weight of the truck frame being supported on said axle by said rollers, substantially as described."

art at the time of the issue of this patent. We have seen that the patent purports to be an improvement upon the structure set forth in the Boyer patent. While Israel D. Boyer and Edith E. L. Boyer appear to have been the inventors, neither of them was a member of the firm of Clark & Boyer at the time the patent was assigned and issued to the firm. The firm was dissolved by the death of Boyer in 1899, and Clark assigned the Boyer patent to D. P. Clark & Co. on May 18, 1904. It is hardly necessary to say, however, that Clark's interest in the Boyer patent at the date of the issue to him of the patent in suit (June 18, 1901) did not entitle him to include in his patent the invention embraced in the prior Boyer patent. Indeed, this would not have been admissible if he had been the inventor of both patents, and so the Clark patent in suit may be read in the light of the Boyer patent precisely as if the latter had been issued to a stranger. James v. Campbell, 104 U. S. 356, 382, 26 L. Ed. 786; Celluloid Manufg. Co. v. Cellonite Manufg. Co. (C. C.) 42 Fed. 900, 905, 906. The structure covered by the Boyer patent is thus described in its specification:

"It consists of a four-wheeled truck and a heavy inertia-wheel, the latter being fixed to a shaft which has its sole bearings on the peripheries of the four running-wheels of the truck, so that any motion imparted to the inertia-wheel will be transmitted through its shaft to the four running-wheels of the truck, causing the truck to move over the floor, or vice versa, any motion given to the truck will be transmitted through its four running-wheels to the shaft of the inertia-wheel."

It is true that, in the preferred form of truck there described, the wheels of one of the axles were placed closer together than those of the other, so that the two pairs of wheels would slightly overlap when mounted in the frame; but, as the specification states, this is not necessary, "for if the shaft of the inertia-wheel be large enough in diameter the adjacent wheels may lie in the same plane." It is also true that in the preferred form motion is imparted to the shaft of the inertia-wheel by a removable top in one or the other of two defined forms, which is set in motion by a string and used as a motor; but the suggestion of a substitute for either of these devices is seen in a method pointed out for recharging the motor, namely, "by pushing or pulling the truck over the floor—the motion of the running-wheels imparting velocity to the motor." And claims 5 and 6 are shown in the margin.[2] It thus becomes evident that the purpose of the Clark

[2] "5. In a locomotive toy, four running-wheels arranged in two pairs near together and in such manner that the adjacent wheels form an angle in which a shaft may lie; an inertia-wheel fixed to a shaft, said shaft lying in the angle formed by the adjacent pairs of running-wheels; the whole in combination and arranged to operate substantially in the manner and for the purpose specified.

"6. A locomotive toy consisting of a vehicle having four running-wheels arranged in two pairs near together and in such manner that the adjacent wheels form an angle in which a shaft may lie; an inertia-wheel fixed to a shaft and independent of the vehicle; on the shaft of the inertia-wheel a handle loosely mounted to enable the wheel to be held in the hand while velocity is imparted thereto and also to enable the live wheel to be placed upon the vehicle with its shaft resting in the angle formed by the four running-wheels, the inertia-wheel then acting as a motor and causing the vehicle to move ahead substantially as specified."

improvement was to reduce the frictional resistance encountered in the operative parts of the Boyer patent. Clark did this by the introduction of slots designed for the axles of the running-wheels and the employment of anti-friction rollers as bearings for the axle of the inertia-wheel. These contrivances operated at once to transpose the weight of the truck from the axles of the running-wheels to the axle of the inertia-wheel and to place the latter axle entirely within rolling contacts. The advance so made in the state of the art as it was disclosed by the Boyer patent is seen, and cannot fail of appreciation, when it is considered that Clark admittedly succeeded in selecting and combining means which were calculated in marked degree to diminish existing mechanical interference with the operation of friction-driven devices.

The scope of the Clark improvement is nevertheless affected by the facts that slots designed to control or give free action to axles of running-wheels, and that anti-friction rollers, were not new at the time he applied for his patent. Slots are shown in the drawings and described in the specification of Trueman's English patent of July 13, 1889:

"*e*, *e*, are the second or traveling wheels, and *f* is the axle of the same, which we mount in slotted or loose bearings *g* in the frame or sides *d* of the carriage, so that the axle *f* can move nearer to or farther from the axle *b* of the fly wheel."

And, as pointed out by defendant's expert when describing the prior art, a number of exhibits consisting of foreign-made toys show axles of traction wheels rotating in vertically slotted bearings, though they do not seem to have been designed, as here, to avoid friction. It is true that these foreign-made toys are much less in size and weight than those made under the patent in suit; but, as these foreign and domestic devices all belong to the toy art, it is too clear for argument that the designer of the larger toys could not shut his eyes to the facts disclosed by the older and smaller objects of the same art. And, as to Clark's anti-friction rollers, they find mechanical analogy in earlier devices. This is not disputed as far as anti-friction bearings are concerned. However, it is disputed that such bearings have been applied to "an inertia-wheel axle mounted on anti-friction bearings"; and in support of this complainant's expert criticises three patents referred to by defendant's expert, viz.: Farley, No. 216,165 (issued June 3, 1879); Anderson, No. 228,720 (issued June 15, 1880); and Burton, No. 487,236 (issued November 29, 1892). The criticism is:

"The axle *f* of Farley, the axle *A* of Anderson, and the axle *15* of Burton is in each instance the axle of an ordinary flanged car wheel. To follow the teachings of these patents would simply lead to the application of anti-friction rollers at the *axle* of the *traction wheels* of a toy. This is not done by either party to the suit."

It is observable that this concedes the prior invention and use of such rollers with respect to axles of ordinary car wheels; and we may safely add that the use of anti-friction bearings in one form or other,

including rolling contacts, was a matter of common knowledge prior to the date of the patent in suit.

Much is said in argument concerning the novelty of the three-point bearing at each end of the floating axle, between the running-wheels and the truck-frame rollers. As we have seen, this is distinctly embraced in the combination set out in claim 1 of the patent in suit; and it is stated in the specification:

"It will also be noted that it results from the construction described that the inertia-wheel is provided with a floating axle having no fixed bearing, but being supported at each end on a three-point bearing composed of the running-wheels and the anti-friction rollers on the truck frame, all of the contacts being rolling contacts."

As already shown, the material feature of this three-point bearing was the application of roller bearings to the upper surface of the floating axle; but this axle had been previously carried in the angles formed by the rims of the four running-wheels of the Boyer patent. Still, under Clark's invention, the inertia-wheel axle was no longer an ordinary floating axle, but was effectually confined within rolling bearings. Further, the declared object of the patentee was to improve the efficiency of toys of this character, by imparting a greater velocity to the inertia-wheel while the toy was being prepared for operation, and "a much longer operative period and a higher initial speed" when the toy was "released for automatic operation." However, when the number of prior patents with their drawings and models appearing as exhibits in the present record are considered, it is plain that the art to which the present patent belongs had been so developed and exploited through competition in toy contrivances as materially to reduce the field for invention (as distinguished from mechanical skill) respecting operative means and appliances. We therefore conclude that the patent is entitled only to a limited range of equivalents; but this does not mean that such equivalency shall not be commensurate with the extent of the invention. McSherry Mfg. Co. v. Dowagiac Mfg. Co., 101 Fed. 716, 721, 722, 41 C. C. A. 627 (C. C. A., 6th Cir.); King Ax Co. v. Hubbard, 97 Fed. 795, 803, 38 C. C. A. 423 (C. C. A., 6th Cir.); Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524, 538, 540, 36 C. C. A. 375 (C. C. A., 6th Cir.); Paper Bag Patent Case, 210 U. S. 405, 415, 28 Sup. Ct. 748, 52 L. Ed. 1122.

2. *The Alleged Infringing Patented Device.* This is covered by letters patent granted to defendant Clark April 27, 1909. The preferred form of the alleged infringing structure may for present purposes be described thus: A toy formed of sheet metal and in imitation of an automobile touring car; the front wheels, called steering-wheels, are mounted on a pivoted axle which may be so adjusted as to cause the toy to travel either in a stright line or in a circle; the rear wheels, called driving-wheels, are mounted on an axle, which in turn is movably mounted (in slots) on the body portion of the vehicle, so that the rear portion of the body may have a downward, and the axle, a forward, movement. While the steering and driving wheels are the same

in diameter, and when traveling in a straight line run in the same plane, the two sets are placed and operated at considerable distance apart. A shaft carrying an inertia-wheel, and extending through openings in the side walls of the body of the toy, is maintained in front of the driving-wheels (at an elevation slightly greater than that of the center line of their axle) and mounted on and held in place by rolling contacts. The contacts with the shaft are at points as follows: On its lower rearward quarter with the rims of the driving wheels; on its corresponding forward quarter, with the peripheries of two anti-friction rollers suitably adjusted upon and pivoted to the inner surfaces of the side walls of the body; and on the center of its upper half with the peripheries of two anti-friction rollers similarly adjusted and pivoted. The ends of the shaft extending beyond the side walls of the toy are enlarged and so grooved as to form friction pinions, which co-operate with beveled contact surfaces formed on the rims of the driving-wheels; and the weight of the rear portion of the toy is thus supported upon such beveled surfaces of the driving-wheels and not upon the axle. Further, as the specification states, the "driving member" engages the "driven member" with a "wedging action," which is designed to increase the frictional contact and to give an improved result in the transmission mechanism. Two claims are made in the letters patent, the first of which is given in the margin;[3] and this claim is the same as the second, except that the latter calls for an axle "movably" mounted and omits the following words found in the first claim: "Said axle and said shaft being relatively movable."

We may now compare the essential features of the alleged infringed and infringing devices; and it should be remembered that we are dealing with the operative parts of these devices. In both structures the shaft of the inertia-wheel is sustained in angles formed by four rolling bearings; in the first structure all these bearings are both ground and driving wheels, while in the second structure only the rear bearings are ground and driving wheels, the other two being anti-friction rollers; but in both structures, the shaft is held in its sustaining angles by two anti-friction rollers contacting with its upper surface. In both structures the combined weight of the shaft, inertia-wheel, and a substantial portion of the body of the toy, is employed through adjustment of the parts to keep the shaft in firm contact with all these wheels and rollers, and so to cause a "biting action" in the first and a "wedging action" in the second structure and for the avowed purpose of increasing the efficiency of the contact between the shaft and its bearings.

[3] "1. In a toy of the character described, the combination with a body portion, an axle mounted on said body portion, and ground wheels carried by said axle and having a plurality of frictional contact surfaces, of a shaft mounted on said body portion and having near each end thereof a plurality of frictional contact surfaces adapted to co-operate with the frictional contact surfaces of the respective ground wheels, the contact surfaces of both said shaft and said wheels being inclined to the plane of their rotation to afford a wedging effect, said axle and said shaft being relatively movable, and an inertia-wheel carried by said shaft whose weight coacts with the said frictional surfaces to hold them together with a wedging action."

Moreover, the "three-point bearing" found near each end of the shaft of the first structure was reproduced in the second, but with these differences in arrangement of parts: (1) The forward wheels of the first, considered as running-wheels, were replaced by the steering wheels of the second structure; (2) the use of these forward wheels as driving-wheels was transposed to the single set of driving-wheels of the second structure; and (3) their use as roller bearings for the shaft of the first was replaced by the two lower anti-friction rollers of the second structure.

The question then is whether this amounts to infringement. It must be conceded that there is a marked difference in appearance between the two structures. On the other hand, there is substantial identity between them in essence of elements and combination and in principle of operation; and they are the same in results attained. In saying this we are conscious of the rule that invention may consist of old elements so combined as to co-operate and produce a new and useful result (Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Ferro Concrete Const. Co. v. Concrete Steel Co., 206 Fed. 666, 669, 124 C. C. A. 466 [C. C. A., 6th Cir.]); but the Clark patents do not present two distinct and independent combinations. They have too many parts, discharging too many functions, that are common to both. Differences in words that are employed in either specification or claims of such patents respectively cannot, in spite of what is disclosed by the devices themselves, conceal the materiality in identity between the patents. Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; Cantrell v. Wallick, 117 U. S. 689, 695, 6 Sup. Ct. 970, 29 L. Ed. 1017. It is true that, so far as their location is concerned, the front wheels of the first structure were omitted in the second; but we have seen that the functions they were designed to perform in the first were substantially replaced in the second structure. These wheels of themselves do not constitute a distinct and complete element of the patent in suit. For present purposes, however, they may be so regarded, and they or their substantial equivalent be treated as necessary to the effective operation of the machine. Still the changes wrought do not amount to an omission of both an essential element and a substantial mechanical equivalent. Union Paper Bag Machine Co. v. Advance Co., 194 Fed. 126, 138, 114 C. C. A. 204, and citations (C. C. A., 6th Cir.).

Clark could not omit these forward wheels and utilize their functions as he did, and at the same time escape the charge of infringement, unless he observed the settled rule that if one omits entirely an ingredient of a patented combination he must do so without substituting any other, or he must substitute one that is new or that performs a substantially different function, or, if old, that was not known at the date of the patent in suit as a proper substitute for the omitted ingredient. Gill v. Wells, 89 U. S. (22 Wall.) 1, 28, 22 L. Ed. 699; Imhaeuser v. Buerk, 101 U. S. 647, 656, 25 L. Ed. 945. Surely continuing to mount the shaft within rolling contacts in the same position and for the same purpose as before, and simply substituting the lower two roller bearings for the wheels in question, was not, so far as maintaining the shaft within such bearings is concerned, to introduce anything new, or anything unknown

as a proper substitute, or any substantial difference in function; for, as we have seen, Clark himself had previously devised the use of like rollers for a kindred and obviously analogous purpose in the patent in suit and for years had applied them to such use. It is equally clear that, when Clark transposed the driving function of these wheels to his two driving-wheels, he simply changed the form, not the substance, of the old rolling contacts (Devlin v. Paynter, 64 Fed. 398, 400, 12 C. C. A. 188 [C. C. A., 3d Cir.]; Bundy Mfg. Co. v. Detroit Time Register Co., 94 Fed. 524, 538, 36 C. C. A. 375 [C. C. A., 6th Cir.]); and even if he so enhanced the frictional efficiency of such contacts, he did not materially change the mode of operation or produce a new result, and so could not in this way escape infringement (Marsh v. Seymour, 97 U. S. 348, 359, 24 L. Ed. 963; Hoyt v. Horne, 145 U. S. 302, 309, 12 Sup. Ct. 922, 36 L. Ed. 713; Macomber on Fixed Law of Patents [2d Ed.] p. 411, § 455).

Further, the changes here made are analogous in principle to those involved in Morgan Engineering Co. v. Alliance Mach. Co., 176 Fed. 100, 109, 100 C. C. A. 30 (C. C. A., 6th Cir.); and when we look at the substance of things, as distinguished from their form, there would seem to be in the infringing device here as clearly an embodiment of the patent in suit as there was in the infringing structure of the patent involved there; for, as Mr. Justice Clifford said in Machine Co. v. Murphy, supra, 97 U. S. at page 125, 24 L. Ed. 935:

"The substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself." Winans v. Denmead, 15 How. 330, 342, 14 L. Ed. 717; Devlin v. Paynter, supra, 64 Fed. 400, 12 C. C. A. 198; Hoyt v. Horne, supra, 145 U. S. 309, 12 Sup. Ct. 922, 36 L. Ed. 713; Cantrell v. Wallick, supra, 117 U. S. 693, 6 Sup. Ct. 970, 29 L. Ed. 1017.

We are consequently satisfied that there is no sufficient reason to restrict the invention in suit to the particular form preferred and described in the specification (National Tube Co. v. Marks, 216 Fed. 507, 133 C. C. A. 13, decided by this court July 25, 1914; Hoyt v. Horne, supra, 145 U. S. 309, 12 Sup. Ct. 922, 36 L. Ed. 713); and, although the range of equivalency is limited, as stated, we hold that the claims are each infringed.

[3] In reaching this conclusion we are not unmindful of the language of the claims of the patent; as, for example, each claim calls for "two pairs of running-wheels having parallel axles." We have seen that such wheels (obviously with parallel axles) were embraced in the Boyer patent, and that the invention of Clark was distinctly additional to that of Boyer. The merit of Clark's invention was the release it gave to the Boyer device, as also to friction-driven devices generally, from undue frictional resistance to free operation. Even the rigor of the rule which ordinarily confines a patentee to the language he has used in stating his claims is not of such a hard and fast fiber as to suffer appropriation of the essence of such an invention as this, simply because the patentee employed fit words to apply his improvement to an earlier invention; certainly there is no such degree of absolutism in the rules of construction as to require such a course to be pursued in the instant case, for that would be (as we have said of his contesting title) to permit Clark

both to sell and keep his invention. Macomber, Fixed Law of Patents (2d Ed.) p. 16; Bundy Mfg. Co. v. Detroit Time Register Co., supra, 94 Fed. 539, 540, 36 C. C. A. 375.

Other Alleged Infringing Devices. It is to be observed that plaintiff did not in its original bill or any of its amended forms specifically describe any alleged infringing device, and that the answer in its original and amended forms denies the averments of infringement. In addition to his infringing patented device, Clark manufactured and sold two other types of machines, called defendant's "power arrangement" of 1910 and 1911, respectively, and but little need be said of these devices. The first involved a change from single to double roller bearings at the ends of the inertia-wheel shaft. These rollers are mounted on the ends of pivots which pass through the side walls of the toy, each pivot carrying a roller on the exterior and interior surfaces of the walls, and the upper sets of rollers are removed to points forward and nearly in vertical line with the location of the forward lower rollers. The 1911 power arrangement changes the location of the inertia-wheel shaft to points on the rims of the driving wheels directly above the ends of their axle, and the location of the roller bearings to points immediately above and near the ends of the shaft, where they contact with its forward and rearward quarters; one roller being pivoted to the interior and the other to the exterior surface of each wall of the toy. It is to be noted of these changes in power arrangement that in both instances the three-point bearing is preserved at the ends of the shaft; further, they are but relocations of the points of contact between the inertia-wheel shaft and its rolling bearings. The relations between and the interdependence of the parts remain substantially the same as they existed in the patented infringing structure. The efforts made to justify these structures under Pilbrow's patent (1843), which was designed for steam engines, or Smith's patent (1890), which was devised as a gearing for motor cars, are sufficiently answered (1) by the fact that if those devices were operative, which is doubtful, they are so materially unlike the devices in issue here as to be inapplicable, and (2) by the continuing practical appropriation, through Clark's infringing devices, of the gist of the patent in suit. It cannot well be claimed that either the 1910 or the 1911 structure was not, both as to functions and manner of operation, the substantial equivalent of its immediate predecessor; and it need not be said that, if we are right in our conclusion as to the infringing character of the device made in accordance with Clark's infringing patent (the immediate predecessor of the 1910 structure), it follows that the changes of 1910 and 1911 are not sufficient to avoid infringment.

[4] 3. *The Turner Patents.* These patents were applied for March 5, 1909, and, as stated, were issued in the name of John C. Turner, assignor, to the plaintiff; the first, No. 930,107, on August 3, 1909, and the other, No. 930,633 August 10th of that year. Concededly the subjects of these patents were each in form and design conceived and as many as 50 hand-made samples of them made, in the shop of D. P. Clark & Co. more than two years before the date of application. Con-

cededly Turner was then in the employ of the partnership as foreman of its construction department, and there is sharp conflict in the testimony as to whether Clark himself did not conceive and suggest the idea and plan of each device; Turner doing nothing more of importance than to carry out Clark's directions. However, it is not necessary to attempt to reconcile this conflict, because we are satisfied that some of the sample toys were exhibited with the view of effecting sales, and to all intents and purposes toys of these types were sold more than two years prior to the application. This occurred as early as February, 1907, and the judicial sale of the assets was confirmed February 5, 1909. Meanwhile these classes of toys had been regularly manufactured and sold by the partnership without objection on the part of Turner and without apparent purpose of any one connected with the business to apply for patents. It was not until March 5th following the judicial sale, as we have seen, that Turner declared himself as the inventor of the articles. Of course, sales of the toys made within the two-years period do not of themselves show that similar sales were made before; but Turner's long acquiescence tends to show that the purpose was, when the toys were originally devised (no matter by whom), to treat the designs as ordinary copartnership developments of the toy art, and so to forego any claim of invention. Atlantic Works v. Brady, 107 U. S. 192, 199, 200, 2 Sup. Ct. 225, 27 L. Ed. 438; Egbert v. Lippman, 104 U. S. 333, 337, 26 L. Ed. 755. This also adds to the probability of truth in the evidence adduced that sales, as well as the incidental public use attending such transactions, actually took place and with Turner's consent prior to the two-years period.

The court below found that the defense of prior use and sale had been established, and so decreed that the patents were invalid. We concur in this conclusion. In doing so we have in mind the insistence of counsel that the portions of these toys which are claimed to have been covered by the Turner patents—that is, the bodies of the toys—had not been perfected when the sales were made. This is based upon the theory that these portions were hand-made and not machine-made. We are convinced, however, that there was no material difference between these portions of the toys whether produced by hand or machine; and it is to be remembered, as before pointed out, that the operative parts of the toys—the friction-driven device covered by the Clark patent in suit—had admittedly been perfected long before. The sales were made through accepted orders upon the exhibition and faith of the samples so produced, and were carried out in accordance with the established course of business of the partnership; and we think this was sufficient under the familiar and settled doctrine of sales. Plimpton v. Winslow (C. C.) 14 Fed. 919, 921, per Lowell, C. J.; Egbert v. Lippman, supra, 104 U. S. 336, 26 L. Ed. 755; Worley v. Tobacco Co., 104 U. S. 340, 343, 344, 26 L. Ed. 821; Dalby v. Lynes (C. C.) 64 Fed. 376 378, per Putnam, C. J. The fact that the purchasers were, according to their custom of dealing with D. P. Clark & Co., given the right slightly to reduce the number of articles ordered, cannot alter the effect of the sales made; and since this privilege did not extend to anything like the whole number of articles ordered, the present case is broadly

distinguishable from William B. Mershon & Co. v. Bay City Box & Lumber Co. (C. C.) 189 Fed. 741, 748, where Judge Denison held that a sale "on trial" of a single machine did not constitute a sale within the meaning of section 4886 (Comp. St. 1913, § 9430).

[5, 6] 4. *Unfair Competition.* The averments made in this respect are at best meager, and are confined to the two suits upon the Turner patents. The plaintiff corporation was created under the laws of Ohio, and is located and doing business in the city of Dayton in that state; and the defendant is a citizen and resident of the same state and city. The amended bill upon the first Turner patent in form contains only one cause of action, comprised in several counts. After the usual averments of infringement, it is stated that "in thus copying your orator's patents and designs" the defendant "has been guilty of unfair competition with your orator." In the last amended bill in the suit upon the second Turner patent, plaintiff in terms introduces a second cause of action, and avers that defendant is using "designs, dies, and patterns" of plaintiff in the manufacture of locomotive toys, "which are a close imitation" of plaintiff's toys, "and is selling the same in competition" with plaintiff; that this has resulted in depriving plaintiff of "a large share of the good will," etc., which, "but for the unlawful competition, it would have held and enjoyed."

In view of the invalidity of the Turner patents and the lack of diversity of citizenship, we do not think this court has jurisdiction to pass upon the question of unfair competition. We are aware of decisions to the contrary. It is in effect said and with much force in some of the cases that a court once acquiring jurisdiction under an act of Congress, say in a patent or trade-mark suit, may determine an issue of unfair competition, and this upon the principle that the court, having acquired jurisdiction for one purpose, may, in spite of the failure of that purpose, retain the case and determine other questions without respect to the citizenship of the parties; but we think this is opposed to the rule laid down respecting this class of cases in Leschen Rope Co. v. Broderick, 201 U. S. 167, 172, 26 Sup. Ct. 425, 50 L. Ed. 710, affirming decision below 134 Fed. 571, 572, 67 C. C. A. 418 (C. C. A., 8th Cir.), approved and reaffirmed in Standard Paint Co. v. Trinidad Asph. Co., 220 U. S. 446, 460, 31 Sup. Ct. 456, 55 L. Ed. 536. See, also, Cushman v. Atlantis Fountain Pen Co. (C. C.) 164 Fed. 94, by Judge Lowell; Bernstein v. Danwitz (C. C.) 190 Fed. 604, 605 and citations; King & Co. v. Inlander (C. C.) 133 Fed. 416; Meckey v. Grabowski (C. C.) 177 Fed. 591, 592; Johnston v. Brass Goods Co. (D. C.) 201 Fed. 368; Keasby & Mattison Co. v. Philip Cary Co. (C. C.) 113 Fed. 432. Contra, Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co. (C. C.) 182 Fed. 832, 833; Woods Sons Co. v. Valley Iron Works (C. C.) 166 Fed. 770. The opinion of Judge Severens in Globe Wernicke Co. v. Fred Macey Co., 119 Fed. 696, 56 C. C. A. 304 (C. C. A., 6th Cir.), is explained by the averment and fact of diversity of citizenship appearing in the record; and the opinion of Judge Knappen in Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 128 C. C. A. 203 (C. C. A., 6th Cir.), discloses such diversity.

The decree in case No. 2443, concerning the Clark patent in suit, is

reversed and remanded, with costs, and the usual decree for injunction and accounting will be entered; and the decrees in cases Nos. 2444 and 2445 are each affirmed, with costs.

DAVIS SEWING MACH. CO. v. NEW DEPARTURE MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. October 16, 1914. On Petition for Rehearing, December 8, 1914.)

No. 2,428.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—COASTER BRAKE FOR BICYCLES.

The Townsend patent, No. 850,077, for a coaster brake for bicycles, covers a device the essential feature of which is a telescoping, screw-threaded connector within the hub of the rear wheel, movable to the right and left and revolvable both with and upon the driver sleeve, and which, when the pedal is driven forward, moves to the right and clutches the hub, and, when driven backward, moves to the left, releases the hub, and clutches the brake mechanism. In such feature it was not anticipated in the prior art, and, while not strictly a pioneer, the invention was the step which resulted in making practical and commercial the combination in one device of the driving, coasting, and braking functions, and the patent is entitled to a fairly liberal application of the rule of equivalents; its claims being not too broad to cover and protect the real invention. Also *held* infringed.

2. PATENTS (§ 101*) — VALIDITY — ELEMENTS DESCRIBED GENERALLY AS "MEANS" OR "MECHANISM."

A claim of a patent is not functional and invalid merely because one of its specified elements is "means" or "mechanism"; but such result may or may not follow, depending upon whether such all-inclusive term is used with reference to the element or subcombination which is the real point and gist of the invention, or to elements or parts already well known and designed to co-operate with the new element in order to make a completely operative unit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*

For other definitions, see Words and Phrases, First Series, Mechanism; also, First and Second Series, Means.]

3. PATENTS (§ 101*)—CONSTRUCTION—COMPARISON OF SPECIFIC AND GENERAL CLAIMS.

In determining whether the ambiguous terms of a claim should be confined more or less closely to the form shown in the drawings, it is usually well to compare with other claims which may not be in suit; and if other claims are found which call for the specific construction of a part mentioned more generally in the claims in suit that will be persuasive for not giving the limited construction to the general terms.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

4. WORDS AND PHRASES—"BRAKE"—"BRAKE PAIR"—"BRAKE SHOE"—"BRAKE DRUM."

An effective "brake" consists of two members, which are called the "brake pair," consisting of the "brake shoe," which is the movable member, and the "brake drum," or the stationary member.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Brake.]

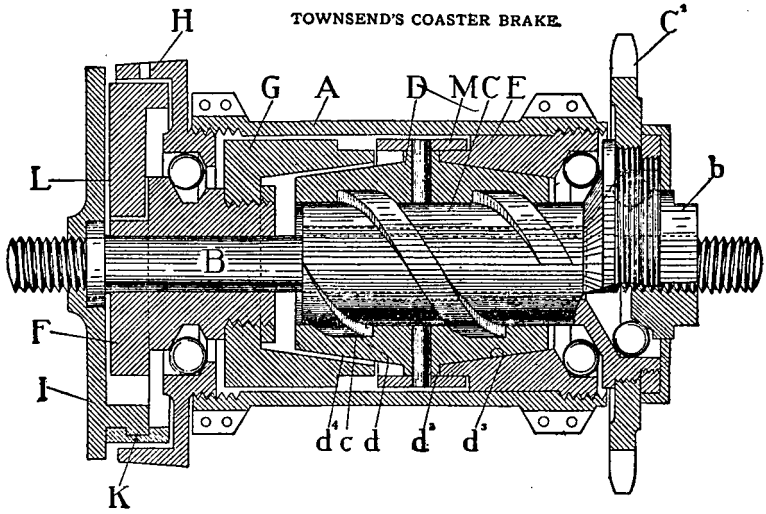
---

*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 Ohio; Howard C. Hollister, Judge.

Suit in equity by the New Departure Manufacturing Company against the Davis Sewing Machine Company. Decree for complainant, and defendant appeals. Affirmed.

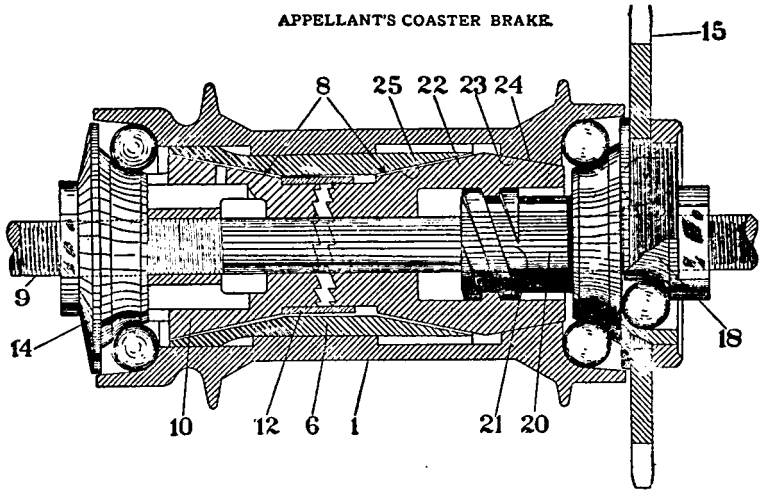
The New Departure Company brought suit against the Davis Company for infringement of claims 25–30, and claim 19, of patent No. 850,077, issued April 9, 1907, to Townsend, for a coaster brake for bicycles. There was the usual interlocutory decree for plaintiff, and defendant appeals. The parties will be named here as below. Their respective structures are shown in the following cuts, and claims 19 and 26 are given in the margin.[1] The other claims in suit are similar to 26.



[1] Claim 19.—In a bicycle, the combination with a wheel hub and axle, of a brake mechanism, a driver for the hub and brake mechanism, a rotatable sleeve connected with the driver and mounted upon the axle within the hub, a laterally shiftable, rotatable sleeve mounted upon the sleeve of the driver and having tapered portions, a complementary spiral connection between said sleeves, and tapered clutch elements carried by the hub and brake mechanism with which the tapered portions of the shiftable sleeve may engage, substantially as described.

Claim 26.—A driving, coasting and braking mechanism for vehicles, comprising the combination with a wheel, a brake therefor, and a driver with relation to which said wheel can independently rotate, of a brake-anchoring device anchored to a relatively stationary structural element of the vehicle, a laterally shiftable connector which in one position operatively connects said driver with said wheel for driving the latter and in another position permits said driver to apply said brake, said connector having rotary movement with respect to said driver and said wheel being rotatable with respect to said connector, and threaded operating connection between said driver and said connector, substantially as described.

APPELLANT'S COASTER BRAKE.



Prior to the Townsend patent, hub brakes, by which back pedaling produced a braking contact inside the hub, were common. Devices also had been made permitting the pedal and the hub-driving clutches to be disengaged, so that the rider could coast down hill with his feet stationary on the pedals. Townsend was not even the first to conceive the abstract desirability of providing mechanism by which the rider could, at his pleasure, drive the wheel forward by his pedaling, or make the pedals stationary while he coasted, or apply the brake by back pressure on the pedals; but he was the first to embody this idea in practical, efficient, commercial form. The operation of his device will be clear, from a brief description of the cut. *B* is the rear-wheel axle of a bicycle, fixed at each end in the frame (not shown) and held against revolution. At one end it has, rigidly attached, the disc, *I*, which carries the expansible split ring, *K*, intended to operate as a brake shoe. At the other end the axle carries the revolving sprocket wheel, C^1, driven by a sprocket chain from the pedal shaft; and extending inwardly from, and rigidly connected to, this sprocket wheel, is the sleeve, *C*, whereby this sleeve revolves with the sprocket freely around the axle in either direction. All the parts intermediate the sprocket and the disc at the other end are included within the revoluble hub, *A*. Obviously, a driving revolution imparted to the hub will impel the wheel, friction being minimized by suitable ball bearings, as shown. At the inner end the hub shell is extended and enlarged as shown, so that its interior surface forms a brake drum against which the split ring, *K*, may be expansibly forced into braking contact. Neither the sprocket and its attached sleeve, which form the driving mechanism, nor the parts at the other end, which make the braking mechanism, are permanently connected with the hub; and therefore, in what may be called the normal and is the coasting position of the parts, the hub and wheel freely revolve without much frictional contact with either driving or braking mechanism. The operative contact, necessary for these functions, is accomplished by and through a sleeve, *D*, which, for convenience, may be called the connector. It surrounds, and, except as limited by other parts, may be revolved upon, the driver sleeve, *C;* but interposed between the two is a thread and screw connection, so that, if the connector is held against rotating while the driver sleeve revolves, the connector necessarily moves longitudinally upon the driver sleeve one way or the other, according as the rotation is forward or back. As constructed, when the driver sprocket and the wheel are driven forward, the connector is moved to the right; upon a back pedal pressure, the connector moves to the left. The right-hand end of the connector is given an exterior taper, and the adjacent part of the hub a corresponding interior taper; so, as the connector

moves to the right, these two parts constitute a friction clutch, which, as the forward pressure is maintained, lock together the driver sleeve, the connector and the hub, and the wheel is driven forward. The greater the driving pressure, the more perfect the clutch. When the motion of the sprocket is reversed by back pressure, the connector is at once carried to the left, and, after slight travel in this direction, its tapered left-hand end becomes one member of the friction clutch, the other member of which is attached to a rocking sleeve surrounding the axle. When this rocking sleeve is so locked by this friction clutch to the connector, it makes part of a revolution until a lever which it carries comes in contact with the split ring, *K*, expanding this against the brake drum carried by the hub, and so completing the brake action. Obviously, the greater the backward pressure applied to the sprocket, the greater the braking pressure applied to the brake drum. Obviously, too, when there is pressure in neither direction upon the sprocket, the hub is disconnected from driver and from brake. To insure that the connector shall not rotate with the driver sleeve until it has nearly or quite reached its clutching position at one or the other end of its travel, Townsend provides a lag spring, marked *M;* but its detailed operation need not be described.

Edward Rector, Frank Parker Davis, and Russell Wiles, all of Chicago, Ill., for appellant.

G. P. Moore, of Bristol, Conn., and Melville Church, of Washington, D. C., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges

DENISON, Circuit Judge. [1] As in every patent case, the court must select that method of approach to the crucial questions which seems to furnish the simplest and clearest solution; and, in the present case, it seems to us best to inquire: First, what were the scope and extent of Townsend's real invention, as shown by comparison with the state of the art? Second, does the defendant employ this invention? And, if so, then, third, do the terms of the patent grant fairly permit a construction which will cover the form of the invention so appropriated by defendant?

We are satisfied that the substance of Townsend's invention, its real inventive novelty, its meritorious forward step, are found in his creation of this connector, movable to the right and left inside the hub, clutching the hub at one end of its travel, at the other end of such motion clutching the brake mechanism, and, in its intermediate position, clutching neither. Whether its telescoping form with reference to the driving member and its thread and screw connection therewith were included in the foundation of his invention, or were only selected and nonessential forms, may be important in some future controversy. In this case it appears that defendant uses these more specific features, and so we hereafter assume, for the purposes of this case, that these two things are essential characteristics of the invention.[2] The peculiar means by which this shiftable connector at one time firmly unites the hub to the driving sprocket, and at another time firmly joins the brake to the driving sprocket, constitute only the environment of Townsend's invention. These things were neces-

[2] Some of the claims do not specify "telescoping" or "screw-threaded," but say that the connector has "rotary movement" upon the driver. This is the same thing, so far as now involved.

sary, in order to give the invention its operative field; but they were not, of themselves, of the body or essence of his primary inventive thought.

The prior art shows various forms of driving connections between the sprocket and the hub, released by back pedaling, and various forms of brakes so constructed that the two members of the braking pair were forced into contact by back pedaling pressure; but nowhere do we find any construction that fairly discloses this shiftable connector, screw-threaded upon the driver sleeve, revolvable both with and upon that sleeve, and clutching one mechanism, or the other, or neither, as it moves back and forth. We do not overlook the patent to Carver, No. 160,570, March 9, 1875, for a friction pulley. This contains the germ of the idea; but its modification and adaptation from the friction pulleys of a factory to the hub of a bicycle we think is, clearly enough, invention.

The Brewster patent, No. 713,594, November 18, 1902, and the connected testimony regarding early use, even if they established a sufficiently early date, would not demonstrate any lack of patentable novelty in Townsend's connector as we have described it. Brewster undertook to accomplish his objects by a loosely mounted sprocket having wedge-shaped cams on its vertical surface, which, upon reverse motion, would constitute a friction clutch with a loosely mounted disc having corresponding wedge-shaped cams, and would force this disc laterally into braking contact with a hub surface. The practical efficiency of this device is, at best, left doubtful by the testimony; and the Brewster patent and device chiefly serve to emphasize the thought that Townsend's invention was not in the driving clutch or in the braking mechanism, but was in the telescoping, screw-threaded connector sleeve, clutching, at the pleasure of the rider, the driving mechanism, or the braking mechanism, or neither.

The patent to Priest & Priest, No. 623,825, of April 25, 1899, might or might not need more careful consideration, if it was early enough; but there is nothing tending to carry it back of its date of filing, September 28, 1898, while Townsend's original application, though filed October 10, 1898, was executed September 19, 1898, and the proof is clear enough that Townsend's invention was perfected and in use in the summer of 1898. The Priest & Priest patent, therefore, needs no attention.

From our review of the prior art and the alleged anticipations or limitations, we are satisfied that Townsend's invention is essentially measured by this shiftable sleeve connector in this surrounding and application, and that his invention, while not rightly to be called pioneer, was the step which resulted in making practical and commercial the combination in one device of the driving, coasting and braking functions, and that his invention is entitled to a fairly liberal application of the rule of equivalents.

If this connector is the characterizing feature of Townsend's improvement, it is hardly to be doubted the defendant uses the invention. Referring again to the cuts, it will be seen that defendant has the Townsend sprocket, driver sleeve, shiftable connector, and threaded

engagement between the two latter, almost precisely like Townsend. Indeed, no difference is said to exist, save in the means of clutching the brake mechanism and in the braking mechanism itself. The extent of these differences and what effect they have on the question of infringement must be reserved to consider in connection with the true meaning of the claim. It is enough to say at present that the shiftable connector sleeve, with the characteristic functions which have been described, and which we have found constituted the real and substantial advance which Townsend had made in the art, has been appropriated and is being used by defendant without material change of form.

Having thus found what Townsend invented, and that it has been taken by defendant, we come to the inquiry whether, through indifference or otherwise, the patent grant was so limited that it does not give to Townsend a monopoly of his real invention; and this requires that we first observe the departures which the defendant has made in its brake clutch and brake mechanism.

[4] An effective brake consists of two members, which may be called a brake pair, and which we have spoken of as the brake shoe and the brake drum. This terminology implies that the relatively movable member be called the shoe and the stationary one the drum. It cannot make any particular difference which member revolves. In a bicycle structure, the axle is fixed, the hub is revolving, and the two parts of the brake pair are essentially the axle member and the hub member. The drum, as above defined, may be attached to the axle or to the hub. The relatively movable shoe may be pressed, radially, from the axle against the drum on the hub, or from the hub against the drum on the axle. Both forms were common. So, also, before Townsend's invention, brake drums had taken two forms: A cylindrical surface, against which an expanding or contracting ring was radially forced, and a tapered or conical surface, longitudinal of the axle, against which a corresponding tapered or conical hub surface was longitudinally forced. Townsend, like all others, could use any of these forms. He selected and illustrated the cylindrical and expanding ring form of brake that has been described. The defendant selected the conical form. It attached firmly to the axle (and anchored to the frame) the tapered nut, *10*, and this became the relatively stationary member of the brake pair, or, as we have called it, the brake drum. Defendant then provided, within the hub, a sleeve which he splined to the interior surface of the hub, so that it must revolve therewith, but was longitudinally slidable therein. This sleeve is shown in the cut by the numeral *6*. It was tapered at both ends corresponding to the tapers in the adjacent surfaces of the connector and the brake drum. When the driver sleeve receives back pressure and the connector is driven to the left, it makes contact with this sleeve, *6*, and pushes the same along until the taper at the other end of the sleeve contacts with the brake drum. Then, as the lateral motion continues, it may be assumed that the connector and the right half of the sleeve, *6*, lock together with an efficient friction clutch, in which case the left half of the sleeve obviously becomes the shoe member of the brake

pair, and the braking effect is obtained. Defendant also provides complementary teeth, which make a positive lock between the connector and the brake drum when the connector reaches the extreme left-hand position; but the office of these interlocking teeth is wholly supplementary to the functions of Townsend's patent. They serve to maintain the braking effect after it is once established, and so lessen the muscular effort otherwise required in maintaining the back pedal pressure. They cut no figure on the question of infringement.

Defendant says that by the double taper of its interior hub sleeve it gets a double braking effect, part at each end. This may be true, but it is immaterial. If defendant uses the Townsend shiftable connector, at one point clutching the hub for driving, and at another point clutching the part which actuates the brake shoe, it is immaterial that it gets a supplementary braking effect somewhere else. Indeed, the difference between a friction clutch and a brake, in this situation, cannot be determined. Until the two members of the pair are so set that relative motion ceases, they constitute, mechanically, a brake, no matter if they have been called a clutch. When they are so set, they constitute a clutch, no matter if they have been called a brake.

Returning, now, to the terms of the claims, and selecting No. 19, we find that it clearly reads upon defendant's structure. Only two suggestions to the contrary are made. It is first said that, while the hub carries a tapered clutch element with which the right-hand end of the connector (shiftable sleeve) may engage, the brake mechanism carries no tapered clutch element with which the left-hand end of the connector may engage, but that the tapered clutch element with which the left-hand end of the connector engages is carried by the hub and not by the brake mechanism. It is not clear that there would be a material departure from the claim if a specified element was carried by one instead of by the other of two named co-operating parts; but however that might be, and giving defendant the benefit of this argument, it still is true that the left-hand end of this hub sleeve, *6*, is the brake shoe, one member of the brake pair, and, therefore, a part of the brake mechanism; and so it is literally correct to say that the right-hand end of this hub sleeve is a taper clutch element, with which the connector may engage, and which is itself integral with, and is therefore carried by, part of the brake mechanism.

The other suggestion is that unless the call of the claim be restricted to the form of brake mechanism shown in the drawing or its equivalent —in other words, if it calls for any suitable brake mechanism—the claim is too broad, because really for a function, and so is invalid under the rule of Westinghouse v. Boyden, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. The principle of the Westinghouse Case is not applicable here. There the abstract idea involved in the invention was that the preliminary traverse of the piston should admit air from the reservoir to the brake cylinder, and that a further traverse of the same piston should admit air directly from the main air pipe to the brake cylinder. This abstract idea was given embodiment by the inventor through an auxiliary valve operated by the further traverse of the piston, and this auxiliary valve (with its equivalents and in association

with the parts of the older patent) constituted the thing of which, under the patent law, the inventor was entitled to a monopoly. The second claim, as construed by the court, went further, and undertook to claim the abstract idea involved, or, in other words, the function of the piston in its further traverse. The real analogy between that case and this rests on the fact that in one the auxiliary valve and in the other the shiftable connector formed the substance of the inventive advance over the old art.

In order to make the Westinghouse Case so parallel as to require here a conclusion of invalidity, we must find therein a holding that a claim which included as an element the auxiliary valve which constituted the invention, and also included the piston which only furnished operative surroundings for the invention, was invalid, because it covered any kind of piston rather than the variety shown in the drawings; and the case carries no such thought. To perfect the parallel from the other point of view, we must suppose a claim which specified as an element, not the form of connector which Townsend had invented, but any connecting means clutching the hub mechanism on one motion and the brake mechanism on the reverse motion. Some of the claims of the Townsend patent are subject to plausible attack on this theory; but not so, we think, of the selected claims in suit. These claims do not extend to every means by which a forward motion makes one connection and a reverse motion makes the opposite connection, nor even to every form of a laterally shiftable connector housed within the hub. They are confined to what is, in this respect and comparatively speaking, a specific embodiment of this function, viz., the connector sleeve, telescoping on the driver sleeve, driven longitudinally thereon by the intermediate screw-thread connection, effecting a taper clutch at each end of its travel and being released from both clutches at its intermediate position.

[2] Reliance is also placed upon the opinion of this court, speaking by Judge (afterwards Mr. Justice) Lurton, in Tyden v. Ohio Table Co., 152 Fed. 183, 81 C. C. A. 425. In this case, the claim calling for "means" was held invalid because it covered all means for accomplishing the result, and so was functional. We do not question the application of the rule as made to the facts of that case; but we do not understand that a claim is functional and invalid merely because one of its specified elements is "means," as in the Tyden Case, or "mechanism," as in the present case. This result may or may not follow, depending upon whether the all-inclusive term is used with reference to the element or subcombination which is the real point and gist of the invention, or whether it is used with reference to elements or parts of the combination already well-known and designed only to co-operate with the new element in order to make a completely operative unit. In other words, where used with reference to the exact point of novelty, "means" or "mechanism" may expose the claim to attack on the ground that it is functional; in that respect, each case will present a problem by itself. But where used with reference to the make-up of the field in which the real invention finds its usefulness or with reference to the connecting parts which permit the salient

novelty of the invention to accomplish its function, these words are only a convenient formula of the broadest equivalency of which the real invention permits. Their use amounts to a statement by the inventor that, as to this element, the claim is not confined to the form shown, nor to any close imitation of that form, but extends as broadly as is consistent with the extent of his inventive step to all forms accomplishing that part of the ultimate, composite result, and, of course, does not, of itself, prevent the court (where the state of the record requires) from interpreting the claim as limited to a more or less close approximation to the "means" described in the specification. Rich v. Baldwin (C. C. A. 6) 133 Fed. 920, 923, 66 C. C. A. 464; Kellogg Co. v. Dean Co. (C. C. A. 6) 182 Fed. 991, 1003, 105 C. C. A. 545.

That the Supreme Court has not intended, either in the Westinghouse-Boyden Case or in other instances where claims have been held void because functional, to predicate this result merely on the presence of the word "means," "mechanism," etc., is apparent. In Morley Co. v. Lancaster, 129 U. S. 263, on page 286, 9 Sup. Ct. 299, 32 L. Ed. 715, there was an extreme instance. The claim was for the combination of three elements: "Button-feeding mechanism; appliances for, etc.; and feeding mechanism." The objection that this and other similar claims were void on their face because for a function could not have escaped the attention of Mr. Justice Blatchford, who wrote the opinion sustaining their broad validity; indeed he expressly said that these claims were not for the result or effect, irrespective of the means employed. The case being, however, one of the class where the vital point of the invention—the making of the combination of these different sets of mechanism—was expressed in these general terms, it was ruled that they did not cover every possible means, but yet must be treated as terms of very considerable scope and inclusiveness. In the latest reported decision touching this point, Paper Bag Patent Case, 210 U. S. 405, 422, 28 Sup. Ct. 748, 752 (52 L. Ed. 1122), the claim called for the combination of a rotating cylinder, forming plate, and "operating means for the forming plate adapted to cause the said plate to oscillate about its rear edge, etc." (The claim included other mention of "means" as elements, but this is the one to which the opinion refers.) It was argued that, by extending the patent to cover a device in which the defendants used very different means of causing a forming plate to oscillate about its rear edge, the court below had given the patentee a patent for a function. The Supreme Court held, in effect, that the use of these general terms is not objectionable in cases where the element so identified serves to provide a "working relation" for what may be called the more primary elements of the combination. Mr. Justice McKenna says:

"The distinction between a practically operative mechanism and its function is said to be difficult to define. Robinson on Patents, § 144 et seq. It becomes more difficult when a definition is attempted of a function of an element of a combination which is the means by which other elements are connected and by which they coact and make complete and efficient the invention. But abstractions need not engage us. The claim is not for a function, but for a mechanical means for bringing into working relation the folding plate and the cylinder."

The Patent Office practice, in the shaping of claims with reference to these phrases, has vacillated. After some of the early court decisions disapproving the particular uses of these words which were involved in the cases decided, the Patent Office was inclined to forbid their use; but this confusion later settled down into the clearly established rule that these words would not be permitted where the novelty of the invention was in the specific mechanism to which they were intended to refer, but would be approved when they described "mere adjunctive devices which connect or give co-operation to the various elements or features of the invention, but are in themselves no actual controlling part of it." Ex parte Paige, 40 O. G. 807, 810; Ex parte Pacholder, 51 O. G. 295; Ex parte Halfpenny, 73 O. G. 1135. Pursuant to this rule regulating the "substantive" and the "adjunctive"—which we consider only another form of words for the distinction we have expressed—the great majority of patents during the last few years have contained claims identifying certain elements as for "means," "mechanism," "devices," etc.

In none of the cited decisions of this court especially relied upon in argument[3] do we find any holding that a claim calling for "means" is thereby, and thereby only, made functional; but, if there were any such holding, it must yield to the rule of the Paper Bag Case. These considerations demonstrate to us that the call of claim 19 for "a brake mechanism" does not make the claim functional or invalid, and that this claim is infringed. The same considerations govern the use of similar phrases and terms in claims 25–30.

[3] In determining whether the ambiguous terms of a claim should be confined more or less closely to the form shown in the drawings, it is usually well to compare with other claims which may not be in suit; and if we find other claims which call for the specific construction of a part mentioned more generally in the claims in suit, that will be a persuasive reason for not giving the limited construction to the general terms. That test is not applicable here, because no one of the claims in the Townsend patent calls for anything more particular than a "brake" or "brake mechanism," etc.; but the reason for this omission is found in the specification, which informs us that this patent is not intended to reach the particular form of brake which Townsend has devised, but that he reserves for another copending application the claims which relate to that part of his invention. This situation emphasizes and confirms our conclusion from the face of the claims in suit, viz., that they do not refer to and are not confined to any particular form of brake or brake mechanism.

We should reach the same result, if we considered the calls for a brake and brake mechanism from the point of view of substantial equivalency for the form shown in the drawing. Considering the reasonable range of equivalents to which Townsend is entitled, and the fact that both his general form of the braking mechanism and the de-

[3] Columbus Co. v. Robbins, 64 Fed. 384, 12 C. C. A. 174; Western Co. v. Williams Co., 108 Fed. 952, 48 C. C. A. 159; Rich v. Baldwin, 133 Fed. 920, 66 C. C. A. 464; Wessell v. United Co., 139 Fed. 11, 71 C. C. A. 423; American Co. v. Sexton, 139 Fed. 564, 71 C. C. A. 548.

fendant's general form were well known, defendant has made no vital departure. In each case, the left-hand travel of the connector brings it into engagement with the clutch element housed in the hub. In each case the clutch element is thereby actuated, and, in turn, directly or indirectly actuates the brake shoe and drives it against the brake drum. Defendant's transposition of the drum from the hub to the axle, and of the shoe from the axle to the hub, is not, speaking broadly, a material change. The same elements coact and produce the same braking result. Although the manner of their coaction is not identical, it is similar enough to justify the requirements of the equivalency rule in this case.

The lag spring forms an element of claims 27 and 28; but defendant uses substantially the same spring in the same location and arrangement, and so these claims present no further question on this account.

The decree below is affirmed, with costs.

On Petition for Rehearing.

Defendant's petition for rehearing forcefully again presents one position not considered in the opinion filed. The opinion assumes that defendant's interior hub sleeve *6* is the "tapered clutch element carried by the hub," of claim 19, and that it provides the clutching function at the left-hand end of the connector which is called for when the opinion defines Townsend's invention as residing in the "connector sleeve clutching at the pleasure of the rider the driving mechanism or the braking mechanism or neither." This assumption in the opinion is now challenged because (it is said) this hub sleeve is not a clutch at all, and performs no clutching function, but is one member of a brake pair, and is nothing else.

As matter of strict terminology, the opinion was wrong in calling this hub sleeve a "clutch," or a "clutch element"; but we think that this precision in name is not a matter of substance, and that the hub sleeve is fairly within that breadth of definition which, from the record, should be given to "clutching" and "clutch element." Here, again, we must notice, as pointed out in the opinion, the frequent lack of structural distinctions and the uncertain functional distinctions between a clutch and a brake. Not only is a clutch a brake while the clutch is being set, but while a brake of this class is being set it is a *slipping* clutch. Hence it is obvious that the name by which the part happens to be designated is not, of necessity, controlling. Ordinarily, we think of a clutch as a device by which two separable members are made continually to revolve in unison; but Townsend, when speaking of a clutch element at the left-hand end of his connector, did not use the term in this full sense, since his clutch socket *G* and its attached rocking actuator could turn only a small fraction of one revolution. The fact is that the left-hand motion of the connector operates to push an intermediate element which, in turn, pushes one of the brake members. As the motion called for by Townsend's form was rotary, he calls this intermediate element a clutch element. His specification calls it merely "a suitable clutch whereby" the connector sleeve may be connected with the brake actuator.

When the tapered left-hand end of defendant's connector sleeve moving to the left first makes contact with the taper socket in the end of the hub sleeve, there is no effect, except that the hub sleeve is pushed longitudinally. As soon as the limit of this motion is reached, there is a tendency for the connector sleeve and the hub sleeve to set together and to revolve in unison. This is a clutching tendency, and it takes partial effect, but cannot take full effect, because one member cannot revolve. Eventually, when and while the members are set together, neither can revolve, except in unison with the other, and this again discloses a clutching function.

While, as above pointed out, the mutual engagement of Townsend's left-hand taper sleeve and its taper socket is not, in the extremest sense, "clutching," it is properly enough so called in the specification and the claim; but "clutching" is only the form of engaging appropriate to actuate Townsend's form of brake. The real ultimate function is to "engage and actuate"; and the mere use in the claim of the name "clutch element" does not prevent extending it to cover an element which, though it engages and actuates, and though it looks like a clutch, and though part of the time it acts like a clutch, yet is not merely a clutch all the time. We do not intend hereby to adopt a construction for claim 19 which will make it coextensive with certain other claims not in suit, which call for any means of engaging instead of for taper clutch elements. There is room for distinction.

The suggestion in the opinion that "it may be assumed that the connector and the right half of the sleeve, *6*, lock together with an efficient friction clutch," implies inaccuracy when thus stated. They do not lock together until the revolution stops; the existing tendency to lock together is resisted and retarded. The definitions in the opinion which incorporate the clutching function should say "clutching or equivalently engaging," and, so reformed, are not open to the criticisms now urged. That the method of engaging and actuating employed by defendant at this end of the connector, if, indeed, it is not "clutching," is equivalent, is, we think, sufficiently shown by what has been here said about its operation and what was said in the opinion regarding the field of equivalency.

The petition also presents a supposititious structure in which the left-hand end of the connector and the right-hand end of the hub sleeve are not tapered, but have vertical, parallel faces, and the left-hand movement of the connector operates only to push the hub sleeve along into a braking contact at its other end. It is said that here the taper clutch element would disappear. This supposed construction presents questions of equivalency, and of uniting in one part the functions of two, or the converse, which are not necessarily involved in deciding this case. It is sufficient to say of them as we said in Grever v. Hoffman Co., 202 Fed. 923, 927, 121 C. C. A. 281, 285:

"It will be time enough to consider that question, if such a machine is ever built and works well enough to justify an infringement suit."

The petition for rehearing is denied.

TROY LAUNDRY MACHINERY CO., Limited, v. COLUMBIA MFG. CO.

(District Court, E. D. Pennsylvania. November 12, 1914.)

No. 1111.

1. PATENTS (§ 46*)—VALIDITY—UTILITY OF DEVICE.
Both the constitutional and statutory provisions relating to the granting of patents emphasize the requirement that an invention, to be patentable, must be useful, and, to entitle a patent to protection, it must appear that the device is operative.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 54, 55; Dec. Dig. § 46.*]

2. PATENTS (§ 49*)—SUIT FOR INFRINGEMENT—EVIDENCE.
Evidence merely that the owner of a patent has made, but has ceased to make, the patented device, is not admissible as tending to prove its inutility.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 59–62; Dec. Dig. § 49.*]

3. PATENTS (§ 112*)—UTILITY OF DEVICE—PRESUMPTION FROM GRANT OF PATENT.
While the action of the Patent Office, in granting a patent, does not render the question of the utility of the patented device res judicata, it is entitled to weight on that question.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162–165; Dec. Dig. § 112.*]

4. PATENTS (§ 49*)—SUIT FOR INFRINGEMENT—EVIDENCE.
The fact that neither a patentee nor a subsequent owner of the patent has ever tried out the invention does not carry any implication that the device is a useless one, but it brings such owner in a suit for infringement within the rule that where a fact is in dispute, and one party has the means of producing evidence that would have a convincing bearing, but fails to produce it, the court is justified in giving the fullest weight to the opposing proofs.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 59–62; Dec. Dig. § 49.*]

5. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DRY-ROOM HANGER.
The Bartholomew patent, No. 924,722, for a dry-room hanger, *held* void on the ground that the device shown is inoperative; also *held* not infringed if valid.

In Equity. Suit by the Troy Laundry Machinery Company, Limited, against the Columbia Manufacturing Company. On final hearing. Decree for defendant.

Wm. Steell Jackson, of Philadelphia, Pa., and George L. Wilkinson, of Chicago, Ill., for plaintiff.

W. H. C. Clarke, of Washington, D. C., for defendant.

DICKINSON, District Judge: To discuss or even refer to the facts bearing upon the special features of this case would give inordinate length to this opinion. These facts are found and stated in the special findings.

The plaintiff is the owner by assignment of letters patent No. 924,722, granted June 15, 1909, for a dry-room hanger, its proprietary right in which, it asserts, the defendant has infringed. The case for the plaintiff on its broad merits is not an appealing one. What it has

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

is, not a device, but a drawing of a device, by which plaintiff is unwilling to stand as embodying the invention claimed. There is no evidence that any such device was ever in use. There is no evidence (except the stipulation referred to later) that any device was ever made, except one made to serve as an exhibit model. There is nothing in the case from which it could be found that the owner has ever made use of this invention, or put it upon the market, or ever intended so to do. The defendant company uses dry-room hangers in its business. Its employés devised and constructed a form of hanger, its use of which is sought to be enjoined. This hanger is admittedly operative and superior to anything even remotely suggested in plaintiff's letters patent.

The practical effect of a ruling in plaintiff's favor would be, not only to prevent defendant from using its own device, but to turn the ownership and control of it over to the plaintiff. In a proper case for the awarding of an injunction, such a hardship is more apparent than real, for the reason that a patentee cannot, of course, be deprived of the exclusive use of his invention merely because some one had subsequently improved upon it; and, if the improver does not patent his improvements, the first patentee may use them. Moreover, the courts cannot deprive a plaintiff of his property, nor deny to him a right or a remedy which lawfully belongs to him because not in sympathy with the use which he makes of his own. It is a reason, however, for requiring him to prove his right and would be a reason for withholding, in a proper case, not his legal rights or legal remedies, but those superlegal remedies which are awarded, if at all, not of right, but of grace.

The device under discussion is essentially a traveling clothespin. The course of its travels is confined to a room artificially superheated. This is the dry-room in which the laundried articles are dried out. The hanger feature is that the device is attached to and suspended from an endless chain, by which it is carried around the room and through the superheated air until the article is dried. The hanger must be so constructed that the articles may be easily inserted between the gripping jaws, which will hold them suspended until the drying process is complete, and then permit them to be automatically dropped in the receptacle provided for them. The plaintiff's invention was intended to meet these requirements. The defendant's device does meet them.

[1] This brings us directly to the defense which we have analyzed, and will discuss in a somewhat different order from that in which presented. The first feature is lack of utility. The purpose declared by the Constitution as the motive for conferring power upon Congress to grant exclusive proprietary rights, and the language employed by Congress in prescribing the conditions upon which these rights are given, laid a like emphasis upon the useful. The power is conferred "for the purpose of promoting the progress of science and the *useful* arts." The right is given to him whose invention or discovery is "new and *useful*," and the commissioner is to issue the letters patent only if it shall appear "that the same is sufficiently *useful* and important." This invention is of no use, unless the device embodying it is operative.

[2] Here we must make a short diversion to discuss the question of the admissibility of some evidence offered by the defendant bearing upon the fact of utility. This was excluded. In deference to the urgency with which the offer was pressed, the ruling was modified to the extent that the evidence was permitted to go upon the record to be considered if relevant, but not considered otherwise. The evidence was in the form of a stipulation admitting two facts. One was that the plaintiff had made devices as described in the letters patent. The other was that they had ceased to manufacture. The deduction from these facts to be drawn was that the device was inoperative. This involves a non sequitur. It is to be observed that there was no offer to follow up this evidence with proof of the further fact that the discontinuance was due to a failure of the device to work. This would have been an admission of inutility. It is obvious that a mere cessation of manufacture might have been due to something which had no relation to the merits of the device. The evidence was properly excluded and has been disregarded.

[3] The evidence for the plaintiff consisted of the letters patent and the opinion expressed by plaintiff's expert. Every patented device bears the indorsement of the Patent Office that it, among other things, is "useful." For obvious reasons a working rule cannot be made out of the proposition that the findings of the office are within the res adjudicata principle. Nevertheless, such a finding should carry with it something more than a bare prima facie. The Patent Office is a co-ordinate branch of government. The courts owe an attitude of respect toward the opinions which are expressed in the grant of letters. Where the office had before it all that is before the court, such opinion is entitled to have accorded it all the force which is the accompaniment of judgments which, although not binding, are informative and persuasive. We have before us, however, what the Patent Office did not have, that the only persons who put the operativeness of this device to the test of actual use and trial found it would not work. The plaintiff has also in its favor the opinion of its expert. For the views of this witness we have more than the formality of respect. In all his testimony he was clear, candid, and fair, not yielding, of course, anything which belonged to the side on which he was called and carrying everything which could be urged in its favor as far as it could properly go, but yet recognizing also what he owed to his other profession of engineering. All of his testimony carried weight.

[4] There was, upon the other side, the opposing view of a like expert witness for the defendant. In addition to this, there was the testimony of a man who was one of those who had actually tried this device; one who had seen it at work and who had witnessed its failure. We have the further fact that neither the patentee nor the plaintiff, so far as the evidence discloses, had ever tried out this invention. We do not think this carries any implication that the device is a useless one. We do think, however, that plaintiff is within the rule that where a fact is in dispute, and one of the parties has the means of producing evidence which would have a convincing bearing upon the

question and fails to produce it, if there is no implication that he thinks the evidence would be against him if produced, it is a reason for giving the fullest weight to the opposing proofs. The plaintiff might have given added weight to the testimony of its expert by giving him the opportunity to see the hanger in actual use. This it did not do.

[5] Lastly, we have another witness. This is the model exhibit. We think it on the whole to be a witness for the defense. This does not mean that an opinion formed from an inspection of the device would weigh against the opinion of plaintiff's expert, but it gives added weight to the testimony of the witness who subjected the device to the test of actual trial, because he testified to a failure in just those features in which, upon inspection, you would expect it to fail. We therefore feel, after some hesitation, constrained to find that the device is an inoperative one and is lacking in the element of patentability indicated.

Another branch of the defense is lack of novelty. The application does not distinguish in terms between that to which the claimed invention relates as already known to the art and that which is claimed to be new. This omission, coupled with the absence of precision of statement in what is set forth, makes it not a little difficult to be sure of the meaning intended to be expressed. If, by the expression "having an object," he meant to state in what the merit of his invention inhered, then surely he claimed novelty only in his described mode of hanger construction below, and including what he terms the "yoke." If this is merely illustrative and is descriptive of a preferred form only, then it is difficult to grasp the thought in mind, unless it was to broadly cover any hanger attached to a carrier and having a device by which articles could be taken hold of and held during transit, and which would automatically release its grip at a preselected place. Such a claim would be broader than the then state of the art would support or justify.

The claims of the patent with which we are now concerned are 9, 11, and 14. Claim 14 by itself is unintelligible. Claim 11 is evidently intended to cover a device which might be described as the one-half of the illustrated device. The claim, therefore, which has been chosen to most adequately present the case for the plaintiff is 9. Of the several elements which make up the parts of the device embraced in this claim, the crossbar with the extremities turned down, and having buttons or other forms of gripping faces on the ends, was old. The releasing arm working on a pivot and having another button or gripping face to meet and co-operate with the button on the crossbar was also old. One of the new features in plaintiff's device, as the inventor had conceived them and as we find he meant to describe them, consisted of having the pivoting pins, which held the ends of the releasing arms, separated when the hanger had two arms. He accomplished this by widening the shank below the crossbar and making of it what he describes as a "central depending plate." This was for the purpose of accomplishing the two results referred to in the special findings.

Another new feature was that the releasing arm should extend upward parallel with and close to the shank and should move toward the

shank. This also had a purpose, as already found, and was thought to necessitate the counterbalance. The inventor's expedient for accomplishing this was to give the arm a right-angle bend upward at the bearing point of the grip. This was necessary for another purpose, which was also a novel feature. This right-angle bend enabled the inventor to bring the buttons forming the grip, the part of the arm between the button and the pivot, and the pivoting point all in alignment. This further enabled him to get the horizontal part of the arm jambed into the space between the pivot and the end of the crossbar; the article to be suspended being held by the bite of the buttons. This has been described as a thrust or pinch, as distinguished from the mere force of gravity. It calls for some resiliency in the metal. He undoubtedly thought the merit of his invention to consist in this, and the upward releasing arm parallel with and close to and with the releasing motion toward the shank. The feature, upon which stress is laid by the plaintiff, of having grips on each side of the central pivoting plate, making of the device what is termed a twin, we find to have been known to the art. We see in principle no distinction between two grips spaced so as to take hold at the same time of the two shoulders of a shirt, and in like manner taking hold of two handkerchiefs, or other articles. Moreover, we doubt that the mere duplication of a known device would be a patentable combination. The patentable merit of this invention, if it were otherwise patentable, consists in that it is a combination of the novel features mentioned with the old elements described. Calling an old thing by a new name does not give it patentable novelty.

The applicant describes his crossbar as a U-shaped yoke. This is not a happily chosen or accurately descriptive phrase. If an alphabetical comparison were sought, the Greek letter "Omega" is more readily suggested by the form of this yoke. It has certainly no resemblance to U. The so-called yoke is nothing more than a crossbar. We think therefore the claims of the patent should be restricted to the combination named above.

We wish to accord to the plaintiff the full benefit of the principle that, if an idea of value and novelty is present in a device, the patentee is not to lose his rights because of any mere lack of ability to express his thoughts with absolute scientific accuracy. Few of us could stand such a test. The combining of old things with new, however, while it should give a right to the combination found, should not prevent another inventor from using the old elements in combination with other new ideas, provided the combination is new, and in it he uses only the old elements with his own novel ones.

This brings us to the last matter of defense, which is the fact of infringement. We find no resemblance in mechanical construction or in principle of construction or operation between the device of the defendant and that of the plaintiff, except in those elements which were known before the patent in suit was thought of. The view of plaintiff's expert that the releasing arms of defendant's device extend upward because they are above the grip does violence to the use of language and attempts to force a construction which the words will

not bear. The defendant's grip is almost a counterpart of the Hatfield grip. If the situation of the parties were reversed, it could not be contended that the plaintiff's device infringed the defendant's, and the converse holds good. They come in contact only in those elements which are older than the plaintiff's patent. Plaintiff cannot maintain his bill unless he were able to have it established that he is the inventor of the yoke or the idea of using two known things in couples.

Defendant has given notice of an application for leave to introduce evidence of the use of a device, knowledge of which had come to defendant since the trial. This should be granted, if at all, only upon terms. Defendant has leave to make such application within five days on notice to plaintiff. If made and allowed, the case may be set down for a further hearing. Otherwise bill dismissed, with costs to defendant.

Special Findings of Fact and Discussion Thereof.

1. The plaintiff is the owner by assignment of letters patent No. 924,722, granted June 15, 1909, for improvements in "dry-room hangers."

2. The facts involved in a finding of the features in which the respective devices of the plaintiff and defendant are common to both in form and in principle are these:

(1) Each is a "dry-room hanger," designed to aid in the same result of suspending laundried articles exposed to artificially superheated air while being carried through and around a drying room to be dried to a place of deposit and to be dropped there by the hanger automatically releasing its grip. Such hangers are old in the art, and this feature is not of itself included in the claims of the patent, nor is it involved in the case further than in the question of whether plaintiff's device is an operative one. This fact is separately found.

(2) For the purpose of being thus carried, each has at the top a means of attachment to an endless chain transporting contrivance which in principle and form are alike. The only difference is that the means of attachment provided is from opposite sides. This feature is also old in the art, and not of itself covered by the claims.

(3) Both hangers have, below the top part referred to, depending shanks, which in principle are alike and perform the same function. They differ in shape and dimensions. That of the plaintiff is relatively long and narrow and has an additional attachment feature which the device of the defendant omits. The latter consists of two relatively wide and short plates fastened together with screws, and one plate sliding into a broad slot provided in the other. This depending shank is common to all hangers, is old in the art and not in itself made the subject of any of the claims.

(4) Each has a crossbar or transversely extending part called in the application a "yoke," having half of a gripping device at the ends. This latter feature is more fully described in a later finding. They differ somewhat in form and shape, and differ also in construction to meet the different ways in which the same function is performed. In function and in principle they are, however, alike. The points of dif-

ference, the relation of this yoke to the prior art, and the bearing of the patent claims to the yoke feature are all made the subjects of specific findings. The patentee describes, in some of his claims, this "yoke" as "U-shaped," and the whole hanger as a "U-shaped hanger." Neither the yoke shown in the drawing nor in the exhibit is so shaped, and there is nothing to indicate what the inventor had in mind, except this phrase. The defendant's yoke does not have this shape.

(5) Each has a further depending central shank below the crossbar or "yoke." These differ in form, shape, construction, relative position, and dimensions. They are alike only in the respect that each has one function common to both. This part of the hanger affords the means or base for the support of the arms hereinafter referred to and the pivoting points of their movement. The differences can be most clearly expressed in connection with another feature of the general device. The bearing of the prior state of the art, the differing functions, or, more accurately speaking, the added functions which one has over the other, and the bearing of the patent claims are separately found.

(6) Each has two arms. Each arm extends from the lower shank, to which one end is attached, and in the same direction as the "yoke." Each moves as on a pivot at the attached end, so as to permit the other end of the arm to move freely and come back to its original position. Each arm in each device has a gripping surface of the other half of the gripping device, which is made up by means of this gripping surface being brought in contact with the corresponding gripping surface at the end of the yoke; the article to be held suspended being pressed between the two surfaces. The devices are alike in that the two arms are adapted to be moved independently and either simultaneously or at different times by being brought in contact with any construction operating as a cam placed at any point in the course of the transported movement of the hanger which may be desired. The effect of contact of arm and cam is to so move one end of the arm as to separate the gripping surfaces, thus allowing the article held between them to drop in any preselected place. The two devices differ radically in the other means provided for meeting the performance of the functions which they have in common. These differences involve both mode and principles of construction and of operation, and are made the subjects of independent findings.

(7) In the plaintiff's hanger this central shank takes the form of what the patentee described as a depending plate. In position it follows that of the upper shank. It is, relatively to that of the defendant, long and wide. Length is given to it in order that the pins which form the pivoting attachment of the arms may be on a horizontal line with the bearing point of the gripping surfaces and the part of the arm between the pivot and the grip, so that all may be on the same line or all in exact alignment. Width is given to it in order that there may be a sufficient field of operation, so that there will be no interference of one arm with the other at the upper end. This lower shank or inverted post, as it is in the defendant's device, takes, in plaintiff's design, the form of just what the patentee terms it—"a depending

plate." The arm used by the plaintiff starts at the pivoting rivet and extends laterally outward in a direction parallel with the body bar of the yoke, and then is bent at right angles and extends upward to an end about one-third of its perpendicular length above the yoke. At the angle or elbow thus formed is a cylindrical or barrel-shaped knob, the outside line of whose surface supplies the bearing line of this half of the grip device. At about one-third of the upward part of the arm, a branch or other arm extends outward laterally parallel with the body bar of the yoke. This is a counter balance and has two functions. One is to bring the arm by gravity to drop back to the horizontal after the grip has been opened, and the other is to form a handle by which the operator can force the jaws of the grip down to the point where their centers will be in alignment with the lower part of the arm and jamb them together. The so-called yoke is of flat or plate metal riveted to a crossbar at the bottom of the upper shank. The form of the yoke is that, for about three-fifths of its length, it extends horizontally and along the crossbar mentioned, and for one-fifth of its length at each end is bent downward at right angles, and further bent inward in a curve, each end having one-half of a gripping device corresponding to that at the angle or elbow of the arm. The depending central plate is part of this yoke, and not an extension of the shank-post, as in defendant's device. The movement of the arms by which the grip is released is toward the shank-post, and then back again, and they are given an upright position, so as to narrow the field occupied by the hanger in its movement. This field is, however, widened by the counterbalance, so that this advantage is lost. The arms slide over the surface or face of the yoke, being held in that position by the pivoting rivets. The operation is this: The operator inserts the laundried article between the jaws. Pressure is then brought in by a pull on the counterbalance. This forces the knob on the elbow of the arm down so that the alignment spoken of is produced and the goods are held by the jamb caused by the knobs, obeying the order of the operator to get together. If a little too much force is applied to make the jamb, the elbow gripping surface is forced below the other, and the hanger then becomes inoperative. This jamb holds the article until the hanger is carried to where the cam is placed. The upward extending arm is pushed toward the shank-post. This raises the elbow; the grip opens and the goods drop. The hanger is a "twin," in the sense that the construction on either side of the center is like its brother and can operate independently. Being fastened together, they are also Siamese.

(8) In the defendant's device the crossbar or yoke has the outline shape of an ox yoke, with the ends curving downward and inward occupying the place of bows in an ox yoke. The ends are flattened out, and on this flat part there is a rectangular shaped depression, in which is placed a fairly well-fitting piece of bone with a flat surface. This is very much like what woodworkers call a "dutchman." This bone supplies a gripping surface. In the yoke is a slot extending from near the shank-post to the flat end. There are two arms which, when at rest, have the outline of extended wings. They are inserted in and

protrude through the slot aperture of the yoke and in line with the body bar part of it. From about the middle of the arm there is a finger extending downward and curving inward toward the shank-post. In this is inserted a bone button, so placed as that the middle point of its surface meets the middle point of the other gripping surface. From the middle of the yoke and extending downward in line with and in continuation of the upper post is a lower shank or inverted post. It is in no proper sense a plate, nor is the plane of its position the reverse of the upper shank, as in plaintiff's device. It is short, so that its extremity is relatively much above the bearing point of the grip. It is also provided with a slot in which the inside ends of the arms are inserted, one being placed upon the other, and a loose pin inserted through holes in the lips of the slot and the ends of the arms. This pin acts as a pivot. The device is operated by the laundried article being inserted between the jaws of the grip. These jaws are so placed that a line perpendicular to the outer gripping surface would pass above the pivoting pin. The gravity pressure exerted by the arm holds the articles in place. The jaws open and release the grip by an upward or lifted movement of the arms. The button on this finger of the arm is corrugated to add to the grip. It is made of bone to protect the goods from rust.

3. The device of the plaintiff, as illustrated in the drawing and as embodied in the exhibit, is inoperative. The metal in the latter is resilient. Two causes of its failure are that, if the elbow knob of the arm is not forced down so as to hold the goods by the bite of the jamb of the lower arm against the knob at the end of the yoke, the grip will not hold. If too much force is applied, the knob at the elbow of the arm drops to an inoperative position. We find that the device cannot be made operative through any improvement in mechanical construction, and can be made so only by dropping the novel features of the device described in the application and claims.

4. All the parts of this device above the yoke are old in the art. The construction called the "yoke" is also old, except in respect to the novel feature of a relatively wide and long depending plate having the special and novel functions which this plate was thought by the inventor to have. The width was given to prevent the releasing arms from interfering with each other above the yoke, and this was meant to be assisted by the knob of the releasing arm engaging the side of the wide plate. Length was given to it, so that the pivoting pin might be on the same horizontal plane with the gripping knobs, so as to provide the jambing action described. The releasing arms are old, except in the novel feature of having a right-angle bend at the gripping knob, so as to permit the arm to extend upward parallel with and near the upper shank, in order to reduce the width of the field of operation. The gripping device is old, except in the novel feature of the jambing action above mentioned. The automatic release is old. The adjustment of grips at each end of a body or crossbar, so that two articles may be held and released at will, is old. The only combination of elements which is novel is that of these old elements above described with the new elements above mentioned.

5. The defendant's device has no features in common with the plaintiff's device, except those which are above found to be old. The defendant's device does not employ or embody any of the features of the plaintiff's device, which are found to be novel.

The defendant has not infringed upon plaintiff's patent.

STEBER MACH. CO. v. RANDOM KNITTING CO. et al.

(District Court, N. D. New York. November 12, 1914.)

1. PATENTS (§ 287*)—INFRINGEMENT BY CORPORATION—LIABILITY OF OFFICERS.

The fact alone that defendants are directors of a corporation is not sufficient to charge them with personal liability for infringement of a patent by the corporation, but an officer who was the procuring cause of the infringement is liable with the corporation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 457–459; Dec. Dig. § 287.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNITTED FABRIC.

The Steber patent, No. 865,279, for a knitted fabric having a fleece side, discloses invention and is valid, and its claims are broad enough to cover a fabric having loops, comparatively few in number, on its face side in addition to those on the back required for forming the fleece. Claims 3, 5, and 7 *held* infringed.

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KNITTING MACHINE.

The Steber patent, No. 810,578, for a knitting machine designed to produce a certain fabric, discloses invention and is valid, and is not limited to the machine of the latch needle type described and shown in the specification and drawings, but is infringed by a machine of the spring needle type, in which equivalent parts are so arranged as to co-operate on the same principle to produce the same result. Claim 8 *held* infringed.

In Equity. Suit by the Steber Machine Company against the Random Knitting Company, George W. Cummings, Frank J. Gardner, and William E. Proctor. On final hearing. Decree for complainant against the Random Knitting Company and Cummings only.

Suit in equity to restrain alleged infringement of United States letters patent No. 865,279, dated September 3, 1907, for knitted fabric, issued to Bernard T. Steber, assignor to the Steber Machine Company, and to restrain alleged infringement of United States letters patent No. 810,578, issued January 23, 1906, to said Steber for knitting machine, and also for an accounting.

Richard R. Martin, of Utica, N. Y., for complainant.

Frederick W. Cameron, of Albany, N. Y., for defendants.

RAY, District Judge. The knitting machine patent has no necessary connection with the knitted fabric patent, although the machine was made with special reference to the manufacture or knitting of the knitted fabric. No question is raised of multifariousness or improper joinder, and the evidence has been taken and final hearing had; both parties being content and desirous of having the two patents considered at the same time as well as the question of infringement.

[1] The Random Knitting Company is a corporation and defendants Cummings, Gardner, and Proctor are officers thereof. Gardner and Proctor are directors simply in the corporation, but are not shown to have had anything to do with the alleged infringement, unless it be that they are personally liable because of the fact that they are directors in the corporation. I do not understand that this is sufficient to charge them with infringement. As to the defendant Cummings, he was the procuring cause of the infringement, if there be infringement of a valid patent, and acted with full knowledge.

[2] The knitted fabric patent relates to that class of ribbed knitted fabrics which have wales on one side and meshes on the opposite side, and with which is combined a yarn having projected loops which can be submitted to a brushing or jigging action, so as to produce a fleecy surface upon one side of the fabric. The base fabric is formed of an alternating series of longitudinal wales, knit each from a different yarn, or from the same yarn at different times, if so desired. The stitches forming the wales are all drawn toward the outside of the fabric. The loops forming each wale each include a portion of the other yarn connecting the two neighboring loops at the back of the fabric. The connecting portions of the loops form four-sided meshes on the back of the fabric, which thus exhibits on one face parallel longitudinal wales alternately of different yarns, and on the other side lozenge-shaped meshes or reticulations formed by the connecting legs of the loops.

As to the object of the invention the patentee says:

"The object of my invention is to produce a fabric having superior wearing qualities, a considerable amount of elasticity, and a ribbed face side, resembling very nearly the 'Strutt' rib, in conjunction with a fleece side. I attain this object by knitting a fabric from a plurality of threads, the fabric being of double thickness, each thread or series of threads forming independent wales alternately arranged, the connecting threads of each set of wales being interknitted with the intervening wales, the wales forming the ribs of one side of the cloth, and the connecting threads forming meshes on the opposite side, the fleecing thread being laid between the wales and meshes."

The patentee says:

"I have produced this fabric in several ways, but would call especial attention to my knitting machine patent 810,578, issued January 23, 1906, which describes and shows an ideal method of producing such a fabric, and that it may be knitted from one or more pairs of threads."

While all the claims are in issue, the complainant relies specially on claims 3, 5, and 7, which read as follows:

"3. A knit fabric comprising two alternating series of wales of knit loops, the connecting thread of adjacent wales of each series being caught in and embraced by the knit loops of the intervening wales of the other series and a fleecing yarn looped between the connecting threads. * * *

"5. A knit fabric, all of the knit loops of which appear in wales upon one side, the loops of said wales being drawn between the floats or connecting threads of the adjoining wales, and a fleecing yarn looped loosely through said connecting threads. * * *

"7. A knitted fabric, all of the knit loops of which appear in wales upon one side, the loops of said wales being drawn between and including a portion of the floats or connecting threads of the adjoining wales, and a fleecing yarn looped loosely through said connecting threads."

The defendants contend that the basic web of the patented fabric is not new. The defendants also claim that, the basic web being old, the addition of the supplemental or extra or fleecing or auxiliary thread, it being called by the one or the other of these names, in the mode and manner and for the purposes described, does not constitute invention. Considering the results attained and the utility of the fabric, and its popularity and large sales, all of which are established, I cannot agree with the contention of the defendants, and must and do hold that the patent is valid, and that the presumption of validity has not been seriously shaken, certainly not overcome.

The defendants make a fabric which has the same basic web, and which has the same supplemental or extra or fleecing or auxiliary thread, its fabric inserted and woven in in the same way. There is no evidence Complainant's Exhibit No. 1, Defendants' Fabric, and it is conceded that this was made in or about the month of April, 1913, is not made in accordance with complainant's fabric patent. This seems to me to be identical with the fabric of complainant's patent. The witness Mason states in substance that the defendants' fabric consists of a basic web having on one face a series of longitudinal wales formed by a plurality of knitted loops, which appear to be knit alternately from two different yarns, or from the same yarn at different feeds, and at the back having meshes formed by the legs or floats connecting the loops of alternate wales. The basic web contains a plurality of supplemental fleecing threads or yarns, which lie between the wales on the face of the basic web and the meshes on the back of the same; the supplemental yarn being projected in the form of loops, which are pulled through the meshes at the back of the fabric. The witness also states, in substance, that in defendants' fabric the loops of the supplemental fleecing yarn are also found to some extent on the face of the fabric; that is, on the side showing the needle wales. The witness Mason says, and this court agrees with the conclusion, that the fact that in the defendants' fabric the auxiliary yarn has loops on the so-called face of the fabric in addition to the loops on the back does not avoid the conclusion in any way that defendants' fabric is within the claims of the patent in suit.

If the Steber fabric must be made with at least two body threads, and the defendants' fabric is made with one body thread only, it is possible and probable that infringement is avoided, if that is the only fabric made by the defendants, or the exhibit referred to the alleged infringing goods in evidence and conceded to have been made by the defendants is made with one body or web thread only. I am of the opinion that the Steber patented fabric is not necessarily made with two or more body yarns. The Steber patent says that the base fabric is formed of an alternating series of longitudinal wales knitted each from a different yarn, or from the same yarn at different times, if so desired. It is conceded that if the Steber patented fabric must necessarily be made on the machine shown in the patent No. 810,578, for knitting machines, that there would be used a plurality of yarns, one for each of the alternating series of wales. But the fabric is not confined to that machine, and nothing in the fabric patent in suit limits

the production of the fabric described in it to any particular machine or to any particular method. The fabric patent says that the inventor has produced the fabric in several ways. I do not think it is denied that the infringing goods in evidence does not have in it two body or base threads. The witness Mason is positive on this point and says:

"I have made a careful examination of this fabric since my former affidavit was executed, and I am now able to say that the basic web of said fabric is made of a plurality of yarns, and not of a single yarn."

It is also contended by the defendants that their fabric does not infringe, for the reason that it has supplemental loops, or more properly loops of the supplemental thread, not only on the mesh side or back of the goods, but, also to some extent on the face of the goods. It is self-evident that in the fabric made by defendants usually, if not always, more or less of the loops of the supplemental or extra or fleecing or auxiliary threat are found on both sides of the fabric, but very few of these loops comparatively appear on the front of the goods.

This patent is for a product, a knitted fabric, and if the defendants make the knitted fabric of the Steber patent in suit it is immaterial, in the opinion of this court, that they in manufacturing leave the supplemental thread in such shape that some loops are found on the front side of the goods, or that some supplemental or additional loops on the front side are added by any means. In my judgment the addition of this supplemental thread in such a manner as to leave some loops on the front side, as well as all the loops demanded by the Steber patent in suit on the back, does not avoid infringement. The appearance of the fabric is, of course, changed; but it is the Steber fabric with the same basic web and the same supplemental or extra thread added in substantially the same way, and the result is the same as in the Steber patent, except that some loops are added on the front side. The defendants' fabric comprises two alternating series of wales of knit loops, the connecting thread of adjacent wales of each series being caught in and embraced by the knitted loops of the intervening wales of the other series, and it has a fleecing yarn looped between the connecting threads.

The defendants' fabric is also described by claims 5 and 7 of the Steber patent in suit. The language of claims 3, 5, and 7 is broad, and in my judgment is broad enough to cover loops, comparatively few in number, on the face of the fabric. In any event, infringement is not avoided by the addition of some loops, comparatively few in number, on that side of the fabric. I think it immaterial what the knitted fabric of the patent in suit is used for, or for what use it is intended. The Steber fabric can be used for making underwear, or for making wash cloths and towels, and for many other purposes. The fabric made by the defendants can be used, also, for either or all of these purposes. I think, and hold, that all the claims of the Steber patent, No. 865,279, are valid, and 3, 5, and 7 are infringed by the defendants Random Knitting Company and George W. Cummings. I think it unnecessary to decide whether or not the claims other than 3, 5, and 7 are infringed.

There will be a decree as to the Steber knitted fabric patent No. 865,279, that it is valid, and that claims 3, 5, and 7 are infringed by defendants Random Knitting Company and George W. Cummings, but not by Gardner and Proctor, and that complainant is entitled to a decree for an injunction and accounting.

The Machine Patent.

[3] The Steber patent, for knitting machine, No. 810,578, granted January 23, 1906, and applied for February 1, 1905, was evidently designed and patented to enable Steber to manufacture the fabric described in patent No. 865,279, and which was granted September 3, 1907, and which has just been considered. The claim 8 of this knitting machine patent, in issue, reads as follows:

"In a knitting machine, the combination with a cylinder, needles carried thereby, and a plurality of feeders for said needles, of means for projecting alternate needles up out of action, means for knitting with the alternate set of needles at every feeder, means for causing the sets of needles to interchange, and means for drawing loops of fleecing threads between the shanks of the needles raised out of position."

We have in combination a cylinder or its equivalent; (2) needles carried thereby and a plurality of feeders for said needles; (3) means for projecting alternate needles up out of action; (4) means for knitting with the alternate set of needles at every feeder; (5) means for causing the sets of needles to interchange; and (6) means for drawing loops of fleecing threads between the shanks of the needles raised out of position. This is a broad claim. Steber had previously invented, and he so states, a machine, patent No. 753,645, wherein and whereby the alternate needles are rendered inoperative at each feed, and the others operative, and in which the needles interchange from feed to feed.

In the patent in suit it would seem that Steber had in mind a combination with the needle operating mechanism shown in such earlier patent of mechanism designed to lay an auxiliary yarn around the needles in the cylinder and to carry such yarn inwardly between the needles so as to form loops in that direction. This was the conception of Steber, and claim 8, above quoted, is expressed in broad terms. This claim covers a machine designed to produce the fabric before referred to, and such claim calls for a novel co-operation of mechanism of a wide range. It devolved upon Steber to explain the principle of his machine, and the best mode in which he had contemplated applying that principle, so as to distinguish it from other inventions. It devolved upon him, also, to point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. He was to describe the mode of operation, and that particular combination of devices which distinguish it from other machines.

For a long time the operation of knitting has been accomplished by machines of, in many respects, different types. One is known as the spring needle machine, in which the needles are provided with a beard, and are fixed immovable in a cylinder, and the knitting operation is made possible by the rotation of the cylinder. The other type

of machine is known as the latch needle machine, in which the needles are provided with a hinged latch and are arranged in a stationary cylinder, but in such manner that the needles themselves are movable vertically. In this type the knitting operation is made possible by the vertical movement of the needles. Steber, in applying the principle of his invention and describing it, selected and used as the best mode for so doing the latch needle machine, the one where the needles have the hinged latch and the stationary cylinder, with the needles moving up and down. He did not confine himself to this type of machine. He infringes who uses the spring needle type of machine above mentioned, so arranged as to operate in substantially the same way and produce substantially the same result as does Steber by using and describing the latch needle machine shown in his drawings.

It is unnecessary, I think, to describe in detail the operation of the machine shown in the drawings. Steber has not limited himself to any specific mechanism for causing alternate needles to be operative only at a given feed, and interchanging the two sets of needles from feed to feed. Nor has Steber limited himself to any specific mechanism for forming loops of fleecing thread between the inoperative needles. Steber has been given a claim for a combination of means to do these things broadly. This was allowable and permissible, in view of the prior art. We have a new result. Steber utilizes for the knitting operation the alternate needles only at a given feed, and he makes the other half of the needles at that particular feed inoperative, and he also provides for the interchange of these two sets of needles from feed to feed, and in co-operation therewith he utilizes for the laying in and looping of fleecing thread parts that place such threads upon the needles and force it between the alternate needles in loops projecting through the meshes of the basic fabric and secure the fleecing thread between the needle wales and the connecting threads thereof. Here, in brief, we have the conception of the inventor. Both the latch and the spring needle type of knitting machines, of varied construction, were well known. Parts of machines adapted to these two types of machines are used to diversify their operation and the product, and were well known. Steber devises a new co-operative action between such mechanisms as would give the results he desired.

The validity of the Steber machine patent was not seriously contested on the argument. The defendants' alleged infringing machine is known as a circular spring needle knitting machine. It has a series of needles arranged on a cylinder in circular form. These needles in defendants' machine are not provided with latches, but their upper ends are recurved and terminate in spring extensions or beards. The cylinder of needles is rotated during the knitting operation, and the yarn is introduced beneath the beards and into the hook portions of the needles by the so-called sinker burr or stitch wheel. At a succeeding point in the circle of needles suitable parts are co-operatively arranged with the rotating needle bed to close the beards of the needles and afterwards to raise the previously formed loops from the shanks of the needles and cast off the loops. These operations are repeated at every feed in the machine, and the successive courses of loops are

formed row upon row to build up the fabric in the same manner, speaking broadly, as in the latch needle machines. The parts co-operating with the needles as above described to effect the knitting operations in its simplest form are the stitch wheel, already referred to, whereby the yarn is placed against the needles and within their beards. On the concave side of the rank of needles and slightly ahead of the stitch wheel is found a part called the push-down, a shoe-shaped piece of metal which crowds down on the shanks of the needles the loops placed upon them at prior feeds. At a point succeeding the stitch wheel just described is found in the machine a part called the plain presser, which is a piece of metal mounted on a stand with its edge pushing against the beards of the needles as they go by and closing the beards. Opposite this presser on the concave side of the array of needles is found a so-called landing wheel, which, set obliquely, meshes in with the needles and is adjusted to raise the loops near the bottom of the needle shanks up over the closed beards of the needles, and this action is supplemented by a similar action of the so-called cast-off wheel, which is similarly adjusted to raise these same loops over the upper ends of the needles and thus effect the knitting operation.

Aside from the usual parts already described in defendants' machine is found ahead of the stitch wheel a plush wheel or burr, which has a series of spaced wings provided with semicircular recesses whch are arranged to move between the needles as the latter rotate. Every alternate space between these wings is occupied by a pivoted finger, which fingers are so located that as the plush burr rotates the fingers bear against alternate needles of the bed. The auxiliary or fleecing yarn is fed through suitable guides to the recesses in the wings of the plush burr and back of the movable fingers. The plush burr is mounted in such manner that, as the needles rotate, the auxiliary yarn is introduced at such an angle and at such a height that the wings of the plush burr tend to throw this yarn over the top of each needle, but the movable fingers bear against each alternate needle and project above the same far enough to prevent the supplemental yarn being thrown over these needles. The wings mentioned serve to shove the fleecing yarn through the line of needles, so that loops of this yarn extend on the inner line of needles back of each alternate needle. Between this plush burr and the stitch wheel above described is a so-called clearance wheel, which acts to push the fleecing yarn down on the shanks of the needles and below their beards.

In defendants' machine, in lieu of the ordinary plain presser above described, is found a so-called "one and one cut presser wheel." This consists of a metallic disk on the edge of which are notches or openings alternately shallow or deep, and this disk is mounted on a suitable stand, so that these notches engage the beards of the needles as the needles rotate; the shallow notches closing the beards of every alternate needle, the beards of the other needles remaining open in the deep notches. The action of this one and one cut presser wheel thus results in the loops of body thread on the shanks of half the needles slipping within the beards as they are raised by the landing wheel previously described and not being cast off from these needles, and the knitting

operation is not there performed by those needles as it is by the others. The loops of fleecing thread, as well as the loops of body thread, are cast off the needles whose beards are closed. The one and one cut presser wheel is not shown to have been used ever in combination with a plush burr until the defendants so used it.

The question is: Is defendants' machine within claim 8 of the machine patent in suit? I think it clearly appears that the defendants' machine has in combination the same elements or devices, or their equivalents, as are found in complainant's machine, that defendants' machine has the same mode of operation, and that it accomplishes substantially the same result. The defendants' machine accomplishes the same result as complainant's, as it produces the same fabric, in all things identical, except it has the added loops on the wale side of the goods. Both machines have a cylinder for carrying the needles; both have needles mounted in such cylinder; both have a plurality of feeders for the needles. Defendants' machine has means for rendering alternate needles inoperative, and which means consist of a one and one cut presser wheel, which leaves open the beards of alternate needles where the knitting operation is effected, and makes such needles there inoperative. It has means for knitting with an alternate set of needles at every feed consisting of the well-known parts of spring needle machines and the one and one cut presser already mentioned. It has means for causing the sets of needles to interchange at every feed, consisting of an adjustment of the operative parts already mentioned to accomplish that result. It has means for forming loops of fleecing threads between the shanks of needles not then in operation.

Has the defendants' machine the same mode of operation as that described and claimed and covered by claim 8 of the patent in suit? The test of a machine is not its physical appearance, but the principle on which it works. The defendants' machine, being of the spring needle type, has a different appearance from the complainant's, described in the specification and illustrated in the drawings of the patent in suit, as that is of the latch needle type. I think it clear that Steber originated an operation of parts of knitting machines which accomplishes a new and useful result—a result that was desired. The defendants have worked out a similar operation of parts, differing in detail, but operating and acting on the same principle, and with the same result. The essence of the invention covered by claim 8 of the patent in suit is the utilizing for the operation of the alternate needles only at a given feed, and making the other half of the needles there inoperative, with proper adjustment for the interchange of these two sets of needles from feed to feed, and utilizing parts co-operating therewith that place fleecing thread upon the needles and force it between alternate needles then inactive in loops projecting through the meshes of the fabric and secure it between the needle wales and connecting threads thereof.

The defendants, in order to knit the fabric desired, formed of alternating series of wales with stitches all drawn toward the outside of the fabric and the loops forming each wale including a portion of the yarn which connects the loops of two adjacent wales at the back of the fabric, utilized the ordinary parts of spring needle knitting ma-

chines and combined therewith a so-called one and one cut presser wheel as already shown. This one and one cut presser wheel, by leaving open the beards on half the spring needles, prevents those needles from performing the knitting operation at that feed, which is precisely the needle operating plan of Mr. Steber. And this presser wheel, by closing the beards of the other half of the needles, allows the latter to perform the knitting operation precisely as in the Steber machine. The interchange of the operative and inoperative needles from feed to feed is accomplished in both machines alike merely by a suitable adjustment of the operative parts, so that the interchange is produced. Moreover, in defendants' machine each body thread, when introduced, is laid in front of both sets of needles and carried along just as in the Steber machine, and thus the connecting legs of each needle wale of the fabric are caught into the adjacent needle wale, forming diamond-shaped meshes at the back. So much for the parts for the knitting of the basic web.

In order to force the fleecing thread in loops between the shanks of every other needle, the defendants utilized a so-called plush wheel or burr, in the blades of which are semicircular openings to receive the auxiliary thread. In every other space between these blades are provided the movable fingers already described. These blades, meshing into the needles and placing the auxiliary thread over half the needles, thus force the auxiliary thread between every other needle in loops located as desired. In other words, the auxiliary thread is placed in front of the alternate needles about to operate, and these needles are utilized as posts between which loops of the fleecing thread may be conveniently carried. So that the blades of the plush burr act in conjunction with the alternate needles to locate loops of fleecing thread as desired, and secure such thread between the needle wales and connecting threads of the fabric exactly as do the equivalent parts of the machine described in the patent.

It has been said by the Circuit Court of Appeals in this circuit many times that "one who produces the same result by the use of devices operating in substantially the same way is an infringer. It matters not that the devices may differ in form, in appearance, and in the manner of operation. If they combine to do the same work in substantially the same way it is enough," provided you have substantially the same result. It is not contended in this case by the complainant that defendants have utilized the same precise means to accomplish certain results used by complainant. The contention is that mechanical equivalents have been substituted, such as are found in the other type of machine and as are necessary for its operation.; such type of machine being adjusted to operate in the same manner by equivalent means to produce the same result accomplished by the complainant. It would make this opinion unnecessarily long to go in detail into comparisons of the different parts of the two types of machine. If the patentee has limited himself in his patent to the one type of machine, then he who uses the other type, properly adjusting it to accomplish the same result, does not infringe. But I think that Steber did not so limit himself, and that the defendants do infringe when they take a machine of the other

type and by making the necessary changes produce equivalents which in combination operating in the same way and upon the same principle produce the same result.

In my judgment the defendants infringe, and there will be a decree that the complainant's machine patent is valid, and that claim 8 is infringed by the defendants Random Knitting Company and George W. Cummings, and for an injunction and an accounting. As to the defendants Gardner and Proctor, I do not think infringement is made out, as they had no active part in the infringing acts. No great point was made during the trial, and I think the defendants Gardner and Proctor, while held not to be infringers, are not entitled to costs.

THE SOLVEIG.

(District Court, N. D. California, First Division. May 8, 1914.)

No. 15206.

1. ADMIRALTY (§ 70*)—PROCEDURE—PLEADING—SPECIAL DEFENSE.

In an admiralty court, as in a court of equity or law, a respondent may not prove a special defense not pleaded, as exceptions in bills of lading in a suit against a carrier for damage to cargo, over the objection of libelant, but, if not objected to, such proof will not be disregarded but the answer may be amended to conform thereto; and if libelant proves such fact in making his own case, he has the burden of showing that respondent is chargeable with negligence, which renders him liable notwithstanding the same.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 544–556; Dec. Dig. § 70.*]

2. SHIPPING (§ 141*)—DAMAGE TO CARGO—LIABILITY OF VESSEL.

Cases of wine containing labeled bottles wrapped in straw coverings were shipped under a bill of lading reciting that they were shipped in apparent good order and condition, and providing that the ship should not be liable "for any loss occasioned by breakage, pilferage, wastage, decay, or change of character, however caused," or for "leakage, injury to, or soiling of wrappers or packages, however caused." On delivery the goods were damaged by the rotting of the straw, the staining of the labels and cases, the breaking of bottles, and the substitution of wooden blocks for bottles apparently abstracted. There was no proof of negligence on the part of the carrier. *Held*, that all of such damages were within the exceptions in the bill of lading, except the soiling of the labels, and that, as that was sufficiently accounted for by the staining of the cases, the shipper was not required to prove their good condition when shipped, and was entitled to recover therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497–499; Dec. Dig. § 141.*]

3. SHIPPING (§ 106*)—DAMAGE TO CARGO—RECITALS IN BILLS OF LADING—"APPARENT GOOD ORDER AND WELL CONDITIONED."

Recitals in bills of lading that the goods were "shipped in apparent good order and well conditioned" apply only to such conditions as are visible or fairly ascertainable, and as to those which are not the shipper has the burden of proof, unless the external covering of the goods is so

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

damaged when they are delivered at the end of the voyage as to account for the injury complained of.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 414-419; Dec. Dig. § 106.*

For other definitions, see Words and Phrases, First and Second Series, Apparent Good Order.]

In Admiralty. Suit by A. Cora, Incorporated, against the Norwegian steamer Solveig; the American Trading Company, claimant. Decree for libelant for part of damages.

T. A. Thacher and Denman & Arnold, all of San Francisco, Cal., for libelant.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for respondent and claimant.

DOOLING, District Judge. Counsel having become involved in a long discussion of the rules of pleading and practice, a moment's attention will be given to such rules, in so far as applicable to the present case.

[1] In the admiralty court, as in a court of equity or of law, a defendant, relying upon a special defense, must plead the same before he will be permitted, over objection, to make any proofs in support of it. This is as true of exceptions in a bill of lading as of any other special defense. A carrier, sued for damage to goods intrusted to him for transportation, and who relies upon the fact that he is exempted by the provisions of the bill of lading from liability for such damage, must set up in his answer such of the provisions as he relies upon, together with an averment that the damage complained of was the result of some specified cause or causes falling within the exemptions contained therein. If he fail to do this, he will not be permitted upon the trial to introduce any evidence in support of such defense, if such evidence be objected to. If, upon such objection, he ask to amend his answer, so as to permit the introduction of such evidence, his application is addressed to the discretion of the court, and if such amendment be permitted the libelant will be allowed such time as may be reasonable in order to meet by his proofs the new issue. If, however, the libelant himself in proving his case shall also prove the existence of such exemptions and that the damage complained of falls within them, the burden is then upon him, before he can recover, to establish the fact that, notwithstanding such exemptions, the carrier by reason of his negligence is responsible for the injury. Failing to do so, his libel will be dismissed. For no court will render judgment in favor of a plaintiff whose proof shows that he is not entitled thereto. Similarly, if the libelee, without objection, introduces evidence showing such exemption, though not pleaded, such evidence will not be disregarded by the court; but the answer may be amended to conform to such proof, or even in the absence of such amendment the libel may be dismissed. In other words, the defendant may not prove a special defense, not pleaded, over the objection of the plaintiff; but, if he do prove it without objection, the plaintiff may not afterwards complain.

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

[2] In the present case libelant introduced in evidence the bill of lading, which provided, among other things:

"The ship to be in no way liable for any loss occasioned by breakage, pilferage, wastage, decay, or change of character, however caused, or for damage by steam, rain, or spray."

Also:

"The ship not to be responsible for leakage, injury to or soiling of wrappers or packages, however caused."

The shipment consisted of 619 cases of wines, each case containing labeled bottles incased in wrappers of straw. The damage proved by libelant consisted of the rotting of the straw, the staining of the labels, the staining of the cases, the breaking of bottles, and the substitution of wooden blocks for bottles apparently abstracted. The breaking of the bottles, the staining of the cases, and the substitution of the blocks fall clearly within the exceptions of "breakage, pilferage, and injury to or soiling of packages." The rotting of the straw wrappers, it is urged, does not fall within any of these exceptions; but I am of the opinion that it does fall either within the exception "injury to or soiling of wrappers" or "loss occasioned by decay."

The libelant, having proved that these injuries are within the exceptions, cannot recover therefor in the absence of proof of negligence on the part of the libelee. The staining of the labels does not seem to fall within any of the exceptions. For the damage thus caused the ship must be held liable, if it appear that the labels were in good condition when received. No proof was offered on this point, other than the recital in the bill of lading, "shipped in apparent good order and well conditioned." But the bill of lading also contained the recital, "Weights, contents, gauge, and value unknown."

[3] Under these provisions the words "in apparent good order and well conditioned" ordinarily apply to the external conditions alone, and not to conditions which are neither visible nor fairly ascertainable. When a question arises at the end of a voyage as to the condition of the contents of casks, bales, or cases when received by the ship under such provisions, the rule is that the burden is upon the shipper to show, by evidence other than these recitals of the bill of lading, that such contents were in good condition when so received. To this rule there appears to be attached this qualification: If the external covering of the goods is so damaged when they are delivered as to account for the injury to the contents, then such evidence may be dispensed with. That is the situation here. Evidently the cases were not stained when received by the ship, or they would not have been receipted for as "in apparent good order and well conditioned." But when delivered they were so damaged by stains, rust, etc., as to account for the condition of the labels. This being true, the evidence on the part of the shipper as to the actual good condition of the labels when shipped may be dispensed with.

The ship will be held liable for the damage caused libelant by the injury to the labels, and the case referred to the commissioner to ascertain and report the amount of the same.

In re ELMORE COTTON MILLS.

(District Court, S. D. Alabama, N. D. September 11, 1914.)

No. 1230.

1. BANKRUPTCY (§ 474*)—MORTGAGED PROPERTY—SALE—RIGHTS OF MORTGAGEE—EXPENSES.

Where mortgaged property of a bankrupt was operated for a time by the bankrupt's receiver without the procurement or consent of the mortgagee, and was then sold for less than the mortgage debt, no part of the expenses incurred in operating the property, nor any fees or compensation or costs of administering the general bankruptcy estate, could be charged against the proceeds of the sale to the prejudice of the mortgagee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. § 474.*]

2. BANKRUPTCY (§ 474*)—MORTGAGES—FORECLOSURE—COSTS AND EXPENSES.

Where a mortgagee of a bankrupt's property by written agreement authorized the trustee as her attorney in fact to sell the mortgaged property at public sale under the order of the referee, the proceeds were subject to deduction for the expenses of advertising and a reasonable allowance for services of the trustee in making the sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. § 474.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Elmore Cotton Mills. Petition to review findings and order of the referee allowing the claim of the Robertson Banking Company and awarding compensation to the receiver and trustee. Remanded for further findings.

See, also, 217 Fed. 810.

George Pegram, of Faunsdale, Ala., for petitioner.

Pettus, Fuller & Lapsley, of Selma, Ala., for Robertson Banking Co.

Henry McDaniel, of Demopolis, Ala., for trustee.

TOULMIN, District Judge. [1] On petition of Mrs. Marshall E. Chamberlain for review of the findings and order of referee, W. K. Campbell, in allowance of the claim of Robertson Banking Company, and also of the findings and order of allowance of compensation to L. C. Lowe, as receiver and trustee of said bankrupt estate.

"It has been held in a number of cases that mortgaged property cannot be charged with the expenses of its sale or the fees of the referee and trustee in bankruptcy." In re Zehner (D. C.) 193 Fed. 790. Authorities cited: In re Utt et al., 105 Fed. 754, 45 C. C. A. 32 (Circuit Court of Appeals, Seventh Circuit); In re Williams, 156 Fed. 939, 84 C. C. A. 434 (Circuit Court of Appeals, Ninth Circuit).

"Where mortgaged property of a bankrupt is sold in bankruptcy proceedings * * * for less than the mortgage debt," neither the trustee nor the referee can be allowed any fees, "either out of the fund or as a charge against the mortgagee," to the prejudice of the mortgagee. In re Stewart (D. C.) 193 Fed. 791, 792; In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737 (Circuit Court of Appeals, Eighth Circuit).

In this case the mortgagee Chamberlain had no interest in the operation of the cotton mill. It was not done by her procurement, or with

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

her consent, and no part of the expense of the same can be charged to the fund derived from the sale of the mortgaged property. It was presumably in the interest of, and for the benefit of the general creditors of the bankrupt. The petitioning creditors in bankruptcy procured the order authorizing the receiver to operate the cotton mill, with a limitation to such operation contained in the order. His possession and operation of the cotton mill, if at all as receiver, appears to have been so brief that it is not of sufficient importance to consider. It appears in the record that the trustee soon had possession of the cotton mill, and proceeded at once to operate it, but it does not appear by whose authority. Under the facts of this case as shown in the record, it is too well settled for controversy that no part of the expenses in operating the cotton mill can be charged to the proceeds of the sale of the mortgaged property.

[2] And it is well settled, as a matter of law, that the trustee and the referee are not entitled to, and cannot recover any fees or compensation, or costs of administration of the *general* bankruptcy estate. However, inasmuch as the mortgagees have, by agreement in writing, authorized the trustee, and as their attorney in fact, to sell the mortgaged property at public sale and under the order of the referee, and expenses in advertising said sale and the services of the trustee in attending to the same, have been thereby incurred, I think it just and equitable that the costs of advertising the sale made under said agreement, with reasonable compensation to the trustee for his services in the premises, should be allowed out of the proceeds of the sale. The court may require these expenses to be paid.

The referee has in his custody or under his control $17,000, the proceeds of the sale of the mortgaged property. In order that the court may render a full and proper decree on this review of the record in the case it is necessary that it should have information of certain facts, namely, the amount of taxes due and payable on the property for sale under the agreement; the amount of taxes due and payable on the property at the time of its sale; the amount of the claim of Davis & Furber Machine Company, a prior lien claim and agreed to by the mortgagees, and the data on which "the maximum percentage fixed by the acts" to the trustee, and the amount thereon allowed by the referee. The referee is directed to furnish this information as early as practicable.

Where a referee's findings are not sufficiently definite to enable the court, on a petition for review, to determine the legal questions involved, the proceeding will be remanded to the referee for the additional facts required. In re Hawley Down Draft Furnace Co. (D. C.) 214 Fed. 500.

The judge in the case of In re Zehner, supra, in his opinion, suggests that:

"In Louisiana the mortgage creditor would have to regularly foreclose by proceedings in court, and therefore it would seem just and equitable that the mortgaged property should contribute a portion of the law charges and the expense of sale, not exceeding the amount the mortgagee would be forced to expend in foreclosure proceedings in the state courts."

There is no such law in Alabama as that above referred to in Louisiana, but when the mortgage holders, as in this case, had the right to enter upon the property and sell it without resorting to judicial proceedings, no such law as cited is obligatory.

The other case in the United States District Court above referred to is In re Stewart, 193 Fed. 791. Decisions in both cases by the same judge.

In re ELMORE COTTON MILLS.

(District Court, S. D. Alabama. October 1, 1914.)

No. 1230.

1. USURY (§ 60*)—WHAT CONSTITUTES—MORTGAGES.

"Usury" is the reserving and taking or contracting to reserve and take, either directly or indirectly, a greater sum for the use of money than the lawful interest. Usury is complete where a direct loan of money made, and more than the legal rate of interest, is secured for the forbearance of payment. Hence, where the legal rate of interest was 8 per cent., and a mortgage stipulated for the payment of interest at that rate, and also bound the mortgagor to pay for recording and the tax required to be paid on the mortgage, in violation of the law requiring the lender or mortgagee to pay the mortgage tax when he has the mortgage recorded, it was usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 133; Dec. Dig. § 60.*

For other definitions, see Words and Phrases, First and Second Series, Usury.]

2. USURY (§ 1*)—"UNLAWFUL INTEREST."

"Unlawful interest" is a premium or compensation paid or stipulated to be paid for the use of money borrowed beyond the rate of interest established by law.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, Second Series, Unlawful Interest.]

3. USURY (§ 126*)—DEFENSE—RIGHT TO URGE.

While usury is a personal defense which can be taken advantage of only by the borrower or his representatives, and not by a stranger, yet where a mortgage debt was usurious, a third party in interest might invoke the rule that the mortgagee was not a bona fide holder, in order that subsequent equities might prevail over it.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 364–416; Dec. Dig. § 126.*]

4. MORTGAGES (§ 116*)—CONSTRUCTION—INDEBTEDNESS SECURED—LOAN TO DIFFERENT PERSONS.

Where a mortgage executed by two individuals who operated a corporation was given to secure their indebtedness of $10,000 to the mortgagee, and provided that if the mortgagors, or either of them, should thereafter become indebted to the mortgagee for money loaned or advances made, the mortgage should stand as security therefor, as if included in the note secured, such mortgage did not secure a subsequent indebtedness of the corporation to the mortgagee as against the holder of a junior mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 230–232; Dec. Dig. § 116.*]

---

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

5. BANKRUPTCY (§ 474*)—MORTGAGES—SALE OF MORTGAGED PROPERTY—PROCEEDS—DISTRIBUTION.

Where a bankrupt corporation operated a cotton mill on mortgaged real estate, and at the instance of general creditors instituted bankruptcy proceedings, and the mill was operated at a loss by a receiver for a time without the consent or knowledge of a junior mortgagee, and the mortgagees proved their claims in the bankruptcy proceedings solely to enforce their lien on the proceeds of the mortgaged property, which was sold by the trustee, and the proceeds obtained were insufficient to pay the mortgage indebtedness, such proceeds were not subject to deduction for the loss in operating the mill, nor for any part of the cost or expenses of administering the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. § 474.*]

6. APPEAL AND ERROR (§ 931*)—FINDINGS BY REFEREE—PRESUMPTIONS—REVIEW.

While findings of fact by a referee in bankruptcy are presumed to be correct until the contrary is shown, the weight to be given such findings by the reviewing judge depends on the character of the evidence, and if the findings are based on undisputed facts which are set out in the record, they are entitled to no presumptions in their favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

7. BANKRUPTCY (§ 228*)—FINDINGS BY REFEREE—HEARING DE NOVO.

Where the evidence before a referee in bankruptcy is not in serious conflict, the district court, on review, may disregard the referee's findings entirely and proceed de novo to reject them for reasons of law, and may review the questions presented, though no formal exceptions to the referee's decision are filed, and though they were not discussed before or by the referee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Elmore Cotton Mills. Petition of Mrs. Marshall E. Chamberlain to review the findings of the referee allowing the claim of the Robertson Banking Company, and also findings and order allowing compensation to L. C. Lowe, as receiver and trustee of the bankrupt's estate. Reversed.

See, also, 217 Fed. 808.

George Pegram, of Faunsdale, Ala., for petitioner.
Pettus, Fuller & Lapsley, of Selma, Ala., for Robertson Banking Co.
Henry McDaniel, of Demopolis, Ala., for trustee.

TOULMIN, District Judge. At the hearing of the matters referred to, and at the time said findings and orders were made, the petitioner made objections to the same, which objections were overruled by the referee. Whereupon the petitioner prayed that said findings and orders may be reviewed, as provided in and by the Bankrupt Law of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1913, § 9585]) and the general orders in bankruptcy, which was accordingly granted.

For an understanding of the case as I view it, I shall state the substance of its facts so far as I have learned them from the record before the court. On June 18, 1913, four general creditors of the bank-

rupt, Elmore Cotton Mills, a corporation, filed an involuntary petition in bankruptcy against the said corporation. At the same time they, by proper petition, prayed the court to appoint a receiver to take charge of the property of the bankrupt, and to preserve the same until a trustee should be appointed. The petitioners also asked that the receiver be authorized to operate the cotton mills, and to carry on the business, etc. For cause shown, deemed sufficient, such authority was given as stated, and in the order of appointment, thus:

"That such receiver shall keep a careful and accurate account of the costs and expenses of operating said mill, and if the same cannot be operated without a loss, he shall at once discontinue operating the same."

L. C. Lowe was appointed receiver on the recommendation of the petitioning creditors. It appears that the said Lowe was subsequently acting trustee. It does not appear from the record by what authority —whether by election of the creditors, or by appointment of the referee, on the failure of the creditors to elect. It does not appear from the evidence in the record when said Lowe ceased to be receiver and assumed the position of trustee. I infer, from circumstances shown by the record, that it was very soon after his appointment as receiver. I, however, find in the record, which purports to be an order of the referee confirming a report of the trustee and allowing him costs and expenses for operating and upkeep of the mill of the bankrupt, and also the allowance of compensation to the trustee, the statement or recital that the claim of said trustee was for operating the mill from June 17, 1913, which is an error in date, doubtless made through mistake, inadvertence, or oversight, as the petition in bankruptcy was not filed until the 18th of June, 1913, and the receiver not appointed until that day, and I doubt that he took charge and control of the property on that day. But in my view of the case it is not worth while to discuss the receiver Lowe's connection with the case and the length of time that he acted as such receiver. Mrs. Chamberlain, the petitioner, had no connection with the case at that time, and had no part or interest in the appointment of the receiver.

The court had, at the time of said appointment, no knowledge of any mortgages on the property mentioned in the order of appointment. It was presumed to have been made, and was made, in the interest of and for the benefit of the general creditors. It appears from the record that on March 17, 1911, Benj. F. Elmore and wife, and Mary E. Anderson and husband, made a mortgage to the Robertson Banking Company to secure the payment of a note for $10,000, with interest at 8 per cent. per annum from date, payable January 1, 1912, on certain real estate described therein, a part of which was the land on which the Elmore Cotton Mills were situated, with certain personal property described in said mortgage, as machinery (a boiler, engines, etc.) appertaining to said cotton mills. Said mortgage contains, among others, the following stipulations, covenants, and agreements:

"That said parties of the first part will pay for preparing and recording this mortgage, and the privilege tax required by law to be paid thereon, and if they fail to do so, said party of the second part may, at its option, pay the same, and all sums so paid shall be secured by this mortgage, draw interest from date of payment, and be due January 1, 1912."

"That if said Benj. F. Elmore and Mary E. Anderson, of the first part, or either of them, should hereafter become indebted to said party of the second part, for money loaned, advances made, or by account, note, overdraft or otherwise, before the note above mentioned is paid in full, then, and in any of said events, this mortgage shall stand as security therefor, the same, in all respects, as if included in said note."

This mortgage was recorded on March 23, 1911.

The record also shows that on March 17, 1911, Benj. F. Elmore and wife and Mary E. Anderson and husband executed and delivered to Marshall E. Chamberlain a mortgage on certain real and personal property therein described, being the same property covered and described in the aforesaid mortgage to Robertson Banking Company, except that part of said property described in Robertson Banking Company's mortgage as is said to be situated in Montgomery County, Alabama.

The Marshall E. Chamberlain mortgage was made to secure an indebtedness of said mortgagors to her, and evidenced by five promissory notes, of even date with said mortgage, aggregating in amount to $8,670.40. Said mortgage was duly recorded on April 20, 1911. It contains the following statement:

"It is particularly understood and agreed between the parties hereto that this is a second mortgage to a mortgage heretofore given by the said Benj. F. Elmore and wife, Elizabeth Bostic Willett Elmore and Mary Elmore Anderson and D. D. Anderson, her husband, to secure a loan of ten thousand dollars, and is subordinated and subservient to said mortgage of ten thousand dollars."

The said mortgage further declares that:

"The said Elmore and Anderson represent to and covenant with said Marshall Elmore Chamberlain that, except as to a prior mortgage of ten thousand dollars they are seised of an indefeasible estate in fee simple in and to the above described property, and have a right to sell and convey the same. The said property is free from any and all liens and taxes whatsoever."

The first question presented on this review is the allowance of the claim of Robertson Banking Company in full. Said banking company claims the sum of $12,104.88 to be due it on its mortgage, and claims the same to be secured thereby. The referee, after hearing said claim and the objections to the allowance of certain items of said claim filed by the petitioner, Marshall E. Chamberlain, made a total allowance of $11,626.36 to said banking company on the said claim.

First. The petitioner objects to the amount of said claim as allowed because a part of the same consists of interest on the principal amount of money secured by said mortgage, on which said claim is based, shows on its face "that it is a usurious contract, and therefore said banking company has forfeited all legal right to any interest on the principal sum secured by said mortgage."

Second. Petitioner objects to the allowance of the claim of said Robertson Banking Company, as based on said mortgage, of the note of Elmore Cotton Mills and Benj. F. Elmore, dated December 20, 1912, for the sum of $1,127.30 on the grounds that it is not a part of the indebtedness secured by said mortgage; that said note was executed after the maturity of the note for $10,000, and of the mortgage made to

secure said note of $10,000, and that said note of $1,127.30 is not a valid part of the indebtedness secured by the mortgage; that said mortgage shows on its face that it is a usurious contract; that said Banking Company's mortgage *is* a usurious contract, and said banking company not an innocent purchaser of said note, and therefore it has no right to tack the same to the indebtedness secured by said mortgage; that said note of $1,127.30 is not an obligation of the original mortgagors, and therefore it is not a valid part of the indebtedness secured by said mortgage.

[1, 2] The objection that the mortgage of Robertson Banking Company shows on its face that it is a usurious contract is, I think, well made. The stipulation and agreement contained in said mortgage "that the mortgagors would pay for recording the mortgage and the privilege tax required by law to be paid thereon, and if they fail to do so, the mortgagee may pay the same, and the sum so paid shall be secured by the mortgage, draw interest from date of payment and be due January 1, 1912," does, in my opinion, render the contract usurious.

"Usury is the reserving and taking or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest. Unlawful interest is a premium or compensation paid or stipulated to be paid for the use of money borrowed beyond the rate of interest established by law." Black's Law Dictionary, page 1206.

"Usury is complete where a direct loan of money is made, and more than the legal rate of interest is secured for the forbearance of payment." Ely v. McClung, 4 Porter (Ala.) 128.

The legal rate of interest in this state is 8 per cent. The note executed by Benj. F. Elmore and Mary E. Anderson to Robertson Banking Company for $10,000 stipulates for the payment of interest from date at the rate of 8 per cent. per annum. The mortgage made by said Elmore and Anderson to said banking company, to secure the payment of said note, contains a stipulation, covenant, and agreement that said mortgagors would pay for the recording of said mortgage, and would also pay the tax required by law to be paid on said mortgage. The law provides that the lender, the mortgagee, must pay the mortgage tax at the time he has his mortgage recorded. The borrowers, Elmore and Anderson, covenanted to pay both sums. It is clear that the payment of these sums by the borrowers for the lender is more than the law allows for the use of the money lent, which, with interest at 8 per cent., the borrowers had contracted to pay. Are not these sums paid or stipulated to be paid a premium or compensation for the use of the money borrowed beyond the rate of interest established by law?

It seems to me that this case comes clearly within the principles of the law cited.

"In determining whether a contract is infected with usury, its substance and effect, and not its form, is material. The intent to take or reserve more than lawful interest for a loan of money, or the forbearance of a debt, must exist; and this is deduced from the relations of the parties, their acts contemporaneous with or subsequent to the contract, and all attendant circumstances. When this intent exists, and such is the substance and effect of the contract, no form or covering which may be given it, no device or shift, can sustain it. A simple loan, or the mere forbearance of an existing debt, which, with the

lawful interest, is not put at hazard, but is certainly to be paid, will become usurious by ingrafting upon it stipulations intended for the additional profit of the creditor, and not as compensation for loss or inconvenience he may bear." Uhlfelder & Co. v. Carter's Adm'r, 64 Ala. 532.

[3] While my opinion is that the contract to pay the mortgage tax and the probate judge's fee for recording the mortgage in addition to the 8 per cent. interest on the loan is usurious, the petitioner, the junior mortgagee, cannot avail herself of this fact to the extent of defeating the senior mortgagee's right to interest on the loan of the $10,000, stated and fixed as the consideration of the note and mortgage.

"Usury is a personal defense, and cannot be set up by strangers" to the contract, but only by the parties or their representatives. McGuire v. Van Pelt, 55 Ala. 344.

Usury is a privilege personal to the borrower, and he only can defeat the claim of interest on the loan because of usury in the contract. Fenno et al. v. Sayre, 3 Ala. 458–463. But if the mortgage contract debt is usurious, any third person in interest may invoke the rule that the mortgagee is not a bona fide holder, and latent or secret equities must prevail over it. Smith v. Lehman, Durr & Co., 85 Ala. 394, 5 South. 204; Meyer v. Cook, 85 Ala. 417, 5 South. 147; Hart v. Adler, 109 Ala. 467, 19 South. 894; Uhlfelder v. Carter, 64 Ala. 532, supra.

[4] The objection to the allowance of the claim of Robertson Banking Company on the note of Elmore Cotton Mills and Benj. F. Elmore is on the ground that it is no part of the indebtedness secured by said banking company's mortgage. The objection is good. No such indebtedness is provided for in the mortgage. There is nothing said in the mortgage in reference to the money loaned or advances made to Elmore Cotton Mills.

There is a stipulation in the mortgage that if Benj. F. Elmore and Mary E. Anderson, or either of them, should "hereafter become indebted" to said Banking Company, for money loaned, advances made, etc., the mortgage shall stand as security therefor, the same as if included in said note of $10,000. Even if said stipulation were valid and effective against the petitioner, the second mortgagee of the property sought to be subjected to the claim in question, it is ineffective as to a loan or advance made to Elmore Cotton Mills, if any. Said stipulation is so vague, indefinite, and uncertain that I greatly doubt its enforcement in any proceeding. But it is unnecessary to further discuss this branch of the case here.

"When the debt secured by a mortgage is tainted with usury, the mortgagee cannot claim protection, as a bona fide purchaser, against a secret equity of which he had no notice." Smith v. Lehman, Durr & Co., 85 Ala. 394, 5 South. 204; McCall v. Rogers, 77 Ala. 349.

"Debts contracted by the mortgagor after the execution of the mortgage, or advances subsequently made to him by the mortgagee, cannot be tacked to the mortgage debt * * * to the prejudice of a junior mortgagee." Schiffer v. Feagin, 51 Ala. 335.

"The holder of commercial paper, acquiring it on a usurious consideration, is not a bona fide holder, * * * nor against transactions between the makers * * * with third persons, dealing with them without notice, in good faith, on a valuable consideration." Hart v. Adler, 109 Ala. 467–470, 19 South. 894, 895.

The facts shown by the record are that Benj. F. Elmore and Mary E. Anderson, on March 17, 1911, executed a mortgage to Robertson Banking Company on certain lands to secure the payment of a loan evidenced by a note for $10,000, payable on January 1, 1912, with interest from date at the rate of 8 per cent. per annum. On the same day, March 17, 1911, said Benj. F. Elmore and Mary E. Anderson executed and delivered to Marshall E. Chamberlain a mortgage on said land to secure an indebtedness of said mortgagors to her of $8,670.40, evidenced by promissory notes of even date with the mortgage. This mortgage states that it is a second mortgage to a mortgage heretofore given by the said mortgagors to secure a loan of $10,000, and is subordinated and subservient to said mortgage of $10,000. The mortgagors represented to and covenanted with Marshall E. Chamberlain in the mortgage made to her that the property described therein was free from any and all liens, except as to a prior mortgage of $10,000.

It does not appear from anything in the record that Mrs. Chamberlain had any knowledge or information as to whom said $10,000 mortgage was made, or that it contained a stipulation as to any future loans and advances to the mortgagors that might be made by the mortgagee, Robertson Banking Company. There is no statement in the Chamberlain mortgage of the existence of these facts, and there is no proof in the record before the court that Mrs. Chamberlain, at the time of the execution and delivery of the mortgage to her, had any knowledge or notice that the prior mortgage to Robertson Banking Company contained any agreement or stipulation that said prior mortgage should stand as security for any money loaned or advanced to or paid for said mortgagor, subsequent to the execution of said prior mortgage, except the note for $10,000. The banking company's mortgage was recorded 6 days after its execution, and after the execution of Mrs. Chamberlain's mortgage. The note for $1,127.30 was made December 20, 1912, payable 1 day after date, and being 11 months and 20 days after the note for $10,000 secured by the mortgage, was due. The Chamberlain mortgage was recorded April 20, 1911, 1 year and 8 months prior to the execution of the note for $1,127.30. The three other notes made by the mortgagor, Benj. F. Elmore, to Robertson Banking Company, subsequent to the note for $1,127.30, payment of which is sought out of the proceeds of the sale of the mortgaged property, are subject to same ground of objection as to the allowance of payment of said note of $1,127.30 out of said proceeds. Whether or not they were allowed by the referee the court is not able to say from the record.

The finding and order of the referee in allowing the claim of Robertson Banking Company to the extent of $11,626.36 is, in my judgment, erroneous, and is reversed and annulled. The court has not found from the record before it how the referee arrived at the amount of $11,626.36 allowed by him and awarded to Robertson Banking Company. It finds from that record, all of which is before it, as shown by the referee's certificate of a summary of the evidence that, "By agreement between the parties, only the record is submitted for review"

which includes some oral evidence, therein called written evidence, in contest on the report and compensation of the trustee. When thus submitted it is the court's right and duty to decide the case on that record and determine the respective rights of the parties as, in the judgment of the court, the law and justice require.

Tested by the principles of law announced in this opinion, the court finds that the total amount due the Robertson Banking Company, principal and interest to October 27, 1913, is $9,733.14. This amount is found by allowing the $10,000, with interest, credited by $2,656.62 amount paid on said note, with interest on the balance due on same, and in addition thereto insurance premiums paid by said banking company, with interest, $390.76. Total amount allowed by the court, for which sum a decree will be entered for said Robertson Banking Company, being $9,733.14. A statement of the account of said Robertson Banking Company, as made out under the direction of the court, against the proceeds of the sale of the mortgaged property, is hereto annexed and filed herewith.

It will be observed that all items of Robertson Banking Company's claim against said proceeds, being four certain notes executed subsequent to the execution of the note for $10,000, and the mortgage to secure the same, are excluded and disallowed as a part of said claim.

[5] The second question presented by the referee's certificate is his allowance of the report of the trustee and receiver, and his allowance of their compensation as such. In re Williams, 156 Fed. 939, 84 C. C. A. 434 (C. C. of Appeals, 9th Cir.). The petitioner, Marshall E. Chamberlain, objected to the allowance and order made on said report, which was overruled by the referee. The finding and order approving said report and allowing the same, and the allowance and compensation to the trustee also objected to. Said order is before the court on petition for review. The contention is that the trustee operated the cotton mill at his own risk, and without the knowledge or consent of the petitioner, who held a mortgage on the property, and that he is not lawfully entitled to retain out of the proceeds of the sale of the property, covered by the mortgage, the money alleged to have been lost by him in the operation of the cotton mill. The further contention is that the trustee is not entitled to any compensation out of the proceeds of the sale of the property, inasmuch as such proceeds are insufficient to pay the mortgages thereon. There is no question as to the validity of the mortgages.

"A mortgage creditor of a bankrupt, who proves his claim solely for the purpose of enforcing his lien on the proceeds of the mortgaged property, which has been sold by the trustee, does not thereby become liable for his proportionate share of the cost of the general administration of the estate." Mills v. Virginia Carolina Lumber Co., 164 Fed. 168, 171, 174, 90 C. C. A. 154, 21 L. R. A. (N. S.) 901 (C. C. A. 4th Cir.); In re Williams, supra.

The mortgagee is "entitled to have" his "claim paid in full, provided the property" mortgaged "would bring enough." He "is entitled to have of the proceeds of the sale sufficient to pay" his "debt and interest, provided there is enough. If the property did not bring enough to pay the debt and interest in full then" he "is entitled to have the whole of the proceeds." 164 Fed. 171, 90 C. C. A. 157, 21 L. R. A. (N. S.) 901, supra.

The trustee can acquire no better title or greater right than the bankrupt had; he succeeds to the bankrupt's title—no more, and no less—and he takes subject to liens good against the bankrupt at the time. Mills v. Virginia, Carolina Lumber Co., supra; In re Stewart (D. C.) 193 Fed. 791.

"Expense incurred by a trustee in bankruptcy in caring for real estate which is subject to valid mortgages is presumed to be for the protection of the supposed interest of general creditors, and unless the mortgagees expressly or by * * * implication assent to such expenditures they cannot, in general, be charged with them." In re Vulcan Foundry & Machine Co., 180 Fed. 671, 103 C. C. A. 637 (C. C. A. 3d Cir.).

In my opinion these contentions are sustained and well settled by the authorities.

In the case of In re Harralson, 179 Fed. 490, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737 (C. C. A. 8th Cir.) is analogous, and so similar, in some of its facts, to the case now before the court that I will state substantially the facts of that case, and quote to some extent from the opinions in the case on those facts. At the time of adjudication of bankruptcy, the Ozark Cooperage & Lumber Company had a valid mortgage upon the sawmill and machinery of the bankrupt, securing an indebtedness of $1,640. Said Ozark Cooperage & Lumber Company proved its claim for the debt before the referee, and the mortgage was adjudged valid and the claim allowed. It was stipulated between the trustee and said company that the property covered by the mortgage might be sold by the trustee under an appropriate order of the referee, and clear of the lien of the mortgage, and the lien transferred to the proceeds of such sale. The referee made the order authorizing the trustee to sell the property, such sale to be subject to approval of the referee. The trustee sold the property. It was bid by the mortgagee for $1,500. The sale was approved by the referee, who entered an order directing that the property be delivered to the purchaser upon the payment of sufficient funds to meet the expenses of the sale and commissions, namely $85. The trustee at first only demanded that the Ozark Cooperage & Lumber Company, the mortgagee, pay him in carrying out its bid $70 for his commissions and $15 for commissions to the referee, making an aggregate of $85. Afterwards the trustee insisted that said company pay him in money $1,500, being the amount of the bid for the property purchased. Said company declined to pay the $1,500, or any other sum in money, but insisted on its right to fulfill its bid by entering a credit of $1,500 upon its secured claim of $1,640 which had been adjudged to be a valid lien upon the proceeds of the property purchased. The referee thereupon made an order directing said company to appear and show cause why it refused to pay said purchase money. The company filed a return to said order in which it set up the grounds for its said refusal, as advised by its counsel. Thereupon the referee made an order directing the said company to pay the trustee the said sum of $1,500. On the petition of said company duly filed this order was certified to the District Court for review. Judge of the court said: "Under the facts here

presented, I am of opinion that the referee's order was erroneous, and it should be set aside." The judge further said:

"There appears to have been other property out of the proceeds of which the costs and expenses of the bankruptcy proceeding could be met; but, whether this was the case or not, the secured creditor was entitled to the entire proceeds of the property upon which it had a lien until its debt was fully satisfied, and no part of such proceeds could be properly withheld from it to pay commissions of the trustee and referee or other costs of the bankruptcy administration."

This case was taken to the Circuit Court of Appeals, Eighth Circuit, by the trustee on petition for review of the order of the District Court. The petition for review was denied, and thereby the order of the District Court, vacating and setting aside the order of the referee, stood affirmed. In re Harralson, 179 Fed. 490–493, 103 C. C. A. 70, 29 L. R. A. (N. S.) 737 (C. C. A., 8th Cir.).

The case before this court is a stronger case for the mortgagee than th Harralson Case. In that case the claimant was a creditor of the bankrupt, and its claim was secured by mortgage executed by the bankrupt. In this case the claimant is not a creditor of the bankrupt, except in the sense and contemplation of the Bankrupt Act as "one who owns a demand or claim provable in bankruptcy." Collier on Bankruptcy, pp. 1–7.

The Chamberlain mortgage was not made by the bankrupt, and the proceeds of the sale of the property covered by the mortgage is insufficient to pay the debt secured by it, yet the mortgagee has no claim as a creditor against the bankrupt estate for the deficiency. The bankrupt estate is not liable for it, on the facts presented in the record.

[6] The weight to be given to a finding by a referee in bankruptcy, on review by the judge, depends on the character of the evidence; it being entitled to less weight, if a deduction from established facts. The judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. In re McCrary Bros. (D. C.) 169 Fed. 485; Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184.

The findings of fact by the referee are presumed to be correct until the contrary is shown. But findings based on undisputed facts which are set out in the record are entitled to no presumptions in their favor. In re Williams (D. C.) 120 Fed. 542; In re Swift (D. C.) 114 Fed. 947.

[7] And where the evidence is not in serious conflict the court is not bound by the conclusion of the referee. Authorities supra; In re People's Department Store Co. (D. C.) 20 Am. Bankr. Rep. 244, 159 Fed. 286, the court may disregard the findings of the referee entirely, and proceed de novo to reject them for reasons of law; and they may be reviewed although no formal exceptions to the referee's decision are filed. If any point is presented by the record, then before it, the court may consider it although it was not discussed before or by the referee. In re Miner (D. C.) 117 Fed. 953, 9 Am. Bankr. Rep. 100; In re Samuel Wilde's Sons, 16 Am. Bankr. Rep. 386, 144 Fed. 972, 75 C. C. A. 601; In re People's Department Store Co. (D. C.) 20 Am. Bankr. Rep. 244, 159 Fed. 286; In re Samuel Wilde's Sons, 144 Fed.

972, 75 C. C. A. 601; In re Wood (D. C.) 2 Am. Bankr. Rep. 695, 95 Fed. 946.

The facts disclosed by the evidence in this case relating to the claims of the Robertson Banking Company and of Marshall E. Chamberlain are undisputed. There is no conflict in the evidence as to them.

It appears from the record that Marshall E. Chamberlain proved her claim, under her mortgage, before the referee, the validity and correctness of which claim does not appear from the record to have been disputed or questioned, but it does not appear from the record that the referee found what amount was due her, and what amount she might be entitled to thereon to be paid out of the proceeds of the sale of the mortgage property.

The referee finds that the aggregate of the secured claims was more than the proceeds of the sale, and he ordered that out of the proceeds, after the amounts of compensation for the trustee, all other lawful and proper costs of administration, taxes due, and unpaid have been deducted, the trustee will pay the claims of Davis & Furber Machine Company and Robertson Banking Company, and if a balance then remained, it should be applied to the claim of Marshall E. Chamberlain. The claim of Davis & Furber Machine Company was $1,756.59 and the claim of Robertson Banking Company allowed by the referee, $11,626.36, and the tax claim of $380.75 amount, in the aggregate, to $13,763.70, deducted from $17,000, the proceeds of the sale of the mortgaged property, there remains $3,236.30. As it does not appear from the record how this sum of $3,236.30 was specifically appropriated or set apart, and as it does not appear that any specific amount was found due Mrs. Marshall E. Chamberlain, it is presumed that said sum of $3,236.30 was appropriated or set apart as the compensation for the trustee and cost of administration, etc., as ordered by the referee.

As the court cannot agree with the referee in his said finding and order, it proceeds de novo to state the account. It finds from the undisputed facts, shown by the record, that the amount due Robertson Banking Company, as a balance on its claim, principal, and interest, $9,733.14, for taxes, $380.75, adding thereto the amount admitted and agreed by the mortgagees to be paid Davis & Furber Machine Company, $1,756.59, makes a total of $11,870.48; deducted from $17,000, proceeds of the sale of the mortgaged property, leaves a balance of $5,129.52 to be applied to the mortgage claim of Marshall E. Chamberlain, and which claim the court finds to be due her, $9,891.15, principal, and interest.

On the facts presented, I am of opinion that the referee's orders in the case are erroneous, and should be vacated and set aside; and it is so ordered.

Some of the facts of the case have been neither presented nor found with sufficient definiteness to enable the court, with any degree of satisfaction, to pass upon the question of compensation to the trustee, and commissions, costs, etc., as allowed, and which have arisen in the case. There is an indefiniteness as to the facts on which the claim

was based and allowed, and on what data, "which makes the case unnecessarily cloudy." Quoting from the opinion of the court in Re Hawley Down Draft Furnace Co., in (D. C.) 214 Fed. 501:

"The mind which looks them over returns from the survey with * * * much the feeling of Noah's dove. There is no place upon which to plant your feet."

Amount due Robertson Banking Company:

Face of note of March 17, 1911		$10,000 00
Interest on above note to November 22, 1912		1,344 44
Amount due on note November 22, 1912		$11,344 44
Less cash payments of November 10 and 22, 1912		2,656 62
Balance		$ 8,687 82
Interest on balance to October 27, 1913		654 47
Amount due on note October 27, 1913		$ 9,342 29
Insurance premiums paid by Robertson Banking Company as per statement dated August 15, 1913	$378 58	
Interest on premiums paid by Robertson Banking Company from date of payment to October 27, 1913	12 27	
Total	$390 85	
Amount due on note October 27, 1913	$9,342 29	
Total amount due for insurance	390 85	
Total amount due Robertson Banking Company		$9,733 14

Memorandum of amount due Mrs. Marshall E. Chamberlain:

Principal	$8,670 40
Interest from maturity of notes to October 27, 1913	1,220 75
Total amount due Mrs. Chamberlain October 27, 1913	$9,891 15

From January 1, 1912 (the date when the first note became due under the stipulations of the mortgage) to October 27, 1913 (the date of the sale of the mortgage property) was 1 year 9 months and 26 days. From January 31, 1912 (the date when the other notes became due) to October 27, 1913, was 1 year 8 months and 27 days. The interest was figured at 8 per cent.

BOSWELL et al. v. BIG VEIN POCAHONTAS COAL CO. et al.

(District Court, W. D. Virginia, at Lynchburg. November 3, 1914.)

1. INTEREST (§ 28*)—RATE—WHAT LAW GOVERNS—CONSTRUCTION OF CONTRACT.
Where a promissory note was given and made payable in the same state, the question of the rate of interest it bears is to be determined by the local law.
[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 56–59; Dec. Dig. § 28.*]

2. INTEREST (§ 37*)—STIPULATIONS AS TO RATE—CONSTRUCTION.
Under the law of Virgina as settled by decision, where a note merely provides for interest at a valid stated rate, the debt bears interest at that rate until payment, regardless of the rate established by statute.
[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 77, 78; Dec. Dig. § 37.*]

3. INTEREST (§ 38*)—ALLOWANCE ON JUDGMENT—CONSTRUCTION OF STATUTE.
Code Va. 1904, § 3391, which provides that "in any suit in equity, or in any action founded on contract, where no jury is impaneled, judgment or decree may be rendered for interest on the principal sum recovered until such judgment be paid, and where there is a jury which allows interest the judgment shall in like manner be for such interest until payment," does not vest the court with any discretion as to the rate of interest or time to which it runs, but under the settled law of the state, if there is a lawful contract rate, it continues after judgment or decree, and if not the statutory rate governs, and in either case interest continues until payment of the debt.
[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 79–82; Dec. Dig. § 38.*]

4. STATUTES (§ 227*)—CONSTRUCTION OF WORDS—"MAY" IN GRANT OF POWER.
Permissive words in respect to courts or officers are imperative in cases where the public or individuals have a right that the power so conferred be exercised, and in such cases the word "may," used in the statute, will be construed to mean "shall" or "must."
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.*
For other definitions, see Words and Phrases, First and Second Series, May.]

In Equity. Suit by Thomas T. Boswell and others against the Big Vein Pocahontas Coal Company and others. On settlement of decree of sale.

Keech, Wright & Lord, of Baltimore, Md., and Geo. W. St. Clair, of Tazewell, Va., for complainants.

Jackson & Henson, of Roanoke, Va., and R. B. Tippett, of Baltimore, Md., for Mrs. Browning.

McDOWELL, District Judge. By a deed dated March 12, 1909, Mrs. O. H. Browning, inter alia, leased to one Boswell a tract of coal-bearing land lying near Pocahontas, in this district. In addition to certain royalties, the consideration for the lease was a so-called "bonus" of $200,000. A part thereof was to be paid by April 1, 1909, and the balance was payable in three annual installments, due, respectively, in

one, two, and three years. These installments were evidenced by notes, made at Pocahontas and payable there. The first of the notes, so far as is now material, reads as follows:

"$50,000.00. Pocahontas, Va. April 1, 1909.

"One year after date I promise to pay to the order of Ollie H. Browning fifty thousand dollars, without offset, with interest from date at the rate of five per cent. per annum. For value received, negotiable and payable at First National Bank, Pocahontas, Va. Thos. T. Boswell."

The two remaining notes are identical with the foregoing, except as to the time for payment. In the lease the provision in respect to the notes reads:

"Payable on the respective days aforesaid, with interest at the rate of 5 per cent. per annum from date *until paid.*"

The notes were not paid, and a question has been made as to whether the sums thus in default bear interest at 5 per cent. until the maturity of the notes, until judgment, or until payment.

[1] The legal rate of interest for the loan or forbearance of money in this state is 6 per cent. per annum. Code 1904, § 2817. The questions here are to be decided in accordance with the local law. Ohio v. Frank, 103 U. S. 697, 698, 26 L. Ed. 531; Holden v. Trust Co., 100 U. S. 72, 74, 25 L. Ed. 567; Mass. Ass'n v. Miles, 137 U. S. 689, 691, 11 Sup. Ct. 234, 34 L. Ed. 834; New Orleans v. Warner, 175 U. S. 120, 147, 20 Sup. Ct. 44, 44 L. Ed. 96; Cromwell v. County, 96 U. S. 51, 61, 24 L. Ed. 681; Sherwood v. Moore (C. C.) 35 Fed. 109; Bolles v. Town (C. C.) 45 Fed. 168, 169; Bond v. John V. Farwell Co., 172 Fed. 58, 65, 96 C. C. A. 546.

[2] Under the rule laid down in Cecil v. Hicks, 29 Grat. (70 Va.) 1, 6, 26 Am. Rep. 391, and in Evans v. Rice, 96 Va. 50, 56, 30 S. E. 463, the notes, if read without reference to the lease, are to be construed as meaning interest at 5 per cent. until payment. In the former case the bond read:

"Six months after date, we promise and bind ourselves * * * to pay to John F. Hicks, or order, the sum of $7,000, with interest at the rate of 12 per centum per annum from date."

The opinion reads:

"It was as competent for these parties to agree upon 12 as upon 6 per centum per annum, as the rate of interest upon the debt until its payment; and we are of opinion that they did agree upon 12 and not upon 6 per centum per annum as the rate in this case. We think their contract ought to be construed precisely as if the words 'till paid' had been inserted therein after the words 'from date,' and that such was their obvious meaning."

In Evans v. Rice, supra, the bond read: "With interest at the rate of 8 per cent. per annum, payable annually." It was held that this rate prevailed until payment.

But, even if there were room for doubt as to the proper construction of the notes in the case at bar, the wording of the lease (the formal and fully expressed contract of the parties) removes, as it seems to me, all possibility of even a plausible contention that the contract is otherwise than for 5 per cent. per annum until payment.

It is further contended in behalf of Mrs. Browning that a decree rendered in this cause in January, 1912, directed the payment to her of the "bonus," and that, at least since the entry of that decree, the sum due her should bear interest at 6 per cent. That decree cannot be properly so construed. The clause relied upon reads:

"* * * It is further decreed that Ollie H. Browning * * * shall have and be entitled to a first and prior lien upon the lands * * * for the true and lawful balance remaining unpaid upon the bonus payment of $200,000 in said lease mentioned, * * * 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."

Notwithstanding the facts above set out, it is urgently contended that the debt should bear interest at 6 per cent., at least from the date of the judgment rendered in this cause on October 27, 1914. My own opinion is that the unquestionable contract right of the debtor to have the interest run at 5 per cent. until payment makes argument unnecessary. In Roberts v. Cocke, 28 Grat. (69 Va.) 207, 218, it is said:

"Wherever there is a contract, express or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of the interest as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contract, either in whole or in part."

In Strayer v. Long, 83 Va. 715, 722, 3 S. E. 372, 376, it is said:

"The next assignment of error is as to the allowance of 10 per centum interest on the Long debt. The contract is for 10 per centum per annum, which was a legal rate of interest in this state at that time, if expressly contracted for. But it is argued that in this case the court should reduce the rate of interest to 6 per centum from the time when the lands of the defendant were taken out of his control and put in the hands of a receiver of the court, thus depriving him of the means of paying the debt. * * * But he is bound by his contract as he made it, the same not appearing to be unlawful, nor otherwise invalid. The courts cannot make another contract for the parties."

I think of no sound reason for ruling that, while a creditor is entitled to have a validly agreed upon rate, higher than the regular rate, prevail until payment, the debtor is not entitled to have a validly agreed upon rate, less than the regular rate, prevail to the time agreed upon. In either event we have a clear contract right, and I know of no principle of law which authorizes the courts to make a new contract for the parties. In 6 Va. Law Reg. 658, relied upon by counsel for Mrs. Browning, it is said:

"If a contract is made for interest at the lower rate 'until paid,' of course such express agreement would prevail."

And it is at least doubtful if the editorial in 5 Va. Law. Reg. 113, was intended to present a different contention.

It should be added that there are at least two Virginia decisions which indicate that the foregoing has been the Virginia rule since a very early date. In Brooke v. Roane, 1 Call (5 Va.) 205 (1798), at a time when the statutory rate of interest in this state was 5 per cent., a judgment bearing interest at such rate was rendered against Brooke. When levy of execution thereon was made, the statutory rate of interest having been in the meantime increased to 6 per cent., Brooke executed

a forthcoming bond. This bond was forfeited, and the judgment rendered on the forthcoming bond was for the debt, with interest at 6 per cent. *until paid.* The appellate court (page 206) reversed this judgment and directed the entry of judgment for the debt, "with interest after the rate of 5 per cent. per annum, from the 18th day of July, 1797, *till payment,* and the costs." In Whitehorn v. Hines, 1 Munf. (15 Va.) 557, 589, Judge Fleming said:

"It seems to me, therefore, that an account ought to be taken, and that the legatees of John Glanton pay their ratable proportion of the money due, for hire of negroes, and on the sales of the land, with interest at 5 per centum per annum, on the latter from the death of William Howell *to the time of payment.*"

This case was also apparently decided on common-law principles. The bill was filed in July, 1800, to set aside a conveyance made in 1783.

[3] However, for the sake of complete consideration, I shall discuss as briefly as may be section 3391, Code 1904, as it may be contended that this statute gives the court a discretion to make the debt bear 6 per cent., at least from judgment. From such study as I have made of this statute, and of the Virginia decisions rendered since the enactment of apparently its earliest prototype, I think that the statute gives no discretion, in cases where interest is allowed, as to the *rate* or the *time to which* interest runs, and that, at least in a case such as the one before us, there is no discretion whatever given by the statute. I am quite satisfied that this statute should be as implicitly followed by this court in a chancery case as in a civil common-law cause, if it applies at all. Holden v. Trust Co., supra, 100 U. S. 72, 74, 25 L. Ed. 567, in which it is said that "the question is always one of local law," was an equity cause. So, also, was New Orleans v. Warner, supra, 175 U. S. 120, 147, 20 Sup. Ct. 44, 55 (44 L. Ed. 96) in which it is said: "* * * If the local law be different, this court will follow it." See, also, Coltrane v. Blake (C. C. A. 4th Cir.) 113 Fed. 785, 791, 51 C. C. A. 457, an equity case, in which the local law is held to govern, and Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474.

The statute in question reads as follows:

"In any suit in equity, or in an action founded on contract, where no jury is impaneled, judgment or decree may be rendered for interest on the principal sum recovered, until such judgment be paid; and where there is a jury, which allows interest, the judgment shall, in like manner, be for such interest until payment." Section 3391, Code 1904.

See, also, Code 1887, § 3391; Code 1873, p. 1121, § 18; Code 1860, p. 733; Code 1849, p. 673; 1 Rev. Code 1819, pp. 208, 508. The statute in its original form (Code 1808, p. 29; 3 Shepherd's Statutes at Large, pp. 98, 99, §§ 1, 5) was enacted January 20, 1804, and went into effect May 1, 1804.

One reason for the construction I give to this statute is found in the provision as to the time to which interest runs when a jury allows interest by its verdict. "The judgment shall, *in like manner,* be for such interest until payment." It seems to me that the words "in like

manner" would not appear in this part of the statute, if the former clause had been intended to give the court a discretion as to the time *to which* interest should run.

Another and stronger reason for such construction is found in the Virginia authorities. In Snickers v. Dorsey, 2 Munf. (16 Va.) 505, 510, the second headnote reads:

"In general, since the 1st of May, 1804, when interest is allowed in equity, it should not stop at the time when the balance of account is struck, nor at the date of the decree, but should run *to the payment of such balance.*"

The decree of the appellate court reads:

"And it is ordered that the cause be remanded to the said court of chancery, to be proceeded in upon the principles and for the purpose aforesaid, and also for the purpose of allowing the appellee interest on the principal sum, which may be found due to him, *to the time of payment.*"

In Dunbar v. Woodcock, 10 Leigh (37 Va.) 628, 654, the trial court was held in error to have allowed interest from a remote date, the decree below was reversed, "with instructions to allow interest on the balance which may be found due *from the date of the final decree*" —necessarily *until payment.* In Cecil v. Hicks, supra, 29 Grat. (70 Va.) 1, 3, 8, 26 Am. Rep. 391, the court said:

"The only question presented by the case to this court for decision is: Did the circuit court err in rendering judgment for interest on the said principal sum at the rate of 12 per cent. per annum from the date of said bill till payment, instead of interest thereon at that rate from said date till the maturity of said bill, and at the rate of 6 per cent. per annum from such maturity until payment? * * * Upon the whole, we are of opinion that there is no error in the judgment, and that it ought to be affirmed."

In Evans v. Rice, 96 Va. 50, 56, 30 S. E. 463, 465, the third headnote, by Professor M. P. Burks, reads:

"Agreement to Pay Higher than Legal Rate of Interest—How Long Rate Continues.—Where a greater than the legal rate of interest is agreed on by the parties, on a debt to mature in the future, the greater rate continues, in the absence of an agreement to the contrary, after the maturity of the debt, and until it is paid."

It was contended by appellant (see brief filed at Wytheville and now before me):

"But even though your honors should differ from the views above presented, and decide that the 8 per cent. interest which the $3,000 bond bore was a part and ingredient of the purchase price of the property, then we submit that said bond could only bear 8 per cent. interest *up to the time of its maturity,* and that from and after its maturity 8 per cent. would become usurious. * * *"

The opinion of the court reads:

"It is contended, however, by appellant, that, even though the transaction be not usurious, where a bond is given for the payment of a sum of money at a future day, reserving a rate of interest permitted by contract, but greater than that established by law, only the legal rate can be recovered after the debt becomes due, unless the continuance of the greater rate be expressly provided for in the contract itself. This is the law in many jurisdictions, and is sustained by courts of the highest authority. In this state, however, it has been settled otherwise, and the rate of interest reserved in the contract

continues as an incident of the debt due, in the absence of any stipulation to the contrary. Cecil v. Hicks, 29 Grat. [70 Va.] 1 [26 Am. Rep. 391]."

In Shipman v. Bailey, 20 W. Va. 140, 145, 146, it is said:

"In a number of cases in Virginia and elsewhere the courts have decided, evidently upon this view of the effect of the judgment upon the original contract, that where a debt is contracted for [at] a less or greater rate of interest than the laws of the lex fori permit at the time of its enforcement, if authorized by the laws when or where it was made, the courts of the lex fori will not hesitate to give judgment upon such debt, to bear interest at the rate specified in the contract, not only to the date of the judgment, but afterwards until the debt is paid."

See, also, Bent v. Patten, 1 Rand. (22 Va.) 25; Pickens v. McCoy, 24 W. Va. 344, 353; Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. 1.

In 3 Minor's Inst. (2d Ed.) p. 386, it is said:

"* * * A promise 'to pay $1,000 six months after date, with 8 per cent. (or 12 per cent., or 3 per cent.) interest,' is prima facie interpreted as a promise to pay $1,000 six months after date, with 8 per cent. (or 12 per cent., or 3 per cent.) interest, not only *until maturity*, but afterwards until paid."

In 4 Minor's Inst. (3d Ed.) p. 967, it is said:

"In an action on a contract, where no jury is impaneled, judgment is to be entered for interest on the principal sum recovered, from the time the principal was payable, or expressly bore interest, until payment."

In 1 Robinson's (old) Pr. p. 361, citing Code 1819, it is said:

"In all actions founded on contracts, where judgment shall be rendered in court, if interest be allowed, such interest shall be upon the principal sum due, and shall continue until such principal sum be paid. And in all actions founded on contracts and tried before a jury, the jury shall ascertain the principal sum due, and fix the period at which interest shall commence, if interest be allowed by them; and judgment shall be rendered accordingly, carrying on the interest till the judgment shall be satisfied."

I find nothing in the present statute which gives the court any discretion as to the *rate* of interest. The statute seemingly contemplates that, where interest is properly allowed, it shall be at either the statutory rate or at the (legally) agreed rate. An entire absence of discretion as to the rate of interest tends to support the conclusion that no discretion was intended as to the time *to* which interest, if allowable, should run at the legally agreed rate.

[4] Finally, it must be remembered, in construing this statute, that we are dealing with a case in which there is, by an express contract, a right on the part of the debtor that the interest shall be at the rate of 5 per cent. *until payment.* Under such circumstances, the word "may" in the statute is equivalent to "shall," quoad the rate of interest and the time to which interest shall run. In Black's Interpret. of Laws, pp. 338, 342, it is said:

"The word 'may' will be construed to mean 'shall' or 'must,' when the public interests and rights are concerned, and when the public or third persons have a claim de jure that the power shall be exercised. * * * And, in general, where the statute enacts that a public officer 'may' act in a certain way, which is for the benefit of third persons, he must act in that way."

In Sutherland's Stat. Const. p. 597, it is said:

"Permissive words in respect to courts or officers are imperative in those cases in which the public or individuals have a right that the power so conferred be exercised."

In Supervisors v. U. S., 4 Wall. 435, 445, 446, 447, 18 L. Ed. 419, the statute involved read:

"The board of supervisors * * * may, if deemed advisable, levy a special tax. * * *"

In the opinion it is said:

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his."

See, also, Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560.

It follows that, even if there be in some cases a discretion given by the statute to the court as to the time to which and the rate at which interest shall run, there is no discretion whatever in a case such as we have here. The foregoing are the reasons which lead me, in the decree of sale of October 27, 1914, to order that Mrs. Browning recover interest on the bonus payments at the rate of 5 per cent. until payment.

ABBOTT v. S. B. & B. W. FLEISCHER, Inc.

(District Court, E. D. Pennsylvania. November 11, 1914.)

No. 2756.

SALES (§ 88*)—CONTRACT FOR SALE OF WOOL—ACTION FOR BREACH—QUESTIONS FOR JURY.

In an action for breach of a parol contract by which plaintiff undertook to obtain and to sell to defendant wool of different grades and at different prices, the question what the contract as agreed upon was *held* properly submitted to the jury as determinative of the rights of the parties under the issues.

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

At Law. Action by J. H. Abbott against S. B. & B. W. Fleischer, Incorporated. On motion by defendant for new trial. Denied.

Brown & Lloyd, of Philadelphia, Pa., for plaintiff.

J. W. Bayard and F. P. Prichard, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The reasons for a new trial which are now urged and remain to be disposed of are these:

1. Exception is taken to a part of the charge. The exception relates to a portion of the charge found on page 286 of the stenographer's notes. Separated from its context, the observations here made would

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

seem to have no relevancy to the issue to be determined by the jury. The thought was this: The jury had been asked to find the contract because what it was could be found only from the oral testimony, or the oral testimony supplemented by letters which the parties had interchanged. The letters were hardly more than memoranda of quantities and prices which had been agreed upon. The wool may, in a general way, be described as consisting of two qualities, medium wool, which was the higher priced wool, and fine wool, or what was also included under the general designation of rejections. The quantity of wool embraced in the contract was agreed upon, but there was no distribution of it between the two kinds or qualities. A price had been agreed upon for medium wools, and another price for rejections; but here again there was no agreement as to quantity with reference to the respective prices. Quite a little talk had taken place between the parties, and some questions had been raised about the grading.

The final position of the defendant as to this was that it had been agreed that the wool was to be sorted by defendant's grader, but, if the grading was not satisfactory, the bargain should be off. The final position of the plaintiff was that the defendant had agreed that the grading should be fairly done. The parties knew the conditions under which they were bargaining. These were that neither party knew anything of the wool as to which they were contracting. The expectation was that the plaintiff would go out among the farmers of Western New York and get the wool which the defendant had agreed to take. A schedule of dates and places was arranged between them, constituting an itinerary for the plaintiff and the defendant's grader. At the first place at which they met, at least two questions and two differences arose between them. The plaintiff had gathered a quantity of wool which the farmers had brought to the place thus first designated. There was in quantity approximately 30,000 pounds. The grader graded. The result of this grading was that he graded it as 14,000 pounds of medium wool and 16,000 of fines or rejections. The plaintiff was dissatisfied with and refused to accept of this grading. The meeting finally broke up, with the situation being, according to the plaintiff, that he tendered the 14,000 pounds of medium wool, and offered to deliver the remaining quantity out of the wool which would be found at one or more of the subsequent places of visit arranged for. This would have kept him well within the time limit of his contract. The plaintiff was unwilling, and refused to tender the 16,000 pounds of rejections, claiming that there was much medium wool among it. He did offer, but this was by way of a compromise of the dispute, to regrade the 16,000 pounds himself, take out of it what he considered medium wool, and deliver the remainder as fines or rejections.

In order to understand the defendant's version of conditions when this first meeting broke up, this should be added to the statement already made: While the quantity of wool had been agreed upon and prices had been named, 47,000 pounds were to be at certain prices, and the remainder at higher prices. The prices were 22 cents and 24 cents for medium wool and 17 cents and 18 cents for rejections. The defendant's version is that the plaintiff demanded 24 cents for the me-

dium wool, which the defendant refused to allow. The defendant further insisted on its right to take the whole lot of wool, medium and fine, at the prices named, and refused to take the medium wool by itself. As the plaintiff refused to deliver the medium wool, except at 24 cents, and refused to deliver the fine wool at all, the defendant declared a breach of the contract by the plaintiff, and all further dealings were off.

To complete this statement of facts, it should be stated that the plaintiff's version is that, although he did at first ask 24 cents for his medium wool, when the defendant insisted upon his right to take the first wool offered at the lower price, the plaintiff acquiesced in this, and then made a positive formal tender of medium wool at the 22-cent price.

Under all the facts in the case, and the circumstances and conditions under which the parties dealt, the court had submitted to the jury to find what the contract was, with respect to whether it was in the alternative for the medium wool at its price, or fine wool at its price, or part of one and part of the other, or whether the contract contemplated the plaintiff supplying and the defendant accepting what has been termed the crop of the wool as it came from the farmers to be paid for, the medium part at one price, and the fine wool part of it at the other price, and what was medium and what was fine to be determined by a grading. If the latter were the contract, it is obvious that the grading affected only the price, and that each party was really bargaining for what might be called a price for the whole lot, or, as another way of expressing the same thing, an average price per pound. The determination of this question, of course, had a very important bearing upon the other question of the willingness of the parties on the one hand to tender, and on the other hand to accept, the whole lot of wool, or only the separate parts of it. One of the possible versions of the contract was that the plaintiff should be bound by the defendant's grading. Another was that in the event of a disagreement the contract should automatically end. Another was that the grading should be a fair grading. Still another was that the contract was entirely silent as to the grading.

It was necessary for the court to charge the jury as to what they should do in the event of their finding the contract in this respect to be any one of the contracts just above mentioned. It was, therefore, necessary to instruct the jury what would follow their finding that there was nothing in the contract about the grading; but there was the element in the contract that the parties were bargaining for the whole crop. The part of the charge to which this exception is directed dealt with this aspect of the case, and the jury were told that in the event of the contract being to buy the whole crop, medium and fine, and there being nothing in the contract as to the grading, the question of whether the plaintiff was bound to tender the 16,000 pounds of fine wool depended upon the fact of whether it was really fine wool or whether there was an admixture of medium wool. This came down to the question of whether the grading had been honestly and properly done. The part of the charge quoted for exception

is therefore the introduction to the part which immediately follows, which should be read with it.

We are not convinced there was any error in this. The plaintiff had a very aggressive version of the contract—that under it it was his right to tender either medium wool or fine wool up to the named quantity, and that the defendant was bound to accept it, provided only it was the quality of wool for which the price called. The defendant just as aggressively insisted upon its version of the contract, namely, that it was entitled to the whole crop of wool, and that the defendant was not obliged, after the wool was graded, to pay for the part which the plaintiff was willing to sell, and not get the other part. In the expressive phrase of counsel, the defendant was to take and pay for the wool which was graded, and its grader was not sent up into New York to grade wool which the plaintiff might thereafter sell to somebody else, but was sent there to grade wool which had been contracted to be sold to the defendant subject to the grading.

As these so-called versions and interpretations of the contract are, strictly speaking, different contracts, we see no escape from the conclusion that the jury was required to find which of these two things was the contract in this aspect of it. If the contract was in this respect, as contended for by the defendant, that the plaintiff must tender and the defendant accept the lot or crop of wool as it was presented for grading, then certainly the grading was nothing more than the means of determining the sum which the defendant was to pay for the lot. In other words, the grading bore upon nothing but the price to be paid for the wool. The jury found against the defendant, and the instruction, therefore, was that unless the grading was properly done the plaintiff was not bound to tender the low-priced wool.

2. The defendant also complains of the answer to the defendant's second point. This point asks the court to charge that defendant had the right, if it was to take the wool, to take the whole lot, and was not bound to take a part of it. The answer made to this point was that it depended upon what the contract was. We still think this answer was correct, because if the contract was not for the entire lot of wool as presented for grading, but, for instance, for 47,000 pounds of wool, medium or fine, and wool was tendered which the defendant admitted to be medium wool, then the defendant would be bound to take it.

3. The next complaint is to the answer of the court to the defendant's third point. The affirmance of this point would have been the equivalent of binding instructions, because the undisputed evidence was that the plaintiff's position was as stated in the point. In effect the direction asked for was that the plaintiff was bound to tender the entire lot of wool and not part of it. What has been said above applies with equal force to this.

4. The fourth complaint is directed to the refusal of the court to charge as asked for in defendant's fourth point. This point is in legal effect a reiteration of the third point. The only difference is that the fact upon which the point is predicated is stated inferentially in the fourth point, instead of positively asserted as in the third point. We therefore think it is met by what we have said in respect to point 3.

5. The final complaint is of the refusal of the court to affirm the defendant's sixth point, which asked for binding instructions. We are unable to see anything upon which this point can be predicated, except what has already been discussed with respect to points 3 and 4.

Whatever merit is left in the defense is dependent upon the correctness of the position as assumed and set forth in defendant's third point. There can be no difference of opinion over the fact. The plaintiff limited his tender of wool after the first grading to the part of the wool the defendant had graded as medium, and he refused to deliver as fine the part of the remaining wool graded as fine, because there was much of it which he claimed to be medium wool. If he was bound to tender all the wool, medium and fine, as graded by the defendant, and at the prices named, he committed a breach of the contract, and is certainly not entitled to hold the verdict which the jury has rendered in his favor.

No points were submitted by the plaintiff, but, had there been, the position would doubtless have been taken—must have been taken—that the plaintiff was fulfilling his contract when he tendered wool to the contract quantity and of the contract quality, whether medium, fine, or both. Had the contract been in writing, and had it followed the verbiage of the letters exchanged between the parties, we would have felt constrained to have construed the contract in accordance with the plaintiff's view of it. If this would have been the proper construction of the contract, then no appellate question springs out of this record.

The rule for a new trial is therefore discharged.

In re CENTI.

(District Court, W. D. Tennessee, W. D. October 1, 1914.)

No. 157.

ALIENS (§ 68*)—NATURALIZATION—PROCEEDINGS—SECOND APPLICATION.

Under Naturalization Act June 29, 1906, c. 3592, § 4 (4), 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 531), which provides that it shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and that during that time he has behaved as a man of good moral character, etc., where the petition of an alien has been denied after a hearing on the merits, on the ground that he has not behaved as a man of good moral character during the five years preceding his application, or for other reasons has not complied with such provisions, he cannot maintain a second petition until the lapse of five years from the date of the order denying the first.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

Petition by Bartolomeo Centi for naturalization. On plea in bar. Plea sustained, and petition dismissed.

See, also, 211 Fed. 559.

Casey Todd, of Memphis, Tenn., for petitioner.

Yandell Haun, Asst. U. S. Atty., of Memphis, Tenn., for the United States.

McCALL, District Judge. On June 9, 1914, Bartolomeo Centi filed his petition for naturalization, based upon a declaration of intention made May 12, 1910. On September 7, 1914, the United States, through its District Attorney, filed a plea in bar to the petition for naturalization, and alleged "that on the 17th day of May, 1912, the petitioner filed a petition in this court to be naturalized, and that on the 10th day of January, 1914, said cause came on to be and was heard by this court upon a petition and proof, when it appeared, among other things, that petitioner had repeatedly and for a number of years exercised the rights and privileges of the suffrage, by voting in various elections held in Haywood county, Tenn., while not a citizen of the United States and in violation of law. Whereupon the court refused to grant the petitioner the relief sought, and refused to order issued to him a certificate of naturalization, admitting him to citizenship and to become a citizen of the United States, and dismissed the said petition, and a decree in accordance was entered, which decree was never appealed from, and has never been set aside. In re Centi (D. C.) 211 Fed. 559. Wherefore the United States says that the matters and things contained in the present petition have heretofore been adjudicated by this court, and are now res adjudicata, as between the petitioner and the United States of America, they being the identical parties to both proceedings, involving the same matters; and the United States relies upon and expressly pleads said adjudication as a bar to this petition, and as a bar to the relief sought thereunder."

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

The question raised by the plea is: What length of time must elapse from the date of an order denying, on the merits, a petition of an alien for naturalization, before he may properly file a second petition for naturalization?

There is a paucity of decisions relating to this question, and so far as I am advised none of the federal appellate courts have passed upon it. The fourth section of the Naturalization Act requires, among other things, that:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, * * * and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

In Re Centi, supra, it was held in January, 1914, that the conduct of the petitioner in this case did not comport with the requirement of section 4 of the Naturalization Act, supra, and the certificate of naturalization was denied him, and his petition dismissed. His moral status, as that affects his qualification for naturalization, was thus fixed in January, 1914, and at that time it was adjudged that he had not behaved as a man of good moral character, that he was not attached to the principles of the United States, and was not disposed to the good order and happiness of the same.

The statute requires that it should be made to appear to the satisfaction of the court that an alien, applying for naturalization, immediately preceding the date of his application has resided continuously within the United States for five years, at least, and that during that time he had behaved as a man of good moral character, etc. This statute does not impose a permanent disability, but it does impose a disability for the five-year period expressly stated, and I am of the opinion that in this case the five-year period begins to run from the date the order was entered denying his former application, and that he cannot file and maintain a petition for naturalization in this court until the expiration of five years from the date of the former adjudication, and then upon proof that satisfies the court that he has complied with section 4 of the naturalization act, during that five-year period. In re Spencer, Fed. Cas. No. 13,234; In re Trum, 199 Fed. 361; In re Folkstad (D. C.) 199 Fed. 363; In re Guliano, 156 Fed. 420; In re Manning, 209 Fed. 499.

To hold otherwise would seem to stamp former adjudications wherein an alien has been denied naturalization as a nullity, and an alien might file a petition as often as he is denied citizenship, and that, too, one following hard upon the heels of the other. Either the order denying citizenship should be of some consequence, or it should not be made.

It is true the petition now before me states that on the hearing in the former case the conduct of the petitioner, in his opinion, was not made clear to the court. If this were true, then the remedy would seem to be to have seasonably filed a petition to rehear, and thus to

have offered the court an opportunity to more fully understand the conditions and circumstances of petitioner's illegal voting.

It is further alleged that the cause of the denial of the naturalization has since been cured or removed. The court recalls vividly the evidence of the petitioner on the former hearing. The act of having repeatedly and habitually voted, during a period of several years, cannot be removed, and in the opinion of the court cannot be cured so as to justify the naturalization of petitioner, unless right living in obedience to law for the five years next following the date of the former adjudication can cure it.

If the petitioner in this case considered himself aggrieved at the action of the court in the former case, he could have sought relief in the appellate courts. This he did not do, but comes with a new petition, within six months after the denial of his former petition, and in effect asks this court to ignore its former action and try this case anew. This I think he may not do. If, after the expiration of five years from the date of the former adjudication, he desires so to do, and is so advised, he may file a petition for naturalization.

The result is that the plea is sustained, and the petition dismissed. An order will be entered accordingly.

WHITTED v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.

(District Court, E. D. Arkansas, W. D. October 31, 1914.)

No. 5727.

1. COURTS (§ 339*)—FEDERAL COURTS—CONFORMITY TO STATE LAW—NONSUIT—MOTION—TIME.

Under the Conformity Act (Rev. St. § 914; Comp. St. 1913, § 1537), a federal court is required to conform to the laws of the state in which the court is held, as to the time within which plaintiff may move for a nonsuit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 914; Dec. Dig. § 339.*]

2. DISMISSAL AND NONSUIT (§ 10*)—MOTION—TIME—STATUTES.

Kirby's Dig. Ark. § 6167, provides that an action may be dismissed without prejudice by plaintiff before final submission of the case to a jury, or to the court where trial is by the court. *Held* that, where a motion to direct a verdict for defendant had been granted, but the verdict had not been actually signed when plaintiff moved to take a nonsuit, the motion was too late.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 24; Dec. Dig. § 10.*]

3. DISMISSAL AND NONSUIT (§ 10*)—MOTION—TIME—DISCRETION.

Where plaintiff's case had been fully developed, and no important evidence offered by him had been excluded, and there was no surprise, the court, having sustained a motion to direct a verdict for defendant, would not, in the exercise of discretion, grant plaintiff's motion for leave to take a nonsuit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 24; Dec. Dig. § 10.*]

---

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

At Law. Action by Burt Whitted against the Southwestern Telegraph & Telephone Company. On motion to set aside a judgment and grant plaintiff leave to take a nonsuit. Denied.

R. E. Wiley, of Little Rock, Ark., for plaintiff.

A. P. Wozencraft, of Dallas, Tex., and Walter J. Terry and Edward B. Downie, both of Little Rock, Ark., for defendant.

TRIEBER, District Judge. The facts, in so far as they are applicable to this motion, are as follows:

After all the evidence had been concluded, counsel for plaintiff submitted to the court some special instructions to be given to the jury. The court, after examining them, announced that the instructions would be refused, and that in view of the uncontradicted evidence in the case a directed verdict for the defendant would be given, if counsel for defendant requested it. Thereupon counsel for defendant announced that he intended to make such a motion, and said something else, which the court did not understand. The court then announced that, if no request for an instructed verdict was made, counsel might proceed with the argument. Counsel for defendant again arose, and stated that evidently the court did not understand him, as he had asked for an instructed verdict. The court thereupon announced that the request would be granted, and directed the clerk to submit to the jury the verdict to be signed by one of the jurors. It was then that counsel for the plaintiff requested leave of the court to dismiss the case without prejudice, which request was denied by the court. This request was made before the verdict had been actually signed by the jury.

The authorities on the question as to when the court may permit a voluntary nonsuit are anything but harmonious. Some of the courts hold that no nonsuit can be taken after the motion for a directed verdict has been made; others hold that the action may be dismissed at any time before the court announces its decision, but not thereafter. Some of the courts hold that it may be taken at any time before the court has actually directed the jury to return the verdict, but not thereafter; and still others hold that the cause may be dismissed at any time before the verdict has been actually signed by the jury. For the reasons hereinafter stated it is unnecessary for the court to determine in this cause which of these views should be adopted.

[1] There is also a difference of opinion among the national courts as to whether the statutes of the state in which the court is held are binding under the Conformity Act of Congress (section 914, R. S.); but that question has been determined by the Circuit Court of Appeals of this circuit in Chicago, etc., Ry. Co. v. Metalstaff, 101 Fed. 769, 41 C. C. A. 669, and is authoritative in this court. It was there held that the national courts should be governed by the laws of the state in which the court is held.

[2] Section 6167 of Kirby's Digest of the Statutes of Arkansas provides:

"An action may be dismissed without prejudice to a future action: First. By the plaintiff before the final submission of the case to the jury, or to the court where the trial is by the court."

This statute was construed by the Supreme Court of the state in St. L. S. W. Ry. Co. v. Sewing Machine Co., 69 Ark. 431, 64 S. W. 96, and the court there adopted the rule established by the Supreme Court of Kansas in Ashmead v. Ashmead, 23 Kan. 262; the statute of that state being, like that of Arkansas, that:

"After a case has been finally submitted to the jury or the court, the plaintiff has no right to dismiss the action without prejudice to a future action; but, while all legal right on the part of the plaintiff has ended, the court may, in its discretion, and to prevent injustice and wrong, permit the plaintiff to recall such submission, and dismiss without prejudice; and in such case the action of the court, unless it has abused its discretion, is no ground of error."

In St. Joseph, etc., Ry. Co. v. Dryden, 17 Kan. 278, Mr. Justice Brewer, delivering the opinion of the court, said:

"Where a demurrer to the evidence is sustained, the case is ready for judgment. It has been finally submitted to the court, and the plaintiff has no more right to dismiss then than he has after a verdict is returned. The case is decided, and the plaintiff has no right to avoid that decision by a dismissal."

The statute of Nebraska is identical with that of this state, and in Bee Building Co. v. Dalton, 68 Neb. 38, 93 N. W. 930, 4 Ann. Cas. 508, it was held that to permit a dismissal of a cause after the court had announced that a demurrer to the evidence was sustained, although the verdict had not yet been signed, was error, and reversed the trial court for permitting it.

[3] It is true that there is a discretion left to the courts; but it is not an arbitrary discretion, but one which will promote the ends of justice, and is authorized by the well-established principles of law. If there had been some surprise during the trial of the case, or if some important evidence offered by the plaintiff had been excluded because of some technical defect, and by reason thereof his case was not fully developed, the court would be justified, in the exercise of its discretion, to permit a dismissal of the action, and thus give the plaintiff an opportunity to present his case fully. But in the instant case the entire case had been fully developed; none of the evidence offered by the plaintiff was excluded Nor is it claimed there was any surprise by reason of the evidence introduced by the defendant. For this reason it would be an abuse of discretion for the court to deprive the defendant of the right to have the case finally disposed of, and compel it to undergo the expense of a new trial. In Bee Building Co. v. Dalton, supra, this question was fully discussed, the court saying:

"One who is defending against a claim which he believes to be unjust ought not to be subjected to the expense of litigation which settles nothing. And since he is not permitted to choose another forum when it is discovered that the court is against him, it is manifestly unfair to give the plaintiff an unlimited freedom of choice. The taxpaying public, too, have rights which it may be presumed the Legislature took into account in adopting section 430 [Code Civ. Proc.]. It is, of course, entirely proper that courts should be maintained at public expense to hear and determine all controversies that may be submitted to them; but it is no part of the business of the state in administering justice to provide for sham trials, or to maintain courts for experimental investigation. Indeed, it would be a reproach to our judicial system to permit a defeated litigant to abandon his case and sue again, thus harassing

the defendant and wasting money raised by taxation for public purposes. Our conclusion is that the court erred in sustaining plaintiff's motion."

The signing of the verdict by the jury is a mere ministerial or ceremonial act. It is the decision of the court which is the judgment. Judgments of courts are of a higher grade than the signing of a verdict, and it has been uniformly held that the judgment of a court is its pronouncement from the bench; the record only being the evidence of what the court decided. Freeman on Judgments, § 38; United States v. Stoller (D. C.) 180 Fed. 910; American Mortgage Co. v. Williams, 103 Ark. 484, 145 S. W. 234. In the last-cited case the facts were that the decree had been pronounced by the court during the term, but it was not actually drafted at that time and was entered after the term had expired. Under the laws of Arkansas, in force at the time the decision was rendered, a decree or judgment rendered in vacation was a nullity. Poole v. Oliver, 89 Ark. 85, 115 S. W. 952. But in the Williams Case the court held:

"The mere fact that the decree was not actually entered by the clerk in the record until in February, 1902, and beyond the term, did not affect its validity; nor is the fact that the decree appears entered in the record after the order of final adjournment of that term of court sufficient to impeach its verity."

In my opinion, it is too late for a plaintiff to ask for a nonsuit after the court has granted a motion for a peremptory instruction in favor of the defendant and directed the jury to sign it, unless some extraordinary reason demanded it.

The motion is overruled.

UNITED STATES v. SMITH.

(District Court, E. D. Pennsylvania. November 14, 1914.)

No. 7.

1. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—PRESUMPTION AS TO CHARACTER.
An instruction requested in a criminal case, that defendant was entitled to a presumption of good character, *held* properly refused, as directed to a fact not in issue; the jury being fully instructed as to the legal presumption of innocence of the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

2. CRIMINAL LAW (§ 921*)—EVIDENCE—ADMISSIONS BY DEFENDANT—PROOF AND EFFECT.
Admission in evidence of a statement by defendant: "I am in it pretty badly. Don't be hard on me. I don't want to go to jail again"—testified to by a witness, when asked, without objection, to state what defendant said when arrested, *held* not ground for new trial, where the jury was cautioned not to be influenced thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2206–2209; Dec. Dig. § 921.*]

Criminal prosecution by the United States against Robert Smith. On motion in arrest of judgment and for a new trial. Denied.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Walter C. Douglas, Jr., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] The leverage of this motion is upon the refusal of the court to affirm the defendant's point as written. This point was:

"Seventh. The defendant is entitled to a presumption of good character."

Presumptions are either of law or fact. If the point means the former, then what it means is the presumption, not of good character, but of innocence. This proposition was affirmed, and the jury was instructed to give the defendant the full benefit of this presumption. There is not, nor could be, any complaint on this score. If the presumption meant is one of fact, then the proposition involves this logical absurdity: The issue in criminal cases is one of guilt or innocence of the offense charged. Good character is a defense. The evidence of the prosecution which points to guilt is met with testimony as evidence of good character which points to innocence. The defense of good character may be introduced, or not, at defendant's election. It should be permissible to overcome any presumption of fact which is not conclusive with contravening proofs. If, therefore, good character is presumed as a fact, the fact gets in issue and is open to contradiction.

This brings us face to face with a dilemma. If the presumption can be overcome by proofs, evidence of bad character can be introduced, without the defendant having put his character in issue. If

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

the presumption must stand unchallenged, then theoretically a defendant of a character so bad that he dare not put it in issue stands higher than the one who offers evidence of good character, and as high as one who proves good character. A like practical dilemma discovers itself. The trial judge, in a proper case, should certainly be free to make clear to the jury the distinction between good character, as proven, and the presumption of innocence, both of which alike inure to the benefit of the defendant. It would be a delicate undertaking to attempt to distinguish between good character proven and good character presumed as a fact, without presenting to the jury the suggestion that in the latter case good character had not been proven. The attempt would probably be futile.

On general principles, therefore, the point as written should not have been affirmed. The only answer of which it is susceptible would be that a defendant is presumed to be innocent, and, negatively stated, there is no presumption of bad character because of the absence of evidence of a good one. These considerations induced the refusal of the point. In a nutshell, the point was not answered, because directed to a fact not in issue.

At the argument for a new trial cases seemingly in conflict with the views expressed were cited. A careful scrutiny of the records in those cases show this conflict to be not real. This is made so clear by the case of Fields v. United States, 27 App. D. C. 433, 448, and 205 U. S. 292, 27 Sup. Ct. 543, 51 L. Ed. 807, that further comment is uncalled for.

The other objections are to the admission of evidence. With respect to the objection to preliminary questions leading up to sales, the objection was first based upon the proposition that the United States was confined to evidence of sales on the date laid in the indictment. As the day was laid under a videlicet, the objection was overruled, on the ground that the United States was not held to the day named, but could, without variance, prove an offense near that date but not later. Counsel for defendant assented to the soundness of this ruling, but based a subsequent objection upon the ground that evidence was being introduced of the commission of offenses different from the offense laid in the indictment. There was no basis for such an objection. The witness under interrogation was the customer to whom the sale of oleomargarine had been made. The questions asked were merely leading up to the sale. She was asked if she knew the defendant, and how she came to know him. Her reply was that she had bought butter of him and was a customer. One of the counts in the indictment charged him to have been a "dealer" in oleomargarine. It was admissible, therefore, to show him to have been a dealer. The admission was on this ground. We see in this no error.

Another complaint is based upon the answers to questions which went merely to the identity of the defendant. Witnesses were asked whether they knew him, how long they had known him, and in what business he was engaged when they knew him. The answer was that they knew him as a manufacturer of oleomargarine. There was no testimony, no suggestion even, and no thought on the part of any one, that

this testimony involved any charge of former criminality. We say no thought of this on the part of any one, because counsel for defendant did not object to it. The admission is not now urged as a reason for a new trial in itself, but as the foundation of the complaint that there was a conspiracy to prejudice the defendant by conveying information to the jury that he had been previously convicted.

[2] The next complaint is to statements made by defendant when caught redhanded. The statement was: "I am in it pretty badly. Don't be hard on me. I don't want to go to jail again."

This came in answer to a question as to what the defendant had said, to which no objection had been interposed. The answer was made the basis of a motion to withdraw a juror, and the exception is based upon the refusal of the court to grant the motion. In the opinion of the trial judge the incident was best dealt with by a warning to the jury not to be influenced by this feature of the testimony. It was made a feature of the charge. The defendant offered no evidence. This gave his counsel the close. How this incident of the trial should be best treated was a matter of judgment. It was treated by counsel in a tactful, impressive, and, as the court was satisfied, such a convincing way that no harm befell the defendant because of it. All that counsel said received the full sanction of the court, although, as was to be expected, counsel went further than the court of its own motion would have been justified in going.

We see no reason to interfere with the verdict, and the motion for a new trial is dismissed.

UNITED STATES v. HILL.

(District Court, D. Colorado. September 28, 1914.)

No. 5339.

1. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—BURDEN OF PROOF.

In a suit for the cancellation of a patent to land, where it is shown that the entry was fraudulent, defendant has the burden of proof to establish the defense that he was a bona fide purchaser for value without notice.

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

2. EVIDENCE (§ 383*)—DOCUMENTARY EVIDENCE—CONCLUSIVENESS.

The consideration paid for land by a defendant claiming to be a bona fide purchaser must be alleged and proved independently of the recital in the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660–1677; Dec. Dig. § 383.*]

3. PRINCIPAL AND AGENT (§ 177*)—NOTICE TO AGENT.

Notice to an agent for the purchase of land of facts affecting the title is binding on his principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 670–679; Dec. Dig. § 177.*]

---

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

4. VENDOR AND PURCHASER (§ 244*)—BONA FIDE PURCHASER—EVIDENCE.
Evidence that a grantee of land sent money to his brother as his agent with which to purchase the land and that the purchaser had no knowledge of facts affecting the title, *held* insufficient to show either that the consideration was paid, or want of notice to sustain the claim that he was a bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611; Dec. Dig. § 244.*]

In Equity. Suit by the United States against Charles B. Hill. Decree for complainant.

Frank Hall, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

J. Foster Symes, of Denver, Colo., for defendant.

LEWIS, District Judge. This is a suit brought to obtain a decree cancelling patent to 320 acres of coal land on the ground that the same was obtained by fraudulent practices of the entrymen. The answer denies the fraud and sets up the defense of a bona fide purchaser for value. There is some criticism made on both sides, in the briefs submitted after final hearing, of the pleadings,—the defendant claiming that the proof does not make out the case stated in the bill, and the complainants that the answer does not contain all of the elements necessary to constitute a defense under the claim of a bona fide purchaser. The complaint does charge a conspiracy, on the part of the defendant and the entrymen, to unlawfully obtain the lands, but it also directly charges the entrymen with fraudulent conduct in making the entry; and while the proof does not appear to be sufficient to support the conclusion that the defendant personally participated in the alleged conspiracy, it amply sustains the fraudulent character of the entry. We pass the criticisms with the assumption that the pleadings on both sides are sufficient and look to the facts.

The proof on both sides is short, the complainants offering only one witness, together with the entry papers and patent, and the defendant himself being the only witness in his behalf. The entry was made by Lewis M. Allen and Chas. D. Richards. The coal declaratory statement of the entrymen bears date December 24, 1902, and the other papers required by the rules and regulations of the land office bear dates thence on as late as April 4, 1903. They all appear to have been signed by the entrymen before James W. Barbee a notary public at Denver, Colorado. The receiver's coal receipt for the government purchase price, to-wit, $3,200, is dated at Glenwood Springs, Colorado, April 2, 1903, and recites that that amount of money was received from Allen and Richards for the land entered. The register's final coal certificate of entry bears the same date and was issued by the register in the names of the two entrymen. The patent which runs in the names of the entrymen bears date July 23, 1903. The deed from the entrymen to the defendant Hill, copy of which was offered in evidence by the defendant, bears date April 2, 1903, and was filed for record in the office of the recorder of Routt County, where the land is situate, December 21, 1907.

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

The only witness called on behalf of complainants was Lewis M. Allen, one of the entrymen. He testified that a man whom he knew, but whose name he could not recall, asked him on the street one day if he had ever exercised his right to enter coal land; that the next day he went to the office of James W. Barbee, in Denver, and signed papers which were represented as being necessary for him to make the entry; that he did not know his co-entryman Richards; that he was at Barbee's office only on the one occasion; that he signed all the papers which he ever signed in connection with the matter on that one visit; that he was induced to do so on the consideration paid to him of $2.50, which he received, and that this was all he ever had to do with the matter in any respect; and that he never paid anything to the government for the land and never received any papers thereafter in reference to the land.

The defendant Hill testified in his own behalf, that he was a resident of Montgomery, New York; that he did not know the entrymen and had never met them; that his brother N. P. Hill resided at Florence, Colorado, and notified the defendant at about the time the deed bears date that he was able to purchase for him the tract in question, and he directed his brother to purchase it; that he paid $3,400 for the land; that his brother at that time was holding some of his funds which were used on the purchase, but that he sent him a check for the greater part of it, and sometime thereafter received the deed signed by the entrymen, copy of which was offered in evidence.

The defendant had previously exercised his right under the statute in entering coal lands. He testified that he did not know whether the entrymen, Allen and Richards, received any of the money which his brother was directed to pay.

The entry being clearly fraudulent, the only question for consideration is whether or not the equity of the complainants is superior or inferior to the rights of the defendant.

[1] 1. Under the allegations of the bill and the proof adduced, the burden rested on the defendant to allege in his answer and establish by evidence facts showing that he was a bona fide purchaser for value without notice.

In Boone v. Chiles, 10 Pet. 177, it is said at page 211 (9 L. Ed. 388):

"The answer setting it up is no evidence against the plaintiff who is not bound to contradict or rebut it (citing cases). It must be established affirmatively, by the defendant, independently of his oath (to the answer), (citing cases)."

In Nickerson v. Meacham (C. C.) 14 Fed. 881, 883, it is said:

"A party relying on the defense that he is a bona fide purchaser, entitled to hold notwithstanding a prior equity, must establish his defense by proof. It is an affirmative defense."

In Smith v. Orton, 131 U. S. lxxv, 18 L. Ed. 62, it is said:

"To bring the defense within it (the rule which affords protection to a bona fide purchaser), it must be averred in the plea or answer and proved, that the conveyance was by deed, and that the vendor was seized of the legal title; that all the purchase money was paid and paid before notice."

See, also, Sillyman v. King, 36 Iowa, 207; Lewis v. Lindley, 19 Mont. 443, 48 Pac. 765; Raymond v. Flavel, 27 Or. 248, 40 Pac. 158; Prickett v. Muck, 74 Wis. 207, 42 N. W. 256.

I think the rule is correctly stated in Fulton v. Woodman, 54 Miss. 158, 172, thus:

"Upon whom rests the burden of proof? The complainant contends that the claim of being a bona fide purchaser is an affirmative defense, and that, therefore, the burden of proving it is upon him who pleads it. This is only true where fraud in some previous holder of the title has been shown. In such a case, the defendant who sets up the claim of a bona fide purchaser in himself, as freeing him from the effects of the fraud, must prove this affirmative claim. But it surely requires no argument to show that, in order for this principle to come in play, the previous fraud by which the title has been vitiated must be established, and that this cannot be accomplished by charges without proof."

It having been already assumed that the defense is sufficiently pleaded in the answer, we turn to the evidence to see whether the defendant, on whom the burden rests, has established the defense so set up; and thus overcome complainants' equity. This he could do by establishing a superior equity in himself. U. S. v. Detroit Co., 131 Fed. 668, 67 C. C. A. 1; s. c., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499.

[2] From the testimony offered in behalf of the defendant it appears that he knew nothing about the transaction, further than that he furnished his brother with funds with which to buy the land, and he later received the entrymen's deed. His brother was not called as a witness. It is reasonably inferable that his brother could have disclosed fully what the transaction was. He was undoubtedly the defendant's agent in the alleged purchase. No one else acted in that behalf for the defendant. It is clear from the proof that none of the money furnished by the defendant was paid to the entryman Allen, and there is no evidence that the other entryman, Richards, received any of it. The deed to him was executed by them. They were the vendors to whom the money would be paid, or paid at their direction. If the brother of the defendant did not pay the money to them,—and it is apparent that the entryman Allen got none of it,—then the only person who could tell us to whom it was paid is the defendant's brother. Counsel agreed at the hearing that the brother was still among the living, but he was not produced as a witness. If we are to indulge in presumptions, the most natural one would be that the brother knew all about the character of the entry made by Allen and Richards and paid $3,200, the required purchase price, out of the money sent him by the defendant to the receiver of the land office when the entry was accepted. The brother was the defendant's agent, and whatever he knew or did for the defendant in the matter is attributable to the defendant. But we put presumptions aside. Allen testified that all he ever got was $2.50 for making the filing papers, and there is no proof that Richards ever got anything. Certainly the defense is not made good by simply showing that the vendee paid without disclosing to whom he paid. It will not do simply to say that he paid it to his agent. So far as we know from the proof, his agent may still have the money. There is no evidence that the defendant has paid anything for the land.

In Boone v. Chiles, 10 Pet. 177, supra, it is said at page 211 (9 L. Ed. 388):

"The consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed. Notice must be denied, previous to, and down to, the time of paying the money, and the delivery of the deed."

In Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063, it is said:

"None of the original deeds in appellant's chain appear to have been produced on the hearing, though certified copies were attached to the pleadings, but no independent evidence was adduced of the payment by any of the defendants of any money whatever. As against complainant the recitals in these deeds cannot be relied on as proof of the payment of the purchase money."

[3] 2. This condition of affairs, as conclusively shown by the proof, may logically lead to the further conclusion that the defendant is chargeable with notice. For in the last case cited it is further said:

"Apart from this we hold appellant chargeable with notice. The rule is thus stated by the Virginia Court of Appeals, in Burwell v. Fauber, 21 Grat. [62 Va.] 446, 463: 'Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. Caveat emptor is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser. He is bound not only by actual, but also by constructive notice, which is the same in its effect as actual notice. * * * He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice.' "

In saying this I mean to hold the defendant to whatever his agent learned and did in the transaction while acting for him. It is hardly believable that the defendant's brother and agent did not know the whole story. Notice to an agent is binding upon his principal. Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; McIntire v. Pryor, 173 U. S. 38, 52, 19 Sup. Ct. 352, 43 L. Ed. 606; Mechem on Agency, §§ 717, 724; Warner v. Warren, 46 N. Y. 228; Hough v. Richardson, 3 Story, 659, Fed. Cas. No. 6,722, bot. 2d col. p. 577.

[4] Defendant's defense has not been made out by the proof. The best that can be said for defendant on the facts is, that he has left two indispensable elements of his defense, i. e. payment of the consideration and lack of notice of the entrymen's fraud on complainants, in grave doubt,—indeed, it should rather be said, there is no proof of payment.

For these reasons decree must go for complainants as prayed.

It is so ordered.

UNITED STATES v. COOPER et al.

(District Court, D. Montana. January 20, 1914.)

Nos. 946-948.

1. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—ISSUES AND PROOF.

Where the evidence in a suit for cancellation of a patent to land shows that the original entry was fraudulent, a defendant has the burden to allege and prove as an affirmative defense that he was a bona fide purchaser for value.

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

2. LIMITATION OF ACTIONS (§ 126*)—SUIT FOR CANCELLATION OF LAND PATENT—PERSONS NOT PARTIES.

The bringing of a suit for the cancellation of a patent to land does not suspend the running of limitation in favor of a grantee, who purchased prior to the suit, until he is made a party.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 548-550; Dec. Dig. § 126.*]

3. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—RELIEF.

In a suit by the United States for the cancellation of a patent to lands, which is barred as against the latest purchaser, who has not paid for the land, but not as against his grantor, who was first made the defendant, relief may be granted in the way of damages, by requiring the purchase money to be paid to complainant, with interest, in lieu of rents and profits for the time defendants have been in possession.

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

In Equity. Suits by the United States against Frank D. Cooper and George Heaton. Decrees for complainant.

See, also, 196 Fed. 584.

Burton K. Wheeler, U. S. Atty., of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., for the United States.

James A. Walsh, of Helena, Mont., for defendant Cooper.

Day & Mapes, of Helena, Mont., for defendant Heaton.

BOURQUIN, District Judge. These are suits to cancel homestead patents to public lands, brought against the patentees' vendee and the vendee of the latter. The facts sufficiently appear in a previous decision. 196 Fed. 584. The last vendee was made a party defendant subsequent to said decision.

Briefly, the court, mindful of the law that in suits to cancel patents for fraud the complainant is not entitled to recover unless the alleged fraud is established by clear, strong, unequivocal, and convincing proof, in quantity and quality commanding respect and producing conviction, after careful consideration of the evidence, finds the fraud alleged so proven, but in two only of the suits, and has made findings accordingly. In the matter of the Freeman patent it appears his house upon the land involved was not built until the month of final proof,

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

and then by virtue of defendant Cooper's contract and payment. In Gilbert's case, the proof is there was no house and no improvements of any kind on the land for about the last two years of the time when he should have been resident thereon in compliance with conditions precedent to patent.

[1] That their final proofs were false, the patents not earned, and so procured by fraud, is proven. Cooper, their vendee, claiming to be a bona fide purchaser of their lands, by the foregoing proof the burden shifted to him to sustain his affirmative defense aforesaid. 20 Cyc. 751 et seq.; 39 Cyc. 1780; 2 Pom. Eq. § 759 et seq. He failed. He made no effort to prove the entrymen had complied with the law, but contented himself in mere affirmance of leading questions that he had paid a "money consideration" for the lands, did not know when he purchased that "it was claimed" that the entrymen had not complied with the law, and that he "purchased that land in good faith." The "money consideration" might have been $1, nominal, grossly inadequate, a "vile price," not a valuable consideration, and insufficient to support the plea of bona fide purchaser. See cases, 39 Cyc. 1700.

In view of all the circumstances, visible conditions on the lands, Cooper's adjacent and surrounding ranches, business, residence, his employment of the entrymen, the only reasonable inference is that Cooper had knowledge of the entrymen's noncompliance with the homestead law. But the burden on him to disprove notice, merely saying he did not know "it was claimed" they had not complied with the law, does not serve. As a matter of fact, it does not appear it was so claimed when he purchased, and his statement is far from a disclaimer of knowledge of the actual facts. His conclusion he purchased in good faith goes for nothing. Cooper's contract vendee, Heaton, not having paid for the lands, and not having the legal title, is not a bona fide purchaser.

[2] But the latter is entitled to the benefit of his plea of limitations. His answers claim it, the proof establishes it, and the mere oral statement of his counsel before the suits were set for final hearing that he would not appear, as it was arranged between him and Cooper that, if Cooper's title was upheld, Heaton would pay for the lands, otherwise not, is not sufficient to constitute waiver or abandonment of the plea. The sale contract binds Cooper to that—title or no sale. The statutory time of six years within which suits can be brought to vacate patents had run before Heaton was made a party defendant to the suits, and he did not purchase pendente lite. It is familiar law that suits do not suspend the running of limitations against those not parties and not purchasers pendente lite, and limitations run until they are made parties, then only the suits being "brought" as to parties brought in by amendment.

The suits are to cancel patents, to divest all estates created by the patents, and to revest them in complainant. Heaton has the equitable estate in and to the lands involved. He has vested rights therein. He is an indispensable party defendant. Subpœnaed to defend, it is his right to make any and all defenses, including that of limitations, even

as his predecessors in interest might under appropriate conditions. In equity, as at law, in defense of equitable estates, as well as legal ones, limitations and the statute here involved may be pleaded. It follows complainant cannot have the relief of cancellations. It is too late, limitations having run.

[3] But it does not follow that justice and equity cannot be done. Equity having power and the court having jurisdiction, decrees can conform to the exigencies of the suits and award appropriate relief under the complainant's general prayer. In cases like unto these, this relief takes the form of damages and of seizing upon the unpaid purchase price of the lands, for the value of the lands (taken to be the price for which Cooper sold to Heaton, in absence of other proof), interest, and costs, with a lien upon the lands to secure payment. See Dowell's Case (C. C.) 7 Fed. 881; Story, Eq. Jur. §§ 28, 439; Lockhart v. Leeds, 195 U. S. 437, 25 Sup. Ct. 76, 49 L. Ed. 263. For complainant was entitled to the special equitable relief prayed when the suits were commenced, but the right thereto is impracticable—failed—barred at time of decree.

Interest in lieu of rents and profits for the time defendants have had possession (the Cooper-Heaton contract shows this has been at least since said contract's date) is allowable in equity and is warranted by the law of the locality of the lands. There is no evidence of any sale by Heaton, nor of abandonment of possession by him.

Decrees accordingly.

UNITED STATES v. BRANNAN.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1914.)

No. 2627.

1. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT—ISSUES AND PROOF.

In a suit by the United States for the cancellation of a patent to land on the ground of fraud, brought against the patentee and subsequent grantees, where the bill alleged facts showing that complainant was entitled to such cancellation as against the patentee, which facts were proved, further allegations that the other defendants purchased with knowledge of the fraud were surplusage, and a failure to prove them did not constitute a material variance; but that one or more of such defendants bought in good faith for value and without notice was an affirmative defense, without allegation and proof of which complainant was entitled to the relief prayed for.

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

2. EVIDENCE (§ 383*)—DOCUMENTARY EVIDENCE—CONCLUSIVENESS.

In such a suit, recital of a consideration in the deed to the last grantee, or in prior deeds, is not proof that such consideration, or any valuable consideration, was paid, to sustain an allegation that he was a bona fide purchaser.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.*]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Suit in equity by the United States against Lewis I. Brannan and others. Decree for defendant Brannan, and the United States appeals. Reversed.

For opinion below, see United States v. Cowart, 205 Fed. 316.

Alex. D. Pitts, U. S. Atty., of Selma, Ala., and Harry T. Pegues, Asst. U. S. Atty., of Mobile, Ala., for the United States.

Joseph C. Rich and J. Gaillard Hamilton, both of Mobile, Ala., for appellee.

Before WALKER, Circuit Judge, and SHEPPARD and CALL, District Judges.

WALKER, Circuit Judge. [1] The bill in this case sought the cancellation of a patent to land issued to Vicy M. Cowart on the commutation of a homestead entry made by her, and of deeds to the same land made, respectively, by the patentee to one Wilson, and by Wilson to the appellee Brannan. The patentee, Wilson and Brannan were the parties defendant to the bill. The patentee and Wilson made no defense, and decrees pro confesso were entered against them. The answer of Brannan put in issue the allegations of the bill as to the fraud committed by the patentee in procuring the issuance of the patent, and duly averred that both Wilson and Brannan, in acquiring title to the land, were bona fide purchasers for a valuable consideration and with-

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

out notice of any fraud committed by the patentee in the acquisition of the patent. The counsel for the appellee Brannan do not question, and there is no room for questioning, the sufficiency of the allegations and proof to show a right as against the patentee to have the patent canceled. It clearly appears that the patentee did not reside upon and cultivate the land for a period of 14 months, as required by the statute applicable in such a case, and that the evidence of such residence and cultivation, upon the faith of which the patent was issued, was false. 6 Fed. Stat. Anno. 317 (Comp. St. 1913, § 4589); United States v. Mills, 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752. The contention in behalf of the appellee is that there was a failure to make out the case alleged in the bill, in that the evidence adduced failed to prove the allegations of the bill to the effect that Wilson and Brannan, when the deeds to them respectively were made, knew of the fraud practiced by the patentee in acquiring the patent.

The allegations just mentioned were coupled with others to the effect that neither Wilson nor Brannan was a bona fide purchaser for value without notice of the plaintiff's equity. Plainly the allegations of the bill as to Wilson and Brannan being cognizant of the fraud committed by the patentee were made in anticipation of their defending on the ground that they purchased for value and without knowledge or notice of the facts which rendered the patent voidable, and were intended to serve, in effect, as a reply to such a defense, if it should be made. The other allegations of the bill disclosed a state of facts under which the plaintiff was entitled to a cancellation of the patent as against the patentee and any one claiming under her who did not acquire the title in such circumstances as to be protected against the fraud perpetrated by her in the acquisition of the patent. The averments of the bill distinctly negatived the existence of such a defense. It was only by Brannan's answer that an issue as to his being a bona fide purchaser for value was tendered. As the averments of the bill, other than those as to Wilson and Brannan knowing of the fraud committed by the patentee, disclosed a state of facts under which the plaintiff was entitled to a cancellation of the patent and of all subsequent conveyances of the land embraced in it, the allegations as to Wilson and Brannan knowing of the invalidating fraud committed by the patentee could be stricken from the bill without destroying the plaintiff's right of action. It follows that those allegations were surplusage. A failure to prove them did not constitute such a variance as was entitled to be given the effect of depriving the plaintiff of the right to the relief sought. Surplusage need not be proved. Immaterial variances between the allegations and the proof may be disregarded. The allegations as to Wilson and Brannan knowing of the fraud committed by the patentee were not descriptive of that which was set up as the ground for canceling the patent and the conveyances subsequent to it, and, in the absence of proof that either Wilson or Brannan was a bona fide purchaser for value, it was not incumbent upon the plaintiff to sustain those allegations by proof. Washington & Georgetown R. Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101; Prestwood

v. McGowan, 148 Ala. 475, 41 South. 779; Greenleaf on Evidence (15th Ed.) § 51; 16 Cyc. 405.

[2] The appellee Brannan, by his answer, denied the material allegations of the bill, and as a further defense set up that he was a bona fide purchaser for value without notice. As stated above, the material averments of the bill were clearly proved. The result was to entitle the plaintiff to have the relief prayed, unless the affirmative defense pleaded was established by evidence. This the appellee Brannan wholly failed to do. To be entitled to protection as a bona fide purchaser, he must have bought in good faith and paid value. United States v. Des Moines, etc., Co., 142 U. S. 510, 530, 12 Sup. Ct. 308, 35 L. Ed. 1099. The burden was upon him to make satisfactory proof of purchase and payment. The recital in the deed to him did not constitute such proof. Lakin v. Sierra Buttes Gold Min. Co. (C. C.) 25 Fed. 337, 341; United States v. Hill (Sept. 28, 1914, U. S. D. C. Colo.) 217 Fed. 841; United States v. Cooper (Jan. 20, 1914, U. S. D. C. Mont.) 217 Fed. 846; Hodges v. Winston, 94 Ala. 576, 10 South. 535; United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724; Boone v. Chiles, 10 Pet. 177, 211, 9 L. Ed. 388; 39 Cyc. 1780. There was no evidence that either the patentee's deed to Wilson or Wilson's deed to Brannan was supported by any valuable consideration. The result of the absence of such evidence was that the affirmative defense pleaded was wholly unsupported. The evidence adduced having clearly made out the case stated in the bill, and no defense set up having been supported by evidence, the plaintiff was entitled to a decree canceling the patent and vacating the subsequent conveyances of the land embraced in it.

In support of the contention that it was incumbent upon the plaintiff in the first instance to prove the averments of the bill as to Wilson and Brannan having, at the times the conveyances were made to them, respectively, knowledge of the fraud committed by the patentee, the counsel for the appellee Brannan refer us to the ruling made in the case of United States v. Clark, 200 U. S. 601, 26 Sup. Ct. 340, 50 L. Ed. 613. There is nothing in the opinion rendered in that case to indicate that proof of allegations so made is essential as to a defendant who sets up the defense that he was a bona fide purchaser for value, but who fails to prove a payment of value, or that the burden of proving that essential element of the defense mentioned can be regarded as assumed by a plaintiff whose bill distinctly negatives the existence of such a defense. For reasons above indicated, the averments of the bill as to the subsequent grantees having knowledge of the fraud committed by the patentee did not constitute a material feature of the case alleged, and the case was made out, whether those redundant allegations were or were not proved by the evidence adduced.

The decree of the District Court is reversed, and the case is remanded for further proceedings in conformity with the conclusions above stated.

HOUSTON et al. v. UNITED STATES. †

(Circuit Court of Appeals, Ninth Circuit. October 13, 1914.)

No. 2288.

1. CONSPIRACY (§ 43*)—INDICTMENT—AVERMENT OF OVERT ACT.
An indictment under Rev. St. § 5440 (Comp. St. 1913, § 10201), for conspiracy to defraud the United States, is sufficient if it alleges the unlawful scheme and an act done by one of the conspirators which had for its purpose the furtherance of such scheme without alleging the manner in which it tended to effect that purpose. Nor is such an indictment defective because it fails to describe in detail the means by which the object of the conspiracy was to be attained.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. § 43.*]

2. CONSPIRACY (§ 43*)—CRIMINAL PROSECUTION—EVIDENCE.
Under an indictment charging defendants as individuals with conspiracy to defraud the United States by means of fraudulent and collusive bids for the furnishing of coal, evidence was competent which showed that the bids were made in the name of corporations of which defendants were officers and were signed by defendants as such officers.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. § 43.*]

3. CONSPIRACY (§ 45*)—CRIMINAL PROSECUTION—EVIDENCE.
On the trial of a defendant charged with conspiracy to defraud the United States, a letter written by defendant, who was secretary of a corporation, to a bank authorizing an employé to sign checks on behalf of the corporation, *held* admissible as tending to corroborate other evidence that the employé was also authorized to indorse checks made payable to the corporation.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100–104; Dec. Dig. § 45.*]

4. CONSPIRACY (§ 43*)—CRIMINAL PROSECUTION—EVIDENCE.
Under an indictment under Rev. St. § 5440 (Comp. St. 1913, § 10201), charging a conspiracy to defraud the United States, it was not error to admit evidence of other overt acts than those specifically named in the indictment.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. § 43.*]

5. CRIMINAL LAW (§ 150*) — LIMITATION OF PROSECUTION — CONSPIRACY TO DEFRAUD THE UNITED STATES.
Where a conspiracy to defraud the United States was formed more than three years prior to the indictment, and acts in pursuance thereof were done both prior to and within the three years' prosecution therefor under Rev. St. § 5440 (Comp. St. 1913, § 10201), it is not barred by the limitation imposed by Rev. St. § 1044, as amended in 1876 (Comp. St. 1913, § 1708).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.*]

6. CONSPIRACY (§ 33*)—WHAT CONSTITUTES.
Under Rev. St. § 5440 (Comp. St. 1913, § 10201), relating to conspiracy to defraud the United States, the offense consists of the unlawful scheme

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

† Rehearing denied November 17, 1914.

upon which the minds of conspirators have met, together with any act to effect the object of the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*

For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

Ross, Circuit Judge, dissenting.

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

Criminal prosecution by the United States against Charles E. Houston and John H. Bullock. Judgment of conviction, and defendants bring error. Affirmed.

The plaintiffs in error were convicted of conspiracy under section 5440 of the Revised Statutes. The indictment alleged, in substance, that on or about April 1, 1908, at Seattle, in the state of Washington, the defendants did willfully, knowingly, and unlawfully and feloniously conspire, combine, confederate and agree together to defraud the United States of divers large sums of money, and to bar the United States of its legal remedies to recover the moneys of which it was to be defrauded, and further to defraud and deceive the officers of the United States, and to defraud the United States of the benefits which would have resulted from honest and competitive bids and proposals to contract for the furnishing and sale to the United States of coal. The subject-matter of said conspiracy and the objects thereof, and the means by which the same were to be effected, were as follows: On or about March 10, 1908, the United States, acting through the Quartermaster for the Department of the Columbia of the United States Army, published and circulated an advertisement inviting bids and proposals to contract for the furnishing and sale to said United States of certain large quantities of coal which the United States desired to purchase for governmental use during the fiscal year commencing July 1, 1908, and ending June 30, 1909, at those certain military posts known as Ft. Davis, Ft. St. Michael, and Ft. Liscomb, all situated in the District of Alaska, which bids and proposals to contract were to be submitted to the said Chief Quartermaster on April 10, 1908; that the principal object of said conspiracy was to induce the United States to award and let contracts for the purchase of coal and to purchase and pay for said coal at grossly exorbitant and fraudulent prices, whereby the United States should be defrauded of large sums of money for the use and benefit of said conspirators, which object was to be effected and consummated by means of collusive, dishonest, and fraudulent bids and proposals to contract for the furnishing of coal, which bids and proposals to contract should be ostensibly competitive but in fact collusive, dishonest, and noncompetitive, and for grossly exorbitant prices to be secretly agreed upon by said conspirators; that it was also one of the objects of said unlawful conspiracy that, after the United States should have been thus defrauded, the true facts in the premises should be concealed from the United States, whereby the United States should be defrauded of its legal remedies to recover the moneys of which it should have been defrauded, which object was to be effected and consummated by means of false, fraudulent, and fictitious vouchers and entries, and books of account relating to the disbursement and use by said conspirators of the moneys of which the United States was to be defrauded as aforesaid. And the indictment charges that said unlawful conspiracy has, at all times since April 1, 1908, been furthered and continued in force by each of said conspirators.

The indictment alleges as overt acts: (1) That after the formation of said conspiracy and during the continuance thereof, and to effect the object thereof,

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

said John H. Bullock on August 13, 1908, at Vancouver, Wash., did knowingly, unlawfully, and corruptly induce, persuade, and cause one John E. Baxter as Quartermaster of the United States Army to issue, and the said John E. Baxter did issue, a certain check or warrant drawn upon the First National Bank of Portland, bearing date August 13, 1908, in favor of John J. Sesnon Company, for the sum of $39,163.50, which check was subscribed by said Quartermaster and was for funds and money of the United States, then and there on deposit in the First National Bank of Portland, Or.; (2) that on September 1, 1908, at Seattle, Wash., the said Bullock did knowingly, unlawfully, and corruptly induce, persuade, and cause one Frank A. Kane as agent of said John J. Sesnon Company, to indorse and negotiate said check, which said Kane then and there did, and which check was thereafter, on September 2, 1908, duly paid by said First National Bank of Portland, Or., out of the aforesaid funds of the United States; (3) that on August 13, 1908, at Vancouver, Wash., said Bullock corruptly induced and persuaded and caused one John E. Baxter, Quartermaster of the United States Army, and the said Baxter did issue a certain check or warrant drawn upon the First National Bank of Portland, bearing date August 13, 1908, in favor of John J. Sesnon Company for the sum of $53,878.50, which warrant was subscribed by said Baxter as Quartermaster and was for funds and moneys of the United States then and there deposited and in the said First National Bank; (4) that on September 1, 1908, at Seattle, Wash., said Bullock knowingly, unlawfully, and corruptly induced, persuaded, and caused Frank A. Kane as agent of said John J. Sesnon Company to, and the said Frank A. Kane then and there did, indorse and negotiate said check or warrant, which check or warrant was thereafter, and on September 2, 1908, duly paid by the First National Bank of Portland, Or., out of the aforesaid funds of the United States.

Samuel H. Piles, James B. Howe, Charles H. Farrell, James H. Kane, and Wickliffe B. Stratton, all of Seattle, Wash., for plaintiff in error Houston.

O. L. Willett and Frank Oleson, both of Seattle, Wash., for plaintiff in error Bullock.

B. D. Townsend, of Washington, D. C., and Glenn E. Husted, and F. C. Rabb, both of Portland, Or., Special Asst. Atty. Gen., for the United States.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The indictment charges that the conspiracy was entered into on April 1, 1908, and that it has at all times since that date been "furthered and continued in force" by each of said conspirators. Four overt acts are alleged to have been done in August and September, 1908. The substance of the objections to the indictment is that it contains no allegation that bids were ever actually interposed by the conspirators, or what such bids were, that the crime could not be completed without the initial overt act of interposing bids by the cooperation of the conspirators, and that all overt acts must be alleged. We find no merit in these objections.

[6] Under section 5440, the offense consists of the unlawful scheme upon which the minds of the conspirators have met, together with an act to effect the object of the conspiracy. The allegation that a single act was done by one of the conspirators, which had for its purpose the

furtherance of the unlawful scheme, completes the allegation of the offense, and the rule is well settled that it need not appear upon the face of the indictment that the overt act was such that it could be seen to have a necessary or logical relation to the conspiracy charged. It is enough if the indictment allege that it has that effect. In brief, it is sufficient to state the overt act without alleging the manner in which it tended to effect the purposes contemplated. We so held in United States v. Benson, 70 Fed. 591, 17 C. C. A. 293, following United States v. Sanche (C. C.) 7 Fed. 715, United States v. Donau, 11 Blatchf. 168, Fed. Cas. No. 14,983, and the same has been held in Gantt v. United States, 108 Fed. 61, 47 C. C. A. 210, and United States v. Shevlin (D. C.) 212 Fed. 343, and we find no decision to the contrary.

But it is said that by the decision of the Supreme Court in Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, a new rule of pleading has been educed, that, inasmuch as it was held in that case that the offense defined in section 5440 is not complete until an overt act is done to carry out the purpose of the conspiracy, the averments by which the overt act is pleaded must upon their face show that the act was so related to the conspiracy as necessarily to be a portion thereof. We do not so understand that decision. The court was there dealing with the question whether an overt act performed in one district by one of the parties who had conspired in another district would give jurisdiction to the court in the district where the overt act was performed as to all the conspirators. It was held that, under section 5440, an overt act was necessary to complete the offense. No new rule of pleading was announced, and it does not follow from any principle there affirmed that an indictment in a conspiracy case which would be good and valid before that decision should now be held defective. Under a rule of pleading such as is now contended to have been established by that case, the very indictment which in that case the court sustained would have been subject to objection on the very ground that is here urged. For that indictment contained no allegation which showed that the overt acts pleaded therein would tend to effect the object of the conspiracy. In the opinion the court said:

"The powers of the Land Office were necessarily to be invoked and proceedings therein instituted and prosecuted by acts innocent indeed of themselves, taking only criminal taint from the purpose for which they were done."

In that case the indictment charged conspiracy to defraud the United States of public lands in lieu of lands within forest reserves established in Oregon and California, by means of false and fraudulent proofs, whereby the conspirators were to obtain fraudulently from those states title to and possession of school lands within the limits of such reserves, which were open to purchase from those states by residents thereof upon appropriate applications supported by affidavit showing the resident's qualifications to make such purchase, and his intention to purchase in good faith for his own benefit, and that he had made no

contract to sell the claim, the applications to be made in the names of fictitious persons and in the names of persons not really desiring or qualified to purchase said lands, the names of the latter class to be procured by paying or causing to be paid to them small sums of money and by falsely representing or causing to be represented to some of them that they were merely disposing of their rights to purchase such school lands. In the opinion it is said:

"Most of the overt acts charged consisted in the filing in the General Land Office by Dimond, as attorney for Hyde, his appearance in different selection cases, in some of which he urges and sets forth the reasons for favoring a speedy action. In counts 35 to 40, both inclusive, the overt act charged is the payment of money by Benson to either Valk or Harlan, alleged in the indictment to be salaried officials of the General Land Office and charged with duties pertaining to the exchange of lands of private claim or ownership included in a forest reserve or other public land. Two overt acts are charged against Hyde, one of which was committed on July 29, 1903, by causing to be transmitted by mail from the United States Land Office at Vancouver to the Commissioner of the General Land Office at Washington a written notification to the Commissioner, signed by Hyde for C. W. Clarke, that the latter appealed to the Secretary of the Interior from a certain decision of the Commissioner, with an assignment of errors, and the second of which was that Hyde, on March 31, 1902, caused to be presented by the hand of Dimond a paper signed by him, Hyde, notifying the Commissioner that one S. E. Kieffer was authorized and appointed as Hyde's agent to post notices in the ground described in a certain application and to make affidavit of posting."

Nor is the indictment defective for its failure to describe in detail the means by which the object of the conspiracy was to be attained. It was not necessary to allege what the bids were, or that they were actually made. The bids were but a portion of the means whereby the unlawful purpose was to be accomplished. The indictment charges, not that the object of the conspiracy was to interpose collusive and fraudulent bids, but that it was to defraud the United States of the money that should be paid as the purchase price of coal. It is enough if such an indictment contain a general description of the means. Crawford v. United States, 212 U. S. 183, 192, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Dealy v. United States, 152 U. S. 539, 543, 14 Sup. Ct. 680, 38 L. Ed. 545. And a general allegation of the continuance of the conspiracy is an averment of a substantive fact and is sufficient. Dealy v. United States, supra; United States v. Barber, 219 U. S. 72, 78, 31 Sup. Ct. 209, 55 L. Ed. 99.

We think that the averments of the indictment were sufficient to advise the defendants of the nature of the offense with which they were charged, and as to which they were required to prepare their defense, and sufficient to sustain a plea of former conviction or acquittal in a case of a second indictment for the same offense. Said the court in Cochran & Sayre v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630 (39 L. Ed. 704):

"But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar

offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

In Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, it was held that an indictment charging the accused with a conspiracy to commit the crime of subornation of perjury in proceedings for the purchase of public lands was sufficient, although the precise persons to be suborned and the elements essential to the commission of the crimes were not particularized.

Error is assigned to the admission in evidence of the statement made by Jarvis to Douglas, in March or April, 1909, that the $6,892 payment made to him by Houston was "the rake-off on the government coal contract." It is said that this evidence was inadmissible, because the statement was made after the object of the conspiracy had been completely consummated. To this it is to be said that it does not appear that the conspiracy had been consummated at that date. There was evidence of acts done in carrying it out as late as May 8, 1909. Again, the statement was made during the time the second object of the conspiracy was being effected. It was admissable to show that Jarvis was a member of the conspiracy, and it was for that purpose that it was admitted. As to that evidence, the court charged the jury that, before they could consider the statement of Jarvis as being the statement or act of the other defendants, it must have been made or done during the life of the conspiracy, and it must have been a statement or act in furtherance of, and to effect the object of, the conspiracy, and that, if the conspiracy was consummated and completed before that date, nothing that Jarvis said could affect either of the defendants.

[2] We find no error in the admission of evidence of the acts of the corporations of which the defendants were officers, under an indictment which charged the defendants as individuals. The evidence so admitted was that the conspirators interposed bids in the name of their respective corporations, and signed them as officers of the corporation. The indictment did not charge that the bids were to be signed by the individuals. It charged that the scheme of the conspiracy was to be carried out by fraudulent and collusive bids without stating what names were to be subscribed thereto, and it charged that the fruits of the conspiracy were to accrue to the defendants "or to the corporations represented by them." When Bullock signed the bids in the name of Sesnon Company, by himself as secretary, he committed an act within the allegations of the indictment, and proof thereof was properly admitted.

[3] It is contended that it was error to admit in evidence a letter addressed by Bullock to the Dexter Horton National Bank, authorizing Frank A. Kane to sign checks on behalf of the John J. Sesnon Company. The objection made to the letter was that it was immaterial and not included in the indictment. It is now urged that the letter was subject to objection because it did not authorize Kane to indorse checks payable to the Sesnon Company, but only to sign checks issued by that company. The testimony of the teller of the bank was that the letter was authority to Kane to indorse or sign checks or other

negotiable papers for the Sesnon Company. Kane, who was called as a witness did not in fact deny that he had authority to indorse such checks. He said that during June, July, August, September, and October of 1907 and 1908, he indorsed the checks payable to the Sesnon Company, that arrived at the Seattle office. When asked under whose authority he did so, he answered that he could not say that he ever had any authority for doing it. "It was just a custom," and he testified that in the winter months he did it under Bullock's supervision, and that in the summer months, in Bullock's absence, he continued to indorse them as before. We think the letter was properly admitted as tending to corroborate the evidence that Bullock authorized Kane to indorse the checks. The checks in question were drawn in favor of the John J. Sesnon Company, and were indorsed "John J. Sesnon Company by Frank A. Kane, Agt."

[4] We find no error in the assignment that evidence was admitted of overt acts other than those which were pleaded in the indictment. No decision of a federal court is cited in which it has been held that in such a case the prosecution is limited to proof of the overt acts which are specifically charged. The contrary has been held in United States v. Howell (D. C.) 56 Fed. 21; United States v. Burkett (D. C.) 150 Fed. 208; and United States v. Eccles (C. C.) 181 Fed. 906. In Bannon & Mulkey v. United States, 156 U. S. 464, 469, 15 Sup. Ct. 467, 469 (39 L. Ed. 494), the court said:

"To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offense nugatory. It is never necessary to set forth matters of evidence in an indictment."

In Heike v. United States, 227 U. S. 131, 145, 33 Sup. Ct. 226, 229 (57 L. Ed. 450) the court said:

"Another objection to evidence concerned the admission of testimony that the same course of conduct was going on long before the date in the indictment when it is alleged that the defendants conspired. The indictment, of course, charged a conspiracy not barred by the statute of limitations, but it was permissible to prove that the course of fraud was entered on long before and kept up."

At common law and in the absence of statutory changes thereof, it is not necessary to plead any overt act, but all overt acts may be shown in evidence as tending to prove the conspiracy, and its object. State v. Stockford, 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; State v. Mayberry, 48 Me. 218; Ochs et al. v. People, 124 Ill. 399, 16 N. E. 662; People v. Brickner, 15 N. Y. Supp. 528. The language of section 5440 indicates that Congress did not intend to change the common-law rule further than to make it essential to the offense described therein that there should have been at least one overt act to effect the object of the conspiracy.

There are other assignments of error as to the admission of evidence. We do not deem it necessary to discuss them. We find no error in any of them.

Error is assigned to the refusal of the court to direct a verdict for the defendants at the close of the testimony. One of the grounds of the motion was the insufficiency of the evidence to sustain a verdict against the defendants. We have carefully considered the evidence, and we think the court was fully justified in submitting the case to the jury.

[5] Another ground of the motion was that the prosecution of the offense charged was barred by the statute of limitations. It is urged that the statute commenced to run on April 21, 1908, the date when the contracts were let for furnishing the coal for Forts Davis and St. Michaels, or that, at the latest, the statute began to run on July 13, 1908, the date when Bullock certified to the vouchers. The object of the conspiracy was alleged to be to defraud the United States, and there was proof of acts done by the defendants, which showed that the purpose of the conspiracy was not fully consummated when the vouchers were certified to. That act was followed by others. On August 13, 1908, at the instance of Bullock, Baxter issued the checks; on September 1st, Kane, under authority from Bullock, indorsed the checks on behalf of John J. Sesnon Company; and on September 2d, the bank paid the checks. The indictment was found on August 12, 1911. Where the conspiracy was formed more than three years prior to the indictment, and acts in pursuance thereof have been done, both prior to and within the three years, prosecution is not barred, for the conspiracy may be a continuing offense, and it may be alleged and proven that it was continued in force and operation to a time within the statutory period of limitation. It was so held by this court in Hedderly v. United States, 193 Fed. 561, 569, 114 C. C. A. 227, in accordance with the very decided weight of authority, and that rule has been finally approved and settled by the decision in United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168.

We find no error for which the judgment should be reversed. It is, accordingly, affirmed.

ROSS, Circuit Judge (dissenting). The indictment against the plaintiffs in error was based on section 5440 of the Revised Statutes as amended May 17, 1879 (21 Stats. p. 4), which reads:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court."

Another provision of the Revised Statutes requires prosecution of such offenses to be commenced within three years. The indictment was filed August 12, 1911; objection to its sufficiency, as well as to the time of its presentation, being appropriately taken by the plaintiffs in error.

In respect to the crime denounced by section 5440, the Supreme Court, in the late case of Hyde v. United States, 225 U. S. 347, at page

357, 32 Sup. Ct. 793, at page 798 (56 L. Ed. 1114, Ann. Cas. 1914A, 614), which was a prosecution based upon the same statute, said:

"It is contended by the defendants that the conspiracy—the union in an unlawful purpose—constitutes the crime, and that the requirement of an overt act does not give the offense criminal quality or extent, but that the provision of the statute in regard to such act merely affords an opportunity to withdraw from the design without incurring its criminality (called in the cases a locus penitentiæ). The following, among other cases, are cited in support of this view: United States v. Britton, 108 U. S. 199, 204 [2 Sup. Ct. 531, 27 L. Ed. 698]; Pettibone v. United States, 148 U. S. 197, 203 [13 Sup. Ct. 542, 37 L. Ed. 419]; Dealy v. United States, 152 U. S. 539, 547 [14 Sup. Ct. 680, 38 L. Ed. 545]; Bannon v. United States, 156 U. S. 464–468–469 [15 Sup. Ct. 467, 39 L. Ed. 494]; and the opinion of this court when this case was here before [Hyde v. Shine], 199 U. S. 62–76 [25 Sup. Ct. 760, 50 L. Ed. 90].

"It must be conceded at the outset that there is language in those cases that, considered by itself, justifies the contention based upon them. In the United States v. Britton, for instance—and the language of the case is resorted to for the genesis of the doctrine and makes strongest for the contention—Mr. Justice Woods, speaking for the court, said: 'The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.' Reg. v. King, 7 Q. B. 782; Commonwealth v. Shedd, 7 Cush. [Mass.] 514.'

"The case was followed in Pettibone v. United States to the effect 'that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by any one or more of the conspirators in furthering the object of the conspiracy.'

"In Dealy v. United States it is said that: 'The gist of the offense is the conspiracy. * * * Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.'

"Indeed, it must be said that the cases abound with statements that the conspiracy is the 'gist' of the offense or the 'gravamen' of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by section 5440, supra. It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but section 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object, and provides that when such an act is done 'all the parties to such conspiracy' become liable. Interpreting the provision, it was decided in Hyde v. Shine, 199 U. S. 62, 76 [25 Sup. Ct. 760, 50 L. Ed. 90], that an overt act is necessary to complete the offense. And so it was said in United States v. Hirsch, 100 U. S. 33 [25 L. Ed. 539], recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete another thing, and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the Solicitor General, 'can be a crime of which no court can take cognizance.' The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something

more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction."

It is there, as I understand it, in effect held, contrary to previous decisions of that court as well as of other federal courts, that in order to constitute a crime under the provisions of section 5440 of the Revised Statutes, an overt act or acts is essential. That being so, it cannot admit of doubt that the indictment must allege such overt act or acts, for it is a cardinal rule of criminal pleading that everything made essential to constitute the crime must be alleged.

Turning to the indictment, we find what the conspirators agreed to do thus stated:

"That on or about the 1st day of April, in the year of our Lord one thousand nine hundred and eight, at Seattle, in the county of King, state of Washington, and within the jurisdiction of this court, one Charles E. Houston, late of said county of King, and one John H. Bullock, formerly of said county of King, but late of the county of Multnomah, in the state of Oregon, and one D. H. Jarvis (now deceased) and others to the grand jury unknown, did willfully, knowingly, and unlawfully and feloniously conspire, combine, confederate and agree together to defraud the United States of America of divers large sums of money, and further to defraud the said United States of its legal remedies to recover the moneys of which it was to be defrauded as aforesaid, and further to defraud and deceive the officers of the said United States having authority in the premises in the discharge of their official duties with reference to the several transactions hereinbefore set forth, and further to defraud the said United States of the governmental and other benefits that would have resulted from honest and competitive bids and proposals to contract for the furnishing and sale to said United States of coal as hereinafter set forth.

"The subject-matter of said unlawful conspiracy, the objects thereof, and the means by which said objects were to be effected are as follows, to wit:

"On or about the 10th day of March, A. D. 1908, the said United States, acting through the Chief Quartermaster for the Department of the Columbia of the United States Army, published and circulated an advertisement inviting bids and proposals to contract for the furnishing and sale to said United States of certain large quantities of coal, which the said United States desired to purchase for governmental use during the fiscal year commencing July 1, 1908, and ending June 30, 1909, at those certain military posts known as Fort Davis, Fort St. Michael and Fort Liscum, all situated in the District of Alaska, which said bids and proposals to contract were to be submitted to the said Chief Quartermaster for the Department of the Columbia on the 10th day of April, A. D. 1908.

"The principal object of said unlawful conspiracy was to induce the said United States, acting through its duly authorized officers, to award and let contracts for the purchase of said coal, and to purchase and pay for said coal, at grossly exorbitant and fraudulent prices, whereby the said United States should be defrauded of large sums of money for the use and benefit of said conspirators, or some of them, or certain corporations then and there represented by said conspirators respectively; which said object was to be effected and consummated by means of collusive, fraudulent and dishonest bids and proposals to contract for the furnishing of said coal, which said bids and proposals to contract should be ostensibly competitive, but in fact collusive, dishonest and noncompetitive and for grossly exorbitant prices to be secretly agreed upon by said conspirators and communicated to one another prior to the making of said bids and proposals to contract.

"It was also one of the objects of said unlawful conspiracy, that after the said United States should have been defrauded in the manner and by the

means hereinbefore set forth, the true facts in the premises should be concealed from the said United States, whereby the said United States should be defrauded of its legal remedies to recover the moneys of which it should have been defrauded as aforesaid, and should be defrauded of all legal redress in the premises, which said last named object of said unlawful conspiracy was to be effected and consummated by means of false, fraudulent, fictitious and collusive checks, vouchers, and entries in books of account relating to the disbursement and use by said conspirators of the moneys of which the United States was to be defrauded as aforesaid.

"Which said unlawful conspiracy has at all times since said first day of April, A. D. 1908, been furthered and continued in force by each of said conspirators, except as to said D. H. Jarvis since the date of his decease on or about June 22, A. D. 1911."

Notwithstanding the foregoing averments in respect to the alleged agreement of the alleged conspirators, the indictment contains not one line or word to the effect that the said alleged conspirators or either of them directly or indirectly ever made any bid or proposal through the Chief Quartermaster of the United States Army of the Department of the Columbia, or otherwise, for the furnishing or sale to the United States of any coal which it desired to purchase for governmental use during the fiscal year commencing July 1, 1908, and ending June 30, 1909, at the military posts known as Ft. Davis, Ft. St. Michael, and Ft. Liscum, or for any other purpose, or at all; and as a necessary consequence the indictment contains no charge that the said conspirators or either of them directly or indirectly made to the United States through its said Quartermaster or otherwise, any collusive, fraudulent, or dishonest bid or proposal to contract for the furnishing of any coal, or that they or either of them ever made to the United States through its Quartermaster or otherwise any bid or proposal of any nature or character. Yet, as has been seen, it is expressly alleged that the subject-matter of the alleged conspiracy, its objects, and the means by which those objects were to be effected, consisted in inducing the United States through its authorized officers to award and let contracts for the purchase of certain coal for which it had previously asked bids through its Chief Quartermaster for the Department of the Columbia, at grossly exorbitant and fraudulent prices, whereby the government would be defrauded of large sums of money for the benefit of the alleged conspirators or those for whom they were acting, all of which was to be effected and consummated by means of collusive, fraudulent, and dishonest bids and proposals to contract for the furnishing of the coal, at grossly exorbitant prices to be secretly agreed upon by the alleged conspirators prior to the making of such bids and proposals.

The indictment does charge that, after the formation of the alleged unlawful conspiracy, and during its continuance, and to effect its object:

"The said John H. Bullock, on, to wit, the 13th day of August, A. D. 1908, at Vancouver in said Western District of Washington and within the jurisdiction of this court, did knowingly, unlawfully and corruptly induce, persuade and cause one John E. Baxter as Quartermaster of the United States Army to issue, and the said John E. Baxter did issue a certain check or warrant drawn upon the First National Bank of Portland, Oregon, bearing date of said 13th day of August, 1908, in favor of 'John J. Sesnon Co.' for the

sum of thirty-nine thousand one hundred and sixty-three and 50/100 ($39,163.50) dollars, and which said check or warrant was subscribed by said John E. Baxter as Quarter (master) of the United States Army, and which said check or warrant was for funds and money of the said United States then and there on deposit in said First National Bank of Portland, Oregon." And

"That after the formation of said unlawful conspiracy and during the continuance thereof, and to effect the object thereof, the said John H. Bullock, on, to wit, the 1st day of September, A. D. 1908, at Seattle in said Western District of Washington, and within the jurisdiction of this court, did knowingly, unlawfully, and corruptly induce, persuade and cause one Frank A. Kane, as agent of said John J. Sesnon Co., to, and said Frank A. Kane then and there did endorse and negotiate said check or warrant last herein described, and which said check or warrant was thereafter and on the 2d day of September, 1908, duly paid by said First National Bank of Portland, Oregon, out of the aforesaid funds of said United States." And

"That after the formation of said unlawful conspiracy and during the continuance thereof, and to effect the object thereof, the said John H. Bullock, on, to wit, the 13th day of August, A. D. 1908, at Vancouver, in said Western District of Washington and within the jurisdiction of this court, did knowingly, unlawfully and corruptly induce, persuade and cause one John E. Baxter, as Quartermaster of the United States Army, to, and the said John E. Baxter did issue a certain check or warrant drawn upon the First National Bank of Portland, Oregon, bearing date the said 13th day of August, 1908, in favor of 'John J. Sesnon Co.' for the sum of fifty-three thousand eight hundred and seventy-eight and 50/100 ($53,878.50) dollars, and which said check or warrant was subscribed by said John E. Baxter as Quartermaster of the United States Army, and which said check or warrant was for funds and money of the said United States then and there on deposit in said First National Bank of Portland, Oregon." And

"That after the formation of said unlawful conspiracy and during the continuance thereof, and to effect the object thereof, the said John H. Bullock, on, to wit, the 1st day of September, A. D. 1908, at Seattle, in said Western District of Washington, and within the jurisdiction of this court, did knowingly, unlawfully, and corruptly induce, persuade and cause one Frank A. Kane, as agent of said John J. Sesnon Co., to, and said Frank A. Kane then and there did indorse and negotiate said check or warrant last herein described, and which said check or warrant was thereafter and on the 2d day of September, 1908, duly paid by said First National Bank of Portland, Oregon, out of the aforesaid funds of said United States."

But the indictment does not charge that the check or warrant therein referred to had any connection with any bid or proposal by the alleged conspirators for the sale to or purchase by the United States of any coal at exorbitant prices by means of pretended and fraudulent competitive bids, or otherwise. It will not do to indulge in any inferences in respect to that matter in considering the question of the sufficiency of the indictment, for, as already said, a cardinal rule in criminal proceedings is that the indictment must state every ultimate fact made essential by law to the constitution of the crime denounced. The present indictment was undoubtedly drawn with the manifest purpose, as I think, of avoiding the bar of the statute of limitations; for, as has been shown, notwithstanding the fact that it makes no mention whatever of the making of any bid or proposal by or on behalf of the alleged conspirators or either of them for furnishing and selling to the government any coal in response to the advertisement of its Quartermaster, or otherwise, yet on the trial the government introduced evidence not only that the defendants did make such bids for the furnishing and sale to it of the coal advertised for, at exorbitant prices,

but that such bids and proposals, while nominally competitive, were really fraudulent and made pursuant to the agreement of the defendants thus to defraud the United States. And such proof was deemed by the jury so conclusive as to result in a verdict of guilty against the appellants. To such proof they objected upon the ground, among other grounds, that it was barred by the three-year statute of limitations. The government deemed it necessary to prove that the alleged conspirators did make the collusive and fraudulent bids and proposals in response to the advertisement of the Quartermaster, as it undoubtedly was, for the reason that not only was the making of such collusive and fraudulent bids and proposals one of the essential elements of the crime undertaken to be charged, but, according to the express declaration of the indictment itself, "the principal object" of it. It being necessary to prove the fact of the making of such collusive and fraudulent bids and proposals, it was, upon well-settled principles, necessary to allege the making of them. To have done so, however, the indictment would have shown upon its face that the conspiracy alleged to have been entered into was consummated more than three years before the filing of the indictment, and, consequently, barred by the statute of limitations.

In one of the briefs filed by counsel on behalf of the government, it is said:

"The principal objection urged against the indictment in the present case is that the interposing of two or more bids was an indispensable step in the execution of the conspiracy, without which the overt acts alleged in the indictment could not have tended to effect the object of the conspiracy; this objection being based upon the general proposition that an indictment for conspiracy under section 5440, R. S., must allege the commission of all indispensable overt acts from the inception of the conspiracy down to the last overt act alleged in the indictment.

"The decision of this court in Chaplin v. United States, 193 Fed. 879, 114 C. C. A. 93, is conclusive upon this proposition. The same question was raised, considered, and decided; and the decision was squarely against the contention raised there, and which is renewed in the present case. * * * The contention urged in the Chaplin Case was identical in principle with the contention urged in the present case."

How mistaken counsel are in this contention will be readily seen by reference to the case of Chaplin v. United States and remembering the change wrought in the law in respect to the crime defined by section 5440 of the Revised Statutes by the decision of the Supreme Court in the case of Hyde v. United States, supra. The Chaplin Case arose under the Desert Land Act, one of the provisions of which declares:

"That it shall be lawful for any citizen of the United States, or any person of requisite age who may be entitled to become a citizen, and who has filed his declaration to become such, and upon payment of twenty-five cents per acre to file a declaration under oath with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land. * * *"

The court in its opinion said (193 Fed. 881, 114 C. C. A. 95):

"The question presented to this court is whether the indictment charges the commission of a crime. The contention of the plaintiffs in error is that, inasmuch as an entryman of land under the desert land acts has the right to assign his entry as soon as it is made, the plaintiffs in error committed no

crime in conspiring to induce an entryman to make an entry when he had the actual present intention to assign his right to another; that the entryman has the right to make an entry with the intention to assign; that the land office has no right to exact from him an affidavit which renounces such right; that, if it does exact such an affidavit, the entryman does not commit perjury in making it, and the entry which he makes is legal, no matter what his intention may be."

In considering the validity of the indictment in that case, which was for alleged conspiracy, the court said:

"It is contended that the indictment is fatally defective for failure to allege that the defendants accused therein ever caused any fraudulent entries to be made, or ever took any steps or did any act to that end. But it was not necessary to allege that such entries were in fact ever made. The offense charged was a conspiracy to defraud the United States. The nature and object of the conspiracy, and the means whereby the conspirators intended to carry out their scheme, were set forth. The offense was complete when the unlawful conspiracy was formed and the plans were adopted. There remained, however, a locus penitentiæ until something more was done. Instead of abandoning their conspiracy, the indictment alleges that the conspirators performed certain overt acts. In the counts on which the plaintiffs in error were found guilty, they were charged with making certain false and fraudulent affidavits of expenditures which were sworn to have been made on desert land entries within the first year after the date thereof, which affidavits were set forth and were alleged to have been sworn to before the receiver of the land office, and they contained the jurat and the signature of such officer. These overt acts were within the scope of the conspiracy as charged, and they tended to accomplish its object. In United States v. Britton, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, it was said: 'The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone.'"

As will be seen, the court there held that "the offense was complete when the unlawful conspiracy was formed and the plans were adopted." Such was undoubtedly the law at the time of the rendition of that decision; but, as has been seen from the decision of the Supreme Court in the case of Hyde v. United States, supra, such is no longer the law.

Another consideration which renders the decision of this court in the case of Chaplin v. United States wholly inapplicable to the present case is that neither of the overt acts alleged in the indictment in the present case had, in so far as the indictment shows, any connection whatever with the making by the alleged conspirators of any bid or proposal of any character for the furnishing and selling to the government of any coal pursuant to the advertisement of its Quartermaster, or otherwise.

For the reasons stated I am of the opinion that the judgment should be reversed and the cause remanded, with directions to the court below to sustain the demurrer to the indictment.

SCHWARTZ v. UNITED STATES.

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

No. 1255.

1. CONTEMPT (§ 54*)—PROCEEDINGS FOR PUNISHMENT—FORMAL REQUISITES.
There is no fixed formula for contempt proceedings, and technical accuracy is not required. It is sufficient if the offense is set out so that the defendant is clearly informed of the charges against him, and whether a criminal or civil contempt is alleged; and this is to be determined by examination of the entire record.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–149; Dec. Dig. § 54.*]

2. INJUNCTION (§ 230*)—VIOLATION—CONTEMPT—JURISDICTION AND POWER OF COURT.
Where, in a civil suit of which the court had jurisdiction, charges of contempt were made against defendant for violation of an injunction issued therein, and he appeared and pleaded, and, after the proceeding had been transferred to the criminal docket, procured a suspension of the proceeding on his voluntary promise to obey the injunction, he cannot attack a subsequent judgment for contempt against him in the criminal proceeding, after a hearing, on the ground of the invalidity of the injunction order.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502–516; Dec. Dig. § 230.*]

3. CONTEMPT (§ 66*)—CRIMINAL PROCEEDINGS—REVIEW IN APPELLATE COURT.
While, in a case of criminal contempt, the trial court must be convinced of the guilt of the accused beyond a reasonable doubt, a finding of such fact, supported by competent evidence, cannot be reviewed by an appellate court.

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

4. CRIMINAL LAW (§ 304*)—CRIMINAL CONTEMPT—EVIDENCE.
A proceeding for criminal contempt growing out of a civil suit is collateral to it, and the court may take judicial notice in the trial of the contempt proceeding of all orders made in the civil cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. § 304.*]

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

Proceeding for criminal contempt in the name of the United States against Meyer Schwartz. From a judgment of conviction, defendant brings error. Affirmed.

Joseph R. Curl and John C. Palmer, Jr., both of Wheeling, W. Va. (A. M. Belcher, of Charleston, W. Va., on the brief), for plaintiff in error.

Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va., and John A. Howard, of Wheeling, W. Va., for the United States.

Before PRITCHARD and WOODS, Circuit Judges.

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

WOODS, Circuit Judge. The question to be decided in this cause is whether the assignments of error present any valid reason for the reversal of a judgment of the District Court by which Meyer Schwartz was held to be guilty of contempt and sentenced to imprisonment for 60 days.

In the case of West Virginia-Pittsburg Coal Co. v. John P. White and others the District Judge granted a temporary restraining order, dated September 29, 1913, directed to the defendants, as officers of the United Mine Workers of America and as individuals, "and all persons combining and conspiring with the said designated persons and all other persons whomsoever." The tenor of the order was to enjoin interference with plaintiff's business by using threats, force, intimidation, or persuasion to induce its employés to break their contracts or leave their work, or by using like means to induce any person to refuse to accept employment with plaintiff, and to enjoin trespassing on plaintiff's premises for the purposes above indicated. The charge against Schwartz seems to fall under the italicized portion of the following provision of the order:

"From interfering in any manner whatsoever, either by threats, violence, intimidation, persuasion, or entreaty, with any person in the employ of plaintiff who has contracted with and is in the actual service of plaintiff, to entice or induce him to quit the service of plaintiff, or to fail or refuse to perform his duties under his contract of employment, and *from ordering, aiding, directing, assisting, or abetting, in any manner whatsoever, any person or persons to commit any or either of the acts aforesaid.*"

By petition filed November 11, 1913, the plaintiff alleged:

"Meyer Schwartz, who keeps a store near your petitioner's Locust Grove mine, after being advised of the terms and provisions of the said restraining order, has continued to furnish a meeting place for your petitioner's striking employés and to assist in inducing your petitioner's striking employés to remain away from their work, in violation of their respective contracts of employment."

The affidavit of Virgin, attached to the petition as a part of it, alleges service of the order on Schwartz, his acts of furnishing a place for the striking miners to hold their meetings as near as possible to the mines, and of providing a conveyance and a driver for two of the officers of the United Mine Workers to go over the plaintiff's property to a meeting of the strikers.

A rule to show cause was issued, and the hearing fixed for December 1, 1913. On that day the court, on motion of plaintiff, made an order naming a number of persons, including Schwartz, who had appeared and submitted themselves to the court in response to the rule to show cause, and reciting its opinion that the petition and affidavits showed a criminal contempt, and directing that the proceedings be entitled "United States v. Van Bittner" and others, Meyer Schwartz being named as one of the defendants, that the cause be docketed on the law side of the court on the criminal docket, that the petition and affidavits and the orders relating to the contempt proceedings be filed as a part of the record in the criminal case, and that the contempt pro-

ceedings "shall not be further prosecuted in this suit in equity, but shall be prosecuted on the law side of the court as a criminal contempt case."

After hearing the arguments, the court on the following day made an order refusing to dismiss the bill, and granting a temporary injunction identical in language with that of the restraining order. At the same time an order was made staying further proceedings until the further order of the court.

By petition filed on January 17, 1914, West Virginia-Pittsburg Coal Company represented to the court, by petition and affidavits, that, although the defendants had appeared in open court on December 2, 1913, and promised to desist from the acts charged as contempt, and to comply strictly with the order of injunction, they nevertheless had continued to violate the order in many particulars set out. An attachment was issued against Schwartz, and he was required to show cause why he should not be punished for the alleged contempt. At the hearing on January 27, 1914, the court, after denying the motion of defendant's counsel to quash the petition, and after hearing the evidence, adjudged the defendant guilty of contempt and sentenced him to imprisonment for 60 days.

[1] Although out of logical order, for the sake of clearness, we consider first the error assigned that the charge against Schwartz should have been dismissed for indefiniteness. It is true that Schwartz is not specifically charged by name in this last petition and the affidavits attached; yet, reading them in connection with the first petition and the affidavits thereto attached, it appears that the only charge in the last petition which involves him is that of maintaining at petitioner's mine, near Colliers, tents occupied by a number of strike agitators who "live in the most disorderly manner, drinking, fighting, shooting, and disturbing your petitioner's employés who live near by." This definite charge is against all the defendants, and was notice to Schwartz of the accusation he had to meet.

But, aside from that, the original petition and affidavits, as we have pointed out, contained distinct and definite charges against him, and the order suspending his trial on these charges did not affect his liability to answer them. Under that order making the United States a party, transferring the cause to the criminal docket, and directing the original petition and affidavits to be filed in the criminal proceeding, the charges and specifications contained in the original papers stand against the defendant as the basis of the criminal proceedings. There is no fixed formula for contempt proceedings, and technical accuracy is not required. It is sufficient if the offense is set out, so that the defendant is clearly informed of the charges against him and whether a criminal or civil contempt is alleged; and this is to be determined by examination of the entire record. 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; Aaron v. United States, 155 Fed. 833, 84 C. C. A. 67; United States v. Huff (D. C.) 206 Fed. 700.

Objection was not made that Schwartz was not a party to the pro-

ceedings and was not bound by the order of injunction. On the contrary, the defendant appeared in the cause on December 1, 1913, and submitted himself to the jurisdiction of the court. Breach of a promise made to the court did not subject him to contempt proceedings; but the appearance and the promise precluded the defendant from averring that he was not a party bound by the order. Examination of the record excludes even the slightest doubt that the defendant was fully advised of the charge against him, appeared before the court and submitted himself to its order, and procured a suspension of the proceedings by a voluntary promise to obey the injunction. If the charge had been originally for civil contempt, all proceedings of that character were discontinued by the order, and the defendant was fully advised that he was called on to meet a charge of criminal contempt, and on that charge he was tried and fully heard. This being so, it would be not only adopting the extreme technicality formerly required in the criminal procedure, but extending it to the point of absurdity, to sustain the objections to the form and method of the procedure in this contempt case.

There is nothing in the record indicating that defendant's counsel made a motion to require the charges to be made more definite and certain, and hence there is no ground for the assignment of error on that point.

Neither the bill of exceptions nor the assignments of error point out what portion of the evidence should have been excluded as irrelevant. The first bill of exceptions is merely a copy of the evidence, and no objection to any of it appears to have been made. The assignment of error on this point has, therefore, no basis in the record.

[2] There is no force in the position that the judgment should be reversed because the court exceeded its power in adjudging the defendant guilty of contempt for furnishing a meeting place for organizers of the United Mine Workers of America and others, and thus aided them in inducing by force, threats, intimidation, and persuasion the employés of West Virginia-Pittsburg Coal Company to quit work. It is true that the judgment for contempt, as well as the order of injunction, will be set aside on writ of error, when the trial court had no jurisdiction to make the order of injunction. In re Rowland, 104 U. S. 604, 26 L. Ed. 861; In re Fisk, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; United States v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265. But that condition is not presented here. The court had jurisdiction of the subject-matter—the protection of the West Virginia-Pittsburg Coal Company in its property rights—and of the defendant, who had appeared in the cause to answer the charge that he had unlawfully interfered with those rights.

The defendant appeared in answer to a rule to show cause, pleaded not guilty of the contempt charged, and asked and obtained time to produce his witnesses, without questioning the power of the court to make the order. He, along with others, excepted to the order transferring the cause to the criminal docket and making the papers

the basis of a charge of criminal contempt; but, so far from prosecuting this exception, he waived it by appearing before the court, submitting himself to its order, and promising obedience, and thus procuring a suspension of the proceedings. Under these conditions it cannot be said by the defendant that the order of injunction and the order to show cause, acquiesced in by him and not appealed from, is a nullity, because it may have been erroneous in embracing acts which should not have been held to be unlawful aid to those who were charged with unlawful interference with the business of the West Virginia-Pittsburg Coal Company:

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery." Gompers v. Bucks Store & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

[3] The well-established principle is that in a case of criminal contempt the trial court must be convinced of the guilt of the accused beyond a reasonable doubt, but when there is evidence tending to show guilt the finding of fact by the trial court cannot be reviewed by this court. Bessette v. Conkey Co., 194 U. S. 338, 24 Sup. Ct 665, 48 L. Ed. 997. In this case there was evidence that the defendant rented his land to the officials of the United Mine Workers of America and others, who were taking means forbidden by the injunction to induce the employés of West Virginia-Pittsburg Coal Company to quit work, not only with the knowledge that it would be used, but with the purpose that it should be used, as a base for their operations. There was also evidence that he furnished conveyances to some of the same persons for a like purpose. This was evidence tending to show the "aiding and assisting" by the defendant which the court had forbidden.

[4] It is true that the record does not show that the stay order and the order of injunction were formally introduced in evidence; but throughout the taking of the testimony they were referred to by the witnesses, including the defendant, as if they had been introduced, and were so treated by counsel in the examination. Besides, it does not appear that the omission was made the basis of a motion to dismiss, or in any way called to the attention of the court. To reverse the judgment on this ground would be carrying technicality to the point of extreme attenuation. There is authority for the proposition that the criminal contempt is so far distinct from the original civil proceedings that the order of injunction must be formally introduced. State v. Hudson County Electric Co., 61 N. J. Law, 114, 38 Atl. 818. But we think this rule too technical. The better view is that, as one proceeding grows out of the other and is collateral to it, the court will take judicial notice in the trial of the latter of all orders made in the former. State v. Jones, 20 Wash. 576, 56 Pac. 369; State v. Thomas, 74 Kan. 360, 86 Pac. 499; State v. Porter, 76 Kan. 411, 91 Pac. 1073, 13 L. R. A. (N. S.) 462; Haaren v. Mould, 144 Iowa, 296, 122 N. W. 921, 24 L. R. A. (N. S.) 404.

The judgment against the defendant was suspended, and it was ordered that he be admitted to bail pending the disposition of the cause by this court. Hence there is no foundation for the assignment of error alleging that the suspension of the sentence and bail were denied.

This court in a unanimous opinion (John Mitchell et al. v. Hitchman Coal & Coke Co., 214 Fed. 685, 131 C. C. A. 425) has expressed its views fully on the limits to which an injunction of this sort should go. It was there held that it is an invasion of the rights of the citizen to enjoin the promotion of a labor union by persuasion and other peaceable and lawful means. Had this order of injunction been brought up for review by the defendant, it would have been modified in his behalf. But it is too late to allege before this court that the injunction was too broad when the defendant appeared in court to answer the charge of violating the injunction, and, instead of bringing the order up for review, waived all objections to it by submitting himself and promising obedience to it.

Affirmed

SCORIC v. UNITED STATES.

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

No. 1256.

1. INJUNCTION (§ 230*)—VIOLATION—PROCEEDINGS FOR PUNISHMENT—SUFFICIENCY OF CHARGES.

   Charges of criminal contempt in violating an injunction *held* sufficiently specific to sustain a judgment of conviction.

   [Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502–516; Dec. Dig. § 230.*]

2. INJUNCTION (§ 230*)—VIOLATION—PROCEEDINGS FOR PUNISHMENT—FORMAL REQUISITES.

   The fact that through a clerical error the name of a defendant, charged with others with contempt for violation of an injunction, was omitted from an order entered on the petition transferring the proceeding to the criminal docket for trial, does not invalidate a judgment against him therein, where he appeared, pleaded, and contested the case.

   [Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502–516; Dec. Dig. § 230.*]

3. INJUNCTION (§ 231*)—VIOLATION—PROCEEDINGS FOR PUNISHMENT—REVIEW IN APPELLATE COURT.

   The question of the validity of an order granting an injunction, not appealed from, cannot be raised in an appellate court on review of a subsequent judgment for contempt for violation of the injunction.

   [Ed. Note.—For other cases, see Injunction, Cent. Dig. § 517; Dec. Dig. § 231.*]

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

---

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

Proceedings for criminal contempt in the name of the United States against Paul Scoric. From a judgment of conviction, defendant brings error. Affirmed.

John C. Palmer, Jr., and Joseph R. Curl, both of Wheeling, W. Va. (A. M. Belcher, of Charleston, W. Va., on the brief), for plaintiff in error.

Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va., and John A. Howard, of Wheeling, W. Va., for the United States.

Before PRITCHARD and WOODS, Circuit Judges.

WOODS, Circuit Judge. Most of the assigned errors of procedure, and in the judgment and sentence against the defendant for contempt by reason of his disobedience of an order of injunction of the District Court, have been discussed and disposed of by the opinion in the like case of Meyer Schwartz v. United States, 217 Fed. 866, 133 C. C. A. 576, filed herewith, involving the charge of contempt in disobedience of the same orders. On some points, however, the facts are not precisely the same.

[1] 1. We think the charges against the defendant were sufficiently definite. The petition of November 11, 1913, alleges:

"On October 15, 1913, Van Bittner, James Oates, Joseph July, Thomas Smith, Richard Webb, and Paul Scoric organized and held a meeting near your petitioner's Locust Grove mine, at which they paid certain sums of money to each of your petitioner's striking employés for the purpose of inducing them to remain away from work and continue on strike. At said meeting they made inflammatory speeches, entreated, persuaded, urged, and threatened your petitioner's employés, who are on a strike, to continue to remain away from work, and to induce those who are working to join the strike."

In the affidavit of Virgin, attached to the petition as a part of it, it is alleged:

"Van Bittner, James Oates, Joseph July, Secundo Coliffee, Tom Smith, Richard Webb, and Paul Scoric have, in violation of the restraining order above mentioned, advised, urged, and persuaded our miners to continue on a strike and to refuse to resume working under their contracts with our company. They have also held meetings as near to our mines as they could get without actually trespassing on the company's property, in which some of them, with others, have made inflammatory speeches, urging and persuading our employés to continue the strike and to continue in violation of their contracts to refuse to work in our mines. * * * I had also told Jos. July, Tom Smith, Richard Webb, Paul Scoric, and Meyer Schwartz about the restraining order, for the purpose of warning them against violating it, before they participated in the meeting above described. * * * Richard Webb is acting as secretary of the local union of the miners, has furnished them a place for holding the meeting, and is constantly active in encouraging, persuading, and urging the strikers to continue on a strike and to refuse to work, and in inducing those who are working to quit work in violation of their respective contracts of employment. Paul Scoric, Tom Smith, and Jos. July are actively engaged in doing the same thing."

Still more specific are the following charges contained in the affidavit of Virgin, attached to the second and supplemental petition of January 17, 1914:

"That some of said parties, James Oates, Tom Smith, and Paul Scoric, against whom a rule was issued by said court, and who, among others, promised to remove the two tents on the county road immediately in front of some of the company's houses, have not removed said tents, but still maintain them as headquarters for striking miners of the said West Virginia-Pittsburg Coal Company, over which place said James Oates, Tom Smith, and Paul Scoric, and their associates, Dan R. Brown, Carl Neidhoffer, Paul Wetter, W. H. Thompson, William Bailey, Sheaky Heaky, and Carls Schmidt, frequently met with other of the striking miners and create disturbance of the peace, and some of them go upon the company's grounds and threaten violence to the officers of the company and do violence to employés of the company. * * * That on the morning of Saturday, January 3, 1914, about 11 o'clock a. m. the said Paul Scoric and Carl Neidhoffer assaulted John Mathia and Hector Gobi on the company's grounds, while they were working for the said company, the said Scoric saying, among other things, to Mathia, 'I will kill you,' and threw a half brick at Mathia's head, the said Neidhoffer striking the said Hector Gobi with a large club, at the same time threatening to do him great bodily harm."

2. If there was an order suspending the proceeding against Scoric until the further order of the court, it does not appear in the record. But the original proceeding had not been dismissed and was still pending when the supplemental petition was filed on January 17, 1914. The charges under this second petition, which he was also required to answer, were contained in an affidavit made January 5, 1914. It is therefore obvious that the scope of the court's inquiry properly embraced all charges of specific acts of disobedience of its order done between the date of the temporary restraining order and the affidavit made on January 5, 1914.

3. It is true that Scoric denied all these charges; but it is not seriously disputed that there was evidence from other witnesses, which might well be accepted as true by the District Court, supporting some of the charges of contempt. This being so, this court can give no relief against the finding of the trial court. Bessette v. Conkey Co., 194 U. S. 338, 24 Sup. Ct. 665, 48 L. Ed. 997.

[2] 4. The point was made for the first time at the oral argument in this court that the proceeding must be dismissed because the name of Paul Scoric does not appear in the order of December 1, 1913, setting out that the petition and affidavits showed a case of criminal contempt, and ordering the case to be prosecuted in the name of the United States against Van Bittner and others named, and docketed as a criminal cause on the law side of the court. It is perfectly clear from the record that the omission was merely a clerical error, which in no wise prejudiced the defendant. He was one of the parties distinctly charged by name in the original petition with specific acts of contempt. He appeared by attorney in the cause on November 25, 1913, in response to the order of November 11, 1913, pleaded not guilty to the charge, and was allowed further time to produce his witnesses. He appeared again on December 2, 1913, submitted himself to the court, and promised to obey the order. He was distinctly charged by name with definite acts of contempt in the second petition. In response to the attachment issued against him he again appeared in person and by attorney on January 27, 1914, and upon denial of his motion to quash

the petition pleaded not guilty. Under these circumstances the clerical mistake of omitting the name of the defendant from the order of December 1st cannot avail; for the point is altogether technical. The principle was thus applied in Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, where the name of a person other than the defendant was used in an indictment for perjury:

"It is further urged that the indictment in the third count thereof does not properly charge an offense against Holmgren. It is true that in the third count it appears that the name of Frank Werta, the alien, was written by mistake for that of Gustav Holmgren, in averring that the witness was duly and properly sworn; but this count also contains the averment that 'the said Gustav Holmgren, having taken such oath to testify as aforesaid, did then and there willfully,' etc., and 'contrary to the said oath testify in substance and to the effect,' etc. This objection does not appear to have been specifically pointed out in the demurrer, or otherwise taken advantage of upon the trial. In this proceeding it is too late to urge such objections to a matter of form, unless it is apparent that it affected the substantial rights of the accused. Rev. Stat. § 1025; Connors v. United States, 158 U. S. 408 [15 Sup. Ct. 951, 39 L. Ed. 1033]; Armour Packing Co. v. United States, 209 U. S. 56, 84 [28 Sup. Ct. 428, 52 L. Ed. 681]."

[3] This court in a unanimous opinion (John Mitchell et al. v. Hitchman Coal & Coke Co., 214 Fed. 685, 131 C. C. A. 425) has expressed its views fully on the limits to which an injunction of this sort should go. It was there held that it is an invasion of the rights of the citizen to enjoin the promotion of a labor union by persuasion and other peaceable and lawful means. Had this order of injunction been brought up for review by the defendant, it would have been modified in his behalf. But it is too late to allege before this court that the injunction was too broad, when the defendant appeared in court to answer the charge of violating the injunction, and, instead of bringing the order up for review, waived all objections to it by submitting himself and promising obedience to it.

Affirmed.

CLINCHFIELD COAL CORPORATION v. STEINMAN.

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

No. 1265.

1. SPECIFIC PERFORMANCE (§ 38*) — CONTRACTS ENFORCEABLE — PAROL CONTRACTS FOR CONVEYANCE OF LAND.

To render a parol contract for the conveyance of land specifically enforceable in equity, it must be certain and definite in its terms, the acts of part performance proved must refer to, result from, or be done in pursuance of the contract proved, and it must have been so far executed that damages will not afford full compensation for its breach.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 113; Dec. Dig. § 38.*]

2. EQUITY (§ 263*)—BILL—DISMISSAL FOR INSUFFICIENCY OF ALLEGATION.

Since a bill in equity is required to state only the ultimate facts, a court should be cautious not to dismiss a bill for mere lack of fullness of detail in allegation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 535–540; Dec. Dig. § 263.*]

3. GIFTS (§ 45*)—PAROL GIFT OF LAND—SUIT TO ESTABLISH TITLE AGAINST SUBSEQUENT GRANTEE.

A bill alleging a parol contract by the owner of land to give a definitely agreed upon tract of the same to his son as an advancement and in full of his share in the father's estate, and that the son at once took and held open and notorious possession and improved and continued to reside with his family on the land, which was subsequently conveyed to him by his father, *held* to state a cause of action to establish his equitable title from the date of the contract as against a later conveyance by his father of mineral rights in the land.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 80; Dec. Dig. § 45.*]

4. GIFTS (§ 45*)—PAROL GIFT OF LAND—SUIT TO ESTABLISH TITLE AGAINST SUBSEQUENT GRANTEE.

That there was some discrepancy between the boundary of the land as described in the alleged parol contract and in the subsequent deed made in confirmation thereof did not justify the dismissal of the bill on demurrer or motion; the land being at the time undeveloped and of small value, and absolute accuracy in such respect not being essential.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 80; Dec. Dig. § 45.*]

5. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASERS—POSSESSION AS NOTICE OF PRIOR RIGHTS—"NOTICE."

Under the law of Virginia, open and peaceable possession of land under a claim of right is "notice" to a subsequent purchaser of the right or claim of the person in possession both to the surface and minerals thereunder.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–545, 548–562; Dec. Dig. § 232.*]

6. QUIETING TITLE (§ 29*)—LACHES—SUIT TO ESTABLISH EQUITABLE TITLE TO LAND.

One in the exclusive possession of land under claim of title is not chargeable with laches in not bringing suit to establish his right, so long as no superior title is asserted by another.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.*]

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

Appeal from the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

Suit in equity by the Clinchfield Coal Corporation against A. J. Steinman. Decree for defendant, and complainant appeals. Reversed.

W. H. Rouse, of Clintwood, Va., and E. M. Fulton, of Wise, Va. (H. G. Morison, of Johnson City, Tenn., on the brief), for appellant.

J. Hale Steinman, of Lancaster, Pa., and R. T. Irvine, of Big Stone Gap, Va. (J. F. Bullitt, of Big Stone Gap, Va., and A. C. Anderson, of Wise, Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in its bill claims an equitable title to a tract of land containing 54 acres derived through successive conveyances from John W. Fleming, holding under an alleged parol gift from his father, Philip Fleming, made in 1870. Under the allegation that the equitable title set up is prior in date to the defendant's legal title from Philip Fleming, dated December 18, 1874, conveying all the coal, iron ore, and other minerals and fire clay in and under a tract of land containing about 1,000 acres, including the land in dispute, the plaintiff asks that the defendant be enjoined from prosecuting his pending action of ejectment brought under the deed of Philip Fleming to him, and that he be required to specifically perform the agreement to convey attributed to his grantor Philip Fleming. The District Judge sustained a demurrer to the original bill, and afterwards under the new equity rules granted a motion to strike from the files the amended bill.

[1] The main question to be decided on the appeal is whether the amended bill sets out a definite and enforceable parol contract of conveyance covering a particular tract of land. The rules on the subject have been considered and stated in many Virginia cases, from Shobe v. Carr, 3 Munf. (Va.) 10, to McLin v. Richmond, 114 Va. 244, 76 S. E. 301. Variance will be found in the language of the opinions, and some of them may seem to lay down more stringent requirements than others. But the established rules which control all the decisions are those stated by Judge Keith in McLin v. Richmond, supra:

"First, 'that the agreement relied on is certain and definite in its terms; second, that the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; and, third, that the agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party and place him in a situation which does not lie in compensation. Wright v. Pucket, 22 Grat. (63 Va.) 370; Plunkett v. Bryant, 101 Va. 818, 45 S. E. 742; Reed v. Reed, 108 Va. 790, 62 S. E. 792."

In Wright v. Pucket, 22 Grat. (Va.) 374, and Crane's Nest C. & C. Co. v. Virginia, etc., Co., 108 Va. 862, 62 S. E. 954, it is said:

"The tendency of all the modern cases, both in England and in this country, is to prefer giving the party compensation in damages, instead of a spe-

cific performance. Wherever damages will answer the purpose of indemnity, this alternative will be preferred, as it will equally satisfy justice, and will be coincident with the provisions and in support of the authority of the statute."

[2] Nearly all the reported cases were decided on the application of these general rules to the evidence adduced. In applying them to the decision of a demurrer or a motion to strike out a pleading, it is to be borne in mind that the demurrer admits, not only the facts specifically alleged, but all facts which are reasonably inferable from those alleged. United States v. Des Moines, etc., Co., 142 U. S. 510, 12 Sup. Ct. 308, 35 L. Ed. 1099. It is not to be expected that the bill should set out the evidence to be adduced; for good pleading requires that the bill state only the ultimate facts to be proved by the details of the evidence. Therefore the court should be cautious not to dismiss a bill for mere lack of fullness of detail in the allegation. The general principle is thus stated in Daniell's Chancery Pleading and Practice:

"A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing, but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief, at the hearing will be attended with considerable difficulty, will not support a demurrer. Therefore, where a bill was filed for the specific performance of an agreement entered into by a bankrupt, by the intervention of an agent, and previous to the bankruptcy, a correspondence took place, through the agent, as to granting a lease, and the case turned upon the point whether the facts stated amounted to a perfect agreement, Lord Loughborough thought that, although the circumstances, as stated in the bill, amounted more to a treaty than a complete agreement, the question whether it was an agreement or not must depend very much upon the effect of the evidence, and therefore overruled the demurrer."

This rule was approved in Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838, and Van Dyke v. Norfolk, etc., R. Co., 112 Va. 835, 72 S. E. 659, though in the latter case it was held to be limited by the consideration in actions for specific performance that the court "must be enabled to say from the facts and circumstances alleged in the bill whether the minds of the parties met upon all the essential particulars of the contract, and, if they did, then can say exactly upon what substantial terms they agreed and trace out the particular line where their minds met."

[3] The allegations of the amended bill to be tested by these rules are:

"That the said deed from Philip Fleming to John W. Fleming, dated February 23, 1878, hereinbefore filed as Complainant's Exhibit No. 19, on its face indicates that the title of John W. Fleming, your orator's predecessor in title, originated of that date. As a matter of fact, your orator charges that long prior to the said date, to wit, some time in the fall of 1870, the said John W. Fleming became vested with a complete equitable title to the said boundary of land under and by virtue of a parol gift in the nature of an

advancement made to him by his father, Philip Fleming, under the following circumstances: The said Philip Fleming had expressed his intention to divide his estate among his children during his lifetime. The said John W. Fleming, who was at this time living with his father, became engaged to marry, and the said Philip Fleming, knowing this fact, and desirous to provide his said son with a home, offered to give to the said John W. Fleming, in the nature of an advancement, the choice of two parcels of land, both of which were portions of a tract containing about 1,000 acres conveyed to him by Warders. The said John W. Fleming selected the tract of land, which was then and there pointed out, indicated and described to him, as follows: All the land bounded by the Elias J. Rose tract, James A. Collier tract, and a line commencing at a beech on Big branch, the beginning corner of the said Rose tract, and running thence in a westwardly direction, and so as to take in the heads of the hollows to a sugar tree in the forks of the Sawpit hollow, then designated and agreed upon; thence a straight line to a large chestnut on Big branch, then designated and agreed upon; thence a straight line to the top of the ridge to a large chestnut, then designated and agreed upon; thence south up to the top of the ridge to a walnut on Short branch, then designated and agreed upon, on the Collier line; thence with the Collier and Rose lines to the beginning. The said John W. Fleming then and there accepted the said parol gift as an *advancement* and in *full of his portion* of his father's estate and *has never* received any other property from the estate of his said father, Philip Fleming, who died intestate about 20 years ago.

"Immediately thereafter the said John W. Fleming entered into possession of the said land, made large expenditures thereon, and began to clear, fence, and cultivate the same, and in December, 1870, he erected a substantial log house thereon. On October 6, 1870, the said John W. Fleming married and immediately moved upon said land and into the said house, and was living in the said house, cultivating and improving the said land, and in the open, notorious, and exclusive possession of every part thereof on December 18, 1874, the date upon which the said Philip Fleming executed an attempted deed, hereinafter filed as an exhibit, to J. D. Price and A. J. Steinman, and has lived upon and cultivated the said land up until the present time. Your orator would here state that the said land so indicated, pointed out, and given to the said John W. Fleming by his father, the said Philip Fleming, was and is the same tract of land which was afterwards conveyed to the said John W. Fleming by deed dated February 23, 1878, hereinbefore filed as Complainant's Exhibit No. 10."

Thus the bill distinctly alleges (1) a contract by parol that John W. Fleming should have the land, supported by the consideration of love and affection, and in pursuance of the intention of Philip Fleming to divide his property among his children, and of the agreement between father and son that this land should be all that the son should receive from his father; (2) the taking and holding exclusive and adverse and notorious possession of the entire land by the son; (3) making large expenditures thereon by the son, building a house, clearing and fencing, and making it his family home in reliance on the contract.

This seems to be sufficient to bring the case within the rule stated in McLin v. Richmond, supra. It is true that the improvements made by the son might represent little value in later conditions or in a developed or progressive community, but under such primitive conditions as the bill implies it may be reasonably inferred that they were the result of arduous and continuous labor bestowed in reliance on the contract that the title to the land should pass, and were such improvements of his home as to make the loss of it irremediable. Whether this is so or not will be determined by the evidence. To say the least, it seems to us that

the case stated in the bill is strong and clear enough to make decision of it under a demurrer unsafe.

[4] 2. Importance was attached in the decree of the District Court to the apparent discrepancy between the description of the land in the amended complaint, which seems to call for a straight line on one side from the "big beech" to the "sugar tree," and the description in the deed of 1878, made by Philip Fleming to John W. Fleming, alleged to embrace the land in dispute, which seems to call for three lines between the points designated. It is true that a parol contract for the conveyance of land and the acts done under it must bear upon a definite tract distinctly identified by boundaries or otherwise; but the exaction of absolute accuracy would be unreasonable, especially as to lands of little value and in an undeveloped country. The discrepancy may be of great significance, or so slight as to be unimportant; that can only be determined when the evidence is before the court.

[5] Under the rule in Virginia proof of notice to defendant of the John W. Fleming interest in the land must have been "such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of mala fides." Vest v. Michie, 31 Grat. (Va.) 149, 31 Am. Rep. 722; Arbuckle v. Gates, 95 Va. 802, 30 S. E. 496; Crane's Nest, etc., Co. v. Virginia, etc., Co., supra. But in Chapman v. Chapman, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846, it is held that such possession as is here alleged is notice:

"The open and peaceable possession of land under a claim of right is notice to all the world of the right or claim of the person in possession; and where one buys land in the possession of another than his vendor or grantor, he is bound to take notice of such possession and of all that it imports."

Possession of the surface was possession of all the untouched minerals under the surface. Steinman v. Vicars, 99 Va. 597, 39 S. E. 227. And there is nothing in the position that the notice given by possession did not extend to notice of claim to the minerals.

[6] Laches in delaying to bring his action from 1870 until 1912 cannot be attributed to John W. Fleming, since it is alleged he was in the exclusive possession of the land, and there was no assertion of any superior title by the defendant or those under whom he claims. Ruckman v. Cory, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728.

The decree of the District Court must be reversed.

Reversed.

PECK et al. v. RICHTER.

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

No. 141.

1. BANKRUPTCY (§ 342½*)—REVIEW OF DECISION OF REFEREE—ESTOPPEL.
Where a bankrupt filed three separate claims against his trustee for services rendered to the estate, two of which were disallowed and the third allowed in part, his acceptance of such allowance did not estop him from the right to review the referee's decision as to the other claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

2. BANKRUPTCY (§ 482*) — ATTORNEY'S DOCKET FEE — "REFEREE" — "FINAL HEARING IN EQUITY."
A referee in bankruptcy, first provided for by Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 (Comp. St. 1913, §§ 9585–9656), is not a "referee," within the meaning of Rev. St. § 824 (Comp. St. 1913, § 1378), which provides for the taxation of an attorney's or solicitor's fee of $20 "on a trial before a jury in civil or criminal causes or before referees, or on a final hearing in equity or admiralty"; nor is a review by the District Court of an order of a referee allowing or disallowing a claim or an administration charge against a trustee a "final hearing in equity," within such provision, and in no event can more than one such docket fee be taxed in any one bankruptcy proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*

For other definitions, see Words and Phrases, First and Second Series, Referee.]

Petition to Revise Orders of the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

In the matter of Joseph C. Richter, bankrupt. Petition by Miles E. Peck, trustee, and the Clark Implement Company, to revise orders of the District Court in favor of the bankrupt. Reversed in part.

L. E. Waggoner and Joe Kirby, both of Sioux Falls, S. D., for petitioners.

Robert F. Riemer, of Sioux Falls, S. D., for respondent.

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

SMITH, Circuit Judge. The respondent, Joseph C. Richter, was adjudged a voluntary bankrupt August 1, 1913, and the petitioner, Miles E. Peck, was on August 18, 1913, chosen and qualified as trustee of the bankrupt estate. The bankrupt filed three separate and distinct claims against the estate.

(1) The first of these claims was for cutting and shocking 27 acres of wheat and 107 acres of oats belonging to the bankrupt estate after the petition in bankruptcy was filed, about August 1, 1913, and before the qualification of the trustee, which was about August 18, 1913.

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

(2) The second claim was for stacking the same wheat and oats and furnishing board for the men, after the trustee was appointed and at his request.

(3) The third claim was for taking care of the horses, cattle, and hogs belonging to the bankrupt estate after the filing of the petition but both before and after the appointment of the trustee.

The referee allowed only $15 on the first claim for binder twine and rejected the balance of that claim and all of the second and third claims. The bankrupt applied for review by the judge under section 38 of the Bankruptcy Act and General Orders No. 27 (89 Fed. xi, 32 C. C. A. xxvii). The trustee sought to have the proceedings for review dismissed because he had paid and the bankrupt had accepted the $15 allowed him; but this application was denied, and the trustee seeks in this proceeding to revise that action of the court. These claims were all for expenses of administering the estate under section 62 of the Bankruptcy Act, and were not for debts which may be proved under section 63 of the Bankruptcy Act. In other words, the claims were all in the nature of costs, and not in the nature of debts.

[1] It is the contention of the petitioners that the bankrupt, having taken the $15 awarded him by the referee, should now be held to have waived the right of review and be estopped to contend that the adjudication of the claims should be set aside. His position will be conceded as a general proposition. That is, it will be conceded that the rule is well established that a party who claims the benefit of an order or judgment in a case, or accepts the benefits or receives the advantages thereof, shall be afterwards precluded from asking that the order or judgment be revised or set aside. This is a general rule and is well established, but it is subject to several exceptions. It will be sufficient to point out one of these:

"When Judgment Settles Distinct Controversies. When a judgment or decree settles two or more distinct controversies, the acceptance of a sum of money, to which appellant is declared to be entitled by one portion of the judgment or decree, does not estop him from appealing from another and independent adjudication therein." 2 Cyc. 654.

This is fully sustained by decisions of this court (Darragh v. H. Wetter Manufg. Co., 78 Fed. 7, 23 C. C. A. 609; In re Letson, 157 Fed. 78, 84 C. C. A. 582); and by the Supreme Court (Gilfillan v. McKee, 159 U. S. 303, 16 Sup. Ct. 6, 40 L. Ed. 161; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346); and by the Circuit Court of Appeals of the Seventh Circuit (Worthington v. Beeman, 91 Fed. 232, 33 C. C. A. 475); and by numerous state courts (Tyler v. Shea, 4 N. D. 377, 61 N. W. 468, 50 Am. St. Rep. 660; Wishek v. Hammond, 10 N. D. 72, 84 N. W. 587; Goodlett v. Investment Co., 94 Cal. 297, 29 Pac. 505; Fiedler v. Howard, 99 Wis. 388, 75 N. W. 163, 67 Am. St. Rep. 865). In Byram v. Polk County, 76 Iowa, 75, 40 N. W. 102, it was held by the Supreme Court of Iowa that acceptance by an officer of a specific item of his account for fees awarded him by the district court is not a waiver of his right of appeal as to other items.

The additional allowance was made on the second and third claims

filed by the bankrupt, and no more was allowed him under the first claim than the $15 for binding twine. If an additional amount had been allowed under the first claim, a somewhat close question would be presented; but we have no doubt that the bankrupt still retained the right to a revision of the refusal of the referee to allow him anything on his second and third claims, and the application to revise the action of the District Court in this regard must be denied.

[2] The application for review was determined by the District Court on December 4, 1913. The decision was as follows:

"1. That the bankrupt be allowed a reasonable compensation for all services rendered or caused to be rendered for the trustee herein after his appointment for stacking the said grain herein mentioned, and for taking care or having taken care of the said live stock belonging to the bankrupt estate from the time of the appointment of the trustee to the 17th day of October, A. D. 1913, inclusive, for the reason that the bankrupt after the appointment of the trustee does not owe the creditors the duty to take care of the bankrupt estate for the trustee without compensation, and said services were performed at the request of the trustee.

"2. That this matter be referred back to the said Hon. Henry A. Miller, referee in bankruptcy, in the above-entitled matter, for the purpose of taking proof or evidence as to the reasonable value of the services rendered by the bankrupt or caused to be rendered as aforesaid.

"3. That the bankrupt recover his costs and disbursements herein out of the estate of the said bankrupt."

Presumptively under the last clause the clerk taxed an attorney's docket fee of $20 in favor of the bankrupt's attorney. The trustee excepted to this taxation, and on December 18, 1913, filed a motion to retax costs and that this item be not allowed. On December 31, 1913, the court made the following order:

"1. That the order made and filed in the above-entitled matter by the judge of this court on the 4th day of December, A. D. 1913, on a referee's certificate to review, be modified to the extent that the bankrupt, Joseph C. Richter, be allowed an attorney's docket fee of $20, and it is so ordered.

"2. That the costs as taxed by the clerk on the 8th day of December, 1913, the same consisting of the following items: Docket fee, $20; two affidavits, 50 cents; and clerk's fees, $5.95—or a total of $26.45, be the judgment of this court, together with subsequent clerk's fees incurred in said matter, and amounting to $1.55."

The action of the court is sought to be revised in this respect. It is provided by statute:

"Fees of Attorneys, Solicitors, and Proctors. Sec. 824. On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars."

The first question is: Was there a referee in this case within the meaning of this statute? And the second is: Was there a final hearing in equity?

This statute was first enacted in 1853. Act Feb. 26, 1853, c. 80, 10 Stat. 161. There was then no referee provided for by federal statute, and the referees referred to here manifestly were common-law referees. There was at that time no bankruptcy law in existence. The act of 1841 had been repealed on March 3, 1843. 5 Stat. 614, c. 82.

But even the act of 1841 did not provide for any referees but did provide for commissioners. The Bankruptcy Act of 1867 made no reference to referees, but provided for registers. The act of 1898, first created the office of referee in bankruptcy.

If this new officer is a referee, within the meaning of section 824, Revised Statutes, the expenses of bankruptcy proceedings are to be vastly increased by the taxation of $20 on every claim heard by him. Such was not the contemplation of the bankruptcy law, and the court apparently recognized this, for it ordered the taxation of this fee as a part of its order of December 4, 1913. We conclude that a referee in bankruptcy appointed under the act passed in 1898 is not a referee, within the meaning of section 824 of the Revised Statutes, first enacted in 1853.

Was the hearing by the court a final hearing in equity? There was but one bankruptcy proceeding pending, and if this was a final hearing, then there might be innumerable final hearings in the one proceeding, and innumerable taxations of $20. There was nothing pending but the bankruptcy proceeding, and it has been held that where the proceeding is voluntary there can be no such fee taxed at all, but when the proceeding is involuntary such a fee may be taxed in the bankruptcy proceeding. Note to Coy v. Perkins (C. C.) 13 Fed. 111, 115; Gorden v. Scott, 10 Fed. Cas. 816; In re Mead, 16 Fed. Cas. 1274. In any event there could only be one final hearing in the bankruptcy case, and the taxation of such a fee upon the determination of each claim and administrative charge would mean ruin to many bankrupt estates. It is our duty to so interpret this statute as to preclude such a result. Central Trust Co. v. Wabash, St. Louis & Pac. Ry. Co. (C. C.) 32 Fed. 684.

The action of the District Court in allowing this fee is set aside, and it is ordered to disallow the item of $20 docket fee as a part of the cost of this proceeding. Owing to the fact that upon the principal matter here presented the action of the District Court is sustained, there will be no judgment for costs.

RAWLINS et al. v. HALL-EPPS CLOTHING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1914.)

No. 2685.

1. BANKRUPTCY (§ 236*)—ORDER FOR EXAMINATION OF BANKRUPT—AUTHORITY OF COURT—TIME—"IN PROCESS OF ADMINISTRATION."

Under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (Comp. St. 1913, § 9605), authorizing the examination of a bankrupt and other witnesses concerning the acts or property of a bankrupt "whose estate is in process of administration," the court has authority to order such an examination at any time after the filing of a petition, although the proceedings are involuntary, and there has been no adjudication nor appointment of a receiver. The court, however, should not permit such examination to be perverted from the purpose it is intended to accomplish, which is the recovery of assets of the estate for distribution, to that of aiding the petitioning creditors in establishing their case for adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 393, 394; Dec. Dig. § 236.*]

2. BANKRUPTCY (§ 235*)—EXAMINATION OF BANKRUPT—PROCEEDINGS TO PROCURE—NOTICE.

An order for the examination of a bankrupt under Bankr. Act, § 21a, is not granted to petitioning creditors as a matter of right, and where, in involuntary proceedings, there has been no adjudication nor appointment of a receiver, should not be granted without giving the bankrupt notice and an opportunity to be heard.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 389, 395–397; Dec. Dig. § 235.*]

3. BANKRUPTCY (§ 235*)—EXAMINATION OF BANKRUPT—REASONABLENESS OF ORDER.

A general order requiring alleged bankrupts, who were mercantile partners and resided at a distance from the referee, to appear for examination prior to the adjudication, and to produce all their books of account and other writings and memoranda "from which might be ascertained any of the matters and things to be covered in said examination," *held* unreasonable and erroneous, as too broad in its terms.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 389, 395–397; Dec. Dig. § 235.*]

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

In the matter of J. C. Rawlins and S. J. Rawlins, partners as the Rawlins Mercantile Company, alleged bankrupts. Petition by bankrupts to superintend and revise an order for their examination procured by the Hall-Epps Clothing Company and others, petitioning creditors. Order reversed.

Alexander Akerman and Charles Akerman, both of Macon, Ga., for petitioners.

George S. Jones and Orville A. Park, both of Macon, Ga., for respondents.

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

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

GRUBB, District Judge. This was a petition to superintend and revise an order of the District Court for the Southern District of Georgia, directing the petitioners, hereafter designated "the bankrupts," against whom an involuntary petition in bankruptcy had been filed in that court, to appear before the referee in bankruptcy at Macon, Ga., to be examined as witnesses concerning the acts, conduct, and property of the bankrupt, which was a partnership composed of the petitioners, and with reference to the cause of its bankruptcy, its dealings with creditors and other persons, the amount and the whereabouts of its property, and in addition all matters which may affect the administration and settlement of the estate. The order further required the petitioners to produce for inspection and examination before the referee at the time and place of the examination all of the books of account of the bankrupt and other writings and memoranda from which might be ascertained any of the matters and things to be covered in said examination. The petitioners, the alleged bankrupts, filed an answer, denying insolvency and the commission of an act of bankruptcy, and demanding a jury trial for those issues. The order complained of was made before adjudication, and before the appointment of a receiver. The petitioners' residence and place of business was distant from Macon, the place of examination.

The order is assailed for three reasons, and it is contended by petitioners:

(1) That the court was without authority to make the order in advance of an adjudication and when no receiver had been appointed in the case.

(2) That the order was made without notice to the bankrupts, and without affording them an opportunity to be heard upon it before it was made.

(3) That the order was unreasonable in its terms, in that it required the production of all the books of account and other writings and memoranda from which might be ascertained any matters to be covered by the proposed examination, without specification or identification, except by way of a general conclusion.

[1] First. The authority for the examination is claimed to be found in section 21a of the act of 1898. The application was made by the petitioning creditors, as authorized by that section. The question is whether section 21a authorizes an examination of the bankrupt before adjudication and in the absence of the appointment of a receiver. This depends upon whether a bankrupt estate in that attitude can be said to be in the process of administration, within the meaning of that language in section 21a of the Bankruptcy Act. The Supreme Court of the United States in the case of Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448, has held with reference to a voluntary bankruptcy, in which a receiver had been appointed, that:

"The estate of the bankrupt is in process of administration after the petition has been filed and a receiver appointed, and an examination may be ordered at any time thereafter under section 21a of the Bankruptcy Act."

While the decision may not be broad enough to extend to an involuntary bankruptcy and one in which there is no receivership, the reasoning of the court would indicate that the bankrupt court had authority to make such an order in an involuntary case in which no receiver had been appointed. Referring to the meaning of the words found in section 21a, "a bankrupt whose estate is in process of administration under this act," the court said (231 U. S. page 717, 34 Sup. Ct. 246, 58 L. Ed. 448):

"We are of opinion that the estate was in process of administration at the time when the examination before the commissioner was ordered and the testimony of Cameron given. This court has decided that the filing of the petition in bankruptcy operates to place the property of the alleged bankrupt in custodia legis and prevents any creditor from attaching it; and, although by the terms of the act the estate does not vest in the trustee until the date of the adjudication, it is placed at the time of the filing of the petition under the control of the court with a view to its ultimate distribution among creditors. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307 [32 Sup. Ct. 96, 56 L. Ed. 208]. And see Mueller v. Nugent, 184 U. S. 1, 14 [22 Sup. Ct. 269, 46 L. Ed. 405]; Everett v. Judson, 228 U. S. 474, 478, 479 [33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154]. And this is true, notwithstanding, as contended by the petitioner, that, should the attempt to obtain an adjudication of bankruptcy fail upon the subsequent hearings, the receivership would necessarily be vacated and the property turned back to the alleged bankrupt."

This would seem to imply that the bankrupt estate was in process of administration, for the purpose of section 21a, from the time of the filing of the petition. The language of the Supreme Court seems to apply to an involuntary case as well as to a voluntary case. In view of the language of the opinion, we are not disposed to hold that the court below was without authority to grant an order for the examination of the bankrupts, under proper terms and conditions, before adjudication and in the absence of a receivership.

The purpose of the examination is to develop the whereabouts of assets of the estate for the purpose of aiding its administration, and not to enable the petitioning creditors to elucidate evidence to assist them in establishing the insolvency of the bankrupt or the act or acts of bankruptcy relied upon by them. This is quite manifest from the following language of the Supreme Court in the case quoted from (231 U. S. at pages 717 and 718, 34 Sup. Ct. 246, 58 L. Ed. 448), viz.:

"In order to arrive at the true meaning of section 21a, other provisions, as well as the purpose of the act, must be had in view. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved. If such examination is postponed until after adjudication, which may not take place for at least 20 days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of, and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated. The importance of such early examination of bankrupts was emphasized in Re Fleischer [(D. C.) 151 Fed. 81], supra."

Section 3d of the Bankrupt Act (Comp. St. 1913, § 9587) covers the examination of the bankrupt and the production of his books, so far as the issue of his solvency or insolvency, is concerned. It is, by that section, made his duty to appear on the hearing, if he denies insolvency, and submit to an examination and produce his books; the penalty of failure being that the burden of proving his solvency shall rest upon him. The two examinations provided for by these two sections are distinct, and the purpose of each is different.

The bankrupt court should not permit the examination provided for by section 21a to be perverted from the purpose it is intended to accomplish, viz., the recovery of assets of the estate for distribution, to that of aiding the petitioning creditors in establishing their case for adjudication. It can only happen in rare instances that an examination under section 21a can be useful before adjudication and in the absence of a receivership for the purpose of recovering assets, since in that situation there would be no officer of the bankrupt court authorized to seize the assets, when discovered. However, we are not prepared to say that there might not be a case when the utility of such an examination for the purpose intended, even in the absence of a receivership, might not be shown.

[2] Second. The order complained of was granted on the ex parte application of the petitioning creditors, and without giving the bankrupts a hearing upon the application. The order for the examination is not granted, as a matter of right, to the petitioning creditors, certainly not before adjudication, and when the bankrupts are denying insolvency and the commission of any act of bankruptcy, and we think the bankrupts should have been given notice and the opportunity to be heard in resistance of the application, before it was granted.

[3] Third. The order required the bankrupts to produce "all of the books of account of said Rawlins Mercantile Company, and other writings and memoranda, from which may be ascertained any of the matters and things, hereinbefore mentioned, and to be covered in said examination." We think the order was too broad and uncertain in its requirements. The alleged bankrupts' place of business was distant from the place fixed for the examination. The requirement of attendance would, in itself, be burdensome. The production of many books and papers would add materially to the burden. The bankrupts may have been in business many years, and their books of account and other writings and memoranda referring to their business voluminous. Many of them might be immaterial to the issues involved in the bankruptcy proceeding, yet the order places the risk of nonproduction on the bankrupts. They are required, by its terms, to determine at their peril what books of account and other writings and memoranda are material to the ascertainment of any of the matters mentioned in the order and to be covered in the examination.

We think this was requiring too much of the bankrupts. They should have been apprised by the order itself what specific books, writings, and memoranda they were required to produce. Possibly a requirement to produce their present books of account would have been sufficiently definite, since what those books of account were was more pe-

culiarly within the knowledge of the bankrupts. The requirement was not so limited. It was only restricted by the materiality of the books and documents to the purpose of a future examination, the scope of which was unknown to the bankrupts except as disclosed by the terms of the order. We think that the order was unreasonable, in that it required the producton of books and documents without proper description to enable the bankrupts to know with sufficient certainty what specific books and documents they were expected to produce to comply with it, and was therefore equivalent to a requirement to produce all the books and papers belonging to their business. Such an order to produce encountered the condemnation of the Supreme Court of the United States in the case of Hale v. Henkel, 201 U. S. 43–76, 26 Sup. Ct. 370, 380, 50 L. Ed. 652, in the following language:

"Applying the test of reasonableness to the present case, we think the subpœna duces tecum is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different states in the Union. If the writ had required the production of all the books, papers, and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpœna. Doubtless many, if not all, of these documents may ultimately be required; but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpœna of this description is equally indefensible as a search warrant would be, if couched in similar terms. Ex parte Brown, 72 Mo. 83 [37 Am. Rep. 426]; Shaftsbury v. Arrowsmith, 4 Ves. 66; Lee v. Angas, L. R. 2 Eq. 59."

For these reasons, we think the petition to superintend and revise should be granted, and the order of the District Court on which it is based should be set aside, and the respondents be taxed with the costs of this court; and it is so ordered.

DREYER v. PERKINS.

In re PERKINS LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. November 3, 1914.)

No. 2644.

BANKRUPTCY (§ 288*)—JURISDICTION OF COURT—SUMMARY PROCEEDING.

A court of bankruptcy is without jurisdiction in a summary proceeding to decree specific performance of a contract made by a bankrupt by directing his trustee to execute a conveyance of land.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*

Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Petition for Revision in Matter of Law of a Decree of the District Court of the United States for the Southern District of Georgia; Wm. B. Sheppard, Judge.

In the matter of the Perkins Lumber Company, bankrupt. Petition by Joseph M. Dreyer, trustee, to revise a decree in favor of H. W. Perkins. Modified.

Frederick T. Saussy, of Savannah, Ga., for petitioner.

Edw. S. Elliott, of Savannah, Ga., opposed.

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

CALL, District Judge. In the bankruptcy case of the Perkins Lumber Company, H. W. Perkins filed an intervention, setting up, in short, that by certain arrangements, set out in said petition, he had been put in possession of certain land theretofore belonging to the bankrupt under an understanding that same was to be conveyed to him in fee simple, but deed had never been made, and praying that the trustee of the bankrupt's estate be required to make such deed to said lands to said Perkins, and the schedules of said bankrupt, in which said land was described, be corrected by eliminating said land therefrom. On this petition a rule nisi was issued, and said intervention was answered by the trustee, setting up various reasons why the prayers of the intervention should not be granted on the merits, and concluding with the prayer that the possession of the property be surrendered to the trustee to be administered, and that the answer be taken as a cross-bill for the purpose of recovering the land.

The referee thereupon proceeded to take testimony on the issues made by said intervention and answer, and on September 13, 1912, ordered the bankrupt's schedule to be corrected by striking therefrom the land described in the intervention; that the trustee in bankruptcy make a deed to H. W. Perkins for whatever interest the Perkins Lumber Company had or might have in the land. Within the time allowed

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

by law, the trustee filed his petition for review by the judge of the District Court of this order, and on December 27, 1913, the District Court passed a final order confirming the ruling of the referee. It is this order of the District Court that is brought up for revision.

After the examination of the record and briefs in the case, we are of the opinion that the order or ruling of the referee went too far in requiring the trustee of the bankrupt to execute and deliver a deed of whatever rights the bankrupt may have had in the real estate to H. W. Perkins. The referee under the Bankrupt Act is not vested with the power to order specific performance of a contract, and this is what he attempted to do in this case. It is unquestioned the petitioner, Perkins, was in possession of the land in question, for some years prior to the bankruptcy proceedings, claiming title thereto adverse to the bankrupt. The District Court, under such state of facts, had no jurisdiction to proceed under summary proceedings to adjudicate the rights of the trustee or the adverse holder, as was attempted in this cause. While it is questionable whether the matter sought to be litigated herein was such as should have been brought by summary proceedings, still each of the parties sought that method and asked affirmative relief therein, and we therefore do not decide that question.

We see no error of law in the order of the District Court, affirming the ruling of the referee, except as above pointed out, and this cause is one of revision in matter of law. The ruling of the referee and judgment of the District Court should be amended, by striking from said ruling the portion requiring the deed from the trustee in bankruptcy; and the judgment, thus amended, is affirmed.

The costs of this court will be taxed against the petitioner, H. W. Perkins, who first invoked the summary jurisdiction of the District Court.

CROWN CORK & SEAL CO. OF BALTIMORE CITY v. BOND BOTTLE SEALING CO.

(District Court, D. Delaware. October 21, 1914.)

No. 319.

(Syllabus by the Court.)

PATENTS (§ 328*)—INFRINGEMENT—APPARATUS FOR THE MANUFACTURE OF BOTTLE CLOSURES.

The Wheeler patent, No. 887,883, for apparatus for the manufacture of bottle closures, is restricted to apparatus under the operation of which the three elements entering into and composing the bottle closure, namely, the metal cap, the fusible material or binding medium, and the cork disk or packing, are all assembled and contemporaneously heated in their assembled condition before being subjected to pressure; pressure being applied to the closure only while cooling. Defendant's apparatus does not disclose means for heating the three members of an assembled closure before the same are subjected to pressure and cooling as contemplated and required by the patent, and therefore does not infringe.

In Equity. Suit by the Crown Cork & Seal Company of Baltimore City against the Bond Bottle Sealing Company. On final hearing. Decree for defendant.

James Q. Rice, of New York City, and Howell S. England, of Wilmington, Del., for complainant.

Melville Church, of Washington, D. C., Marshall A. Christy, of Pittsburgh, Pa., and Ward, Gray & Neary, of Wilmington, Del., for defendant.

BRADFORD, District Judge. The bill in this case was brought by the Crown Cork and Seal Company of Baltimore City, a corporation of Maryland, against the Bond Bottle Sealing Company, a corporation of Delaware, for alleged infringement of letters patent of the United States No. 792,284, granted June 13, 1905, to the complainant as assignee of William Painter, for Method or Process of Manufacturing Bottle Closures; No. 887,838, granted May 19, 1908, to the complainant as assignee of William Painter, for Machine for Making Closures for Bottles and the Like; and No. 887,883, granted May 19, 1908, to the complainant as assignee of William H. Wheeler, for Apparatus for the Manufacture of Bottle Closures. The charge of infringement has been abandoned with respect to the two patents first above mentioned, and with respect to patent No. 887,883 has been restricted to claims 1, 4, 6, 7, 23, 24, 25, 26 and 27, which are as follows:

"1. In an organization for uniting the metallic member of a bottle or like closure with its compressible packing having a fusible material interposed between it and said metallic member, means for heating the assembled members of the closure while free to allow the expanding air to escape, and means for pressing the parts together while cooling, substantially as described."

"4. In an organization for uniting the metallic member of a bottle or like closure with its compressible packing having a fusible material interposed be-

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

tween it and said metallic member, a plunger, a support on which the closure rests and between which and the plunger the closure is pressed, and means for heating the assembled parts of the closure for fusing the interposed material before the compression takes place, said compression taking place during the cooling of the parts and the hardening of the interposed binding material, substantially as described."

"6. In an organization for uniting the metallic members of a bottle or like closure with its compressible packing having a fusible material interposed between it and said metallic member, means for supporting the closure in inverted position, means engaging the packing and the cap or metallic member to press them towards each other, means for cooling the closure while subjected to pressure, and means for applying heat to fuse the said interposed binding material before the inverted closure is subjected to pressure and while it is free to allow the escape of the expanding air, substantially as described.

"7. In an organization of the class described, means for pressing the parts of the closures together and means for heating the closures with their interposed fusible binding material, said heating means serving to move the closures to the pressing means, substantially as described."

"23. In apparatus of the class described, a revolving series of plungers, means for previously heating and then delivering the closures thereto, and means for discharging the closures from beneath the plungers at one point, substantially as described.

"24. In apparatus of the class described, a revolving series of plungers, means for previously heating and then delivering the closures thereto and means for discharging the closures from beneath the plungers at one point, said means consisting of the incline in the path of movement of the closures, substantially as described.

"25. In combination in apparatus of the class described, means for heating the closures while free from pressure, chilling and pressing means, and means whereby the closures are delivered from the heating means to the chilling and pressing means, substantially as described.

"26. In combination in apparatus of the class described, means for heating the closures while free from pressure, chilling and pressing means for receiving the heated closures from the heating means, said pressing means acting to press the parts of the closure together between itself and the chilling means, substantially as described.

"27. In combination in apparatus of the class described, means for heating the closures while free from pressure, a chill plate and plunger for receiving the heated closures for cooling and uniting the parts thereof, said plunger pressing the closures between itself and the chill plate, substantially as described."

The validity of the patent in suit is not disputed, and I do not think it can successfully be assailed. The controlling question is whether on a proper reading of the claims there has been infringement. In view of the largely functional mode of expression employed in the several claims it is necessary, in order to gain an intelligent conception of the nature and structure of the apparatus therein referred to, to resort to the patent description in which it is the duty of the inventor truly to describe his invention and to which express reference is made in each claim. Wheeler in the description says:

"My invention relates to the manufacture of bottle closures of the class known as crown cork sealing caps or closures, and it concerns particularly a machine for uniting the compressible or resilient packing material to the metallic cap. In carrying out my invention I employ heat to soften or fuse the protecting and binding medium located between the packing or sealing gasket and the metal cap and after the parts are thoroughly heated they are allowed to cool or subjected to artificial cooling, and during this time they are

subjected to pressure so as to firmly unite the packing or gasket to the cap by the binding and protecting medium. During the heating action of the parts they are not subjected to pressure or to any action which would tend to confine any moisture or air which may be in the material or in the pit holes or crevices thereof or pocketed between the members of the closure, but on the contrary, the assembled parts are left entirely free for the escape of any moisture or for the escape of the air in expanding. * * * I aim among other things to provide a construction for the uniting of the assembled members of the closure which may be added to existing forms of assembling machines, occupying no more floor space than is necessary to accommodate the existing form of machine. I have sought also to provide a compact arrangement, but at the same time one in which the heating action on the members of any one closure may be continued a sufficiently long time to thoroughly soften the binding material and to drive out any moisture or air in the material or between the members which might interfere with the firm uniting of the parts. The invention consists in the features, combination and arrangement of parts hereinafter described and particularly pointed out in the claims. * * * My present improvement contemplates uniting the metallic cap with its compressible contents or packing by fusing the interposed material, such for instance as the collet described, and subjecting the parts to pressure while cooling and while the binding or sealing material is hardening. It is thought to be unnecessary to describe the assembling mechanism and the die mechanism as these parts are fully disclosed in the patent referred to. [No. 798,549.] * * * From the above it will be seen that the assembled parts of the closure are subjected to heat while in the condition in which they leave the dies of the assembling machine. In this condition the packing while frictionally held by the walls of the cap, is free from pressure or from contact with any device which might act to prevent the escape of the air or moisture from the crevices or from the body of the material itself within the cap. It is desirable to allow the air and moisture, if there be any, to escape freely before the parts are subjected to pressure, for if the pressure takes place before or simultaneously with the heating, any air contained in the pit holes or crevices of the packing or between the members of the closure or any moisture present on or about the members, may, by expanding, tend to separate the parts and prevent them from uniting perfectly under continued pressure."

The invention covered by the patent in suit is not a process, but mechanism or apparatus specifically pointed out and described. Wheeler states that "the invention consists in the features, combination and arrangement of parts hereinafter described and particularly pointed out in the claims." The rule that the inventor of a process need only describe an approved means for its practice and is not restricted in the enjoyment of the patent monopoly to the particular means described, is inapplicable to machine or apparatus patents. In the former case what is patented is the process and not any instrumentality for conducting it; but in the latter it is the machine or apparatus itself as described and claimed. The doctrine of equivalents has more or less liberal or restricted application according to the nature and scope of the invention, excepting in so far as the inventor has by his claims read in connection with the description and drawings excluded the application of that doctrine. Unless form has been made essential by the inventor, no merely formal change from the patented device or mechanism will avoid infringement. It was wholly unnecessary for the protection of his patent monopoly that Wheeler should declare that he did not limit himself to the "precise form of the elements" of the patented combination, or that the fundamental principle under-

lying them might be embodied in apparatus "of different form from that disclosed" without departing from the scope of his invention, or that the "assembling mechanism" might be in any desired form. While it is true that Wheeler, from abundant caution, though unnecessarily, thus declared, in substance, that infringement could not be avoided by purely formal changes in the elements of the combination, it is equally true that by the plain and unmistakable import of the language of the description and of the claims as well as by the structure of the apparatus disclosed, of which he said his "invention consists in the features, combination and arrangement of parts hereinafter described and particularly pointed out in the claims," he is limited to apparatus under the operation of which the three elements entering into and composing the bottle closure, namely, the metal cap, the fusible material or binding medium, and the cork disc or packing, are all assembled and contemporaneously heated in their assembled condition before being subjected to pressure; pressure being applied to the closure only while cooling. Wheeler states that heat is employed "to soften or fuse the protecting and binding medium located between the packing or sealing gasket and the metal cap and after the parts are thoroughly heated they are allowed to cool or subjected to artificial cooling, and during this time they are subjected to pressure so as to firmly unite the packing or gasket to the cap by the binding and protecting medium"; that "during the heating action of the parts they are not subjected to pressure * * * but, on the contrary, the assembled parts are left entirely free for the escape of any moisture," etc.; that he aims "to provide a construction for the uniting of the assembled members of the closure," etc.; that his present improvement "contemplates uniting the metallic cap with its compressible contents or packing by fusing the interposed material * * * and subjecting the parts to pressure while cooling and while the binding or sealing material is hardening"; that it is "unnecessary to describe the assembling mechanism and the die mechanism as these parts are fully disclosed" in patent No. 798,549; that "after leaving the die mechanism the composite closure is discharged into a chute *1*, Fig. 1, which directs the closure onto a heating table or steam plate *2*"; that "the closures are subjected to heat from the heating table which being transmitted through the metal of the cap, directly in contact with the heating table, causes the binding and protecting material which is interposed between the compressible packing of cork or other material and the cap to be fused for the purpose of uniting the compressible packing with the cap and for other purposes," as set forth in patent No. 792,284; that "the closures as they traverse the heating table are free, not being subjected to pressure, and they follow each other through the grooves *4* closely, and during this time they are subjected to the heat from the heating table for which the spiral plate acts as a cover and serves to form, in connection with the surface of the heating table, a chamber in which the closures are subjected to the heat while free from pressure"; that "in the revolution of the steaming table, chili ring and plunger-carrying ring the plungers are raised just before they

reach the point at which the closures are discharged from the spiral and from the heating table onto the chill ring, and this permits the proper positioning of the closure beneath the elevated plunger, and when this has taken place the roller of the elevated plunger runs off from the stationary cam *19*, thus allowing the plunger to fall and engage the packing, placing the same together with the other parts of the closure under compression, and in this condition, and while in contact with the chill ring, the closure makes very nearly a full revolution about the axis of the machine," etc.; that "the assembled parts of the closure are subjected to heat while in the condition in which they leave the dies of the assembling machine"; that in this condition the packing "is free from pressure"; that "if the pressure takes place before or simultaneously with the heating, any air contained in the pit holes or crevices of the packing or between the members of the closure or any moisture present on or about the members, may, by expanding, tend to separate the parts and prevent them from uniting perfectly under continued pressure"; and that "by reason of the spiral course over which the closures are made to pass, the heat continues to act on the closures for a long time so as to thoroughly soften the interposed binding material and prepare the parts for the cooling and pressing action." Not only are the claims touching which infringement is urged, as, indeed, are all of the claims of the patent in suit, in perfect harmony with the description and drawings of the patented apparatus, but on their face and by reference to the apparatus as described require the three parts or elements of the bottle closure to be heated in their assembled condition before cooling and subjection to pressure. Claim 1 requires "means for heating the assembled members of the closures while free to allow the expanded air to escape, and means for pressing the parts together while cooling, substantially as described." It is too plain for argument from this language in connection with the description and drawings that the assembled members of the closures are the parts which are to be "pressed together," and include all the three elements entering into the composition of the closures. The suggestion that the word "assembled" is only a descriptive term, and not indicative of the physical relationship between the different members or parts of the closure during the process of heating and subsequent cooling, respectively, is too strained and unreasonable, I think, to have any force. Claim 4 requires "means for heating the assembled parts of the closure for fusing the interposed material before the compression takes place, said compression taking place during the cooling of the parts, and the hardening of the interposed binding material, substantially as described." Considerations similar to those applicable to claim 1 apply here. Claim 6 requires "means for supporting the closure in inverted position, means engaging the packing and the cap or metallic member to press them towards each other, means for cooling the closure while subjected to pressure, and means for applying heat to fuse the said interposed binding material before the inverted closure is subjected to pressure and while it is free to allow the escape of the expanding air, substan-

tially as described." The closure includes the three elements or parts entering into it and as all of them are subjected to pressure and cooling, so all of them in their assembled condition are first subjected to heat. Claim 7 requires "means for pressing the parts of the closures together and means for heating the closures with their interposed fusible binding material, said heating means serving to move the closures to the pressing means, substantially as described." The language of this claim in connection with the patent description and drawings clearly requires that, as in the case of the claims already considered, the three parts or elements of and constituting the closure shall be heated, pressed and cooled respectively in their assembled condition. Claims 23 and 24 require a "revolving series of plungers, means for previously heating and then delivering the closures thereto," etc. Claims 25 and 26 require "means for heating the closures while free from pressure, chilling and pressing means," etc. Claim 27 requires "means for heating the closures while free from pressure, a chill plate and plunger for receiving the heated closures for cooling and uniting the parts thereof," etc. Each and every of these five claims requires that all the parts of the closure in their assembled condition shall be heated before being delivered to or received by the chilling and pressing means, and that they should be sufficiently heated to allow their firm and perfect union, under subsequent pressure and cooling, before any pressure or cooling should be applied. The closures are to be delivered from the heating means, not to other heating means, but to the pressing and chilling means. Any incidental heat that may be delivered to the cork disc by reason of its being brought into contact with the interposed fusible material under the impact or pressure of the plunger without substantial previous heating cannot satisfy either the language or the purpose of the patentee. Wheeler states in the description that "by reason of the spiral course over which the closures are made to pass, the heat continues to act on the closures for a long time so as to thoroughly soften the interposed binding material and prepare the parts for the cooling and pressing action." He does not, it will be perceived, confine his attention to the softening of the interposed binding material, but also regards the preparation of the parts, including the cork disc as well as the cap and interposed binding material, "for the cooling and pressing action." He further states that "if the pressure takes place before or simultaneously with the heating, any air contained in the pit holes or crevices of the packing or between the members of the closure or any moisture present on or about the members, may, by expanding, tend to separate the parts and prevent them from uniting perfectly under continued pressure."

The invention of the patent in suit is apparatus or mechanism designed, constructed and adapted for the assembling and uniting of the three parts of a bottle closure by a method essentially different from that disclosed in the earlier patents. In Crown Cork & Seal Co. v. American Cork Specialty Co., 211 Fed. 650, 128 C. C. A. 154, the circuit court of appeals for the second circuit had under consideration an appeal from the district court where it had been held [201 Fed.

344] that the use of the defendants' machine was an infringement of the patent here in suit and also of patents Nos. 792,284 and 887,838, granted to the complainant here as assignee of William Painter, June 13, 1905, and May 19, 1908, respectively. The appellate court distinguished the invention of the patent now in suit from those of the two earlier patents and, while affirming the decree below as to the Wheeler patent, reversed it as to the two Painter patents, holding that "the organization of the first two patents was directed towards securing a better and smoother union of cork and metal through the binder, by applying pressure during the fusion process," and saying:

"Wheeler pointed out that pressure during heating trapped air, moisture, or gases, resulting from the fusion of the binder and really prevented perfect union. He therefore departed radically from the two patents above discussed by leaving the cork unpressed during the heating period, so that the air, gas, etc., could escape, and applying pressure only when the heating zone was passed."

The two Painter patents referred to require all the parts of the closure in their assembled condition to be under pressure and while so under pressure to be heated. In the description of the method or process patent No. 792,284 Painter says:

"Broadly stated, my novel method or process consists, first, in interposing a suitable fusible protecting and binding medium between the packing or sealing disks or gaskets and the coincident inner surfaces of the metal cooperating therewith and of which the crown-caps are composed; secondly, while the caps and disks, and fusible binding medium are properly heated for fusing said medium, subjecting the whole to appropriate pressure, and, thirdly, while still heated and the packing held under controlling pressure hardening the binding medium or permitting it to harden by cooling it, the disk, and cap."

All the claims of that patent strictly conform to the method or process as above described. In the description of the machine patent No. 887,838 Painter says:

"In certain applications for patent filed by me June 6, 1902 (Serial No. 110,535), and September 29, 1902 (Serial No. 125,180), I disclosed certain novel methods or processes of manufacturing bottle closures, wherein a special feature involves the interposition of a suitable fusible protecting and binding medium between a suitable metallic cap and a suitable sealing gasket or packing; then properly heating the cap, gasket and said medium, and meantime subjecting the whole to appropriate pressure, and while still under such pressure, cooling the completed closure."

"Serial No. 110,535" refers to the application for the Painter patent No. 792,284. The claims of patent No. 887,838 conform to the mechanism disclosed in the patent description and drawings and require, as stated in claim 10, "means for pressing together the members of a bottle or like closure, means for first subjecting said members to heat while maintained under pressure and then to cooling influences while maintained under pressure." In Crown Cork & Seal Co. v. American Cork Specialty Co., supra, the defendants did not apply any pressure until after the combined metal, cork and binder left the heating part of the machine—did not "press during heating"—left "the

cork unpressed during the heating period"—and was consequently held by the circuit court of appeals not to infringe either of the two Painter patents above referred to; the court deciding that under those patents the combined metal cap, cork disc and binding medium must be under "pressure while the heat is fusing the binder." An essential feature of the apparatus of the Wheeler patent is means for the adequate and complete heating of all the members of the closure, as assembled, before the subjection of the cork disc to pressure. This feature differentiates the patent in suit from the Painter patents Nos. 792,284 and 887,838, which contemplated and required the heating under pressure of all the parts of the closure as assembled and then the cooling of the same also under pressure. The same feature differentiates the defendant's apparatus from that of the complainant. The counsel for the defendant have well described the operation of the defendant's apparatus, the construction of which it has been stipulated is substantially represented by the drawing Plaintiff's Exhibit No. 3, "Bond Machine," as follows:

"In the operation of the machine, the empty metal shells which rest upside down on the table *A*, are pushed by an operative upon a continuously rotating dial *B*, which moves in the direction shown by the arrow. This dial carries the metal shells around in line through the raceway *C*, and there they are delivered one by one to the successive pockets of the continuously rotating dial *D*. The shells are brought by the dial *D* in succession underneath a device indicated at *E* for placing the fusible adhesive substance within the shell. The paper impregnated with the adhesive substance is fed in a strip in a line, as indicated on the drawing, passing underneath the device *E*, which acts to punch successive disks or collets from the strip and to deposit them one after the other in successive shells as they pass beneath. Each shell, with the collet of fusible adhesive substance in place in it, is carried on around by the dial *D*, in the direction shown by the arrow, until it strikes the inclined abutment *F*, by which it is shunted into one of the pockets of the continuously rotating dial *G*, each successive shell containing its adhesive substance thus passing from one dial to the other. The shells on the dial *G* are carried in succession under a device for heating the adhesive substance, so as to soften it. This heating device, marked *H*, is simply a blowpipe burner having three downward jets, which are narrow, like a lead pencil, and by means of which heat is applied to the adhesive substance, each shell being thus exposed to the flames of the burner for the fraction of a second in its passage beneath them. As the shells with their contained adhesive substance pass in succession from underneath the burners, they are again deflected by the angular shunting abutment *I*, into pockets provided for them in the continuously rotating dial *K*, where they receive the cork disks. The cork disks are arranged one on top of the other, in an upright tube shown at the point *L*. From the bottom of this tube they pass one at a time to pockets in the surface of a small continuously rotating carrier *M*, by means of which they are brought in succession to a point immediately over the path of the metal shells on the dial *K*. A series of plungers *P* are provided, one arranged above each of the pockets in the dial *K*, and this series of plungers rotates with the dial at the same speed. A cam track *R* is provided for the heads of the plungers, and serves to hold the plungers elevated for a portion of their travel. This cam track *R* ends abruptly at the point *S*, where a cork disk and a metal shell beneath come for an instant into alignment. Thus as the head of a plunger runs off this abrupt termination of the cam track, the plunger is snapped down by a spring, causing it to instantaneously push the cork disk into the metal shell upon the previously softened adhesive substance, and the plunger remains in its depressed position until plunger and shell reach the inclined starting point of the cam track, somewhat less than

half a revolution beyond the point *S*, where the plunger rides up on the cam track, releasing the now finished closure, and the latter is shifted off the dial *K* by means of the inclined abutment *O*."

The defendant's apparatus does not disclose means for heating the three members of an assembled closure, before the same are subjected to pressure, as contemplated and required by the patent in suit. On the contrary, the cork disc, which is fed from an unheated upright tube beyond the heating zone and only after the cap and the fusible binding or adhesive medium have been heated from their passage through that zone, is not heated until the plunger at a point considerably removed from the heating zone and after the cooling period has commenced, presses it down upon the binding or adhesive medium, still remaining sufficiently heated to be operatively adhesive, producing a condition of things not only inconsistent with the claims and description of the patent in suit, but distinctly condemned by Wheeler who particularly points out the injury that may result "if the pressure takes place before or simultaneously with the heating"—the cork disc in the defendant's apparatus, as already stated, in substance, not being subjected to pressure or heat until the instant it is brought by the plunger into contact with the heated adhesive medium. The difference in mechanism and operation between the apparatus of the defendant and that of the complainant is accentuated by the means respectively employed by them in the application of heat in connection with the preparation of closures. In the description of the Wheeler patent it is said:

"Further, it will be observed that as a heating medium, I use steam and this is applied to the table over whose imperforate surface the crowns pass. There is no direct contact of the heating medium with the crowns and no damage results thereto. * * * The heating table occupies the space within the standards or supporting legs of the apparatus and by reason of the spiral course over which the closures are made to pass, the heat continues to act on the closures for a long time, so as to thoroughly soften the interposed binding material and prepare the parts for the cooling and pressing action."

On the other hand, in the defendant's apparatus the heat is applied before the insertion of the cork disc into the cap and by means of three downward jets of a blowpipe burner "to the adhesive substance, each shell being thus exposed to the flames of the burner," etc. Indeed, the operation of the defendant's apparatus, aside from subsequent cooling under pressure, more nearly resembles that described in patent No. 468,226, dated February 2, 1892, granted to William Painter, for improvements in bottle-sealing devices, than that of the complainant's apparatus. According to the method followed under that patent the cork disc was subjected to heavy pressure or a crushing operation. Painter says in the description:

"This crushing operation may be performed prior to the insertion of the disks into the caps; but it is best accomplished at the time the disk is forced into the cap, the latter having had its interior already coated with a film of well-dried shellac, and then heated sufficiently to melt the shellac and render it adhesive. * * * A cork disk as received from the cork-cutting machine is placed in the cap *B'*, previously coated inside with shellac and well heated, and then subjected to heavy crushing pressure," etc.

It was only after the cap and the shellac were heated that the assembling and uniting operations were completed by inserting the cork disc and forcing it down so that, to use the language of the description, "it is also well confined in the cap by the melted shellac." The patent does not disclose how long the closure remained under pressure, but it is natural and fairly may be inferred from the fact that the purpose of the patent and the method therein referred to was to cover a firmly united closure, that the "heavy compression" necessary to produce the "heavily-compressed sealing-disc" called for in the patent, had some duration as distinguished from a merely instantaneous blow. The method thus referred to in this prior and expired patent, aside from subsequent cooling under pressure, is substantially the operation of the defendant's machine so far as the assembling and binding together of the parts of the closure are concerned. In the machines held by the circuit court of appeals for the second circuit in Crown Cork & Seal Co. v. American Cork Specialty Co., 211 Fed. 650, not to infringe the Painter patents Nos. 792,284 and 887,838, but to infringe the Wheeler patent in suit, "the cork was inserted while the closure was being assembled; that is, before it was fed into the machine, and before it was subjected to any heat, while progressing under the influence of the star ring." Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co. (D. C.) 206 Fed. 473. That those machines were an infringement of the Wheeler patent there can be no doubt; but they radically differ from the defendant's apparatus and the fact that they were held to infringe is immaterial and without significance so far as the present case is concerned. After the district court had rendered its decision and prior to the decision by the court of appeals the defendants in that case constructed and operated certain apparatus in which "the closure is assembled without the cork, moved forward under the influence of the star ring, through the zone in which heat is applied directly from the burners, and then, while the holding parts of the machine are still in their heated condition, and while the tin, gum, and paper of the closure are in heated condition, the cork is added." The construction and operation of this latter apparatus were held to be a violation of the injunction issued with respect to the former and the defendants were adjudged in contempt. The Court of Appeals disapproved of the action of the court below, saying:

"We are satisfied that the District Judge should have left the question whether the changed device infringes to be settled upon an application for injunction, presumably in a new suit. To accomplish this result the decrees should be amended by inserting a clause which describes the infringing machines covered by said decrees as machines in which the combination of metal, cork, and binder is assembled before the processes of heating, fusing, pressing and cooling begin."

While the question now under consideration was not decided by the court of appeals, the above quoted language from its opinion tends to support the defendant's contention here. Further, it may not be an irrelevant or immaterial fact that in the apparatus referred to in the contempt proceedings there was an assembling plunger which, after the heating of the cap and adhesive medium and while they continued

heated, the adhesive medium being in a fused condition, deposited the cork disc in the cap and in contact with the fused adhesive medium. After such assembling of the cork disc with the metal cap and adhesive medium, the cork was left for sometime in contact with the fused adhesive medium, becoming heated by it, but not under uniting pressure, and, therefore, permitting the escape of air or gas until finally subjected to the action of a uniting plunger which compressed and firmly united the parts of the closure during the cooling period. There was thus a marked difference between such apparatus and that of the defendant here, in that in the latter the heating and pressure of the cork disc are simultaneous, there being no previous assembling of the three elements of the closure.

The mere operative result or function of the complainant's machine was not patented, but only the apparatus. Any one is at liberty to reach a result, not in itself patented, of a patented device, provided he does it by substantially different means or by means other than those to which the inventor is restricted by the provisions of his patent. In Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, the court said:

"Even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value."

Here, not only is there a substantial difference in method adaptation between the apparatus of the complainant and that of the defendant, but the complainant is so restricted by the terms of the Wheeler patent as to exclude the alleged infringement. The bill must be dismissed with costs.

DAMPSKIBSELSKABET DANNEBROG v. RANDALL et al.

(District Court, D. Maryland. November 2, 1914.)

SHIPPING (§ 45*)—CONSTRUCTION OF CHARTER PARTY—LOADING CARGO—COST OF SEWING BAGS OF GRAIN.

Under a charter party which required the ship to load a cargo of grain "in shippers' bags," where wheat was delivered on board from elevator chutes and was there placed in bags furnished by the shippers, which were closed by sewing before they could be loaded, the cost of sewing the bags was a charge against the charterer.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 177–181; Dec. Dig. § 45.*]

In Admiralty. Suit by the Dampskibselskabet Dannebrog, owner of the steamship Lejre, against Blanchard Randall and others, doing business as Gill & Fisher. Decree for libelant.

Convers & Kirlin, of New York City, and Ritchie, Janney, Griswold & Hamilton, of Baltimore, Md. (John M. Woolsey, of New York City, and Robertson Griswold, of Baltimore, Md., of counsel), for libelant.

Brown, Marshall, Brune & Thomas, of Baltimore, Md., and Daniel R. Randall, of Annapolis, Md., for respondents.

ROSE, District Judge. The libelant, a Danish corporation, is the owner of the steamship Lejre. The respondents are a Baltimore firm engaged in the business of exporting cereals. On October 15, 1913, the libelant, through a Baltimore shipbroker, chartered the ship to the respondents to carry 18,000 quarters of grain (as it turned out, wheat) in shippers' bags to Santos. The wheat was delivered on board from the elevator chutes. Bags furnished by the respondents were so placed as to receive it. The mouths of these bags were closed by sewing. The handling of the bags necessary to get the wheat into them and then sewing them cost half a cent a bushel, or $722.40 in all, the bulk of which expense was for the sewing. The controversy is as to whether the libelant or the respondents should pay this amount.

By the terms of the charter party, the cargo was to be brought and taken from alongside at merchants' risk and expense. The vessel was to load under inspection of underwriters' agents at her expense. The ship says that she was to load "from said charterers or their agents a full and complete cargo * * * of wheat * * * in shippers' bags." It claims that it was the shippers' duty to deliver to it the bags with the wheat in them in such condition that it could perform its obligation to load them. The shippers contend that, when they provided the bags and put the wheat on board the ship, they did all that they were required to do.

It is admitted that the decided cases throw little or no light on the controversy. There was a time when a good deal of grain was shipped from Baltimore in bags. Of late years such shipments have been extremely rare. For 12 or 15 years the cargo in question is the second

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

of that kind which has gone out of Baltimore. None of the witnesses can recall what was the custom of the port as to the payment of the sewing charge, or whether or not it was formerly usual to make express provision concerning it in the charter parties. While much the larger part of the ordinary grain cargoes are now shipped in bulk, the underwriters require a portion of each cargo to be in bags, which are stowed so as to keep the grain in bulk from dangerously shifting. The work of sewing the bags used for such portion of the cargo is treated as a part of the stowage of the cargo, and is paid for by whomever in any particular case is by the terms of the contract required to bear the expense of loading.

The respondents offer testimony to show the construction which the parties have put upon the words of the charter party before its execution or delivery. The libelant objected to the admissibility of such evidence as tending to vary or contradict the written word. The testimony was taken subject to a subsequent decision as to its legal effect.

Two witnesses on this point were examined, both on behalf of the respondents. One was the shipbroker, who, acting for the libelant, had on its behalf chartered the ship to respondents. He testified that he had heard the respondents were in the market for a ship. He offered them two—the Lejre and another. The other was a little larger, and in that respect was better suited to respondents' needs. It, however, would not be as promptly available. The terms of the charter he was authorized to offer for it would clearly put the expense of the sewing upon the respondents. He cabled to the libelant an offer of the respondents for the ship, stating that the cargo was to be in shippers' bags. Some cablegrams followed as to price and other details, but nothing was said in any of them as to the question now in controversy. It was, however, according to his testimony, discussed between himself and the respondents, or the one of them who in fact conducted the negotiations. The shipbroker says that he expressed his personal opinion that a charter party worded as the one in suit would put the expense of sewing upon the ship, but he adds that he told respondents that he did not know whether the libelant would think so, and he further communicated to the respondents the opinion of another experienced Baltimore shipbroker that under such a charter party they and not the ship would have to pay for the sewing, and, according to him, after this the respondents decided to accept the charter, and to take their chances as to the construction which would ultimately be put upon it.

The member of the respondents' firm who testifies said he relied upon the shipbroker's statement of his opinion as to the construction of the charter party. The broker was the libelant's agent, and the respondents assumed that he spoke for it. According to the witness' recollection, the doubts of the shipbroker were not expressed to him until after the charter party was signed.

The discrepancy in the testimony was what might naturally be expected. It affords a striking illustration of one of the reasons why the rule forbidding parol modifications should in most cases be adhered to. Both the witnesses are testifying to their best recollection. Whether the testimony is admissible or not, it is too contradictory and un-

certain to throw any light on the interpretation of the contract. That must be construed as it is written.

When the ship arrived, the captain engaged the stevedore. Shortly after loading began, the captain told the stevedore that he must look to the respondents for the cost of the sewing. The stevedore said he would hold the ship for it. The captain notified the respondents that he expected them to pay. When they would not, he paid under protest.

What is the proper construction of the charter party is very doubtful. Upon the best thought I can give, it seems to me that the libelant has a little the better of the argument. The grain was to be delivered on board the ship fit for loading. It could not be loaded until the bags were sewed. It is true that, where the underwriters require in shipments of grain in bulk a portion of the cargo to be put in bags, the custom of the port requires that the shippers shall pay the expense of sewing unless otherwise provided; but that is because in such cases the putting in bags is required in order to make good stowage, and the cost of so doing is part of the expense of stowing.

The question having been in the minds of the respondents and of the libelant's agent before the charter party was made, it is to be regretted that one or the other of them did not insist on inserting words in it which would have made this dispute, with its waste of time and money, impossible.

The libelant may have a decree.

STANDARD HOME CO. v. DAVIS, State Bank Com'r, et al.

(District Court, E. D. Arkansas, W. D. October 15, 1914.)

No. 1819.

1. CONSTITUTIONAL LAW (§ 42*)—DETERMINATION OF VALIDITY OF STATUTES.
   A statute will not be declared unconstitutional at the instance of one not affected by it.

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

2. COMMERCE (§ 16*)—TRANSACTIONS CONSTITUTING INTERSTATE COMMERCE—INVESTMENT COMPANIES—"INTERSTATE COMMERCE."
   An investment company, which sells contracts requiring the purchaser to make monthly payments, which are invested by the company and, after a certain number of successive payments have been made, returned, with the profits earned, not exceeding a specified sum, and which also makes loans to its contract holders for the purchase of homes, taking mortgages on the property purchased, is not engaged in commerce, within the meaning of the commerce clause of the Constitution (article 1, § 8); and the fact that its business is interstate does not render a state statute regulating its operations within the state unconstitutional as in violation of such clause.

   [Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. § 16.*

   For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

---

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

3. SEARCHES AND SEIZURES (§ 7*)—WITNESSES (§ 300*)—PRIVILEGES AND IMMUNITIES—UNREASONABLE SEARCH.

A state law authorizing an inquiry into the condition of corporations doing business in the state, and requiring them to submit to an examination in respect thereto, is not unconstitutional, as in violation of the provisions of the fourth or fifth amendments, protecting persons from unreasonable searches and from being compelled to be witnesses against themselves in any criminal case.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7;* Witnesses, Cent. Dig. §§ 1042, 1042½; Dec. Dig. § 300.*]

4. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—POWER OF STATE TO REGULATE.

When a foreign corporation accepts a license to do business in the state of Arkansas, which by article 12, §§ 6, 11, of its Constitution, provides that the charters of corporations may be altered or annulled by the Legislature, and that foreign corporations doing business in the state shall have no greater powers, privileges, or franchises than domestic corporations, such provisions become a part of the contract between the corporation and the state, which may make any laws affecting the business of the corporation that may be deemed proper, provided they do not amount to a confiscation of property or an impairment of the obligation of contracts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509, 2571; Dec. Dig. § 636.*]

5. CORPORATIONS (§ 636*)—REGULATION BY STATE—ARKANSAS STATUTE.

Act Ark. March 28, 1913 (Laws 1913, p. 904), providing for the regulation of investment companies, *held* not in violation of the federal or state Constitutions, in so far as it affected the rights of a foreign company, nor void because of the unreasonableness of its requirements, or on the ground it is not within the police power of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509, 2571; Dec. Dig. § 636.*]

6. CONSTITUTIONAL LAW (§ 276*)—PERSONAL RIGHTS—LIBERTY TO CONTRACT.

While freedom of contract is a right inherent in every person under the Constitution of the United States, it is not an absolute, but a qualified, right, free from arbitrary restraint, but subject to reasonable regulation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 845, 846; Dec. Dig. § 276.*]

7. CONSTITUTIONAL LAW (§ 70*)—DETERMINATION OF VALIDITY OF STATUTES—JUDICIAL AUTHORITY.

The courts cannot review the economics or facts on which the Legislature of a state bases its conclusions that an existing evil should be remedied by an exercise of the police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. § 70.*]

In Equity. Suit by the Standard Home Company against John M. Davis, Bank Commissioner of the State of Arkansas, and others. On motion to dismiss. Motion sustained.

The plaintiff seeks to enjoin the enforcement of what is known as the "blue sky law" of the state of Arkansas, enacted by the General Assembly of 1913, upon the ground of its unconstitutionality. The defendants filed a motion to dismiss for failure to state a cause of action, the plaintiff not asking for a temporary injunction. In order that the issues involved may be fully understood, a copy of the act, as approved March 28, 1913, is here set forth:

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

"An act to provide for the regulation and supervision of investment companies and to provide a penalty for the violation thereof.

"Be it enacted by the general assembly of the state of Arkansas:

"Section 1. Every individual, corporation, co-partnership or company, and every association (other than national banks and corporations not organized for profit) now, or which shall hereafter be organized in this state, whether incorporated or unincorporated, which shall sell or negotiate for the sale of any stock, contracts, bonds or other securities of any kind or character other than bonds of the United States, or of some municipality authorized to issue bonds of the state of Arkansas, and notes secured by mortgages on real estate located in the state of Arkansas, or sell building stock or loan investments, or building investments to any person or persons in the state of Arkansas, other than those specifically exempted herein, shall be known for the purpose of this act as a domestic investment company. Every such investment company organized in any other state, territory or government, organized under the laws of any other state, territory or government, shall be known for the purpose of this act as a foreign investment company.

"Section 2. Before offering or attempting to sell any stock, contracts, bonds or other securities, building contracts, loan investments or other securities of any kind or character other than those specifically exempted in section 1 of this act to any person or persons, or transacting any business whatever in this state, except that of preparing the documents hereinafter required, every such investment company, domestic or foreign, now or hereafter doing business in this state shall file in the office of the insurance commissioner of this state, together with a filing fee of five dollars ($5.00), in addition to the fees now required of all corporations, the following document to wit:

"A statement showing in full detail the plan upon which it proposes to transact business. A copy of all contracts, bonds or other instruments which it proposes to make with or sell to its contributors. A statement which shall show the name and location of the investment company, and an itemized account of its actual financial condition and the amount of its property and liabilities, and such other information touching its affairs as said insurance commissioner may require. If such investment company shall be a copartnership or unincorporated association it shall also file with the insurance commissioner a copy of its articles of copartnership or association, and all other papers pertaining to its organization, and if it be a corporation organized under the laws of Arkansas it shall also file with the insurance commissioner a copy of its articles of incorporation, constitution and by-laws, and all other papers pertaining to its organization. If it shall be an investment company organized under the laws of any other state, territory or government, incorporated or unincorporated, it shall also file with said insurance commissioner a copy of the laws of such state, territory or government under which it exists or is incorporated, and also a copy of its charter, articles of incorporation, constitution and by-laws and all amendments thereof which have been made and all other papers pertaining to its organization.

"Section 3. The duties devolving upon the insurance commissioner under this act shall automatically pass to and become a part of the duties of the bank commissioner whenever that office shall be created in this state, and the fees provided for herein for the services of the insurance commissioner and his assistants shall also pass to the bank commissioner and his assistants to pay them for the time required in the performance of the duties set out in this act. Provided in no event shall this act be construed so as to increase the salary of the bank commissioner beyond that fixed by the act creating his office, nor shall this act increase the salary of the insurance commissioner, but in order to carry out the provisions of the act an assistant or deputy may be appointed at a salary of $1,800 a year, to be paid monthly in accordance with section 15 of this act, and said sum is hereby appropriated out of the fund mentioned in section 15 for said salary.

"Section 4. All of the above described papers shall be verified by oath, of a member of a copartnership or company, if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or unincorporated association. All such papers however, as are recorded or are on

file in any public office shall be further certified to by the officer of whose records or archives they form a part, as being correct copies of such records or archives. The verification described in this section shall be made in the office of the insurance commissioner or bank commissioner as the case may be, and it will not be sufficient for the same to be made in the state where the company is domiciled and then mailed to the commissioner but where the individual, corporation, copartnership or company or association is a nonresident of this state, then the verification and filing must take place as described in this proviso. Provided further, that the verification and filing of papers as provided in this act may be mailed or otherwise sent to the commissioner where the individual, corporation, copartnership or company or association is a resident of the state.

"Section 5. Every foreign investment company shall also file its written consent, irrevocable that actions may be commenced against it, in the proper court of any county in this state in which a cause of action may arise, or in which the plaintiff may reside, by the service of process on the secretary of state, and stipulating and agreeing that such service of process on the secretary of state shall be taken and held, in all courts, to be as valid and binding as if due service had been made on the company itself, according to the laws of this state or any other state, and such instrument shall be authenticated by the seal of said foreign investment company and by the signature of a member of the copartnership or company, if it be a copartnership or company, or by the signatures of the president and secretary of the incorporated or unincorporated association, if it be an incorporated or unincorporated association, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers of the corporation authorizing the said secretary and president to execute the same. Whenever service of process is served on the secretary of state, he shall within twenty-four hours thereafter mail the same to the home of the company against whom the process is directed. The secretary of state is hereby commanded to register said summons and if within a reasonable time he does not receive a return card showing the same has been delivered, he shall register another letter to said company.

"Section 6. It shall be the duty of the insurance commissioner to examine the statements and documents so filed, and if said insurance commissioner shall deem it advisable he shall make or have made a detailed examination of such investment company's affairs, which examination shall be at the expense of such investment company, as hereinafter provided; and if he find that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract contain and provide for a fair, just and equitable plan for the transaction of business, and in his judgment promises a fair return on the stocks, bonds and other securities by it offered for sale, the insurance commissioner shall issue to such investment company a statement reciting that such company has complied with the provisions of this act, that detailed information in regard to the company and its securities is on file in the insurance commissioner's office for public inspection and information, that such investment company is permitted to do business in this state, and such statement shall also recite in bold type that the insurance commissioner in no wise recommends the securities to be offered for sale by such security company. But if said insurance commissioner finds that such articles of incorporation or association charter, constitution and by-laws, plan of business or proposed contract contain any provision that is unfair, unjust, inequitable or oppressive to any class of contributors, or if he decides from his examination of its affairs that said investment company is not solvent and does not intend to do a fair and honest business, and in his judgment does not promise a fair return on the stocks, bonds, or other securities by it offered for sale, then he shall notify such investment company in writing of his findings, and it shall be unlawful for such company to do any further business in this state until it shall so change its constitution and by-laws, articles of incorporation or association, its proposed plan of business and proposed contract and its general financial condition in such manner as to satisfy the insurance commissioner that

it is solvent, and its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contract provide for a fair, just and equitable plan for the transaction of business and dues, in his judgment promise a fair return on the stocks, bonds and other securities by it offered for sale; provided, that all expenses paid or incurred and all fees or charges received or collected for any examination made under the provisions of this section of this act be reported in detail by the insurance commissioners and a full report and record thereof made in detail. After any such domestic or foreign investment company is admitted under the terms of this act its license may be revoked by said insurance commissioner if he finds that said company is attempting in any manner to defraud the public. Whenever a right of any investment company to do business in this state is refused or revoked as set out in this section, said company may within 20 days after notification institute a suit in the chancery court in any county in this state where its principal office is maintained or its principal agent resides, asking that said refusal or revocation be annulled. The insurance commissioner or his deputy shall defend said suit upon notice that the same is pending and the Attorney General or his assistant shall represent him. If it be determined that the refusal or revocation was wrongful the company shall be reinstated and the cost shall be paid in the same manner and out of the same fund as the cost for maintaining this department. If it be ascertained that the refusal or revocation be justified, the cost shall be paid by the company. The company shall not be permitted to do any business after notice of refusal or revocation until it be determined by the chancery court that the refusal or revocation was wrongful, provided, such company may be allowed to continue in business in the discretion of the chancery court under such regulations as said court may prescribe.

"Section 7. It shall not be lawful for any investment company either as principal or agent, to transact any business, in form or character similar to that set forth in section 1 of this act, except as is provided in section 2 of this act, until it shall have filed the papers and documents above provided for. No amendment of the charter, articles of incorporation, constitution and by-laws of any such investment company shall become operative until a copy of the same has been filed with the insurance commissioner as provided in regard to the original filing of charter, articles of incorporation, constitution and by-laws, nor shall it be lawful for any such investment company to transact business on any other plan than that set forth in the statement required to be filed by or to make any contract other than that shown in the copy of the proposed contract required to be filed by section 2 of this act, until a written statement showing in full detail the proposed new plan of transacting business and a copy of the proposed new contract shall have been filed with the insurance commissioner, in like manner as provided in regard to the original plan of business and proposed contract, and the consent of the insurance commissioner obtained as to making such proposed new plans of transacting business and proposed new contract.

"Section 8. Any investment company may appoint one or more agents, but no such agent shall do any business for said investment company in this state until he shall first register with the insurance commissioner as agent for such investment company, and for each of such registrations there shall be paid to the insurance commissioner the sum of two dollars ($2.00). Such registration shall entitle such agent to represent said investment company as its agent until the first day of March following, unless said authority is sooner revoked by the insurance commissioner; and such authority shall be subject to revocation at any time by the insurance commissioner for cause appearing to him sufficient.

"Section 9. Every investment company, domestic or foreign, shall file at the close of business on December 31st and June 30th of each year, and at such other times as is required by the insurance commissioner, a statement verified by the oath of the copartnership or company if it be a copartnership or company, or by the oath of a duly authorized officer, if it be an incorporated or an unincorporated association, setting forth in such form as may be prescribed by the said insurance commissioner, its financial condition and

the amount of its assets and liabilities, and furnishing such other information concerning its affairs as said insurance commissioner may require. Each regular statement of December 31st and June 30th shall be accompanied by a filing fee of two dollars and fifty cents. Any investment company failing to file its report at the close of business December 31st or June 30th of each year within ten days of that date, or failing to file any other or special report herein required within thirty days after receipt of request or requisition therefor, shall forfeit its right to do business in this state.

"Section 10. The general accounts of every investment company, domestic or foreign, doing business in this state, shall be kept by double entry, and such company, its copartners or managing officers, shall at least once in each month make a trial balance of such accounts, which shall be recorded in a book provided for that purpose; such trial balances and all other books and accounts of such company shall at all times during business hours, except on Sundays and legal holidays, be open to the inspection of the insurance or bank commissioner and his deputies.

"Section 11. The insurance or bank commissioner shall have general supervision and control, as provided by this act, over any and all investment companies, domestic or foreign now or hereafter doing business in this state, and all such investment companies shall be subject to examination by the insurance or bank commissioner or his duly authorized deputy at any time the insurance or bank commissioner may deem advisable and in the same manner as is now or may hereafter be provided for the examination of insurance companies. The rights, powers, and privileges of the commissioner shall be the same as is now or may hereafter be provided with reference to examination of insurance companies. If such examination resulted in a revocation of the examined company's right to do business in this state or a change in its method of doing business and this finding if appealed from is sustained, such company shall pay a fee for such examination of not to exceed five dollars ($5.00) for each day or fraction plus the actual travel and hotel expenses of the person making the examination, however not to exceed ten days. The failure to pay either expenses shall work a forfeiture of the right to do business.

"Section 12. Whenever it shall appear to the insurance commissioner that the assets of any investment company now or hereafter doing business in this state are impaired to the extent that such assets do not equal its liabilities, or that it is conducting its business in an unsafe, inequitable or unauthorized manner, or is jeopardizing the interest of its stockholders or investors in stock, bonds, or other securities by it offered for sale, or whenever any investment company shall fail or refuse to file any papers, statements or documents required by this act, without giving satisfactory reasons therefor, the insurance commissioner shall at once communicate such facts to the Attorney General, who shall thereupon apply to the chancery court where such company is located or is doing business, or to a judge of said court for the appointment of a receiver to take charge and if such facts or fact be made to appear it shall be sufficient evidence to authorize the appointment of a receiver and the making of such orders and decrees in such cases as equity may require.

"Section 13. Any person who shall knowingly or willfully subscribe to or make or cause to be made any false statements or false entry in any book of such investment company or exhibit any false paper with the intention of deceiving any person authorized to examine into the affairs of such investment company, or shall make or publish any false statement of the financial condition of such investment company, or the stocks, bonds or other securities by it offered for sale, shall be deemed guilty of a felony, and upon conviction thereof shall be fined not less than two hundred dollars ($200.00) nor more than ten thousand dollars, and shall be imprisoned for not less than one year nor more than ten years in the state penitentiary.

"Section 14. Any person or persons, agent or agents, who shall sell or attempt to sell the stock, bonds or other securities of any investment company, domestic or foreign, or the stock bonds or other securities by it offered for sale, who have not complied with the provisions of this act, or any investment company, domestic or foreign, which shall do any business, or offer or at-

tempt to do any business, except as provided in section 2 of this act, which shall not have complied with the provisions of this act, or any agent or agents who shall do or attempt to do any business for any investment company, domestic or foreign, in this state, which agent is not at the time duly registered and has fully complied with the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than one hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail for not more than ninety days, or both such fine and imprisonment, at the discretion of the court.

"Section 15. All fees herein provided for shall be collected by the insurance commissioner and by him shall be turned over into the state treasury, and all fees so turned into the state treasury or so much thereof as may be necessary not to exceed five thousand dollars ($5,000) in any one year, are hereby reappropriated to the insurance commissioner for the purpose of paying the salaries and expenses necessary for carrying this act into effect; and the insurance commissioner is hereby authorized to appoint such clerk and deputies as are actually and absolutely necessary to carry this act into full force and effect. Provided, however, none of them shall be related by blood or marriage to such insurance commissioner or any of his deputies. All moneys actually and necessarily paid out by the insurance commissioner to any clerk or deputy appointed under this act, as salaries, or any money actually and necessarily paid out by the insurance commissioner, or by any clerk or deputy appointed under this act, for traveling or incidental expenses shall be paid by the state treasurer out of such fees upon the state auditor's warrants, to be issued upon sworn vouchers containing an itemized account of such salaries or expenses.

"Section 16. Should the courts declare any section of this act unconstitutional or unauthorized by law, or in conflict with any other section or provisions of this act, then such decision shall effect only the section or provision so declared to be unconstitutional, and shall not effect the other sections or part of this act.

"Section 17. In addition to the other penalties provided by this act, no contract made by any domestic or foreign investment company which has failed to secure a license as provided for in this act shall be enforceable in any of the courts of this state by said company.

"Section 18. Any individual, or persons, copartnership, corporation, companies or association, domestic or foreign which shall sell any building or investment contracts or like securities on which payments are required to be made by the purchaser from time to time, shall first before being permitted to do business in this state enter into a bond with the state of Arkansas in the sum of twenty thousand dollars ($20,000) for the faithful performance of its contract or undertaking. Said bond must be approved by the insurance commissioner and in all suits for a violation of contract or otherwise, the bonding company or securities may be joined in the original suit. Provided, that in lieu of the bond provided for in this section, such individual or persons, copartnership, corporations, companies or associations, domestic or foreign, may deposit twenty thousand dollars ($20,000) in cash, United States bonds, bonds of the state of Arkansas, if any such be issued or any municipality or improvement district in the state, or notes secured by first mortgages on real estate in Arkansas on which money has been loaned, provided the commissioner shall be the sole judge as to whether the bonds, secured notes or other securities are in fact worth twenty thousand dollars ($20,000) on the open market. Provided further, that any such individual or person, firm, company or corporation shall be entitled to collect the interest on any such bond certificates of deposit, mortgages, notes or other security so deposited, and shall also be entitled to affect an exchange of any such obligations so deposited by depositing in lieu thereof other security of equal value, or of the value of said sum of twenty thousand dollars ($20,000).

"Section 19. This act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage and all laws and parts of laws in conflict herewith are hereby repealed."

The allegations of the bill, in so far as they affect the questions involved herein, are: That the plaintiff is an investment company, organized and existing under and by virtue of the laws of the state of Delaware. That it is engaged in the business of writing and selling investment home purchasing contracts and in lending money on real estate collateral in the state of Arkansas and other states of the Union. That by the terms of these contracts the applicant therefor agrees to pay $6 at the time of signing the application therefor, and an additional $6 on the 15th day of each month thereafter until a loan has been made, when he pays an additional sum as interest, or until 80 monthly installments of $6 have been paid; it being further provided by the contract that in the event 80 monthly installments of $6 each have been paid for 80 consecutive months the company will refund to the purchaser the total monthly installments paid thereon and a pro rata share of the profits, which will amount to $240, and entitle the stockholder to $720, but the $720 is to be paid out of a certain fund if the money is in that fund. If the money is not in that fund and the party wants cash at maturity, he is to receive only $528, or a profit of $48 on the $480 paid. That by prompt payment of 12 installments the purchaser of the contract becomes eligible to receive a loan of funds to purchase a home, in the sum of $1,000, in the order of his application therefor, out of the loan or reserve fund of the number and series to which such contract may belong, the loan to be made when such funds have accumulated; but if there is a default in the monthly payments within the first 12 months all payments made are forfeited. To provide for this reserve fund the company agrees to place to the credit thereof $4.75 from each monthly installment received from the contract holder, after the third installment, together with return principal payments from loans granted from such fund, profits on loans, interest, and other items. The reserve fund is to be used only for loans to holders of contracts. After a loan has been made, the purchaser agrees to pay the same back to the company in small monthly installments, which payments are credited to the indebtedness and returned to the loan or reserve fund.

It is further alleged that plaintiff is offering these securities or contracts for sale in the state of Arkansas, and has been engaged in such business for a long time, and has expended large sums of money in advertising such business in order to build it up, and had invested large sums of money therein before the enactment of the act in question; that it has acquired in the course of such business a valuable good will and an extensive clientele, and valuable information as to the conduct of its business; that it has complied with all the laws of the state of Arkansas relative to foreign corporations, and has paid all fees required by law. It is further alleged that plaintiff sends into the state of Arkansas its agents and employés, who there solicit orders for the securities hereinbefore described, which orders are transmitted to the company at Birmingham, Ala., its principal place of business, where such orders are accepted or rejected, and if accepted the securities so purchased are then forwarded to the purchaser in Arkansas from the company's office in Birmingham, Ala.; that it has contracted to sell certain such securities, and is being solicited by various persons, firms, and corporations to sell the same, but is prohibited from so doing by the provisions of this act; that the defendants have notified plaintiff, and those with whom it has contracts upon which loans are ready to be made, that its securities cannot be sold in Arkansas, and that plaintiff cannot transact any business whatever in said state, because of the terms and provisions of said act.

In an amendment to the original bill it is alleged that plaintiff's business is transacted almost exclusively through the mails of the United States, the applications for securities and their acceptance being sent through the mail; that said business consists exclusively of interstate transactions. It is further alleged that plaintiff has filed with the bank commissioner all of the statements, papers, and information required by said act, but notwithstanding this the said commissioner arbitrarily refuses to give plaintiff the certificate of compliance provided by said act; that said defendants have announced their intention of arresting and prosecuting plaintiff, its solicitors, agents, and employés, and enforce the penalties provided by said act, should it attempt to further carry on its business in this state.

The bill attacks the constitutionality of the act upon the following grounds:

1. That it is in violation of the fourteenth amendment to the Constitution of the United States, because it denies complainant the equal protection of the law: (a) In that said act is applicable to state banks and trust companies, but not to national banks; (b) that it applies to stocks, bonds, and other securities, but is not applicable to the bonds of the United States, nor to any municipal bonds of the state of Arkansas; (c) that it applies to mortgage securities upon real estate situated without the state of Arkansas, but does not apply to mortgages on real property situated within the state of Arkansas; (d) that it does not apply to notes secured by mortgage upon real property situated within this state, but is applicable to mortgages on property within the state, if said mortgages secure bonds.

2. That said act is violative of section 8 of article 1 of the Constitution of the United States, because it imposes a burden upon interstate commerce, in that it prohibits the sale of stocks, bonds, and other securities of the plaintiff in the state of Arkansas unless said plaintiff and other companies of like nature, though organized under the laws of another state or country, shall have filed with the bank commissioner the report and information and paid the fees required by said act, and in all other respects conformed thereto; that the contracts and other securities issued by said investment company are legitimate articles of commerce, and that the sale thereof in interstate commerce is not subject to regulation by the state of Arkansas in any way whatsoever, and that the sale thereof by said investment company, its agents and brokers, to residents of the state of Arkansas, to be delivered in the state of Arkansas, payment therefor to be made upon such delivery and from time to time thereafter, to said investment company in another state, is interstate commerce, and the burden and restriction imposed upon such sale are burdens upon interstate commerce.

3. That said act is violative of the fourteenth amendment to the Constitution of the United States, because it deprives plaintiff of its property without due process of law and denies to it the freedom of contract guaranteed by the Constitution, in that: (a) It denies the right of any investment company, as defined in said act, to sell or dispose of its stocks, bonds, or any security, unless said investment company is solvent, irrespective of the price at which said security is to be sold, or the value thereof, and denies any person the right to purchase of any such investment company any of its stocks, bonds, or other securities, if said purchase will, in the opinion of said bank commissioner, probably result in loss to the purchaser, irrespective of the price at which said security is to be sold, and irrespective of the probability that such purchase may result in profit to said purchaser, even though such investment company sells the same without misrepresentation and after having truthfully set forth all facts in relation thereto to the purchaser thereof. (b) That the restrictions and conditions prescribed by the act are not within any power of the state of Arkansas to impose, and are not within the police power of said state, because said restrictions and conditions are not necessary to protect the health, safety, morals, and welfare of the people of the state of Arkansas; and since such restrictions and regulations are imposed upon the business of selling all securities of any kind, as described in said act, except those specifically exempted, they will seriously impede business and commerce of every kind whatsoever by preventing the free purchase of said securities, and the free investment in the stocks, bonds, and securities covered by the said act. (c) Because said act provides that the defendant bank commissioner, his clerks, accountants, and examiners, may examine the business of said investment companies, and their accounts, and may require them to divulge any and all facts in connection with said business, whether or not the same relates in any way to securities proposed to be sold in Arkansas. (d) That having entered the state of Arkansas before the passage of said act for the purpose of doing business therein, filed its charter or articles of association as required by the then existing laws, and paid its money to the state, it became entitled to transact its business therein so long as it continued to do so fairly, honestly, and free from just objection; that the state contracted with it that it should have this right; that under said act, if enforced, it is

not only unlawfully deprived of its property without any compensation whatever, but the obligation of its contract with said state is impaired and destroyed, and is, therefore, in violation of the Constitution of the United States, prohibiting the passing of any law by any state impairing the obligation of contracts; that if said act is enforced it will be deprived of the benefit of previous transactions whereby it has sold many securities, made many contracts, and loaned out money in said state.

4. That said act is violative of section 11 of article 12 of the Constitution of the state of Arkansas, in that it places restrictions, regulations, and limitations on plaintiff's right to do business in this state which are not placed upon domestic corporations, the restrictions complained of being that while individuals, corporations, etc., residents of this state, may verify the statements required to be mailed before any officer of the state, and then sent by mail to the bank commissioner, nonresidents must verify them in the office of the bank commissioner and not elsewhere, thus requiring plaintiff and others similarly situated to make long journeys and incur heavy expenses for the purpose of attesting the papers required to be filed by said act.

5. That said act is violative of the Constitution of the United States, in that the powers and duties conferred upon the said bank commissioner amount to a delegation of legislative power to him, because it empowers said commissioner to determine whether the proposed plan of business, or the proposed contract, of the said investment company is or is not "fair, just, and equitable," and likewise confers upon him the power to determine whether the purchase of said securities promises a "fair return thereon"; that the act in no respect determines the standard of what is or is not "fair," and in no respect determines the standard of what would be a "fair return" on said securities.

6. That said act is violative of section 9, article 2, of the Constitution of the state of Arkansas, because it subjects violators of the provisions of said act to excessive fines and cruel and unusual punishment, in that they are so severe as to prevent plaintiff from challenging the validity of said act in the courts, and necessarily constrain it to submit to the provisions thereof rather than take the chance of the penalties being imposed.

7. That the defendant bank commissioner has announced what facts and information in connection with said business he will require in its preliminary statement, on which the securities of such investment companies will or will not be permitted to be sold in the state of Arkansas, and has had advertised and published blank forms for the furnishing of information by said companies, which he requires all such companies to use in making application to do business in this state; that said blank requires that said investment companies furnish information which is unreasonable, not pertinent to the purpose for which said statement is required under the act, and substantially impossible to furnish for the following reasons: (a) Said blank requires a statement of the consideration paid for its stocks and bonds, whereas, to the unissued stocks and bonds of investment companies, no consideration has yet been paid. (b) It requires a true and complete list of the holders of the securities of said investment companies, wherever located, whereas such list is constantly changing and cannot be truly and completely made. Moreover, said list would require your orator and others similarly situated to furnish the said bank commissioner names of its contract holders, or the holders of its securities, not only in the state of Arkansas, but in all other states and territories throughout the United States. (c) It requires a profit and loss statement which is not in conformity with the account upon its books, and which cannot be made in the manner required in the blank from the books of complainant and others similarly situated. (d) It requires a true and complete statement of its receipts and disbursements for the past 6 or 12 months, whereas such a statement would be cumbersome in the extreme, and would convey no information to said bank commissioner pertinent to the purposes expressed in said act. (e) It requires a list of the officers of said investment companies, together with their holdings of stocks and bonds, the actual cash invested, their estimated net worth, and the time devoted to the company, whereas the number of shares and bonds owned is a matter confidential to

said officers, which said company has no right to divulge, nor has said company accurate information thereof, nor any way in which to determine the actual cash invested by said officers in said company, nor the estimated net worth of its said officers; that all such information is not pertinent to the purposes of said act and is beyond the power of defendants to require. (f) It requires certain references to the character, responsibility, and financial standing of each director, and of said investment company, whereas the giving of such references is not pertinent in any way to the purposes of said act, and is beyond the power of said defendants to require. (g) That said act requires that all such information obtained by said bank commissioner, and all the records of his office in regard thereto shall be open to examination by the public; that the information called for by said blanks is a valuable property right, the publication of which would deprive plaintiff of valuable property rights and would seriously damage its business and otherwise cause it damage and loss.

Murphy & McHaney, of Little Rock, Ark., for plaintiff.

Wm. L. Moose, Atty. Gen., and John P. Streepey, Asst. Atty. Gen., for defendants.

TRIEBER, District Judge (after stating the facts as above). [1] It is a well-settled rule of law that a statute will not be declared unconstitutional at the instance of one not affected by it. Williams v. Walsh, 222 U. S. 415, 423, 32 Sup. Ct. 137, 56 L. Ed. 253; Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; Rosenthal v. New York, 226 U. S. 260, 271, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71; Missouri, K. & T. R. R. Co. v. Cade, 233 U. S. 642, 650, 34 Sup. Ct. 678, 58 L. Ed. 1135. Applying this rule, a number of the grounds upon which the plaintiff attacks the constitutionality of this act cannot be considered in this proceeding.

As the plaintiff is not engaged in the banking business, it cannot be affected by the fact that the statute is applicable to state banks and trust companies, and not to national banks, for, as stated in Collins v. Texas, 223 U. S. 288, 295, 32 Sup. Ct. 286, 56 L. Ed. 439:

"Where the party attacking the constitutionality of a statute has not suffered, the court will not speculate whether others may suffer."

Aside from this, the fact that national banks are excluded from the provisions of the act does not affect its validity for two reasons: First. National banks, being creatures of the national government, are not subject to control or regulations concerning the management of their business by the states. McClellan v. Chipman, 164 U. S. 347, 17 Sup. Ct. 85, 41 L. Ed. 461; Easton v. Iowa, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452; Abilene Nat. Bank v. Dolley, 228 U. S. 1, 33 Sup. Ct. 409, 57 L. Ed. 707, affirming 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065. Second. The fact that some reasonable exceptions are made does not make the act unconstitutional. As stated in Mutual Loan Co. v. Martell, 222 U. S. 225, 236, 32 Sup. Ct. 74, 76 (56 L. Ed. 175, Ann. Cas. 1913B, 529):

"Legislation may recognize degrees of evil without being arbitrarily unreasonable, or in conflict with the equal protection provision of the fourteenth amendment to the Constitution"—citing Ozan Lumber Co. v. Union Bank, 207

U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195; Heath & M. Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236.

There are reasonable grounds for excepting national banks.

The same rule applies to the objection that, while the act applies to stocks, bonds, and other securities, it is not applicable to the bonds of the United States, nor to municipal bonds of the state of Arkansas. It is unnecessary to state reasons why this is not an unreasonable classification. They are apparent. Nor is it material, so far as the rights of the plaintiff are concerned, whether that provision of the statute which prohibits the sale of stocks, bonds, or other securities, unless the company issuing them is solvent, is constitutional or not, as the complainant specifically alleges that it is a solvent corporation and can therefore satisfy the bank commissioner of that fact.

That the act denies to persons the right to purchase stocks, bonds, or other securities of an investment company when, in the opinion of the bank commissioner, such purchase would result in a loss to purchasers, certainly cannot affect the plaintiff, who does not engage in the purchase of stocks or bonds, and does not claim to be authorized to do so by its charter.

Is the act violative of the commerce clause of the national Constitution because it imposes a burden upon interstate commerce? Unless the business of the plaintiff, as set out in its complaint, shows that it is engaged in interstate commerce, it is, for the reasons before stated, in no position to question the constitutionality of the act. The allegations in the bill, as set out in the statement of facts, show the complainant is not engaged in the sale of stocks, bonds, or other securities, as were the complainants in Alabama, etc., Transportation Co. v. Doyle (D. C.) 210 Fed. 173 (construing the Michigan "blue sky" statute), and in William R. Compton Co. v. Allen, 216 Fed. 537, decided by the District Court of the United States for the Southern District of Iowa (involving the Iowa statute). Therefore these cases are not applicable to the instant case.

[2] Is the plaintiff engaged in commerce? It offers nothing for sale, but is purely an investment company. It undertakes to invest any moneys intrusted to it, and the profits derived from the investment, after paying the expenses of the plaintiff corporation, are, after 80 monthly payments have been made, to be paid to the party who made these payments. But these profits are not to exceed a certain sum mentioned in the contract. This is no more commerce than insurance, and that insurance is not commerce, within the meaning of the commerce clause of the Constitution, is no longer an open question. The latest case on that subject is New York Life Insurance Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. 332, where the former decisions of the court, holding that insurance is not commerce, were reaffirmed. Nor are loans of money made to clients for the purpose of enabling them to acquire homes commerce, within the meaning of the commerce clause of the Constitution. Nelms v. Mortgage Co., 92 Ala. 157, 9 South. 141; Southern Bldg. & Loan Ass'n v. Norman, 98 Ky. 294, 32 S. W. 952, 31 L. R. A. 41, 56 Am. St. Rep. 367. Lending money is neither a sale nor a purchase.

Whether the provision of the act (section 4) which requires an officer of a foreign corporation to verify the statements necessary to obtain a license to do business in this state in the office of the bank commissioner, while the officers of a domestic corporation may verify them in any part of the state of Arkansas, and before any officer of that state authorized to administer oaths, and send them to the bank commissioner by mail, is such a discrimination as to vitiate the act, is also immaterial, so far as the plaintiff is concerned, as the complaint alleges that the verification was properly made in the manner prescribed by the statute. But, assuming that it would be unlawful, it would not affect any other provisions of the act, as it is clearly separable. Besides, section 16 of the act provides that:

"Should the courts declare any section of this act unconstitutional or unauthorized by law, or in conflict with any other section or provision of this act, then such decision shall affect only the section or provision so declared to be unconstitutional, and shall not affect the other sections or part of this act."

[3] The act is also attacked upon the ground that it authorizes the bank commissioner, his clerks, accountants, and examiners, to examine the business of such investment company, and may require it to divulge any and all facts in connection with said business, whether or not the same relates in any way to securities proposed to be sold in Arkansas. The plaintiff is a corporation, and it is now well settled by the decisions of the Supreme Court of the United States that the right to inquire into the condition of corporations exists, and, if necessary for the purpose of enforcing a law, to compel the production of all books, letters, and other records, without violating the provisions of the fourth and fifth amendments to the Constitution of the United States. Hale v. Henkel, 201 U. S. 43, 74, 75, 26 Sup. Ct. 370, 50 L. Ed. 652; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; Hammond Packing Co. v. State of Arkansas, 212 U. S. 322, 348, 349, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; Wilson v. United States, 221 U. S. 361, 383, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

[4] Does the fact that this corporation had, before the enactment of this statute, obtained a license to do business in the state of Arkansas, by complying with the laws then in force, and had entered into a large number of contracts in the state, prevent the state from changing the former laws or placing additional burdens upon corporations, foreign and domestic? Section 11 of article 12 of the Constitution of Arkansas, in force at the time the plaintiff first came into the state, provides that foreign corporations shall, as to contracts or business done in this state, "be subject to the same regulations, limitations and liabilities as like corporations of this state, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this state." Section 6 of the same article provides:

"The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this

Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state, in such a manner, however, that no injustice shall be done to the corporators."

When a corporation accepts a charter in a state whose Constitution or general statutes contain such a provision, that provision becomes as much a part of the charter as if it were incorporated in it, and therefore authorizes the state to make any changes it sees proper, provided they do not amount to a confiscation of property or an impairment of the obligations of contracts. City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389; Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796.

As to contracts made by and with the plaintiff prior to the time this act went into effect, it is sufficient to say that there is nothing in the act which prohibits the remittances of the monthly installments by its clients, as they become due, or prevents the plaintiff from carrying out its contracts entered into before this statute became effective. All this act undertakes to prohibit is the entering into contracts thereafter, unless the association complies with the provisions of the act. The statute is prospective and not retroactive.

[5] It is also claimed that the act is violative of the Constitution of the United States, in that the powers and duties conferred upon the bank commissioner amount to a delegation of legislative powers to him. That there is nothing in the Constitution of the United States which prohibits a state from conferring on a commission such powers as are conferred by this act has been frequently decided by the Supreme Court of the United States. United States v. Grimaud, 220 U S. 506, 517, 518, 31 Sup. Ct. 480, 55 L. Ed. 563; Red C. Oil Mfg. Co. v. North Carolina Board, 222 U. S. 380, 395, 32 Sup. Ct. 152, 56 L. Ed. 240. That it is not prohibited by the Constitution of the state of Arkansas has been determined by the Supreme Court of that state in Mechanics' Bldg. & Loan Ass'n v. Coffman, 110 Ark. 269, 162 S. W. 1090, involving this act.

That there is no foundation for the contention that the act is violative of those constitutional provisions of the United States and the state of Arkansas which prohibit excessive fines and cruel and unusual punishments requires no extended discussion. The punishment imposed by the act is not so excessive as to warrant a court in declaring it cruel, or even unusual. That is a matter for the legislative department of the government to determine. In order to enforce obedience to the law it is necessary to impose such punishment as will deter parties from violating it. The punishment of corporations is a fine of not less than $100 nor more than $5,000. Of course, there can be no imprisonment of a corporation; but even the imprisonment of individuals cannot exceed 90 days. In prosecutions for violations of this act the courts are given a great deal of latitude. A fine of $100 may deter a corporation with small capital, while it would not deter a corporation with millions of capital, from violating the law. The fact that many fines may be imposed for violations of the act, while an honest effort is being made to test the law, will

justify a court of equity to interpose its aid, by granting a temporary injunction while the validity of the act is being tested in the courts; but it will not justify a court to declare the entire act unconstitutional upon that ground, especially if we consider that the fine imposed under this act may be as low as $100.

The court is unable to find anything in the questions which applicants for permission to do business in the state are required to answer, which are inquisitorial to the extent of making them so unreasonable that the courts should set aside a statute solemnly enacted by the legislative department of the state, except one. The exception referred to is the requirement of the bank commissioner of a true and complete list of the holders of all the securities of the company. It is no part of the statute, and is not authorized by the act. If plaintiff had been denied the right to do business in this state for its refusal to comply with this requirement of the commissioner, his action would no doubt be unwarranted, and in an action by the plaintiff under section 6 of the act could be corrected. But there is nothing in the complaint to show that this was the case, nor is this a proceeding under section 6.

The claim of plaintiff that the bank commissioner is vested with arbitrary power cannot be sustained, for section 6 of the act provides that:

"Whenever a right of any investment company to do business in this state is refused or revoked as set out in this section, said company may, within twenty days after notification institute a suit in the chancery court in any county in this state where its principal office is maintained or its principal agent resides, asking that said refusal or revocation be annulled. * * * If it be determined that the refusal or revocation was wrongful, the company shall be reinstated and the costs shall be paid in the same manner, and out of the same fund as the cost for maintaining this department."

There is, therefore, ample provision for preventing the bank commissioner from acting arbitrarily or unlawfully. Whether such a proceeding can be maintained in a court of the United States or only in the chancery courts of the state is immaterial in this case, for, as before stated, this is not a proceeding under that provision of the statute, but a direct proceeding to have the entire act, in so far as it affects the rights of this plaintiff, declared void as being in conflict with the Constitutions of the United States and the state of Arkansas.

[6] It is also claimed that the enforcement of the provisions of the act would amount to a deprivation of the right of freedom of contract. While freedom of contract is a right inherent in every person under the Constitution of the United States, and that of the state of Arkansas, it is not an absolute, but a qualified, right, free from arbitrary restraint, but subject to reasonable regulations. This subject has been so fully discussed in Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, 566. 567, 568, 31 Sup. Ct. 259, 55 L. Ed. 328, where the former rulings of that court are collated, that it is only necessary to refer to that case, which was reaffirmed since in Mutual Loan Co. v. Martell, 222 U. S. 225, 235, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529, Rosenthal v. New York, 226 U. S. 260, 270, 33 Sup. Ct. 27, 57 L. Ed. 212,

Ann. Cas. 1914B, 71, and Erie R. R. Co. v. Williams, 233 U. S. 685, 699, 34 Sup. Ct. 761, 58 L. Ed. 1155.

[7] The courts cannot review the economics or facts on which the Legislature of a state bases its conclusions that an existing evil should be remedied by an exercise of the police power. Central Lumber Co. v. South Dakota, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 174. The requirements of the bank commissioner of a statement of the receipts and expenditures of the company, and a list of the officers of the company, with their holdings of stocks and bonds of the corporation, are not unreasonable. Experience has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies by extravagant expenditures for salaries, agents' commissions, and other apparently legitimate purposes through officers who had practically nothing invested in the association, and whose character and reputation stamped them as adventurers and cheats. Such regulations are proper and wholesome. The dockets of the national courts have been crowded for the last few years with criminal prosecutions of persons charged with the use of the mails of the United States in carrying out fraudulent schemes by so-called investment companies and persons offering allurements to get rich quick. But those courts are only clothed with jurisdiction to prosecute those who, in carrying out their fraudulent schemes, make use of the mails, and then only after the commission of the offense. This necessarily affects only a small portion of those engaged in such schemes, and can in no wise act as a preventative. The states alone can provide for the prevention and punishment of all who commit frauds, although the mails are not used for their accomplishment, and enact laws to prevent the commission of these crimes. Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer. Statutes enacted for such purposes ought not to be declared invalid by the courts upon slight grounds, even if extreme cases can be imagined where they may work an injustice. The granting of the privilege to do business of that nature in the state by a high official is, to a certain extent, an assurance to the public that the corporation is properly managed. It is not only his privilege, but duty, to exercise great caution to satisfy himself that not only the scheme, but the men administering the affairs of the company, are of such character and standing, and have such a financial interest in the success of the scheme, as to give reasonable assurance to investors that their money will not be dishonestly dissipated or misappropriated. Nor can there be a reasonable objection to the provision of the statute that this information should be accessible to those who are inclined to invest their money in the securities of that association. There can be no better means of information than the sworn statements of the officers showing the condition of their corporation. National, as well as state, banks and insurance companies are required to publish similar information in the public press, and fully as much in their reports to the officials charged with their supervision. The validity of these requirements has never been questioned.

The claim that the provisions of the act are not within the police

power of the state, as they are not necessary to protect the health, safety, morals, and welfare of its people, cannot be sustained. Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, and German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, are the latest expressions of the Supreme Court on that subject, and leave nothing to be added.

That the statute makes exceptions in favor of notes secured by mortgages on real estate lying in the state of Arkansas cannot be said to be so unfounded and unreasonable as to authorize the court to declare it void. When the lands mortgaged are lying in the state, where the investor resides, he can more easily satisfy himself as to the validity of the title and the value of the mortgaged premises than if they are in a foreign state. The courts cannot pass upon the wisdom of legislation. As stated in Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, 256, 28 Sup. Ct. 89, 91 (52 L. Ed. 195):

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a Legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an *exact* exclusion or inclusion of persons and things."

The motion to dismiss the bill for failure to state a cause of action is sustained.

THE TEASER.

(District Court, D. Massachusetts. December 13, 1913.)

No. 230.

1. ADMIRALTY (§ 82*)—REHEARING AFTER INTERLOCUTORY DECREE.

While there is no rule or settled practice which necessarily prevents a court of admiralty from entertaining a petition for rehearing in a collision suit after the entry of an interlocutory decree on the merits, but before final decree, regardless of the lapse of time, only exceptional circumstances could justify the reopening of the case on a petition filed after the lapse of any considerable time, on the ground of newly discovered evidence, and it should at least appear that the new evidence, if produced, could be accepted for the purpose of reversing the finding at the hearing.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 674, 676-678; Dec. Dig. § 82.*]

2. ADMIRALTY (§ 82*)—REHEARING AFTER INTERLOCUTORY DECREE.

Affidavits of parties and counsel as to statements made by a witness in a collision suit, more than 3 years after the hearing at which he testified, and more than 2½ years after the entry of an interlocutory decree on the merits in favor of the vessel on which he was a seaman, *held* insufficient to support a petition for rehearing; it appearing, also, that he

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

refused to sign an affidavit, and there being no clear showing as to what his testimony would be, if produced.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 674, 676–678; Dec. Dig. § 82.*]

In Admiralty. Suit for collision by John L. McDonald and others, owners of a schooner, against the tug Teaser and barge in tow. Petition by claimants for rehearing, after interlocutory decree for libelants. Denied.

See, also, 188 Fed. 721.

Benjamin Thompson, of Portland, Me., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant of the Harrisburg.

Carver, Wardner, Cavanagh & Walker, of Boston, Mass., for claimant of the Teaser.

DODGE, Circuit Judge. The collision between the libelants' schooner and a barge, towed by the Teaser, out of which this case arose, happened on October 13, 1907. The libel was filed September 20, 1909. After a hearing begun February 1, 1910, and completed by arguments on July 21, 1910, the tug and barge were held at fault for the collision and the schooner free from fault. The opinion was filed January 31, 1911, and an interlocutory decree entered accordingly February 9, 1911.

Assessment of the damages under the interlocutory decree appears to have been long delayed, no final decree having been entered when the present petition was filed on November 5, 1913. The petition asks for a rehearing or reopening of the case on the questions of fault, but it comes more than 6 years after the collision, more than 3 years after the hearing on the merits, and more than 2½ years after the interlocutory decree which determined those questions.

The petition is based upon alleged statements made in January, 1913, and subsequently, to the respondents or to their counsel, by Wilmot Sabean, one of the crew of the schooner and one of the men on her deck at the time, who gave his testimony as a witness for the libelants, in person, at the hearing in February, 1910. These statements tend to contradict testimony he gave at the trial.

[1] It is objected that the petition comes too long after the interlocutory decree to be considered at all. Had there been a final decree, no rehearing could be ordered after the term had closed. In most cases of this kind there is no such delay in ascertaining the amount of damages and in entering a final decree as there has been here, so that, under ordinary circumstances, the time for any rehearing would long ago have expired. None having been entered, however, I know of no authority or settled practice which enables me to say that the mere lapse of time, in and of itself, must necessarily forbid any consideration of such a petition, although, for obvious reasons, it must

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

constitute a serious objection to the reopening of any case finally submitted and decided, so far as the merits are concerned, so long ago.

The petition differs from ordinary petitions for rehearing on the grounds of subsequently discovered evidence, in that it does not set forth the substance of the testimony sought to be introduced, sworn to by the witness whom it is proposed to call, or by any one who can say he will give it if called. Sabean himself has made no affidavit, and it appears from the affidavits of those to whom he is said to have made the statements, that he has declined to make any sworn statement himself. The reopening of the case asked for is only, therefore, to give the respondents an opportunity of attempting in some way to get sworn evidence from him before the court, which might warrant a reconsideration.

Exceptional circumstances only could justify reopening any case once submitted and decided on the merits for such a purpose as this. Still more exceptional must be the circumstances which would justify such a reopening so long after the decision. Nothing short of the most cogent reason to believe that injustice could not otherwise be avoided would be enough. What appears on the present petition and the annexed affidavits is, in my opinion, wholly inadequate for the purpose.

[2] In any event it would certainly have to appear, as the first thing necessary, that Sabean's testimony, if now taken, and if to the effect which the respondents say they have reason to expect, could now be accepted for the purpose of reversing any finding made upon all the evidence heard at the trial in 1910. Upon the papers submitted, it seems to me clear that no testimony he might now give ought to be accepted for any such purpose. These show his first disclosures to the respondents, not made until nearly 2 years had passed since the decision, to have developed into the statements now relied on during successive interviews with the respondents' representatives extending over a further period of nearly 9 months.

A registered letter sent by Sabean to the respondents in Philadelphia January 20, 1913, and received by them January 21, 1913, was the first communication, so far as appears, from him to them since the trial and decision in 1910–11. In this, after stating that he hears the case is not settled and is "goin in cort again," he says, "Well if it does if we can fix it up I will be in your favor." An intimation follows that he will tell them something about the "value of the boat." There is nothing further as to the nature of what he will tell in the respondents' favor. His address is then given, and he requests them to write him.

Next in order of time appears to have come an interview between Sabean and Mr. Wardner, counsel for the tug, at Boston. In an affidavit sworn to October 29, 1913, Mr. Wardner states that he wrote Sabean January 24, 1913, after receiving from Philadelphia Sabean's letter of January 20th, that he would like to see him at his office; that Sabean came there and made him an oral statement about the collision, went away, and subsequently brought in this statement, put in writ-

ing by himself at Mr. Wardner's request. A copy is annexed to the affidavit. It deals, not so much with the value of the schooner, about which there are only a few words, as with the facts of the collision. Asked if he would sign and swear to it, Sabean promised, according to the affidavit, to consider whether he would or not, but never again saw or communicated with Mr. Wardner. The written statement bears neither signature nor date. The affidavit does not give the date of either interview described.

Next in order of time appears to have come a letter from F. W. Munn, managing owner at Philadelphia of the tug and barge, to Sabean, dated May 29, 1913. According to Munn's affidavit, sworn to October 17, 1913, this letter began: "Some time ago you wrote me that you had given incorrect testimony at the trial." In Sabean's registered letter of January 20th I find nothing to warrant this statement.

Next in order appears to have come an interview at Bridgeport, Conn., between Sabean and Mr. Gould, sent to Bridgeport for the purpose by counsel for the barge. Mr. Gould's affidavit, also sworn to October 29, 1913, sets forth that this interview was on July 29, 1913, and that he then wrote down, "principally" at Sabean's dictation, a statement of the facts as Sabean presented them to him; that on the next day, July 30th, he himself dictated a writing, which is annexed, not to this affidavit, but to another, again mentioned below, by Mr. Pullman, a Bridgeport lawyer also employed by counsel for the barge. The affidavit goes on to state that the writing dictated as above by Mr. Gould, "with the very slightest changes in phraseology, exactly corresponds" to the statement prepared on July 29th, and that it "conforms in all respects" with Sabean's oral statements that day made. In it I find nothing about the value of the schooner, but only statements regarding the facts of the collision, somewhat amplified from Sabean's written statement given Mr. Wardner.

The writing dictated by Mr. Gould makes Sabean say that when he testified at the trial he knew that some of his statements were not true. From Mr. Gould's affidavit it appears that he began the interview on July 29th by telling Sabean "that I understood he had written to F. W. Munn, * * * and also had stated to" Mr. Wardner "* * * that he, the said Sabean, had given false testimony at the trial," etc. I do not find this in any previous letter to Mr. Munn which is produced, nor in Sabean's written statement to Mr. Wardner. Sabean, however, appears from Mr. Gould's affidavit to have at once adopted and repeated the statement that he had testified falsely at the trial, and to have said, further, he knew he had done wrong, had been greatly worried by reason of the fact, had therefore written Munn, and wanted now "to do what he could to right the wrong he had done by such testimony." This is the first suggestion of anything of this kind appearing to have been made during the six months which had passed since his first communication to the respondents.

The last paragraph of his alleged statement to Mr. Gould makes Sabean say:

"I gave my statement" (i. e., at the trial) "in such a way that it would bear out what the captain wanted me to testify to. I remember that the cap-

tain and the rest of the crew said that, of course, we wanted to get some money out of the case to pay for the things that were lost, and I supposed that if I told just the kind of story that they wanted me to that I would get my money."

Further reference is made below to this paragraph.

Mr. Gould does not set forth any attempt to get Sabean's oath to any statement. Next in order, however, appear to have come interviews between Mr. Pullman, of Bridgeport, employed by counsel for the barge, on August 4 and August 23, 1913, at which Sabean is claimed to have stated that Mr. Gould's written paper, prepared July 30, 1913, contained the truth, but to have declined to swear to it for fear of the consequences to himself. An affidavit by Mr. Pullman, sworn to October 21, 1913, purports to set forth what took place at these interviews and at a still later interview on October 20, 1913, after Sabean had seen Mr. Blodgett, counsel for the barge, in Boston, on October 4, 1913. The alleged statements of Sabean at these interviews are to the same effect in general as those reported by Mr. Gould. Mr. Pullman avers, as does Mr. Gould, that he has not paid or promised anything to Sabean. For any purposes, except as above stated, I must decline to accept or consider Mr. Pullman's affidavit, for the reason that it incorporates a letter, dated July 31, 1913, from Mr Blodgett to Mr. Pullman, and two letters from Mr. Pullman to Mr. Blodgett, dated August 4 and August 23, 1913. In these letters are contained instructions, statements, and expressions of opinion transmitted between counsel, both acting in the respondents' interest. I am obliged to regard their contents as inadmissible, and improperly introduced here. I cannot believe that counsel acting on the same side may thus make evidence, even in an affidavit, of their communications to each other. Mr. Gould's affidavit is to some extent open to a like objection.

Following in date the interviews of August 4th and 23d appears a letter received by Mr. Munn, according to his affidavit, from Sabean, in September, 1913. I find nothing in it differing in substance from alleged statements previously made by Sabean at one time or another, except the sentence, "The most that I said that wasn't right I was forsed to say was rite." Taken in connection with what has been quoted from his alleged statement to Mr. Gould, I think it clear that this deserves no credit whatever. He could not be heard to claim that he was "forced" to say anything he said in order to "get his money."

The interview of October 4, 1913, between Sabean and Mr. Blodgett, appears from an affidavit by Mr. Blodgett, sworn to October 29, 1913. According to this, Sabean then made statements, additional to those he had previously made, tending to show the schooner's lights not to have been in good condition at the time of collision; but to these statements, like the others, he declined to swear.

It may be true, if the respondents did not first approach, but were approached by, Sabean, that what is said by the court in Palmer v. Merchants' etc., Co. (D. C.) 154 Fed. 683, 701, does not apply here to its full extent. It remains true, however, that suspicion must al-

ways attach to dealings like those with a witness from the other vessel in a collision case. The danger involved seems to me well illustrated by the nature of Sabean's first communication to the respondents, in connection with his progressive disclosures during the subsequent interviews with him. Nor does this imply the conclusion or suggestion that there has been consciously improper dealing with him on the part of any of the interviewing counsel.

If he were now to make these statements under oath, and whether or not the respondents have paid or promised him anything, I should be unable, under the circumstances shown, to accept or rely upon them for any purpose. The facts that he remained silent as to any want of truth in his testimony at the trial, from February, 1910, to January, 1913, permitting the court meanwhile to deliberate upon and decide the case in January, 1911, and that the first suggestion from him of any desire to change his testimony is an intimation to the respondents that he would be in their favor "if we can fix it up," make it impossible for me to believe in the honesty of such statements as he is said to have made since, or of his motive in making them.

To now open the controversy once decided for relitigation because of them would, in my opinion, be to inflict an injustice upon the libelants and to establish a highly dangerous precedent. Sabean's testimony at the trial, it may be added, was by no means of such importance to the result reached that it can be called in any sense controlling.

The libelants move to strike the petition from the files. I am not satisfied that I have the right to take this course. There do not appear to be any such clearly defined rules regarding petitions for rehearing or reopening as would warrant a finding that, on the face of the petition, it is wholly unfit to be considered. The reasons which have led me to dismiss it become apparent upon consideration of it. That I have found part of the matter annexed to it, in support of it, inadmissible, or not proper to be introduced, does not seem to me to warrant striking the whole petition and everything annexed to it from the files.

Since the petition and affidavits were submitted on November 14th, leave to file a further affidavit by Mr. Wardner has been asked. It annexes the original of Sabean's written statement, which is unnecessary; the copy first presented having been assumed to be a true copy. It further sets forth alleged oral communications to the libelants' counsel about Sabean, made since January, 1913. The court cannot be expected to consider alleged oral statements or notices between opposing counsel. Leave to file the affidavit must therefore be refused.

The petition for rehearing is denied.

THE GRAND MANAN (four cases).

(District Court, D Maine. September 9, 1914.)

Nos. 215, 244, 245, 248.

ADMIRALTY (§ 93*)—PRACTICE—INTERLOCUTORY DECREE—VACATION—ADDITIONAL EVIDENCE.

An interlocutory decree, holding a steamer solely at fault for a collision, having been entered, it would not be set aside to enable the introduction of additional evidence of the fireman on the dredge with which the steamer collided, who had been examined and cross-examined at the trial; it not appearing therefrom what the fireman's testimony is; but merely that he has some undisclosed knowledge.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 674–679; Dec. Dig. § 93.*]

In Admiralty. Libels by the Bay State Dredging Company, Limited, by Frank Silva and others, and by Daniel F. Warren, as administrator, against the steamer Grand Manan, the Grand Manan Steamboat Company, claimant; also by the Grand Manan Steamboat Company against the Bay State Dredging Company, Limited. On petition to reopen interlocutory decrees holding the Grand Manan solely at fault for the collision in controversy, to receive additional evidence. Denied.

See, also, 208 Fed. 583.

Blodgett, Jones & Burnham and T. F. McAnarney, all of Boston, Mass., for Bay State Dredging Co.

Benjamin Thompson, of Portland, Me., Edward S. Dodge, of Boston, Mass., and George J. Clarke, of St. Stephen, New Brunswick, for Grand Manan Steamboat Co.

HALE, District Judge. A petition of the Grand Manan Steamboat Company now seeks to reopen the interlocutory decrees for the purpose of receiving further evidence. The causes were heard February 12, 1913; arguments were made before me September 15, 1913; an opinion was filed holding the steamer Grand Manan solely in fault for the collision. Interlocutory decrees were thereupon entered. The cases were referred to an assessor to hear and report the extent of damages sustained by the respective libelants. No report has been entered by the assessor.

The petition now before me recites that one Arthur B. Dixon, the fireman employed by the Bay State Dredging Company, Limited, on dredge No. 4 at the time of the collision, referred to in the libels, and later employed as an engineer on the dredge, and who testified for the libelant in the cause, knows of certain material facts and circumstances which have hitherto been wholly unknown to the Grand Manan Steamboat Company, or its officers, agents, and proctors, which knowledge, from the nature of the case, has hitherto been wholly inaccessible to

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

such officers, agents, and proctors, and which knowledge has been even now only partially disclosed to them; that Dixon has, without any solicitation, offered to testify to such material facts and circumstances; and that, in the judgment of the officers of said Grand Manan Steamboat Company and of its proctors (so far as the latter are acquainted with such facts and circumstances), the testimony of said Arthur B. Dixon is of the most important and material character, and should be received and made a part of the record of this court.

The prayer of the petition is that the court will reopen the decrees; that Dixon be examined before the court and by the court, or that otherwise Dixon may be examined before the court after the proctors for the steamboat company shall have conferred with him, and shall have duly prepared him to testify before the court; that, in either event, his evidence be made a part of the record in these causes; and that the court will make such further orders and decrees as justice may be found to require.

The petition presents many features not generally found in cases where a rehearing is sought on the ground of subsequently discovered evidence. It seeks to reopen the record for the purpose of introducing certain testimony. It does not set forth the substance of the testimony, either by an affidavit of the witness or by statement of proctors. It presents merely the fact that the witness is possessed of certain knowledge which has not been hitherto disclosed, and which the officers of the steamboat company think is material. It does not show how far the learned proctors are advised with regard to the proposed testimony; but that, so far as they are acquainted with it, they too, think it material and important. No case has been brought to my attention which proves very helpful in the decision of this matter. The learned proctors for the petitioner have placed before me the record in the collision case of the schooner Rabonni and the barkentine Nellie E. Rumball, in which the libel Stewart v. Rumball was filed in the District Court of Maine in January, 1889. The record is found in the Circuit Court of this district, to which court the case was appealed after a decision by Judge Webb in the District Court. In that matter, Judge Putnam was dealing with a petition to receive the deposition of the second mate of the barkentine, who could not be procured at the trial in the District Court, and whose absence was the subject of explanation on the part of proctors and of comment by Judge Webb, who specially found that the efforts to secure the testimony of the second mate and the two seamen on the lookout and at the wheel at the time of the collision fully relieved the owners of the barkentine from any prejudice that might arise from the nonproduction of the witnesses. The testimony of the second mate was of great importance; and when he arrived in Boston, the very day upon which Judge Putnam made his decree, there was strong reason for his testimony to be brought before the court. Judge Putnam vacated the decree, and allowed the deposition of the witness to be received.

In the case before me, the witness Dixon was the fireman on board the dredge. He was carefully examined at the trial; he was cross-exam-

ined by Mr. Thompson, in behalf of the steamer, with great care and skill. I have carefully reviewed his testimony in the record. I find nothing in his examination or cross-examination to indicate that he did not tell all he then knew. The learned proctors for the steamer do not give unqualified indorsement to the proposition of the officers of the steamboat company that his further testimony, now sought to be introduced, is material. They present all they have, and leave the whole matter to the discretion of the court. They have acted with a distinct appreciation of their rights and their duties in the premises, and with entire delicacy with reference to interfering with witnesses who were upon the other vessel, having in mind the decisions of the admiralty courts touching this subject; among other things, they have brought to my attention the language of this court in Palmer v. Merchants' & Miners' Transportation Co. (D. C.) 154 Fed. 683, 701, where I referred to The Monticello, 1 Lowell, 184, 188, Fed. Cas. No. 9,739.

It has been well said by Judge Dodge in McDonald v. The Steam Tug Teaser, 217 Fed. 920, in the district of Massachusetts, December, 1913, that only exceptional circumstances can justify reopening a case once submitted and decided on its merits, for the purpose of receiving further testimony. I cannot be justified in reopening this case, unless strong reasons appear for believing that injustice would otherwise be done. The reasons presented do not appear to me sufficiently sound and substantial to call for such exercise of judicial discretion. From anything that is now before me, I think the interests of justice do not require me to vacate the decree of the court and to reopen the causes.

The petition is denied.

FRANKLIN v. MONNING DRY GOODS CO.

(Circuit Court of Appeals, Fifth Circuit. November 30, 1914.)

No. 2592.

BANKRUPTCY (§ 407*)—DISCHARGE—DENIAL—GROUNDS—FALSE CREDIT STATEMENT—"FALSE."

Bankr. Act July 1, 1898, § 14b (3) (Comp. St. 1913, § 9598), provides that the judge of a bankruptcy court shall hear an application for the bankrupt's discharge, and shall discharge him unless, among other things, he has obtained money or property on credit on a materially false statement in writing made by him to any person or his representative to obtain credit from such person. *Held*, that the word "false" in such section was not used in its vernacular sense of erroneous or untrue, but rather as untrue coupled with a lying intent, or intentionally untrue, and hence was not satisfied by a financial statement made by the bankrupt while away from home, and without his books and records, while he was in a hurry to return, because of the illness of his wife, from which statement he omitted an item of indebtedness amounting to $4,300 and also assets of an equal or greater amount (citing Words and Phrases, "False").

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Application by Earl Clifford Franklin for a discharge in bankruptcy, to which the Monning Dry Goods Company filed objections. From an order overruling exceptions to the objections, and denying a discharge, petitioner appeals. Reversed and remanded, with directions.

D. M. Alexander, of Ft. Worth, Tex., for appellant.

R. Y. Prigmore, of Ft. Worth, Tex., for appellee.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

CALL, District Judge. This is an appeal from the judgment of the District Court for the Northern District of Texas, denying the appellant a discharge in bankruptcy.

In this case the appellant was adjudged a bankrupt on February 15, 1912, and on January 6, 1913, filed his petition for a discharge, and on May 10th Monning Dry Goods Company filed specifications of objections to such discharge, alleging in such specifications that the bankrupt had in February, 1911, made a written statement of his assets and liabilities for the purpose of obtaining credit, and that such written statement was materially false in certain respects, to wit: The bankrupt had omitted certain of his debts in said statement, amounting in the aggregate to about $4,534. On September 17, 1913, the referee filed his report, finding that the statement of indebtedness of the bankrupt was incorrect, and at the time of making it he owed about $4,300 more than the statement showed, and thereupon reported his recommendation denying the discharge. On September 20th exceptions to the report of the referee were filed by the bankrupt, in which he at-

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

tacked the correctness of the report of the referee in recommending the denial of the discharge on various grounds. This matter came on for hearing before the judge of the Northern district of Texas, who, having heard the parties, on the 13th of November, 1913, made his order confirming the report of the referee, overruling the exceptions to the same by the bankrupt, and denying the discharge. It is from this order that this appeal is taken.

The proofs taken by the referee, and considered by the District Judge in making his order overruling exceptions and denying the discharge, show that this written report made to the Monning Dry Goods Company was made at Ft Worth, away from his place of business, and away from his books. It was admitted by the bankrupt on the hearing before the referee that the debts found by the referee not to be included in his statement were at the time due and were not included in that written statement, but he claims that it was an oversight entirely, made by reason of his being at Ft. Worth with a sick wife, away from his books and business, and with no intention to deceive. This statement was made in February, 1911, and not read over at the time it was signed; that he had omitted from this statement certain assets larger in amount than the omitted debts, and was simply intended by him as an estimate of his debts. The proofs also show by the testimony of Monning, president of the appellant in this case, that credit was advanced upon the statements made, and that goods were thereafter sold on credit relying upon statements made in the writing. The referee found that the statement was materially false, and made in writing for the purpose of obtaining property on credit, and that property was obtained on credit upon said statement, and the only question to decide was whether or not said statement was so materially false as to bar the discharge of the bankrupt and defeat the protection of the statute. The exceptions filed by the bankrupt were aimed at this conclusion of the referee. The District Judge, in the opinion filed by him at the time of making the order denying the discharge, has this to say:

"But when there is taken into consideration the total of his liabilities as they are revealed in his statement and the amount of the items which he failed to include, it cannot be concluded that the bankrupt made a full and true statement, giving all of his liabilities and confidential debts as declared by him. The statement was made as a basis to secure an additional line of credit. It was accepted and relied on by the concern to whom it was made. It appears from the testimony in the record that the party accepting the statement and acting thereon would not have extended further accommodation and given additional credit, had the statement revealed the bankrupt's actual condition as to indebtedness. In my opinion the statement must be held to be materially false in the sense that phrase is used in section 14b (3) of the Bankruptcy Act."

It is therefore the duty of this court to construe the meaning of the words used in section 14b, cl. 3, of the Bankruptcy Act, as applied to the facts shown in this case. Section 14b (3) of the Bankruptcy Act is as follows:

"The judge shall hear the application for a discharge, * * * and discharge the applicant unless he has * * * obtained money or property on

credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

The facts found by the referee and the District Judge, unquestionably sustained by the proofs, are in short that the statement was in writing for the purpose of obtaining credit, and that property was obtained on credit on said statement, and that said statement was untrue in the material statement of his debts owing at the time of making said statement, as well as to the amount of his assets at said time to an amount equal or greater than the debts omitted. If the words used in the statute are to be construed as they evidently were by the District Judge in this case, there is a clear case made out for the denial of the discharge; and it is pertinent to the inquiry before us to remark that the false statement of the amount of assets, in omitting to state all of them, would equally bar a discharge, if such construction is to be given these words. It is just as material for the purpose of obtaining credit, and equally untrue. Yet we apprehend no one will be found to champion such a construction. We must therefore go further, and ascertain the meaning of the words used by Congress in the act, and the intention of the lawmakers in the use of the words.

This section provides for the discharge of the bankrupt in all cases except those mentioned in section 14b, cls. 1 to 6, inclusive, and is intended for the beneficent purpose of discharging the honest bankrupt from the burden of his debts and thus allow him to begin his business life anew. And this discharge is to be denied only where he is guilty of some one or more of the prohibited acts: (1) Guilty of an act punishable by imprisonment under the act. (2) Destroying, concealing, or failing to keep books with intent to conceal his financial condition. (3) As above set forth. (4) Removing, destroying, concealing, or permitting same, of any of his property within four months, with intent to hinder, delay, or defraud his creditors. (5) In voluntary proceedings, having been granted a discharge within six years. (6) Having refused to obey any lawful order or answer any material question approved by the court in the bankruptcy proceedings.

The intent of the lawmakers can to some extent be gathered by taking into consideration the entire section. There are many decisions construing the grounds for refusing a discharge, other than (3) now under consideration, that materially aid in arriving at the conclusion that it is not within the spirit of the objection that "false," as used in the act, means simply "untrue." This court, in Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 591, 91 C. C. A. 429, 20 L. R. A. (N. S.) 785, construing this clause of section 14b, uses this language:

"For these considerations we are disposed to deny that in the present bankruptcy law the discharge of the honest debtor is a mere incident which could have been omitted without impairing its symmetry and efficiency, and, on the contrary, to assert that the release of the honest, unfortunate, and insolvent debtor from the burden of his debts, and restore him to business activity, * * * is one of the main, if not most important, objects of the law."

In Gilpin v. Merchants' National Bank, 165 Fed. 607, at page 610, 91 C. C. A. 445, at page 448 (20 L. R. A. [N. S.] 1023), Circuit Judge

Gray, speaking for the Circuit Court of Appeals for the Third Circuit, uses this language:

"We fail to perceive any sufficient ground for denying to the third reason for refusing a discharge to the bankrupt, the general characteristic of personal misconduct, that attaches to all others, as set forth in said section of the Bankrupt Act. It would indeed be a harsh construction, and at variance with the general policy of the Bankrupt Act, that would make the conduct described in clause 3 an exception in this respect to the whole category of acts which may severally deprive the bankrupt of his privilege of discharge. It is a construction which should not unnecessarily be made."

And at page 611 of 165 Fed., page 449 of 91 C. C. A., 20 L. R. A. (N. S.) 1023, we find the following:

"But apart from the incongruity imported into this section of the Bankruptcy Act by such construction, it seems to us clear language of this third clause of section 14b requires that the written statement made by the bankrupt, for the purpose of obtaining credit, etc., should be knowingly and intentionally untrue in order to constitute a bar to discharge of the bankrupt. In other words, 'false statement' connotes a guilty scienter on the part of the bankrupt."

In Words and Phrases the word "false" is defined as follows:

"False means that which is not true, coupled with a lying intent."

"False, in jurisprudence, naturally imports something more than the vernacular sense of 'erroneous' or 'untrue.'"

Collier on Bankruptcy (9th Ed.) at page 352, says:

"Falsity of the statement must be proven; and so it is thought that it should be shown that the debtor knew it to be false, or at least did not know it to be true."

"Intention to deceive is always material as an element of proof, and by the weight of authority it is essential to prove such intent."

We therefore have reached the conclusion that the word "false," as used in clause 3 of section 14b of the Bankruptcy Act, means more than untrue, erroneous, or mistaken, but means "false" in the sense that it is "intentionally untrue."

There is no claim in this case that the untrue statement in the instant case falls under the ban of this construction. On the contrary, the incidents and circumstances surrounding the making of the statement would indicate that the bankrupt, believing himself in a sound financial condition, away from his books, with his sick wife away from home, and in a hurry to get back to her, made the statement as a general estimate, rather than an itemized statement of his exact financial condition, such as it might be reasonably supposed a man would make with all the data before him.

It appears from the record that the bankrupt in this case had two places of business, one at Vineville, and the other at another place some distance away, and it was stated in argument before us that there were two statements made setting out liabilities and assets. In the proceeding in this case the record only shows that one statement was relied upon, and is entirely silent as to the other statement. It may be that on another trial of this case the second or other statement will become very material in ascertaining whether, taking both statements together, either or both were "intentionally untrue." This ques-

tion, of course, would have to be settled at the retrial of the case hereinafter directed.

The case is therefore reversed, and remanded to the lower court for such further proceedings in consonance with this opinion as may be necessary. The costs of this appeal to be taxed against the appellee.

BATEMAN et al. v. SOUTHERN OREGON CO. et al.

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

No. 2392.

1. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—AMOUNT OR VALUE IN DISPUTE—AGGREGATION OF CLAIMS.

Where a large number of complainants, each claiming a separate tract of land, although under the same act of Congress, unite in a suit to establish their claims, their causes of action are separate and distinct, and the value of the lands so separately claimed cannot be aggregated for the purpose of giving a federal court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. § 328.*

Jurisdiction of federal courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459; O. J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.]

2. PUBLIC LANDS (§ 117*)—CONCLUSIVENESS OF PATENT.

A patent to public lands from the United States is conclusive against all persons whose rights did not commence previous to its issuance, and the fact that it may have been issued through fraud, error, or irregularity does not subject it to attack by one who at the time had no interest in the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 324; Dec. Dig. § 117.*]

3. PUBLIC LANDS (§ 117*)—GRANT TO AID PUBLIC IMPROVEMENT—SUIT TO ENFORCE CONSTRUCTIVE TRUST.

By Act March 3, 1869, c. 150, 15 Stat. 340, a grant of land was made to the state of Oregon to aid in the construction of a military wagon road; the act providing that the lands should be sold "to any one person only in quantities not greater than one quarter section and for a price not exceeding" $2.50 per acre. The state granted the lands to a corporation, to be used in aid of the construction of the road. By a subsequent act of Congress (Act June 18, 1874, c. 305, 18 Stat. 80) it was provided that, on proof of the construction of the road, patents should issue to the state, or, if it had transferred its interest to a corporation, then to such corporation. Patents were thereafter issued to the corporation. Complainants joined in a suit to enforce the right of each to purchase a quarter section of the land at $2.50 per acre, alleging that it was held subject to a trust to make such sales in accordance with the terms of the grant. *Held* that, whatever might be the right of the United States to enforce such a trust, all others having then no interest in the lands were concluded by the patents and that complainants had no standing to attack the title which the patents purported to convey.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 324; Dec. Dig. § 117.*]

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

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

Suit in equity by D. F. Bateman and 112 others against the Southern Oregon Company, the State of Oregon, and Oswald West, Governor, and A. M. Crawford, Attorney General, of the State of Oregon. Decree for defendants, and complainants appeal. Affirmed.

Suit in equity by the appellants for an interpretation and construction of an act of Congress, entitled "An act granting lands to the state of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said state," approved March 3, 1869 (15 Stat. p. 340), and various acts supplemental thereto; that the court finally and for all purposes wind up and settle the trust described in the complaint, fully ascertaining and definitely settling and adjusting the rights of all parties interested therein; for an injunction restraining logging operations on certain lands situated in the state of Oregon; and for the appointment of a receiver to collect and account for all moneys received by the appellees by reason thereof.

On March 3, 1869, Congress passed an act, entitled "An act granting lands to the state of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said state." The act provided as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there be, and hereby is, granted to the state of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: Provided, that the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses: Provided, further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre: And provided further, that any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: And provided further, that the grant hereby made shall not embrace any mineral lands of the United States, or any lands to which homestead or pre-emption rights have attached.

"Sec. 2. And be it further enacted, that the lands hereby granted to said state shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

"Sec. 3. And be it further enacted, that said road shall be constructed with such width, graduation, and bridge as to permit of its regular use as a wagon road, and in such other special manner as the state of Oregon may prescribe.

"Sec. 4. And be it further enacted, that the state of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding six miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections, as provided in section first of this act.

"Sec. 5. And be it further enacted, that lands hereby granted to said state shall be disposed of only in the following manner, that is to say, when the Governor of said state shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time, until said road shall be completed; and if said road is not completed within five years no further sales shall be made, and the lands remaining unsold shall revert to the United States: Provided, however, that the entire

amount of public land granted by this act shall not exceed three sections per mile for each mile actually constructed.

"Sec. 6. And be it further enacted, that the United States Surveyor General for the district of Oregon shall cause said lands, so granted, to be surveyed at the earliest practicable period after said state shall have enacted the necessary legislation to carry this act into effect."

On October 22, 1870, the Legislature of the state of Oregon passed the following act, entitled "An act donating certain lands to the Coos Bay Wagon Road Company":

"Whereas, the Congress of the United States, at the session beginning on the 7th day of December, 1868, passed an act donating lands to the state of Oregon: * * *

"Be it enacted by the Legislative Assembly of the state of Oregon:

"Section 1. That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights of way, rights, privileges and immunities heretofore granted or pledged to this state by the act of Congress in this act heretofore cited, for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress, upon the conditions and limitations therein prescribed.

"Sec. 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may hereafter be granted to this state to aid in the construction of such road for the purposes, and upon the conditions and limitations mentioned in said act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing such road.

"Sec. 3. Inasmuch as there is no law upon this subject at the present time, this act shall be in force from and after its passage."

Laws Or. 1870, pp. 40–42.

On June 18, 1874, Congress passed the following act, entitled "An act to authorize the issuance of patents for lands granted to the state of Oregon in certain cases":

"Whereas, certain lands have heretofore, by act of Congress, been granted to the state of Oregon to aid in the construction of certain military wagon roads in said state, and there exists no law providing for the issuing of formal patents for said lands:

"Therefore, be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: Provided, that this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the state is already entitled." 18 Stats. p. 80, c. 305.

On February 12, 1875, the United States of America, pursuant to the act of Congress of June 18, 1874, above set forth, duly issued to the Coos Bay Wagon Road Company a patent covering and embracing 42,496.93 acres of the lands granted to the state of Oregon by the act of March 3, 1869; on March 18, 1876, a second patent was issued to the Wagon Road Company covering and embracing 1,080 acres of the lands; on November 8, 1876, a third patent was issued to the Wagon Road Company covering and embracing 61,111.53 acres of the lands; and on February 17, 1877, a fourth patent was issued to the Wagon Road Company covering and embracing 431.65 acres of such lands. The four patents thus issued by the United States to the Wagon Road Company covered, in the aggregate, 105,120.11 acres, and embraced all of the lands granted to the state of Oregon by the act of Congress of March 3, 1869

On May 31, 1875, the Wagon Road Company granted to one John Miller, alias Ambrose Woodroof, all of the lands embraced in the patent first above referred to, with the exception of certain parcels thereof aggregating 6,963.34 acres, which prior to that time had been conveyed to other parties. Subsequently Miller conveyed the lands to Collis P. Huntington, Charles Crocker, Leland Stanford, and Mark Hopkins. On March 27, 1883, Crocker acquired all of the right, title, and interest of Huntington, Stanford, and Hopkins in the lands. On December 20, 1883, Crocker conveyed the lands to one W. H. Besse. On January 7, 1884, the Wagon Road Company conveyed to Besse all the lands embraced in the second, third, and fourth patents hereinabove referred to. On December 29, 1883, Besse conveyed the lands embraced in the first patent to one Gray, and the latter, on January 5, 1884, conveyed the lands to the Oregon Southern Improvement Company. On June 4, 1884, Besse conveyed to the last-named company direct all of the lands covered by the second, third, and fourth patents. On January 1, 1884, the Oregon Southern Improvement Company executed and delivered to the Boston Safe Deposit & Trust Company, as trustee, a certain mortgage or deed of trust covering all of the lands for which patents had been issued to the Wagon Road Company pursuant to the act of Congress of June 18, 1874, to secure the payment of certain bonds to be thereafter issued by the Oregon Southern Improvement Company. On December 28, 1886, William D. Rotch and Edward D. Mantell (who had succeeded the Boston Safe Deposit & Trust Company as trustees under the deed of trust or mortgage), instituted suit in the Circuit Court of the United States for the District of Oregon against the Oregon Southern Improvement Company to foreclose the mortgage or deed of trust. Such proceedings were thereafter had in the suit that on June 23, 1887, pursuant to an order of the court, one George H. Durham, as master thereof, sold to William J. Rotch and William S. Crapo all of the properties of the Oregon Southern Improvement Company, including the lands which that company had acquired by mesne and by direct conveyances from the Coos Bay Wagon Road Company, as hereinabove set forth; and on November 16, 1887, a deed was duly executed and delivered by the master to the grantees, conveying to the latter all of the right, title, and interest of the Oregon Southern Improvement Company in and to such lands. On December 14, 1887, Rotch and Crapo conveyed the lands to the Southern Oregon Company, one of the defendants herein, and the latter company now holds the legal title thereto and is in possession thereof.

It is alleged in the complaint filed by the plaintiffs that the act of Congress of March 3, 1869, granted all of the lands embraced therein to the state of Oregon in trust for the purposes therein set forth; that the state of Oregon, by virtue of accepting the grant of the lands from the United States, became and has ever since remained a cotrustee with the defendant Southern Oregon Company of all of the lands; that the true title to all of the lands is now in the state of Oregon, except such fraudulent and pretentious right as the defendant Southern Oregon Company unlawfully holds as an involuntary trustee of a constructive trust; that the United States has never, by public act or otherwise, directly or indirectly revoked or abrogated the express trust contained in the act of Congress of March 3, 1869, as to the state of Oregon, and the state of Oregon has never renounced the trust or denied it; and the trust remains in full force and effect, and is in the same legal position or situation, as to title, as it was on the 3d day of March, 1869. It is further alleged in the bill that the defendant Southern Oregon Company, by virtue of the acts hereinabove set forth, unlawfully asserts and assumes to exercise and enjoy an unconditional estate in fee simple in and to the lands granted to the state of Oregon, notwithstanding that the Southern Oregon Company, and each of its predecessors in interest, had full and complete knowledge of all the conditions and restrictions affecting the lands.

The bill contains an enumeration of the specific quarter sections of land applied for and claimed by each of the plaintiffs, and in that connection it is alleged that for each tract the claimant thereof had tendered to the Southern Oregon Company the sum of $2.50 per acre, and had demanded a deed therefor; that by virtue of their application for the lands the plaintiffs are, in relation to the trust created by the act of Congress of March 3, 1869, in

privity with the state of Oregon, trustee of all such lands; that the defendant Southern Oregon Company, and all its predecessors in interest, accepted and assented to all the terms, restrictions, limitations, and conditions contained in the acts of Congress hereinabove set forth, and the act of the Legislature of the state of Oregon approved October 22, 1870; that the defendant Southern Oregon Company, and the state of Oregon, are bound by the terms, conditions, and restrictions contained in and created by the express trust set forth in the act of Congress of March 3, 1869; that by virtue of the matters and things set forth in the bill the defendant Southern Oregon Company is an involuntary trustee of all the lands involved in this suit, and such lands constitute and are held as a constructive trust by the Southern Oregon Company, with no title or estate in or to the same whatsoever, except such title as it has acquired by fraud.

The plaintiffs asked for an interpretation and construction of the various acts set forth in the bill; that the court finally and for all purposes wind up and settle the trust described in the complaint, fully ascertaining and definitely settling and adjusting the rights of all parties interested therein; that an injunction issue restraining certain logging operations which, as is alleged in the bill, are being conducted on portions of the lands involved; and for the appointment of a receiver to investigate such operations and to collect and account for all moneys obtained by the Southern Oregon Company by reason thereof.

Motions to dismiss the bill were interposed by the defendants, respectively. The motions were granted, and a judgment entered dismissing the cause, from which judgment the plaintiffs appeal to this court.

T. S. Minot, of San Francisco, Cal. (E. L. C. Farrin, of San Francisco, Cal., of counsel), for appellants.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for appellee Southern Oregon Co.

A. M. Crawford, Atty. Gen., and J. W. Crawford, Asst. Atty. Gen., for appellee State of Oregon.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. The plaintiffs in this case number 113. They each claim a separate and distinct quarter section of land, of 160 acres each, within a larger tract containing 105,120.11 acres claimed by the defendant the Southern Oregon Company. The latter company is the successor in interest through mesne conveyances of the Coos Bay Wagon Road Company, the original grantee, under patents issued to that company by the United States in the years 1875, 1876, and 1877, pursuant to certain acts of Congress providing for the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in Oregon. The purpose of this suit is to compel the defendant the Southern Oregon Company, as the successor in interest in the Coos Bay Wagon Road grant, to convey all its right, title, and interest in and to the separate tracts of land claimed by the respective plaintiffs, as set forth and described in the bill of complaint. It is not claimed that any plaintiff has any interest in the land in suit other than the claim asserted to the specific tract. It is alleged in the bill of complaint that the value of each individual claim of 160 acres of land involved in the suit and claimed by the respective plaintiffs is over the sum of $2,000, exclusive of interest and costs. The purpose of this allegation was to give the court jurisdiction of the case under the statute as it existed prior to January 1, 1912. The bill of complaint in this case was filed on July

29, 1913. The Judicial Code (Act March 3, 1911, 36 Stats. 1087, c. 231 [Comp. St. 1913, § 968 et seq.]) went into effect on January 1, 1912. It is provided in section 24 of this Code (Comp. St. 1913, § 991) that the District Court shall have jurisdiction "of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States. * * *"

This case involves the construction of certain acts of Congress. Assuming that the case, therefore, arises under the laws of the United States, the question is: Does the value of the land in controversy exceed, exclusive of interest and costs, the sum or value of $3,000? The bill of complaint does not so allege. Is it sufficient that by mathematical calculation the aggregate value of the plaintiffs' claims as alleged in the complaint may equal or exceed that amount, and are the plaintiffs' claims of the character that they may be combined together into an aggregate sum sufficient to confer jurisdiction upon the District Court?

The rule with respect to the amount in controversy for jurisdictional purposes was stated by Mr. Justice Bradley in Clay v. Field, 138 U. S. 464, 479, 11 Sup. Ct. 419, 425 (34 L. Ed. 1044), as follows:

"The general principle observed in all is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone."

This rule has been followed in a number of cases, and has been restated in the recent case of Troy Bank v. Whitehead, 222 U. S. 39, 40, 32 Sup. Ct. 9, 56 L. Ed. 81, as follows:

"When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

This rule was followed by members of this court in the recent case of Simpson v. Geary, 204 Fed. 507, 510, in the District Court of Arizona, convened under section 266 of the Judicial Code (Comp. St. 1913, § 1243).

It is clear that the plaintiffs' claim of federal court jurisdiction does not come within this rule. They have not a common, undivided interest in the land in controversy. Their claims are separate and distinct, and the only reason for combining them in one case is that of convenience, and because they form a class of parties whose rights are alleged to have arisen out of the same transaction, and have relation to a common mass of property sought to be administered. This is not sufficient to justify the court in combining their separate claims in one aggregate amount for the purpose of conferring jurisdiction upon the

District Court. But it is possible that this objection to the bill of complaint might be cured by amendment. We will, therefore, proceed to consider a more serious objection to the bill.

[2, 3] 2. It is contended on behalf of the plaintiffs that the proviso contained in the act of Congress of March 3, 1869, "that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre," was a grant to the state of Oregon in trust for the benefit of third parties; that the Southern Oregon Company, having acquired this trust property with notice of such trust, is bound by it and may be compelled to execute it; that the plaintiffs having before the commencement of this suit tendered to the defendant the Southern Oregon Company the sum of $2.50 per acre for the several tracts of land mentioned in the complaint, they have become beneficiaries of the trust and are entitled to a decree of the court compelling the defendant the Southern Oregon Company to quitclaim and release to the respective claimants all its right, title, and interest and estate of every nature whatsoever, to the lands described in the complaint. It is not alleged in the bill that the military wagon road provided for in the act of March 3, 1869, was not constructed and completed in accordance with the terms therein provided; nor is it charged that the lands granted were not applied to the construction of the road. But it sufficiently appears from the act of Congress of June 18, 1874, a copy of which is attached to the complaint, that the road was so constructed and completed, and that the land was applied to its construction. That act provided:

"That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the state of Oregon, as in said act provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof."

As the patents for the lands granted under the act of March 3, 1869, were issued to the Coos Bay Wagon Road Company after the passage of the act of June 18, 1874, the presumption is that they were issued in accordance with the terms of the act; that the state of Oregon by the public act of October 22, 1870, a copy of which is also attached to the bill of complaint, had transferred its interest in the lands to that corporation, and that the lands had been earned by the Wagon Road Company by the timely construction and completion of the wagon road as required by the act of March 3, 1869. We shall therefore assume it to be a fact apparent on the face of the bill of complaint that the military wagon road provided by the act of March 3, 1869, was constructed and completed in accordance with the terms of that act, and that the lands granted were applied to its construction.

What, then, is the interest of the plaintiffs in this grant? It does not appear from the bill of complaint that the plaintiffs or any of their predecessors aided or in any manner assisted in the construction of the wagon road; nor does it appear that they were ever settlers upon

the lands granted, either at the time of the grant, or at the time patents were issued, or at any time; nor does it appear that the plaintiffs, or any of their representatives, ever applied to the state of Oregon, or to the United States, to enter or purchase any of the lands described, under the terms of the grant or otherwise. The claim of the plaintiffs is that the Coos Bay Wagon Road Company, in violation of the proviso of the granting act limiting the number of acres to be sold to any one person to one quarter section, executed and delivered to certain parties deeds of conveyance to the quantities of land described in the patents in excess of one quarter section to one person; that the plaintiffs have tendered the defendant the Southern Oregon Company the sum of $2.50 per acre for their respective quarter sections of land, and have demanded conveyances of the same from that defendant; that the defendant refused to accept the sum offered, and has refused to execute and deliver deeds as demanded.

The grant to the state of Oregon was in aid of the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg. The state conveyed this grant, together with any additional grant that might thereafter be made to the state, to the Coos Bay Wagon Road Company, "for the purpose of aiding said company in constructing the road mentioned and described in the act of Congress, upon the conditions and limitations therein prescribed." No further or other administration of the grant was assumed by the state, and when Congress passed the act of June 18, 1874, providing for the issuance of patents for the lands granted, it recognized that the state had discharged the trust by passing the grant along to the Coos Bay Wagon Road Company. The patents for the lands were thereupon issued by the Land Office to the Coos Bay Wagon Road Company. This was in effect a ratification by Congress of the grant by the state to that company, and the state was thereupon discharged from further administration of the grant, and whatever trust remained was a matter wholly between the United States and the Wagon Road Company and its grantees. The plaintiffs' alleged rights were not asserted until 36 years after the issuance of the last of the four patents conveying the title to the Wagon Road Company. They were therefore not in privity with that title when it was conveyed, and they have since acquired no rights making them privy to the prior title held by the defendants. They are strangers to that title and whatever trust it carries.

The law upon this subject was declared by Chief Justice Marshall, speaking for the Supreme Court, in the case of Hoofnagle v. Anderson, 7 Wheat. 212, 5 L. Ed. 437. In that case, as in the present case, the suit was in equity to obtain a decree for the conveyance of a tract of land to which the defendant held a patent dated the 9th day of October, 1804. The plaintiffs claimed under an entry of the same land made on the 28th day of May, 1806, and consequently 18 months after the date of the defendant's patent. The plaintiffs contended, however, that the patent ought not to stand in their way because it was obtained contrary to law, being founded on a warrant which had been issued by fraud or mistake. The warrant had been issued by the commonwealth of Virginia upon military services rendered the state by the defend-

ant's original predecessor in interest. The warrant erroneously recited that the military services had been rendered in the continental line, whereas it had been rendered in the state line. It was contended on behalf of the plaintiffs that their equity commenced before the legal title of the defendant was consummated, and their pre-existing rights under the statute were impaired by his intrusion into military lands reserved for the plaintiffs. It was contended, further, that the person under whom they claimed had a right to elect among all the vacant lands on the reserved territory, and this right of election had been narrowed by the defendant's patent. Chief Justice Marshall, speaking of the patent in the case, said:

"It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. * * * If a patent has been issued irregularly, the government may provide means for repealing it; but no individual has the right to annul it, to consider the land as still vacant, and to appropriate it to himself."

The decree of the lower court sustaining the patent and refusing the plaintiffs a decree for a conveyance was accordingly affirmed.

The recent case of Burke v. Southern Pacific Railroad Co., 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, was also a suit in equity wherein the plaintiff claimed title to mineral lands under certain mining locations made pursuant to the mining laws of the United States. The lands had 15 years previously been patented to the Southern Pacific Railroad Company under a congressional grant which excluded all mineral land other than iron and coal lands. The patent contained a clause providing:

"Excluding and excepting all mineral lands, should any such be found, in the tracts aforesaid; but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

The plaintiff alleged in the bill of complaint that it was not within the power of the United States to dispose of the mineral lands described in the patent to the Southern Pacific Railroad Company; that said lands had been segregated from the public domain and the beneficial title reserved for mining locators, while the legal title was being held in trust for said locators and their successors. The court was accordingly asked to protect plaintiff's rights by injunctive process controlling the patent issued by the government. Demurrers to the bill were sustained, and the bill dismissed. Upon appeal to this court a number of questions were certified to the Supreme Court of the United States, among others the following:

"Does the fact that the appellant was not in privity with the government in any respect at the time when the patent was issued to the railroad company prevent him from attacking the patent on the ground of fraud, error, or irregularity in the issuance thereof as was alleged in the bill?"

To this question the court answered, "It does," citing Hoofnagle v. Anderson, supra, and other cases in support of that answer. In our opinion the cases cited have determined the law applicable to the present case.

The case of Little Rock & Ft. Smith R. R. Co. v. Howell, 31 Ark. 119, 127, cited by counsel for the plaintiffs in support of his position, does not state any proposition contrary to the law of these cases. In the case cited the Congress of the United States, by Act Feb. 9, 1853, c. 59, 10 Stat. 155, granted lands to the states of Arkansas and Missouri to aid in the construction of a railroad from a point on the Mississippi river, opposite the mouth of the Ohio river, in the state of Missouri, via Little Rock, to the Texas boundary line, near Fulton, in Arkansas. The act provided that where the United States had sold any of the lands granted, or where the right of pre-emption had attached to any of the lands in the grant, other contiguous lands might be selected by the state in lieu of the lands sold or pre-empted. This is a familiar provision which has been incorporated in all subsequent railroad land grants. The Legislature of the state of Arkansas, by act approved January 16, 1855, amended November 26, 1856, conveyed the lands in that state to the Cairo & Fulton Railroad Company upon certain conditions and limitations. A similar grant was made to the Little Rock & Ft. Smith Branch Road. Among other conditions contained in the grant was one providing that:

"Every person who, on the 9th day of February, 1853, occupied by residence and cultivation thereon any tract of land comprised in the grant made by virtue of and under the provisions of said act of Congress of February 9, 1853, may purchase from" the railroad company, "at two dollars and fifty cents per acre, the legal subdivisions of such land as shall include his residence and actual improvements, not to exceed one quarter section, by complying with the following conditions," etc.

The grantees under this act failed to construct the railroad as required, and the Legislature, by act dated February 1, 1859, continued the grant under similar conditions and limitations as to prior settlers, among others that of the right of prior occupants to purchase land under the continued grant and extending such right to a later date. The act provided that:

"Every person who, on the 1st day of November, 1858, resided on or cultivated any improvement on any of the land comprised in the grant made by virtue of the act of Congress, approved February 9, 1853, may purchase from" the railroad company "at two dollars and fifty cents per acre, one hundred and sixty acres, which may include the actual residence, or the farm of such person, as he or she chooses to elect, by complying with the conditions prescribed," etc.

The plaintiff in the case, one Howell, on the 1st day of November, 1858, resided on and cultivated a tract of 126.54 acres within the grant made by Congress to the state of Arkansas, and within the grant to the Little Rock & Ft. Smith Branch Road. He applied to that railroad company to purchase this tract of land, offering the price of $2.50 per acre. It was objected that, by reason of the omission of the name of the Little Rock & Ft. Smith Branch Road from the restrictive clause of the act, that road was not bound by it. The court held that the act was clearly intended to include that road, and that, having accepted the grant, it was bound by its conditions, using the language quoted by counsel for the plaintiffs in this case, as follows:

"The provision conferring on occupants the right to purchase 160 acres, including their improvements, at $2.50 per acre, was a just and reasonable one, the price so fixed being twice that at which the government offered them previous to the grant to the state, and the appellant, accepting the grant upon the terms and conditions imposed, must be held to abide by and perform them."

There is nothing in this case supporting plaintiffs' contention. Aside from the question whether the Little Rock & Ft. Smith Branch Road was bound by the provision in the grant in which its name was omitted, there was no controversy as to the right of a prior settler under the general grant to purchase the land at $2.50 per acre. The beneficiaries under the statute were distinctly pointed out and identified by their prior occupancy of the land held by them, and the plaintiff, claiming as such beneficiary, connected himself with the original source of title prior to the grant to the railroad company. The cases admitting a right of action against a subsequent grantee under such a statute and under such circumstances are too numerous to be cited; but they do not aid the plaintiffs in this case. This is not—

"a suit to have one to whom a patent has been issued declared a trustee for another who at the time of its issue had acquired such a right to the land as to entitle him to that form of equitable relief." Burke v. Southern Pacific R. R. Co., supra.

The plaintiffs were not prior occupants or holders of the lands claimed by them, and they have not otherwise connected themselves with the original source of title. Whatever trust remains to be enforced may be determined by a suit on the part of the United States against the holders of the legal title, and it appears from the bill of complaint that such a suit has been commenced and is now pending in the United States District Court for the District of Oregon, having been brought under resolution of Congress of April 30, 1908, authorizing and directing the Attorney General of the United States to institute and prosecute such a suit.

The decree of the lower court is affirmed.

BERGDOLL v. HARRIGAN.

(Circuit Court of Appeals, Third Circuit. November 16, 1914.)

No. 1851.

BANKRUPTCY (§ 306*)—APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action by the trustee of a bankrupt corporation to recover as a voidable preference a sum paid by the bankrupt a week before the bankruptcy to defendant, who until a day or two before had been its president, the admission in evidence, as bearing on the questions of insolvency and defendant's knowledge or means of knowledge, of the inventory and appraisement made in the bankruptcy proceeding, was not prejudicial to defendant, where plaintiff also introduced a witness who, testifying from his own knowledge, aided only by the inventory, placed a valuation on the property at the time of the payment, as assets of a going concern, of

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

nearly double the amount of the appraisement, which thereupon became immaterial, since plaintiff was bound by the valuation made by his own witness.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 306.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by Frank A. Harrigan, trustee in bankruptcy of the Louis J. Bergdoll Motor Company, against Erwin R. Bergdoll. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph Gilfillan, of Philadelphia, Pa., for plaintiff in error.

Joseph W. Catherine and Frank A. Harrigan, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This action was brought by the trustee of the Louis J. Bergdoll Motor Company, bankrupt, hereinafter referred to as the Company, against Erwin R. Bergdoll, at one time a creditor of the Company, and hereinafter called the defendant, to recover from him the sum of $31,270, which it is alleged he received from the Company as a preferential payment within the meaning of the Bankruptcy Act. The jury rendered a verdict for the plaintiff for the full amount of the claim and interest.

Of the several assignments of errors, those which require a statement of our conclusions are that the trial court erred, first, in refusing to instruct the jury to return a verdict for the defendant; and second, in admitting in evidence the inventory and appraisement of the bankrupt estate.

It appears from the testimony that the Louis J. Bergdoll Motor Company was incorporated on the 18th day of March, 1912, and engaged in the manufacture and sale of automobiles. Its capital stock consisted of 3,000 shares, of which Louis J. Bergdoll, its president, held 2,998 shares. On December 12, 1912, Charles A. and Erwin R. Bergdoll, brothers of Louis J. Bergdoll, were negotiating with Louis J. Bergdoll for the purchase of his stock in the Company, and were appointed by him an executive committee to manage the Company's business. Upon assuming those duties, they, or one or the other of them, were furnished with a statement of the financial standing of the concern under date of December 1st preceding, which showed the net assets then to have been something over $113,000. On January 8, 1913, the 2,998 shares of the capital stock of the Company owned by Louis J. Bergdoll were transferred by him to his brother Erwin R. Bergdoll, the defendant, for the consideration of $1, and thereafter within the same month Erwin R. Bergdoll became president, and together with his brothers, Charles and Grover, became a director of the Company, from which time until March 7, 1913, the defendant with his last-named brothers managed and controlled the business and affairs of the Company.

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

Statements of resources and liabilities, as well as of profits and losses, were made by the bookkeeper under dates of January 1, February 1, and March 1, 1913, showing net assets of the Company on those dates to have been about $90,000. Between January 15 and February 25, 1913, the defendant loaned the Company on open account, by several payments, sums of money aggregating $31,270, and on February 27th thereafter the loan account was closed and notes of the Company were given the defendant for the amount of each individual loan. The funds so loaned were disbursed in the conduct of the business of the Company and commingled with its assets, and no effort was made at the trial by the defendant to trace them into any of the assets in the possession of the Company when the alleged preferential payment was made, or into assets which subsequently came into the possession of the receiver or the trustee of the Company after the filing of the petition in bankruptcy.

On March 5, 1913, the defendant transferred 2,997 of his shares of stock to his mother, Emma C. Bergdoll, and the remaining shares of stock were transferred to individuals who neither purchased them nor were cognizant of the fact that the shares had been transferred to them; the transfer being effected and the new certificates being signed by the defendant, Erwin R. Bergdoll, president, and countersigned by Charles A. Bergdoll, treasurer, of the Company. On March 7, 1913, the defendant and his brothers resigned as officers and directors of the Company, and the three persons to each of whom one share of stock had been issued on March 5th, were elected directors in their places. These were ignorant of the fact that they were stockholders and of their election as directors until some period thereafter, two of them never having attended a meeting of stockholders or of the board of directors of the Company.

On Saturday and Sunday, March 8th and 9th, following, motor cars in course of construction and motor parts to the value of $31,638.25 were transferred from the Company's plant to the premises of another concern, known as the Bergdoll Machine Company, then owned by the defendant, the transfer being made without authority of the Board of Directors of the Motor Company and without knowledge of its officers. On Monday, March 10th, being the day following the day of the transfer of the cars and parts, an employé of the Machine Company handed an employé of the Motor Company a memorandum of the merchandise transferred to the Machine Company, showing the price at which it was purchased or taken over, and delivered to him the Machine Company's check in payment therefor, which was at once deposited in bank to the credit of the Motor Company. The Motor Company thus being in funds, the employé of the Machine Company instructed the employé of the Motor Company to make out a check to the defendant in payment of the notes of the Motor Company held by the defendant. This was done, and in this way it is claimed that Erwin R. Bergdoll, the defendant, secured from the Motor Company the return of the money which he had loaned it.

The alleged preferential payment was made on March 10, 1913, the petition in bankruptcy was filed against the Motor Company on March

17, 1913, and the Company was adjudged bankrupt on April 11, 1913. As evidence of its insolvency, and of the defendant's knowledge of its insolvency, and of the preferential character of the payment at the time it was made, there was introduced testimony showing that the Company was without credit, that its creditors were dunning it for overdue accounts, that a very considerable portion of its accounts collectible was bad, and that its physical assets, carried upon the books at their cost price, were old, obsolete, and depreciated in value. It was further shown that, while the assets of the Company were approximately $91,000, its known liabilities amounted to $167,000, making a deficit of $75,497.88, to all of which information it is claimed the defendant had access, and with all of which it is alleged he was entirely familiar.

Opposed to this testimony, the defendant, for his defense, relied chiefly upon evidence of his ignorance and lack of opportunity to know of the Company's insolvency and of the preferential character of the payment.

The trial judge submitted two issues to the jury: First, whether the Company was insolvent on the date of the alleged preferential payment; and second, whether the defendant, from the surrounding circumstances, knew that the Company was insolvent, or had reasonable cause to believe that it was insolvent, and that the payment of its debt to him would give him a preference over its other creditors.

Without giving to the testimony an extended consideration in this opinion, it is entirely clear that the court below committed no error in refusing to withdraw from the jury the questions of the Company's insolvency and of the defendant's knowledge of an intended preference in paying its debt to him.

The remaining question for consideration is whether the trial court erred in admitting in evidence the inventory and appraisement of the bankrupt estate of the Motor Company. The most pertinent objections made by the defendant to the admission of the inventory and appraisement are that the inventory was made up of personal property that had ceased to be a part of a live and going concern, and that the appraisal thereof was of property that had then become dead, and that, as the appraisers were not in court in the action against him, the defendant was deprived of a right to cross-examine them upon their appraisement.

Oliver A. Bickel, an employé of the Motor Company, produced as a witness for the plaintiff, testified that he was familiar with the quantity, character, and value of the personal assets and stock of the Motor Company at and before the time of its failure; that in February, 1914, at the request of counsel for the trustee, he made an estimate of the value of the stock which the Motor Company had in March, 1913, using the inventory and appraisement of the appraisers in the bankruptcy proceeding only to refresh his memory of the quantity and character of the stock then on hand, and estimated the same was worth at that time about $65,000. This testimony respecting the value of the Company's assets on that date, made with the inventory and appraisement before the witness, and with the assistance which

the data thereby supplied him as to the quantity, but not the value of the stock on hand, and considered with respect to its value as an asset of a going concern at the crucial period of March, 1913, was given and received in evidence. This testimony was produced by the plaintiff, and formed the basis of his claim of the Motor Company's insolvency on March 10, 1913, and by that testimony the plaintiff was bound, notwithstanding the value of the same assets was shown by the inventory and appraisement made in the bankruptcy proceedings to amount only to the sum of $36,621.49.

The defendant neither cross-examined the witness with relation to the figures of the inventory and appraisement nor controverted them by testimony of his own. The defendant may have failed to do this because it was clearly to his advantage to accept the higher figures placed upon the assets by Bickel than to have engaged in a controversy concerning the lower figures placed upon them by the inventory and appraisement. The testimony of Bickel in giving to the Company's assets a value as parts of a live and going business in March, 1913, thus met the defendant's first objection that the inventory and appraisement was of stock that was dead; and his second objection was met by the fact that the plaintiff was bound by the higher figures given by his witness Bickel as to the Company's assets at the time of the alleged preferential payment, without regard to the lesser figures of the appraisement. Therefore the lack of opportunity afforded the defendant to cross-examine the appraisers upon a matter that had ceased to be controlling, in view of the testimony of Bickel, deprived the defendant of no right and did him no prejudice. And this the defendant must himself have thought, in view of his opportunities to cross-examine Bickel upon the figures of the appraisement, and to controvert them by testimony of his own, of neither of which opportunities did he avail himself.

We find nothing in the conduct of the trial below that deprived the defendant of any right or subjected him to any prejudice.

The judgment below is affirmed.

HERMANN v. HALL et al.

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

No. 2371.

PRINCIPAL AND AGENT (§ 69*)—PURCHASE OF PROPERTY BY AGENT—SUIT TO SET ASIDE.

Complainant and his wife authorized defendant, as their agent, to sell certain land of the wife for $4,000, and sent him a power of attorney to convey the same. He made a sale to two purchasers for $4,400, took their note for $100, to apply on the price until the title was examined and approved, and gave them a receipt describing the land and terms of sale. Meantime they decided to form a syndicate to take the land, but when the time came to make the payment one member, who was to take a one-twelfth interest, failed to do so, and at the solicitation of one of the purchasers defendant took his place. The price received was the full value

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

of the land at the time. *Held*, that the rule that a purchase by an agent is voidable, regardless of the price paid, had no application; that when the purchasers gave their note and took the receipt a binding contract of sale was made, and defendant's agency substantially ended; that defendant's purchase was not from his principal, but from the original purchasers; and, in the absence of actual fraud, complainant was not entitled to have the sale set aside in equity.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130–145; Dec. Dig. § 69.*]

Appeal from the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Suit in equity by Christian Hermann against John F. Hall and others. Decree for defendants, and complainant appeals. Affirmed.

Suit in equity by plaintiff to quiet title to certain real property situated in Coos county, Or., and to set aside and have declared null and void, on the ground of alleged fraud, certain deeds purporting to convey the legal title to the land in controversy to the defendants.

On November 7, 1903, the plaintiff, Christian Hermann, and his wife, Dora Hermann, residents of the German Empire, made, executed, and delivered to the defendant John F. Hall a power of attorney, wherein the latter was appointed their true and lawful attorney, and as such, among other things, was empowered to sell and dispose of certain properties owned by Dora Hermann, situated in the state of Oregon, included in which was the property involved in this suit, more particularly described as the N. E. ¼ and lot 2 and the W. ½ of the S. E. ¼ of section 36, township 25 S., of range 13 W. of the Willamette meridian. The defendant entered upon his duties as such attorney and continued to act in that capacity from the date of his appointment until the death of Dora Hermann on the 18th day of September, 1905. On that date, Christian Hermann, the plaintiff in this suit, as the sole heir at law of the decedent, became, under the laws of the German Empire, the owner of and entitled to the possession of all property of which his wife was seised at the time of her death.

Some time in the month of May, 1905, the defendant, as the attorney and agent of Dora Hermann and her husband, under the power of attorney executed by them to him, entered into negotiations with Henry Sengstacken and L. D. Smith for a sale of the property above described to them. It appears from certain correspondence exchanged between the defendant and his principals that he had been authorized to sell the land for $4,000. No agreement for a sale of the property was reached between the defendant and Sengstacken and Smith until May 17, 1905, on which date the transaction was closed; Sengstacken and Smith agreeing to pay for the property the sum of $4,400. The purchasers gave to the defendant their promissory note for the sum of $100, payable in 10 days after date, to be applied on the purchase price of the property, and the defendant gave to the purchasers a receipt therefor. The receipt was not introduced in evidence, for the reason that it could not be found; but Sengstacken testified that it described the lands and the terms of the sale. The testimony of the parties tended to show that the terms of the sale were that one-half of the purchase price should be paid in cash, and the remainder in one year; the unpaid balance to draw interest at the rate of 6 per cent. per annum and to be evidenced by a note secured by a mortgage on the property. The cash payment of one-half of the purchase price was to be made, and the deed, mortgage, and note delivered, after the purchasers had had a reasonable time within which to examine the title to the land.

It also appears from the testimony (which in all substantial respects is without conflict) that after agreeing to purchase the property Sengstacken and Smith proceeded to interest other persons in the transaction, and that some time in the month of July, 1905, Sengstacken informed the defendant that he was going to take some other parties in with him and was going to form a

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

syndicate for the purchase of the land. The syndicate, as originally formed, together with the interest which each member thereof was to have in the property, was as follows: Henry Sengstacken, three-twelfths; L. D. Smith, three-twelfths; Stephen C. Rogers, two-twelfths; J. J. Clinkinbeard, two-twelfths; D. L. Rood, one-twelfth; and Herbert Rogers, one-twelfth.

The title to the property having been passed upon satisfactorily by the attorneys for the purchasers, August 30, 1905, was fixed upon as the date for making cash payment of one-half of the purchase price and delivering the deed, mortgage, and note. On the morning of that date, Herbert Rogers, who had agreed to take a one-twelfth interest in the property, informed Sengstacken that he had "changed his mind" about taking an interest for the reason that he did not consider it a good investment. During the morning of that day S. C. Rogers and Clinkinbeard went to the office of the defendant, and each paid to him the sum of $366.65, representing their proportionate interests in one-half of the purchase price of the property. Later in the day Sengstacken went to the office of the defendant and informed him that Herbert Rogers had refused to take the one-twelfth interest in the property. He then said to the defendant: "What's the matter with you taking his interest? You are getting a commission out of this for selling this land, and you might as well take this to close it up." The defendant replied that he would talk the matter over with his brother, James T. Hall, who was also his law partner. Sengstacken then paid to the defendant the sum of $1,466.70, which represented his three-twelfths interest in one-half of the purchase price, the three-twelfths interest of Smith, and the one-twelfth interest of Rood. The next morning Sengstacken again saw the defendant, and was informed by the latter that he had talked the matter over with his brother, and that they had concluded that they would purchase the one-twelfth interest in the property which Herbert Rogers had refused to take.

Sengstacken testified that he had no knowledge or notice of any kind, prior to August 30, 1905, that the defendant was to take any interest in the property. Smith testified to the same effect; and Stephen C. Rogers, D. L. Rood, Herbert Rogers, and J. J. Clinkinbeard testified that they did not know and were not informed that the defendant had taken an interest in the property for periods varying from one month to one year after the agreement had been consummated and the one-half of the purchase price paid in cash.

It was agreed that the title to the property should be placed in the name of the Title Guarantee & Abstract Company, and on August 31, 1905, the defendant, as attorney, acknowledged and delivered to the Abstract Company, as trustee, a deed for the property involved in this suit. It appears from the testimony that a note, together with a mortgage on the property, were executed by the Abstract Company. Neither the note nor the mortgage was introduced in evidence, and the record is silent as to the actual date of their execution and delivery.

On or about October 2, 1905, the Abstract Company issued a certificate to each of the purchasers, including the defendant, evidencing their respective interests in the land held in trust by it for them. Various assignments of the interests held by the respective parties were subsequently made, whereby Sengstacken, Smith, and one Z. T. Siglin acquired all of the interests of the other purchasers. The parties last named then caused to be organized and incorporated, under the laws of the state of Oregon, the Eastside Land Company. On July 22, 1911, the Title Guarantee & Abstract Company conveyed all of its right, title, and interest in and to the property, as trustee, to the Eastside Land Company, and the latter company is now the owner and holder of the property, with the exception of certain lots and blocks which have been conveyed to the various parties named as defendants in this suit.

Robert J. Upton and St. Rayner & St. Rayner, both of Portland, Or., for appellant.

C. R. Peck and C. A. Sehlbrede, both of Marshfield, Or., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The plaintiff bases his right to the relief prayed for in his complaint upon the rule, laid down by the text-writers and adhered to in many authoritative decisions, that if an agent in the sale of property of his principal purchases it himself, or any interest therein, either directly or through the instrumentality of a third person, without the knowledge or consent of the principal, the sale is voidable, and may be set aside at the option of the principal; that in a transaction of that nature the amount of the consideration, the absence of undue advantage, and similar considerations, are wholly immaterial; and that nothing will defeat the principal's right to avoid the transaction, save and except his own confirmation after full knowledge of all the facts. Mechem on Agency, §§ 455, 461; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Mills v. Goodsell, 5 Conn. 475, 13 Am. Dec. 90; Bain v. Brown, 56 N. Y. 288.

But that rule has no application to the facts of this case. The uncontradicted testimony showed that Dora Hermann authorized the defendant to sell the property for $4,000, and that the defendant entered into negotiations with Sengstacken and Smith for the sale of the property in controversy some time in the early part of the month of May, 1905, and on the 17th of that month the sale was consummated and the transaction closed; the defendant, as attorney for the plaintiff and his wife, agreeing to sell the property to Sengstacken and Smith, and the latter agreeing to buy the same, at the price of $4,400, or $400 in excess of the amount Dora Hermann was willing to take for the property. On that date the purchasers gave to the defendant a promissory note, signed by both of them, for the sum of $100, payable in 10 days after date, to be applied on the purchase price of the property. The testimony also showed that, upon delivery of the promissory note, a receipt therefor was given to the purchasers by the defendant, wherein were set forth a description of the land and the terms of the sale. The receipt was not introduced in evidence, for the reason that it had been lost or misplaced, and could not be found. Testimony as to the contents of the receipt was then properly admissible, and this testimony showed that the terms of the sale were that one-half of the purchase price should be paid in cash; the remaining half to be paid in one year, to bear interest at the rate of 6 per cent. per annum, and to be evidenced by a note secured by a mortgage on the property.

The delivery by the purchasers to the defendant of the promissory note as part payment on the purchase price of the property, and the delivery by the latter to the purchasers of the receipt stating the terms of the sale and containing a description of the property, constituted an actual bona fide sale of the property by the defendant, as attorney, to Sengstacken and Smith—a sale so far completed that it could have been enforced by either the vendor or the vendees. The agency of the defendant thereupon, in all material respects, terminated. No intimation of any nature was made at that time, nor had any been made at any time prior thereto, that the defendant should become the pur-

chaser of an interest in the property. The property was sold outright to Sengstacken and Smith, without any restrictions or conditions.

The court below held that the charge of fraud in the transaction was not sustained, and in this finding we concur. Counsel for the plaintiff seek to draw the inference that there was collusion between the defendant and the purchasers, at the time the latter agreed to purchase the property on May 17, 1905, from the fact that the defendant did not inform Dora Hermann, at the time of the delivery of the deed of August 31, 1905, or thereafter, that he had purchased an interest in the property. But we do not think that the failure of the defendant to so inform his principal furnishes any support for the inference that the defendant was acting in bad faith. The seller was in no degree prejudiced by being kept in ignorance as to who the real purchasers of the land were. She received, not only the price which she herself had put upon the land, but $400 in excess thereof; and the testimony shows beyond all doubt that the sum thus received was at that time the fair value of the land. Who the purchasers were was a matter of indifference to her, so long as the price which she asked was paid in full. Glover v. Layton, 145 Ill. 92, 34 N. E. 53, 55.

After Sengstacken and Smith had themselves agreed to purchase the property, they proceeded to interest others in the transaction with a view of forming a syndicate; but that arrangement was one in which the purchasers only were interested. It was in no respect binding upon the defendant or his principal. The first suggestion that the defendant should purchase an interest in the property was made on the 30th day of August, 1905, more than three months after the sale of the property had been made to Sengstacken and Smith. The purchase by the defendant on that date of a one-twelfth interest in the property was, under such circumstances, in no sense a purchase from his principal. It was a purchase from Sengstacken and Smith, who were obligated as purchasers to pay the purchase price in the event it should be found upon examination of the abstract of title that the title to the land was in Dora Hermann.

The true rule applicable to the facts of this case is laid down by the Supreme Court of the United States in the case of Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592. In that case one Polk had been appointed as agent of the plaintiff, Robertson, for the purpose of selling certain real property to M. O'Donohoe. O'Donohoe was unable to complete the payments under his contract of purchase, and before the deed was delivered to O'Donohoe, and while the same was in the hands of Polk and his partner, Chapman, as agents, to be delivered upon payment of the balance of the purchase price of the land, Polk took over O'Donohoe's contract and completed title in himself. Robertson subsequently brought suit against the agents to set aside the transaction, on the theory that Polk could not properly have taken title to the property. Mr. Justice Harlan, delivering the opinion of the Supreme Court, said:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to ac-

count, not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was in fact injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues he must act, in the matter of such agency, solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal. It is earnestly contended that the evidence brings the present case within the operation of these principles. In this view of the facts we do not concur. The charge against Polk of dereliction of duty is not sustained. While there is some evidence tending to show that he desired, from the outset, to acquire an interest in this property, it does not appear that he intended to practice any deception upon the plaintiff. At any rate, he was not in fact interested in the offer made by O'Donohoe. The latter purchased on his own account, exclusively, and without any understanding that Polk was to become interested with him, or should take his place in the purchase. Polk had no expectation, when O'Donohoe's offer was accepted, of becoming the owner of the property.

"The only circumstance in the case indicating a want of frankness, on the part of Polk, in his letters to the plaintiff, was a statement in the letter of January 22, 1886, implying that he had actually collected the cash payment of $1,000. His explanation of this statement is that he had not been as diligent as he should have been in concluding the business, and he did not suppose it was of any consequence to the plaintiff whether the $1,000 came from him or from O'Donohoe. It would have been more consistent with the truth if he had then stated that he had agreed, or would agree, with O'Donohoe, to take the property, and therefore, as between himself and O'Donohoe, he was bound to make good the latter's obligations to the plaintiff. But the failure of Polk to notify the plaintiff of his agreement with O'Donohoe, immediately upon its being made, cannot affect any right acquired by him under that agreement. The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to, and accepted by, the plaintiff, who executed a deed to O'Donohoe, and placed it in the hands of Polk, to be delivered to O'Donohoe whenever a decree for the sale of the property was obtained, and upon the payment of the $1,000 stipulated to be paid in cash; so that, at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. Nothing then stood in the way either of O'Donohoe agreeing that Polk should take the property, or of Polk becoming a purchaser from him. If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it—if the contract between the plaintiff and O'Donohoe had been so far executed, at the time Polk took O'Donohoe's place in the purchase, that it could not be rescinded by either party to it—then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe; and his failure to give notice of his purchase, immediately upon its being made, cannot be regarded as a fraud upon the rights of the plaintiff. A real bona fide sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee. Upon this ground, the decree below can be sustained without impairing in any degree the rule that an agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale."

It may also be stated, as a general rule, that in all cases of the nature of the one now under consideration the decision depends upon

the application to the particular facts of the rule of disqualification. In those cases where a conflict between duty and self-interest has been shown, the purchase has been held voidable, regardless of the manner in which or by whom the sale was made. Marquam v. Ross, 47 Or. 374, 405, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1. In the present case no such conflict is made to appear. The defendant secured purchasers for the property, not, indeed, at the price at which he had been authorized to sell, but at a price in excess thereof. Upon the consummation of the sale his duty to his principals ceased. The sale was consummated, as we have shown, on the 17th of May, 1905, and nothing then stood in the way of his agreeing three months thereafter to purchase an interest in the property.

The judgment of the court below is affirmed.

CHICAGO, ST. P., M. & O. RY. CO. v. RORVIG.

(Circuit Court of Appeals, Eighth Circuit. October 26, 1914.)

No. 4116.

1. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—DEPOT PLATFORM—OBSTRUCTIONS—ICE—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a passenger by falling on a ridge of ice on defendant's depot platform as the passenger was passing to his train, whether the ice formed on the platform on the day of the accident, or had negligently been permitted to remain for one or more days prior to the accident, *held* for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. § 320.*]

2. EVIDENCE (§ 359*)—PHOTOGRAPHS—CHANGED SITUATION.

Where, immediately after plaintiff had fallen on a ridge of ice on defendant's depot platform, the ice was covered with salt, which removed it, and there was no controversy as to the other relative locations as disclosed by the evidence, photographs of the platform, etc., taken two or three days after the accident, were properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509–1512; Dec. Dig. § 359.*]

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

Action by Bjorn Rorvig against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George W. Peterson, of St. Paul, Minn., for plaintiff in error.

Hammond & Farmer, of St. James, Minn., and S. B. Wilson, of Mankato, Minn., for defendant in error.

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

SANBORN, Circuit Judge. The railway company, the defendant below, complains of a judgment against it for alleged negligence in

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

its failure to remove an accumulation of ice from its platform at Madelia, Minn., which the plaintiff alleged caused him to fall and to break his hip as he was walking across the platform of the station to enter one of defendant's trains at about noon on January 16, 1912. The refusal of the court below to instruct the jury to return a verdict for the defendant at the close of the evidence, and its refusal to receive in evidence two photographs of the place of the accident taken two days thereafter, are specified as errors.

These facts were admitted or proved beyond dispute when the evidence was closed: The railroad of the defendant extended east and west past the station at Madelia, which was on the north side of the railroad. On the south side of the station building was a bay window, and a platform between the station building and the track. Under the eaves of the sloped roof over this bay window there was, at the time of the accident, an accumulation of ice, upon which there was a light covering of snow. Plaintiff's witnesses testified that this accumulation was a rough ridge sloping north and south from 1½ inches to 3 inches thick, about 4 feet wide and 8 feet long. Defendant's witnesses testified that it was from one-half inch to an inch thick, 6 inches wide, and 6 feet long. The weather was cold on the day of the accident, and for 10 days before. The maximum temperature on that day was 15 degrees above zero, and the minimum temperature 24 degrees below zero. The mean maximum temperature for the first 16 days of January at New Ulm, 15 miles north Madelia, was 7.75 degrees below zero, and the mean minimum temperature was 21.6 degrees below zero. The plaintiff purchased a ticket from Madelia to St. James from the defendant and started to enter his train, which had arrived, when, as he was walking towards it, he stepped on the ice, fell, and was injured. After the accident one of the employés of the defendant put salt on the ice, and it was gone before the night of January 16, 1912.

The court charged the jury that, if the ice accumulated on the day of the accident, they must return a verdict for the defendant, but that, if it had been on the platform so long prior to that day that the defendant knew, or ought to have known, of its presence, and if it was so rough and dangerous to passengers that persons of ordinary prudence in its situation would have removed it, and the defendant either knew, or ought to have known, its character and location before the day of the accident, they might return a verdict for the plaintiff, if they were of the opinion that the defendant failed to exercise ordinary care to prevent injury to its passengers by the accumulation of the ice. This charge of the court is not challenged.

[1] "The position of the defendant," writes counsel for the railway company in his brief, "is that plaintiff slipped on newly made ice, which had formed on the day of the accident by drippings from the eaves of the station building, which froze on striking the brick platform, forming a slight ridge of slippery ice." But the question whether the ice was newly made on that day, or had been on the platform for many days, was the clear issue during the trial, which the jury decided against the company. Unless, at the close of the trial, the evi-

dence in support of that conclusion was so insubstantial that it was the duty of the court, after the verdict, to set aside the conclusion for want of substantial evidence to sustain it, there was no error in its refusal to direct a verdict for the defendant. To avoid a useless discussion in detail of the evidence for the plaintiff, it is conceded in the discussion of this case that the weight of the evidence was that the platform was cleared by the defendant's employés on the morning of January 16, 1912, before the accident, and on the evening of January 17, 1912; that there was no ice on the platform at either of these times, or for days before; and that the ice on which the plaintiff fell was formed by drippings from the eaves on the morning of January 16, 1912.

Notwithstanding this concession, the record discloses the fact that Mr. Beaman testified that he was the clerk of the hotel at Madelia at the time of the accident, that he took the mail from the train in the night every night to the hotel on a cart on runners or on a sled, that there was a rough ridge of ice on the platform under the eaves of the station building an inch and a half thick, 3 feet wide, and 12 feet long during at least four nights just preceding the accident, that he knew this because he saw it and drew his sled over it each night, that he took the sled over the ice, because it ran more easily there than over the other parts of the platform that were free from ice, that this ice was in the same condition during the four nights just preceding the accident, and that it was gone after the accident. The record also discloses the fact that Mr. Playfair testified that at the time of the accident he was the village marshal of Madelia, that it was a part of his duty to go to the railroad station every day, and he did so, that he was on duty from 1 o'clock in the afternoon until 3 o'clock in the morning each day, that he was accustomed to help Mr. Beaman, the night clerk at the hotel, to draw his mail across the platform, that they ran the sled or sleigh over the ice because it would run easy there, that at the time of the accident and for a week or ten days before that time there was a rough ridge of ice under the eaves of the roof on the station platform an inch and a half thick and 8 or 10 feet long.

The testimony of these two witnesses was too clear, positive, and circumstantial to be disregarded by the trial court. It presented substantial evidence in support of the finding of the jury, and a conflict of evidence on a material issue of fact, upon which the plaintiff had the legal right to their verdict, and there was no error in the refusal of the court to take the case from the jury.

[2] After the situation of the railroad, the station building, the platform, and other relative locations about which there was no controversy had been disclosed by the evidence, and the undisputed fact that the ice on the platform on the day of the accident had been removed on that day after the accident by the use of salt had been proved, the defendant offered in evidence two photographs of the railroad, platform, and the station building, taken two or three days after the accident, and evidence that the condition of the platform was the same at the time the photographs were taken that it was at the time of the accident, except that the salt had caused the ice to disappear, and the court rejected this evidence. There was certainly no error in this

ruling, because when this offer was made the only material issues in the case were the amount and condition of the ice on which the plaintiff fell and the length of time it remained on the platform, and the offered evidence was neither relevant nor material to any of these issues.

There was no error in the trial of this case, and the judgment below is affirmed.

MIDLAND VALLEY R. CO. v. CONNER.

(Circuit Court of Appeals, Eighth Circuit. October 26, 1914.)

No. 4063.

1. CARRIERS (§ 316*)—INJURIES TO PASSENGERS—NEGLIGENCE—RES IPSA LOQUITUR.

The happening of an accident to a passenger is prima facie evidence of negligence on the part of the carrier, and, the passenger being in the exercise of due care, the burden rests on the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285–1294; Dec. Dig. § 316.*]

2. CARRIERS (§ 321*)—INJURIES TO PASSENGERS—PLEADING AND PROOF—RES IPSA LOQUITUR—BURDEN OF PROOF.

Where, in an action for death of a passenger, plaintiff pleaded specific acts of negligence on the part of the carrier, but no allegation of general negligence, an instruction submitting the doctrine of res ipsa loquitur, and charging that such doctrine raised a presumption of negligence on the part of the carrier, and also shifted the burden of proof to the carrier to show that its whole duty was performed, etc., was error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326–1336, 1343; Dec. Dig. § 321.*

Burden of proof of negligence where passengers have been injured, see note to Southern Ry. Co. v. Myers, 32 C. C. A. 23.]

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

Action by Jennie C. Conner against the Midland Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Edgar A. de Meules, of Muskogee, Okl. (Sol. H. Kauffman, of Muskogee, Okl., on the brief), for plaintiff in error.

Horace Speed, of Tulsa, Okl., and W. G. Robertson, of Muskogee, Okl. (Lewis A. Kean, of Muskogee, Okl., on the brief), for defendant in error.

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

SMITH, Circuit Judge. The Midland Valley Railroad Company, hereafter called the defendant, operates a railroad from Tulsa, Okl., northwest through Osage county, in that state, to Silverdale, in Kansas. At Nelagoney this road crosses a line of the Missouri, Kansas

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

& Texas, which extends through the county from northeast to southwest. At Nelagoney the defendant's railroad extends approximately east and west across the Missouri, Kansas & Texas. Immediately southeast of the crossing is a joint depot of the two companies. Jennie C. Conner, hereafter called the plaintiff, is the widow of Joseph F. Conner. On June 19, 1911, Joseph F. Conner came southwest on the Missouri, Kansas & Texas to Nelagoney. After staying there to a noon meal, he bought a ticket on the defendant's railroad to Pawhuska, the first station to the northwest. The freight train on which he expected to go was then in the yard. The ticket agent of whom he bought his ticket told him that he would have to go down in the yard and get on the train; "it wouldn't stop here," meaning at the depot. He went down in the yard, and attempted to get on the caboose, and in doing so was killed. There is a serious conflict in the evidence as to whether the train was standing still when Mr. Conner attempted to enter it or was in slow motion. There was a verdict for the plaintiff, and the defendant sued out this writ of error.

[1] The petition contains five specific allegations of negligence, but no allegations of general negligence. The court instructed the jury as follows:

"The plaintiff complains that the death of her husband was due to defendant's negligence in several particulars, but the only ground which you will consider is in substance that while the deceased was a passenger of the railroad company, and attempting at its invitation to board the caboose of this freight train, the defendant, through its agents and employés in charge of the train, negligently and without notice to him moved the train suddenly and quickly, whereby he was thrown down and dragged under it and came to his death.

* * * * * * * * * *

"In this case, it is incumbent on the plaintiff to show by a fair preponderance of the credible evidence that the railroad company was negligent toward the deceased while in the exercise of his right as a passenger in starting and moving the train. Under the law, however, when it is shown by the evidence that a passenger is injured while the duty for taking care for his safety rests upon a railroad company and he is injured by the operation of its train, then the presumption is that the injury was due to its negligence, and this shifts the burden of proof upon the company to show that the injury was not due to its negligence.

* * * * * * * * * *

"The burden of proof rests upon the plaintiff to show that the accident was due to the alleged train operation by the defendant; but, if this is shown, then the law presumes the accident was due to the negligence of the railroad company; that is, a prima facie case of negligence is made out against the company, devolving upon it the burden of showing that the accident was not due to its negligence."

The defendant having objected to the last paragraph, the court said:

"In view of the exception, the court will restate the burden here, so that it will be clearly understood. The burden of proof is on the plaintiff to show by a preponderance of the evidence that Mr. Conner had this invitation to go upon the caboose at the time and place in question, and that he was injured at the time, and that he came to his death at the time, while he was accepting the invitation to go on board of the train, and that his death was due to the operation of the train, as alleged in the petition. The law holds that where, under such circumstances, a passenger is injured by the instrumentality of the railroad company, and that in this case would be the train operation, then the presumption arises that the injury or fatality was due to the negligence

of the company in its train operation, so that the burden then shifts over to the defendant company to show by a preponderance of the evidence that the train operation was not negligent."

It has been laid down by the Supreme Court in Gleeson v. Virginia Midland Railroad Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, that:

"Since the decisions in Stokes v. Saltonstall, 13 Pet. 181 [10 L. Ed. 115], and Railroad Co. v. Pollard, 22 Wall. 341 [22 L. Ed. 877], it has been settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show, that its whole duty was performed and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551 [11 Sup. Ct. 653, 35 L. Ed. 270]."

The court was doubtless attempting to embody the maxim, "Res ipsa loquitur." It is a matter of grave doubt as to whether this rule has any application to this case. It has been many times held that where the plaintiff alleges specific acts of negligence, instead of general negligence, it has no application whatever. McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872; Roscoe v. Metropolitan St. Ry. Co., 202 Mo. 576, 101 S. W. 32; Beave v. St. Louis Transit Co., 212 Mo. 331, 111 S. W. 52; Evans v. Wabash R. Co., 222 Mo. 435, 121 S. W. 36, and numerous other cases in the Supreme Court and Court of Appeals of Missouri; West Chicago St. Ry. Co. v. Martin, 154 Ill. 523, 39 N. E. 140; Chicago Union Traction Co. v. Leonard, 126 Ill. App. 189; Lone Star Brewing Co. v. Willie, 52 Tex. Civ. App. 550, 114 S. W. 186; Roberts v. Sierra Railway Co., 14 Cal. App. 180, 111 Pac. 519; Moore on Carriers (2d Ed.) 1482, 1485. But this is not the universally accepted rule. Walters v. Seattle R. & S. R. Co., 48 Wash. 233, 93 Pac. 419, and the extensive note thereto in 24 L. R. A. (N. S.) 788.

"Res ipsa loquitur" means "the thing speaks for itself." The question is, What does it say? Does it say that from the accident it is presumed that the company has been negligent in every possible way, or does it say that the presumption is that in some way the company has been negligent? Of course, if the first is what it says, that is, the company has been negligent in every conceivable way, then the presumption is that it was negligent in the very way specifically alleged; but if the second is true, if the presumption is that in some way the company has been negligent, then there is no presumption of negligence in any particular way specified, and this is true although, where the presumption exists, the company must show that it was not negligent in any way. The rule that the evidence must correspond with the allegations is as old as the common law, and if the presumption is simply of some negligence that caused the injury, and not a negligence in all things, one who specifies the negligence can find nothing in the presumption to sustain the allegation.

[2] But the court not only instructed the jury that this presumption existed, but that it shifted the burden of proof. This was in direct

conflict with the opinion of the Supreme Court of the United States in Sweeney v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, which was not published officially at the time of the trial of this case in the District Court.

It follows that this case must be reversed, and other points argued will not be considered, as the question presented may not arise upon another trial.

It is ordered that the case be reversed and remanded, with directions to set aside the verdict and grant a new trial.

GREAT NORTHERN RY. CO. v. HARMAN.

(Circuit Court of Appeals, Ninth Circuit. November 16, 1914.)

No. 2372.

1. RAILROADS (§ 376*)—INJURIES TO TRESPASSERS—LAST CLEAR CHANCE.
Where plaintiff, a trespasser on defendant's railroad track, was injured while endeavoring to remove a push car from the track in front of an approaching train, the fact that he was unlawfully on the track did not place him beyond the pale of the law, nor relieve defendant from liability for injuring him, in case the injury could have been prevented by the exercise of due care on the part of the approaching engineer after plaintiff's position of danger was actually seen and appreciated.

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

2. RAILROADS (§ 381*)—PERSONS ON TRACK—TRESPASSERS—CONTRIBUTORY NEGLIGENCE.
Where plaintiff, a trespasser on defendant's railroad track, on seeing an approaching train, attempted to remove a push car from the track, but was unable to do so in time to prevent a collision, his attempt to remove the car, instead of exercising all his efforts to avoid personal injury, leaving the push car on the track, was not such contributory negligence, continuing up to the time of the accident, as would preclude a recovery under the last clear chance doctrine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1285–1293; Dec. Dig. § 381.*

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 District of Montana; Geo. M. Bourquin, Judge.

Action by Charles Harman against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Veazey & Veazey, of Great Falls, Mont., for plaintiff in error.

Maury, Templeman & Davies, of Butte, Mont., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff had been working as a carpenter in the employment of certain railroad contractors, who were

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

engaged in relining a tunnel on the defendant's road. On being discharged from his work, the plaintiff took a push car belonging to the defendant, placed thereon his tool chest, blankets, and personal baggage, and, accompanied by another man, proceeded to push the car along the track of the defendant from the tunnel to Basin, a station where he expected to take a train in the direction of Butte. He claimed the right so to use the push car on the ground that the railroad track was the only available way to Basin, that if he took the county road he would have to wade a creek, he having no money with which to pay for a livery team, that the track from the tunnel to Basin was a general thoroughfare for employés on the tunnel work, and that the push car had regularly been used by them in carrying emergency supplies from Basin to the tunnel. While on his way, and while he and his companion were pushing the car around a curve, the plaintiff saw a train 400 or 500 feet ahead, approaching at a speed variously estimated by the witnesses at from 20 to 45 miles an hour. While he was diligently endeavoring to remove the push car and its load from the track, and when he had almost succeeded in doing so, the train struck the push car, driving it against the plaintiff, and seriously injuring him.

The court below ruled that the plaintiff was at the time of the accident a trespasser upon the defendant's tracks, and that in using the push car as he did he was guilty of contributory negligence. The plaintiff's action for damages, however, was tried upon the theory that the defendant had "the last clear chance" to avoid injuring the plaintiff, and that it negligently failed in its duty so to do.

[1] It is assigned as error that the court denied the defendant's request for a peremptory instruction to the jury to return a verdict in its favor. On a careful consideration of the evidence we are not convinced that it was error to deny the request. There was evidence tending to show that, after the engineer of the train discovered the plaintiff's danger, he had ample time in which to bring the train to a stop before reaching the place where the plaintiff was. In view of such evidence, the question whether or not the defendant was guilty of negligence in the matter charged was properly submitted to the jury.

The defendant contends that the wrongful and unlawful conduct of the plaintiff, involving moral turpitude, placed him beyond the law of care, and that the defendant owed him no duty to avoid injuring him, even after his perilous position was seen. No authority is cited which sustains so harsh a doctrine. In Missouri & Pac. Ry. Co. v. Weisen, 65 Tex. 447, the court said:

"A man does not forfeit his life, or his right to remain whole, by going where he has no right to go, or being where he has no business."

Cases are cited in support of the proposition that one who is engaged in violation of law cannot recover if his own illegal act was an essential element of his case. In the case at bar the plaintiff was engaged in no violation of a statute. It is true that he was a trespasser, but notwithstanding that fact the defendant's employés in charge of the operation of the train owed him the duty of ordinary

care as soon as his position of danger was actually seen and appreciated. A cause of action arose in his favor, if the defendant actually knew of his peril and thereafter failed to exercise ordinary care to avoid injuring him; and the plaintiff's contributory negligence cannot defeat the action, if it can be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of that negligence. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Chunn v. City & Suburban Ry. Co., 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; Turnbull v. N. O. & C. R. Co., 120 Fed. 783, 57 C. C. A. 151; Herr v. St. Louis & S. F. R. Co., 174 Fed. 943, 98 C. C. A. 550; The Plymouth, 186 Fed. 108, 108 C. C. A. 217; St. Louis & S. F. R. Co. v. Summers, 173 Fed. 358, 97 C. C. A. 328; Atchison, T. & S. F. Ry. Co. v. Taylor, 196 Fed. 878, 116 C. C. A. 440.

[2] But it is urged that the court erred in refusing to instruct the jury that if, after seeing the approaching train, the plaintiff remained on the track in an endeavor to remove the push car, his carelessness in so doing continued as a cause of his injury, and that, therefore, he cannot recover, notwithstanding that the defendant in the exercise of reasonable care might have stopped the train in time to avoid striking him. The cases which are cited to sustain this proposition do not involve the doctrine of the last clear chance. We do not find that what the plaintiff did under the circumstances shows such obvious disregard of duty and safety as amounts to misconduct which the courts should declare to be negligence as a matter of law. The question was clearly one for the jury. Linnehan v. Sampson, 126 Mass. 506, 30 Am. Rep. 692; Mobile & O. R. Co. v. Ridley, 114 Tenn. 727, 86 S. W. 606, 4 Ann. Cas. 925; Corbin v. City of Philadelphia, 195 Pa. 461, 45 Atl. 1070, 49 L. R. A. 715, 78 Am. St. Rep. 825; Maryland Steel Co. v. Marney, 88 Md. 482, 42 Atl. 60, 42 L. R. A. 842, 71 Am. St. Rep. 441; Saylor v. Parsons, 122 Iowa, 679, 98 N. W. 500, 64 L. R. A. 542, 101 Am. St. Rep. 283; Becker v. Louisville & N. R. Co., 110 Ky. 474, 61 S. W. 997, 53 L. R. A. 267, 96 Am. St. Rep. 459; Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172, 13 L. R. A. 190, 29 Am. St. Rep. 553.

The defendant, in view of the obstruction on the track and the plaintiff's peril, was in duty bound to stop the train if possible. The situation was not like that in which an engineer of a train sees a man walking on the track several hundred feet ahead of him, and has the right to assume that the man will get out of the way. It was a situation in which the engineer discovered men on the track with a push car, which if it were not removed, and the train were not stopped, might occasion a disastrous collision. He saw that the two men were in the act of removing the push car, yet, according to the plaintiff's testimony, the speed of the train had not been perceptibly diminished when the collision occurred. The plaintiff had knowledge and experience in the handling of trains, as was shown by the evidence, and on seeing the approaching train may well have assumed that it would be brought to a stop before reaching the place where he was. He was acting in an emergency, with but a moment for deliberation, and what

he did was presumably for the purpose of avoiding injury to the passengers on the train. His conduct in so doing should not be held to absolve the defendant from the duty of reasonable care under the last clear chance doctrine, and it should not be held as matter of law that it was the duty of the plaintiff, on seeing the approaching train, to betake himself to a place of safety and abandon the car on the track, with all the possible resulting consequences. In 29 Cyc. 523, it is said:

"The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, and one who attempts to rescue another from imminent danger is not guilty of contributory negligence, although he thereby imperils his own life, whether he is aware of the danger or not, where such attempt is made in good faith, in the belief that he could save the life of the person in danger and avoid injury himself, unless the attempt be made under circumstances amounting to rashness or recklessness in the judgment of a man of ordinary prudence. Error in judgment at such time will not defeat recovery."

The judgment is affirmed.

W. H. McELWAIN CO. v. BULLOCK.

(Circuit Court of Appeals, First Circuit. November 11, 1914.)

No. 1083.

1. MASTER AND SERVANT (§ 219*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

Plaintiff for four years had operated a sewing machine in defendant's shoe factory, above which was an electric light. She arrived one morning five minutes before time to commence work, when it was quite dark, and was unable to turn on her light, because the current had not been switched on from below, which was done, however, in two or three minutes. In the meantime she undertook to hang up her coat in the place provided, which required her to step upon a chair and from there on a bench, and in doing so she placed the chair on some shoe uppers which had been left on the floor by a fellow servant, and, the chair tilting, she fell and was injured. *Held* that, in so far as there may have been negligence in so placing the coat hangers as to make it necessary to climb upon the bench, the risk was an obvious one, which she knew and assumed; that she also assumed the risk involved in moving around and placing the chair in the dark, which were not required by her employment or properly incident thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. § 219.*

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. WORDS AND PHRASES—"WIRE OF SHOES."

A "wire of shoes" is a four-pronged structure of wire, on which are strung the tops or uppers of shoes.

In Error to the District Court of the United States for the District of New Hampshire; E. Aldrich, Judge.

Action at law by Elizabeth M. Bullock against the W H. McElwain Company. Judgment for plaintiff, and defendant brings error. Reversed.

---

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

Edward C. Stone, of Boston, Mass. (Sawyer, Hardy & Stone, of Boston, Mass., on the brief), for plaintiff in error.

Edward K. Woodworth, of Concord, N. H. (David W. Perkins, of Manchester, N. H., and Streeter, Demond, Woodworth & Sulloway, of Concord, N. H., on the brief), for defendant in error.

Before PUTNAM and BINGHAM, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is a writ of error for review of the rulings of the District Court in an action of tort, wherein the plaintiff, Elizabeth M. Bullock, here defendant in error, had a verdict.

Upon the trial before a jury the defendant, W. H. McElwain Company, at the conclusion of all the testimony, both on behalf of plaintiff and of defendant, moved for the direction of a verdict in its behalf, on the ground that the evidence was insufficient in law to support a verdict for the plaintiff.

While there are 18 assignments of error, we think it sufficient to consider whether there was error in the refusal of defendant's request for the direction of a verdict in its favor.

The plaintiff, Elizabeth M. Bullock, was employed as a vamper in the shoe factory of W. H. McElwain Company, at Manchester, N. H., and operated a sewing machine at a bench whereon were a number of machines, over each of which was suspended an ordinary electric light. The plaintiff was required to be at work at quarter before 7 o'clock a. m., and arrived at the workroom at 20 minutes before seven, on January 4, 1910, when it was still quite dark.

The entrance to the factory and the stairways were artificially lighted, but there was no artificial light in the workroom. The only means of artificially lighting the interior of the room was by electric lights suspended over each machine.

The plaintiff testified that when she entered the room it was light enough so that she could see and get around, and could easily go to her machine. When she arrived at her machine she reached up to turn on the light, but was unable to do so because the current had not been switched on from the main switch controlling all the individual lights in this room, which was situated in a box beside the door on the lower floor. The key to this box was in the possession of a foreman, whose duty it was to turn on the switch when he came in the morning. Plaintiff testified that it was so dark she could not see the floor as she stood there.

[2] The plaintiff then took off her coat, and, for the purpose of hanging it up on hooks, which had been provided for this purpose by the company, on a post back of her machine, placed a chair against a bench back of her, stepped on the chair with her coat upon her arm, and was stepping from the chair to the bench, when the chair tipped and threw her to the floor, inflicting injuries to her knee. She testifies that the light was thrown on two or three minutes after she fell, and that she looked around where she had set her chair, and saw what is called a "wire of shoes." A wire of shoes is described as a four-pronged structure of wire, on which were strung the tops or uppers

of shoes. They were strung 12 pairs on a wire by the operatives, and as a wire was finished it was, in ordinary course, thrown by the operative into the aisle behind her, where it was picked up by a boy. Though she did not so state directly, the inference was suggested that her chair had been placed upon this, and for that reason had tipped.

There was evidence that in order to hang up her garments upon the hooks provided for this purpose it was necessary for her to climb a chair and step from that to the bench, and that no other means were provided for that purpose; that she had done this all the time she had worked in this place—about 4 years.

On cross-examination she stated that she put both feet on the chair, and put her right foot on the bench, when the chair tipped over to the left; that her knee hit the chair, and also struck the floor.

[1] The defendant in error argues that the jury would have been warranted in finding that the master, in the exercise of a reasonable degree of care, should have provided a place to hang coats and hats, the use of which did not require a climb upon a bench, or should have provided a method of stepping on to the bench, involving the use of something less insecure than a light kitchen chair. It is argued, also, that the master was at fault in a failure to light the place and to keep the floor free from obstructions.

The jury were instructed in the following language:

"You may think, independent of the question of lighting, or independent of the question of the wire of shoe uppers, that there was fundamental fault, and that the place was unsafe, and in getting up there, either with or without light, or knowing about the string of uppers, or not knowing about them, that if the woman while in the exercise of reasonable care, by reason of the fundamental fault of furnishing an insecure and unsafe place, was injured. If that is your view, you have a right to decide the case upon that ground alone, if that is in accordance with your judgment. Some of you may take that view; some of you may not; possibly none of you will take that view."

As to this branch of the case, it is quite clear that, if risk was involved in stepping from a chair to a bench, it was a risk which was obvious to a woman of 27 years of age, who had done this for 4 years, and that such risk was known and assumed.

It remains to consider how far this risk was affected, if at all, by any other negligence of the master.

There is no contention that the electric lighting system in itself was defective. The negligence attributed to the master is that the light was not turned on, and that the wire of shoes was not removed from the floor.

Assuming that the absence of light may have contributed to the accident by concealing the wire of shoes on the floor, or possibly making uncertain the step from chair to bench, it does not appear that there was any necessity for the plaintiff to attempt to place the chair or to step upon the bench before the light had been turned on. The testimony shows that the electricity was turned on within two or three minutes, and before the time at which she was required to go to work. The clearing of the wires of shoes from the aisles is shown to have been the duty, not of the master, but of a fellow servant. The risk from moving about in the dark, or from insecurely placing a chair in

the dark, was not a risk required by her employment, or properly incident thereto, but an ordinary and obvious risk, which was voluntarily assumed.

We are of the opinion that the defendant's request for the direction of a verdict should have been granted, and that the refusal was error.

The judgment of the District Court is reversed, the verdict is set aside, and the case remanded to that court for proceedings consistent with this opinion; and the plaintiff in error recovers costs in this court.

CITY OF LEE'S SUMMIT et al. v. JEWEL TEA CO.

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

No. 3960.

1. COMMERCE (§ 40*)—"INTERSTATE COMMERCE"—MUNICIPAL ORDINANCES—LICENSE TAX.

Complainant, an Illinois merchant, employed an agent, who solicited orders for teas and coffees in defendant city, in Missouri, sending the orders to complainant in Illinois by mail. The merchandise was put up in packages according to the quantities ordered, but without the names of the customers on them, and shipped in one or more cases to the agent, who alone had authority to receive the goods from the carrier, and who then delivered the packages to the customers and collected and remitted the price, receiving a salary sent from complainant. *Held*, that the transaction was "interstate commerce," and was therefore not subject to an ordinance imposing a license tax on vendors of teas, coffees, and other kinds of merchandise not otherwise licensed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.*

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. INJUNCTION (§ 105*)—CRIMINAL PROSECUTIONS.

Where city authorities had arrested complainant's agent several times, and threatened to continue to arrest him every time he went there and transacted business for complainant, because of his failure to take out a license under a local ordinance, when in fact the business transacted constituted interstate commerce, the court properly granted an injunction restraining further prosecutions; those pending being expressly excepted from the decree.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by the Jewel Tea Company against the City of Lee's Summit and others, to enjoin the enforcement of a municipal ordinance imposing a license on vendors of teas, coffees, etc. From a decree (198 Fed. 532) for complainant, defendants appeal. Affirmed.

E. S. Bennett, of Lee's Summit, Mo., and Pence & Thayer, of Kansas City, Mo., for appellants.

L. E. Durham, of Kansas City, Mo. (Cowherd, Ingraham, Durham & Morse, of Kansas City, Mo., on the brief), for appellee.

---

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

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

HOOK, Circuit Judge. This is an appeal from a decree on final hearing enjoining the city of Lee's Summit, Mo., and its mayor and city marshal, from enforcing against the Jewel Tea Company a municipal ordinance imposing a license charge of $1 per day upon vendors of teas, coffees, etc., "selling at retail from wagon or other vehicle," and a like sum where the articles are sold "by solicitor taking orders for future delivery." The trial court held that the business of the company was in interstate commerce and therefore not subject to the ordinance. (D. C.) 189 Fed. 280; (D. C.) 198 Fed. 532.

[1] The Jewel Tea Company is an Illinois merchandising corporation, with headquarters at Chicago, in that state. It employed an agent residing in Missouri. The agent canvassed from house to house in Lee's Summit for orders for future delivery of teas and coffees. The orders taken were mostly for half-pound and pound lots. He forwarded the orders to the company at Chicago, giving the quantities only, not the names of the purchasers. At Chicago the company put up the goods in small packages according to the quantities ordered, so as to permit of exact delivery to each purchaser without breaking. On each package was marked its price, but not the name of the purchaser. The packages were then put into a large box or other receptacle and shipped by freight to Lee's Summit; the company being both consignor and consignee. When the shipment arrived at Lee's Summit, the agent received it, opened the box or container, had it hauled around on a dray, delivered the packages unopened to those who had given the orders, and collected payment for them on delivery. At the same time he solicited further orders. He made the rounds about twice each month, and by other canvassing endeavored to increase the trade. The agent remitted the moneys collected to the company at Chicago. He had no financial interest in the business, save his salary, which was paid from that city. Occasionally a purchaser would refuse to accept and pay. In such case the package intended for him was sent to a branch house of the company at Kansas City, Mo., but all the goods delivered in Lee's Summit were shipped directly there from Chicago in the way described.

These facts were undisputed, and they show that the company was engaged in interstate commerce. In a case between the same company and the city of Carthage, Mo., involving substantially the same business method, the Supreme Court of that state very recently so decided. Jewel Tea Co. v. City of Carthage (Mo.) 165 S. W. 743. Answers to the various arguments of appellants to the contrary may also be found in Stewart v. Michigan, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. Ed. 786; Crenshaw v. Arkansas, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565; Rogers v. Arkansas, 227 U. S. 401, 33 Sup. Ct. 298, 57 L. Ed. 569; Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264; Rearick v. Pennsylvania, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. Stewart v. Michigan, supra, is much

like the case at bar. Whether a previous practice of the company would have subjected it to the ordinance need not be determined. It had been abandoned, and the company had a right to adopt that presented here. It was not subterfuge to do so.

It is also urged that the case does not involve the requisite jurisdictional sum or value. It was sufficiently alleged in the verified bill of complaint and denied in the unverified answer. The city attorney filed an affidavit for use in opposition to an application for a temporary injunction, briefly stating that the amount in dispute was less than the sum or value required. There was no plea to the jurisdiction. The equity rules of February 1, 1913 (198 Fed. xix–xlii, 115 C. C. A. xix–xlii), authorizing the making of the objection by answer, were not then in force. But, passing the question of practice, we think the jurisdictional condition may reasonably be gathered from the record, though no testimony was directed specifically to that point.

[2] It is further urged that the controversy should have been left to the state courts, where prosecutions had been begun and were pending. But those prosecutions were excepted from the decree of injunction. The evidence showed that the city authorities had arrested the agent of the company several times, and threatened to arrest him every time he went there and transacted business. The decree of the trial court was right. It looked to the future, not to pending prosecutions in the local courts, and was to protect the right to engage in interstate commerce.

The decree is affirmed.

ILLINOIS CENT. R. CO. v. BEHRENS.

(Circuit Court of Appeals, Fifth Circuit. December 8, 1914.)

No. 2317.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action at law by Joseph Behrens, administrator of John Joseph Behrens, deceased, against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 192 Fed. 581, and 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163.

Gustave Lemle and W. Catesby Jones, both of New Orleans, La., for plaintiff in error.

Armand Romain, of New Orleans, La., for defendant in error.

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

PARDEE, Circuit Judge. This is an action based on the Act of Congress of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665), known as the "Employers' Liability Act," brought by the defendant in error, as administrator of John Joseph Behrens, against the plaintiff in error, for damages for the death of his intestate, alleged to have been caused by the negligence of the plaintiff in error. There was an answer denying the averments of the petition, and especially denying that at the time of the alleged injury to John Joseph Behrens either he or the engine causing the injury was engaged in interstate commerce.

On the trial the following facts were proved: John Joseph Behrens was killed in a head-on collision between trains of the Illinois Central Railroad

and of the New Orleans Terminal Companies during the night of November 28, 1909, in the city of New Orleans, state of Louisiana. The deceased was at the time of his death in the employ of the Illinois Central Railroad Company as a fireman, and was one of a crew attached to a switch engine that operated exclusively within the city of New Orleans, state of Louisiana. The general employment of said switching crew using said engine was to handle over the company's tracks and other tracks in the said city of New Orleans both intrastate and interstate commerce indiscriminately; that is, they might on one trip handle cars that were brought into the city of New Orleans from without the state of Louisiana, or a mixed train containing cars, either loaded or empty, brought into the city of New Orleans from without the state of Louisiana, and cars loaded with freight moving entirely within the state of Louisiana, and on another trip a train made up of cars, either empty or loaded with freight originating wholly within the state of Louisiana and moving to a point within said state.

At the time of the collision which resulted in Behrens' death, the train on which Behrens was working consisted of the said switch engine and 13 cars loaded with sugar that originated in the state of Louisiana and were destined to another point within the state of Louisiana, namely, Chalmette, La. At Chalmette said switching engine and crew were to take up other cars, either loaded or empty, belonging to various railroad companies, and take them to Harrahan, La., and there turn them over to the yardmaster, who was to deliver them to various railroad systems to be transported to points within and without the state.

The case shows that, after the evidence had been concluded, the defendant below, in the presence of the jury, and before the jury had retired to consider its verdict, moved the court to peremptorily instruct the jury to find for the defendant, for the reason that the said train upon which said John Joseph Behrens was injured was purely an intrastate train, and therefore neither the said John Joseph Behrens nor the defendant company were engaged in interstate commerce at the time of the alleged injury, and that the plaintiff suing in his capacity as administrator had no right to recover. The court refused to grant the request to so specially charge, and exceptions were duly reserved; and, further, thereafter the court instructed the jury, over the objections and exceptions of the plaintiff in error as follows:

"This suit is brought under the act of April 22, 1908, known as the 'Employers' Liability Act.' It provides that every railroad while engaged in interstate commerce shall be liable in damages to any persons suffering injury while employed by such carrier in such commerce, and in case of death to his personal representative for the benefit of the employé's parents. I have omitted, of course, a large portion of the act not material to this case. The testimony is undisputed that at the time the accident occurred the deceased was employed as a member of the crew of an Illinois Central switching train, or transfer train, composed of the engine and 13 loaded cars, all of which originated in the state of Louisiana and were destined to another point in the state of Louisiana. It is also shown that the general employment of this switching crew was to handle both intrastate and interstate commerce; that they might on one trip handle cars that were from without the state, or cars mixed, being both interstate and intrastate, and on another trip a train made up of freight originating and ending wholly within the state, as was the case when the accident occurred. On that state of facts I find as a matter of law, and so charge you, that the deceased was entitled to the benefit of the federal act, and the only thing you have to determine is the question of negligence on the part of the employer, the defendant railroad company."

From an adverse verdict and judgment, the plaintiff in error brings the case to this court for review, assigning as error the refusal of the court to give peremptory instruction in favor of the defendant, and the charge actually given.

After argument and submission, this court, desiring instruction of the Supreme Court of the United States for the proper decision of the propositions of law involved, stated the facts proved in the case, and certified to the Supreme Court the following question, to wit: "At the time of the injury re-

sulting in the death of John Joseph Behrens, was he employed in interstate commerce within the meaning of the Employers' Liability Act approved April 22, 1908?"

This question, so certified, has been answered by the Supreme Court in the negative. See Illinois Central R. Co. v. Behrens, 233 U. S. 473–475, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163. It follows that the assignments of error as noted were well taken, and the case should be accordingly reversed.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to set aside the verdict and judgment heretofore rendered, and thereafter proceed in accordance with the views expressed in Illinois Central Railroad Co. v. Behrens, supra.

SHENK et ux. v. AUMILLER et ux.

(District Court, W. D. Washington, N. D. November 10, 1914.)

No. 36.

PUBLIC LANDS (§ 29*)—CONSTRUCTION OF ACT LIMITING ENTRIES—TIMBER AND STONE ENTRIES—"AGRICULTURAL LANDS."

By Sundry Civil Appropriation Act Aug. 30, 1890, c. 837, § 1, 26 Stat. 391 (Comp. St. 1913, § 4558), it was provided that no person who should thereafter enter upon any of the public lands, with a view of occupation, entry, or settlement "under any of the land laws, shall be permitted to acquire title to more than 320 acres in the aggregate under all of said laws." This was followed by the provision of Act March 3, 1891, c. 561, § 17, 26 Stat. 1101 (Comp. St. 1913, § 4559), that the former act should "be construed to include in the maximum amount of land, the title to which is permitted to be acquired by one person, only agricultural lands, and not to include lands entered or sought to be entered under mineral land laws." *Held*, that in view of the manifest purpose of Congress, as disclosed in the former act, to change its previous liberal policy with respect to land entries, owing to the increase of population and the rapid decrease in the quantity of public lands open to settlement, and its purpose to adhere to its long-settled policy of encouraging mineral exploration, as shown by the later act, the term "agricultural lands" was used in the latter in contradistinction to mineral lands, and it was intended to leave all other classes of lands subject to entry, including stone and timber lands, subject to the 320-acre limitation.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 41–47; Dec. Dig. § 29.*

For other definitions, see Words and Phrases, Second Series, Agricultural Lands.]

In Equity. Suit by William W. Shenk and Charlotte M. Shenk, his wife, against William J. Aumiller and Jane Doe Aumiller, his wife. On motion to dismiss. Motion sustained.

France & Helsell, of Seattle, Wash., for complainants.
P. V. Davis, of Seattle, Wash., for defendants.

NETERER, District Judge. This is a bill in equity in which complainants seek to have title to lands quieted, and have the defendants declared trustees of the title to said lands for the complainants, and a decree directing conveyance to complainants, and for general relief, alleging in substance: That on September 22, 1906, John W. Shenk

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

paid the sum of $400, being $2.50 per acre, to the United States land office, and received a receipt for the money, and final certificate for the land entered under Act June 3, 1878, c. 151, 20 Stat. 89 (Comp. St. 1913, § 4671). That said Shenk conveyed to complainants all his right, title, and interest in and to such land, after issuance of such final receipt. That thereafter a contest was initiated against the entry of John W. Shenk, and upon the hearing thereof it was stipulated and admitted that at the date of making final proof, to wit, September 22, 1906, John W. Shenk had exercised his right to acquire 320 acres of land under the desert land laws of the United States. The Secretary of the Interior held said entry for cancellation upon the sole ground that John W. Shenk was disqualified to acquire timber land under the act of June 3, 1878, supra, because he had exercised his right to acquire 320 acres of agricultural land under the desert land laws. That said entry was canceled under a construction of the act of August 30, 1890, as amended by the act of March 3, 1891. That subsequently the Department of the Interior issued a patent to said land to the defendant upon an application to purchase under said act of June 3, 1878.

Under the various land acts in force prior to August 30, 1890, a person otherwise qualified could enter 1,440 acres of public lands, under the following acts: Timber Culture Act March 3, 1874, amended by Act June 14, 1878, c. 190, 20 Stat. 113, 160 acres; Pre-Emption Act Sept. 4, 1841, c. 16, § 10, 5 Stat. 455, 160 acres; Desert Land Act March 3, 1877, c. 107, 19 Stat. 377 (Comp. St. 1913, § 4674), 640 acres (reduced to 320 in 1891 by 26 Stat. 1907 [Comp. St. 1913, § 4679]); Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89, 160 acres; Coal Land Act March 3, 1873, c. 279, 17 Stat. 607 (Comp. St. 1913, § 4659), 160 acres. In addition to these entries, a person could enter, under Act July 9, 1870, c. 235, 16 Stat. 217, 218, placer mining claims and mineral lands without limit to number of acres; the area or size of claims being limited, but there being no limit to the number of claims. The Sundry Civil Service Act of August 30, 1890, 26 Stat. 391, provides, among other things:

"No person who shall, after the passage of this act, enter upon any of the public lands with a view of occupation, entry or settlement, under any of the land laws, shall be permitted to acquire title to more than 320 acres in the aggregate, under all of said laws."

On March 3, 1891, 26 Stat. 1095, c. 561 (Comp. St. 1913, § 5116), an "Act to repeal timber culture laws, and for other purposes," was approved, and in section 17 thereof, at page 1101 (Comp. St. 1913, § 4559), it is declared that such provisions of the Sundry Civil Act—

"shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws."

On October 12, 1894, the Secretary of the Interior (W. R. Harrison, 19 Land Dec. Dept. Int. 299) held that an entry valuable only for timber and stone should not be included in the maximum amount of land that could be acquired under the limitation imposed by the act

of August 30, 1890, as construed by the subsequent act of March 3, 1891. On May 4, 1905 (33 Land Dec. Dept. Int. 539), the Secretary of the Interior overruled the decision of 19 Land Dec. Dept. Int. 299, supra, and canceled the entry of the grantor of complainants, in determining a contest initiated against the said land prior to the said time, and held the land subject to entry, and patent was thereafter issued to the defendant; the contention of the plaintiff being that the act of the Secretary of the Interior, being erroneous and void and his conclusions based upon an erroneous conception of the law, is not final, but is subject to review by the courts. In the administration and disposition of public business, the land decisions of the Land Department upon questions of fact are conclusive. It is only questions of law that are reviewable in the courts. Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157. To the same effect, that erroneous conclusions upon questions of law are reviewable by the court, see Thayer v. Spratt, 189 U. S. 353, 23 Sup. Ct. 576, 47 L. Ed. 845; Le Marchal v. Tegarden, 175 Fed. 682, 99 C. C. A. 236; Howe v. Parker, 190 Fed. 738, 111 C. C. A. 466; Hoyt v. Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404.

Upon the issuance of the final receipt by the United States land office, the government acknowledged that it has received full pay for the land, and that it holds the legal title in trust for the entryman, and will in due course issue to him a patent. The entryman is the equitable owner of the land. The land becomes subject to state taxation and under the control of state laws in respect to conveyance, inheritance, etc.; the Land Department retaining such control over the land as would authorize investigation for sufficient reasons predicated upon fraud in the entry, but this power may not be arbitrarily exercised, and, if improperly exercised, the rights of the entryman may be enforced in the courts, after the patent has issued to other parties. The entryman, however, could not institute an action against the government, and may not be able to enforce his equity until patent has been issued by the government to another person. U. S. v. Detroit Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499. An attempt to deprive the entryman of the vested interest in the land which the payment of the money secures to him, by the Land Department, will be corrected whenever the matter is presented so that the judiciary can act upon it. Cornelius v. Kessel, 128 U. S. 456, 9 Sup. Ct. 122, 32 L. Ed. 482.

Complainant bases his right of action upon the contention that it was the intention of Congress to exclude from the operation of the act of August 30, 1890, all lands except lands which are strictly agricultural, and that the word "agriculture" was used by Congress in its restricted sense, and that it applies only to agricultural lands, or lands capable of being cultivated and planted to seed, and that in the use of the term Congress had knowledge that there were classes of public lands which could be acquired by three separate and distinct methods: (1) Those which could be acquired by settlement and occupation under the homestead and desert land laws; (2) those lands which are unfit for cultivation, but valuable either for timber or stone, and can be purchased under the act of June 3, 1878; (3) mineral lands—and that

the use of the words "agricultural lands" necessarily excluded lands valuable for timber and stone and unfit for cultivation.

Reference to the act of August 30, 1890, shows that Congress excluded from entry or settlement *"under any of the land laws* * * * more than 320 acres in the aggregate *under all of said laws."* This includes every classification. In the construction subsequently placed upon this act Congress referred to only two classifications of land: (a) Agricultural lands; and (b) mineral lands. The primary and general rule of statutory construction is that the intent of the lawmaker must be ascertained, when the language employed is involved and the intent not clearly expressed. The purpose for which the act under consideration is enacted being a matter of first importance in arriving at the solution of the question presented, I think it is proper for the court to consider that the conditions of the United States with relation to increase of population were greatly changed in 1890 from the conditions existing at the dates of the enactment of the various public land laws, and that the spirit of the administration of the public land laws was to benefit the many and not the few. It is common knowledge that in 1890 the public land area open to settlement was becoming very limited. It appears that Congress adopted a new policy by limiting the number of acres to be entered by a person *"under any of the land laws"* and *"under all of the laws."*

Upon the application of this act by the Interior Department, limiting the right of acquisition *under all of the land laws* to 320 acres, including mineral lands, Congress immediately passed the act of March 3, 1891. It had been the settled policy of Congress to permit acquisition under the mineral land laws by individuals of an unlimited number of acres, comprised within various claims which are defined, and the prompt passage of the act of March 3, 1891, supra, demonstrates that it had not intended a reversal of this well-settled policy by the act of August 30, 1890, supra. The only lands excluded by the act of March 3, 1891, supra, from the operation of the act of August 30, 1890, supra, are mineral lands. As an expression of the viewpoint from which Congress approached the subject the Honorable Secretary of the Interior (33 Land Dec. Dept. Int. 541, supra) says:

"The bill had been sent to a conference committee of the two houses, and in the written report of the chairman of the House committee, it is stated: 'Section 17 allows mineral entries in addition to the maximum allowance of 320 acres allowed under existing laws.'"

The existing law was the act of August 30, 1890, supra, and the adoption of the language by the conference committee in which the maximum number of acres was limited to 320 acres was recognized by special reference to the act limiting the number of acres under all of the laws, and it seems to me conclusive that the words "agricultural lands" in the act of March 3, 1891, supra, were used only in contradistinction to mineral lands.

The contemporaneous construction of the act by the department cannot aid the complainants, for the reason that the construction now sought to be declared erroneous was promulgated prior to the entry

of the land and the purchase by the complainants, and the last construction placed upon this act by the department should receive some weight by the courts, especially in view of the language employed.

The motion is sustained.

THE OCEANIA VANCE.

(District Court, W. D. Washington, N. D. August 31, 1914.)

No. 4046.

1. COLLISION (§ 82*) — TOWING TUG AND CROSSING SCHOONER — EXCESSIVE SPEED IN FOG.

A collision between a tug with a tow and a schooner on a crossing course in a thick fog, and in a place where vessels frequently passed, *held* due solely to the fault of the schooner in going at excessive speed; it being shown that there was a strong breeze, and that she was sailing with the wind, with practically all sails set, and making not less than 7 miles an hour. The action of the tug in first reversing, and then at once going ahead at full speed, when the schooner was sighted, not more than 200 feet away, *held* an act in extremis, and not imputable as a fault, even if an error.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170–174; Dec. Dig. § 82.*]

2. COLLISION (§ 82*)—FOG—DUTY TO MAINTAIN MODERATE SPEED.

It is the duty of vessels to maintain a moderate speed in a fog, irrespective of statute, and this duty is especially incumbent on sailing vessels, which are not readily maneuvered.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170–174; Dec. Dig. § 82.*]

In Admiralty. Suit for collision by the Puget Sound Tugboat Company, owner of the tug Sea Lion, against the schooner Oceania Vance; the Coast Shipping Company, claimant. Decree for libelant.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for libelant.

Reynolds, Ballinger & Hutson, of Seattle, Wash., for claimant.

NETERER, District Judge. [1] At about 6:30 a. m., June 19, 1909, the Sea Lion, being 107 feet in length, beam 22 feet, depth of hold 13 feet, having in tow the barge Charger, having 1,700 ton capacity, laden with rock, and sailing from Cowlitz Bay on Waldron Island, bound for Grays Harbor, came into collision with the schooner Oceania Vance, while proceeding on her regular course toward the Straits of Juan de Fuca, the weather being thick and foggy. The course of the Sea Lion was SW–S–¼S, that being the usual course for steam vessels outward bound. Upon entering the fog the Sea Lion started to blow its whistle, a deep, coarse whistle, one long and two short blasts, the prescribed signal for a vessel having a tow. Act June 10, 1896, c. 401, Fed. Stat. Annot. vol. 2, page 159, 29 Stat. 381 (U. S. Comp. St. 1913, § 7853). This was continuously sounded until the time of the collision. Just prior to the collision the men on board the tug Sea Lion heard the Oceania Vance giving three blasts, which indicated that she

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

was a sailing vessel. 29 Stat. 381. The Sea Lion stopped its engines and blew its tow signal. The schooner answered by three blasts of her horn. The schooner was about 175 to 200 feet distant from the tug when first seen by the men on the tug and was heading toward amidships of the Sea Lion. The schooner observed the tug when it was about 300 feet distant. On seeing the schooner, the mate gave the signal to reverse the engines and ordered the quartermaster to put the wheel hard astarboard. At this time the captain, who had previously retired, reached the wheelhouse, and the mate went aft to endeavor to prevent the hauser from fouling the propeller. The Sea Lion, when backed, had a habit of swinging around to port very abruptly, thus bringing her right in line with the way the schooner was coming and making a collision inevitable. The captain, in an endeavor to avert the same, ordered full speed ahead; that being the only chance in his judgment that he then had. The three signals, namely, to stop, to back, and to go ahead, were given one right after the other. At the same time, the captain called to the lookout on the Oceania Vance to put the wheel of the schooner over. This request was not complied with, though good seamanship required such action. A few seconds later the bow of the Oceania Vance struck the Sea Lion about 25 feet forward of the latter's stern, cutting a hole variously estimated from 1½ to 3 feet in width. The Sea Lion sank within a few minutes in 72 fathoms of water. The Oceania Vance, at the time of the collision, was going at a speed to exceed 7 miles an hour. She was sailing before the wind, with the foresail, jib, spanker and mizzen topsail set. A "strong breeze" was blowing, and the place where the collision occurred was where ships frequently pass.

The liability in this case depends wholly upon the fact as to whether or not the speed at which the Oceania Vance was going was immoderate. It is strongly contended on the part of the claimant that she was going not to exceed a speed of 5 knots an hour, and that that was not an immoderate speed. I think a fair consideration of the testimony is conclusive that the schooner was going not less than 6½ or 7 knots an hour. The fact that she was sailing before the wind, with practically all of her sails set, with a "strong breeze" blowing, as stated by one of the witnesses, and by practically all of the witnesses that there was a good breeze, and the further fact of the testimony of the captain, immediately after the collision, that the boat was going at a speed of 6½ to 7 miles an hour, and he had concluded this after an examination of the log, and only modified his testimony upon the hearing, some two years after the collision, and all of the facts as disclosed by the witnesses in the record, would indicate that the vessel was moving at the speed suggested.

It is also strongly contended upon the part of the claimant that, even though the speed of the schooner was 7 miles an hour, that was not an immoderate speed, and that the conduct and action of the tug Sea Lion in reversing its engines and then going forward, instead of stopping the engines and moving at a moderate speed, was the cause of the injury, and it was the negligence of the tug Sea Lion that caused the collision. From a fair consideration of the evidence, I think it

must be concluded that what was done by the officers of the Sea Lion were acts in extremis, and, whether wise or not, is not imputable as a fault. Ship Blue Jacket v. Tacoma Mill Co., 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620.

[2] In view of the density of the fog, it was imperative upon the schooner to move at a moderate speed. This is necessary in order to give approaching vessels an opportunity of observation and greater time within which to adjust themselves to the situation. It has been frequently held that a speed of 5 knots an hour is not an immoderate speed for a sailing vessel. If the schooner had been moving at 5 knots an hour instead of 7, as I believe the testimony to show, there would have been considerable more time, relatively speaking, after the vessel had been discovered, for the crafts to adjust themselves with relation to the situation, and the collision having occurred at a place where ships are frequently passing, the necessity was therefore emphasized for moderation in speed. This is a duty irrespective of the statute. The Rhode Island (D. C.) 17 Fed. 554. In Act Aug. 19, 1890, c. 802, 26 Stat. at Large, page 326, 2 Fed. Stat. Annot. page 160 (U. S. Comp. St. 1913, § 7854), it is provided:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained shall, so far as the circumstances of the case shall permit, stop her engines, and then navigate with caution until danger of collision is over."

While this statute does not include sailing crafts, yet the principle enunciated is held to comprehend and be applicable to sailing vessels. The further fact that a sailing vessel cannot be maneuvered in the manner required is a strong reason, as stated by the courts, for so moderating her speed as to furnish effective aid to an approaching steamer, charged with the duty of avoiding her. She can do practically nothing beyond putting her helm up or down to "ease the blow," after the danger of collision has become imminent.

I think this case is on "all fours" with the Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, where the duty of a sailing vessel in a fog is defined, and in which the court reviews all of the authorities. A consideration of that case, with the facts in this case, precludes any conclusion other than that a decree should be entered for libelant as prayed for; and it is so ordered.

THE TILLICUM.

(District Court, W. D. Washington, N. D. October 22, 1914.)

No. 4730.

1. Collision (§ 83*)—Steam Vessels Meeting—Fog.

A tug, with a barge on the side extending ahead, and a meeting steamship, came into collision in Puget Sound in the early morning in a dense fog. Both were sounding fog signals. The steamship heard the tug's signal ahead, and stopped her engines for a minute, and then started ahead, but almost immediately reversed, on hearing another signal, and an alarm, which she answered. The only lookout on the tug was in the pilot house, which was at least 24 feet back from the bow of the barge. She had also stopped her engines, but both vessels were moving forward at the time of collision. *Held*, that the steamship was in fault for starting ahead without locating the whistle heard ahead, that the tug was also in fault for not maintaining a proper lookout forward, and that both were in fault for not sooner stopping their headway.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 156, 167, 175; Dec. Dig. § 83.*]

2. Collision (§ 21*)—Navigating in Fog—Lookout.

A local custom of tugs to maintain their lookouts either in or just forward of the pilot house does not excuse them for violating the law, which in general, and especially in a fog or darkness, requires all such vessels to maintain a lookout forward, whose sole duty it shall be to look and listen for other vessels; and where such rule is not observed, and a collision follows, every doubt as to the effect of the neglect will be resolved against the vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 18; Dec. Dig. § 21.*]

3. Collision (§ 77*)—Lookout—Construction of Rules.

In view of the provision of article 29 of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 102 [Comp. St. 1913, § 7903]) that "nothing in these rules shall exonerate any vessel * * * from the consequences of any neglect to * * * keep a proper lookout," the requirement of rule 38 of the board of inspectors that all passenger and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch in or near the pilot house, cannot be construed as superseding the long-established admiralty rule requiring a competent lookout forward.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140–149; Dec. Dig. § 77.*]

4. Collision (§ 77*)—"Lookout" Defined.

A "lookout" is a person who is specially charged with the duty of observing the lights, sounds, echoes, or any obstruction to navigation, with the thoroughness which the circumstances admit. His sole duty must be that with which he is charged, and he cannot divide this responsibility with the duties of master or with any other person.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140–149; Dec. Dig. § 77.*

For other definitions, see Words and Phrases, First and Second Series, Lookout.]

In Admiralty. Suit for collision by the Inland Navigation Company, as owner of the steamship Rosalie, against the towboat Tillicum; the Stimson Mill Company, claimant and cross-libelant. Decree against both vessels.

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

Bronson & Robinson, of Seattle, Wash., for libelant.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for claimant and cross-libelant.

NETERER, District Judge. The steamship Rosalie, a vessel of 318.51 gross tonnage, bound from Bellingham to Seattle, at about 5:15 a. m. on the 8th day of April, 1911, collided with the towboat Tillicum, a vessel of 116 tons and 87 feet in length, while proceeding from the Standard Oil dock, in Seattle, to Ballard. The Tillicum had lashed to her side a barge, 28 feet wide and 100 feet long, on which was loaded two oil tank cars. The Rosalie was owned by the Inland Navigation Company, a corporation, and the towboat Tillicum by the Stimson Mill Company. A libel and a cross-libel were filed by the respective parties to recover the damages sustained to their respective vessels.

A dense fog prevailed in the vicinity of the place of collision. The usual speed of the Rosalie was about 9½ knots per hour. She passed West Point Lighthouse about 5:05 a. m. At that time a very light fog prevailed, and the light at West Point was plainly visible. She was giving her regular fog signals, one prolonged blast of her whistle, at the usual intervals. About three minutes after passing West Point her lookout reported one whistle on the port bow, which was also heard by the mate then on duty in the pilot house. The engine was stopped and the vessel drifted about a minute, and hearing no further response to her whistle she started ahead. Then another whistle was heard, followed by a danger signal from the tugboat, which was answered by a like signal from the Rosalie. At this time the lights were seen a short distance ahead. The Rosalie, after giving the signal to go ahead, almost instantly gave the order to reverse. The tug Tillicum proceeded on her course in a thick fog which was prevailing. She gave her fog signals at the regular intervals, and as she proceeded along under Magnolia Bluff in the vicinity of Four-Mile Rock she slowed down to about three miles an hour and endeavored to locate her position by the echoes from the bluff. After proceeding at this speed for about five minutes, having heard no whistle from other vessels, she got an echo of a long whistle from some object ahead of her. She immediately stopped her engine and drifted until her next whistle was given, when the echo from ahead was repeated, and also a danger signal immediately followed, and her engine was thereupon reversed. While the vessels were in this position, the collision occurred. At the time of the collision, A. W. Anderson was master and pilot of the tugboat. Captain Charlesworth was acting as lookout from the pilot house. The scow's bow was from 12 to 30 feet forward of the bow of the tug. The bow of the tug was at least 12 feet forward of the pilot house.

[1, 2] It is contended on the part of libelant that because the tug Tillicum had no lookout, and because she did not stop and reverse in time, and because she was carelessly navigating, she is liable for the damage which was occasioned; while it is contended by the claimant and cross-libelant that the Rosalie was at fault: First, in navigating

at an excessive rate of speed; second, in navigating without due caution after hearing a steam vessel forward of her beam, whose course and position were not ascertained; and, third, in failing to give proper signals when it became apparent that the course and intention of the vessel approaching was not understood. The claimant urges that, while it did not have a lookout upon the bow of the tug, the better point of observation was in the pilot house, and that, even though the pilot rules would ordinarily require the lookout to be on the bow of the boat, yet the custom in the operation of tugboats in and about the waters in which the collision occurred is for the lookout to be stationed just forward of the pilot house, or in the pilot house.

It is immaterial what the custom in the operation of the boats is, if the custom is contrary to the law. If a custom could obtain over the law, navigators could very readily overcome an act of Congress by agreeing upon a rule and adhering to it for such a time as to develop a custom. Such cannot be the law.

"The statement that it is not customary for tugs to maintain a more vigilant lookout than this tug had is immaterial. The law determines their duty in this respect, and they cannot avoid it without becoming responsible for the consequences." The George W. Childs (D. C.) 67 Fed. 272.

It has, in admiralty, long been the established rule of due care that vessels navigating in a fog or in the nighttime shall have a competent lookout.

"Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose, on the forward part of the vessel; and the pilot house, in the nighttime, especially if it is very dark and the view is obstructed, is not the proper place." The Ottawa, 3 Wall. 269, 18 L. Ed. 165.

[4] A lookout is a person who is specially charged with the duty of observing the lights, the sounds, the echoes, or any obstruction to navigation, with that thoroughness which the circumstances admit. His sole duty must be that with which he is charged, and he cannot divide this responsibility with the duties of master or those of any other person about the ship. The J. C. Ames (D. C.) 121 Fed. 918. And it is the duty of the courts charged with admiralty jurisdiction to give the fullest effect to such duty, when the circumstances are such as to call for its application, and every doubt as to the performance of the duty, or the effect of nonperformance, should be resolved against the vessel in the fault, until the contrary is shown by the testimony. The Ariadne, 13 Wall. 475, 20 L. Ed. 542; Wilder's Steamship Co. v. The Low, 112 Fed. 172, 50 C. C. A. 473; The Hypodame, 6 Wall. 216, 18 L. Ed. 794; The Genesee Chief v. Fitzhugh, 12 How. 443, 13 L. Ed. 1058.

[3] Rule 38 of the general rules and regulations prescribed by the board of supervising inspectors, authorized under Rev. Stat. § 4405 (Comp. St. 1913, § 8159), provides:

"All passenger and ferry steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch in or near the pilot house, and this rule applies to all steamers navigating in the nighttime."

This rule, it is contended, applies to the instant case, and that under it no question could arise as to the sufficiency of the lookout.

Article 29 of the regulations for preventing collisions upon harbors, rivers and inland waters (30 Stat. p. 102) provides:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences * * * of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

I do not think that it can be seriously contended that it was intended to supersede the long-established admiralty rule requiring a competent lookout and that he shall be placed in the forward part of a forward moving vessel, and the adoption of article 29 by Congress would seem to remove all doubt. The further contention that a person could see and hear better from the pilot house, because of its elevated position, than from the bow of the vessel, I think, is answered by the testimony in this case, which shows that the fog was general. If the testimony should disclose that the fog bank lay near the water and that the pilot house extended above the fog, the contention might have some force; but under the testimony the court must find that a person could see no farther into the fog 12 or 15 feet above the water than he could 4 or 6 feet. The bow of the scow, being some distance forward of the bow of the boat, placed the master when in the pilot house at least 24 feet back from the bow of the scow, and possibly 42 feet, depending upon the testimony adopted as correct; and the court cannot say that in a dense fog, such as this was, the lookout could have a better point of observation from the pilot house than from the bow of the boat. I think that in the towing of this scow, the lookout should have been stationed as far forward on the sailing craft as possible. The tug with its tow was a craft capable of committing injuries, and its size or shape can make no exception to the rule requiring a lookout.

"If tugs will go about the harbor without lookouts, they may not expect that the court will conjecture nicely what would have happened if the lookout had been in his place, doing his duty, when the collision occurred." The Arthur M. Palmer (D. C.) 115 Fed. 417.

The safety of life and property requires that a tug, in towing a scow in the manner shown, with the bow of the scow from 12 to 30 feet forward of the bow of the tug, in a dense fog, must have a lookout stationed farther forward than in the pilot house on the tug. In a dense fog a short distance to the eye or ear may mean much, and a few feet might save many lives or much property. Courts must, therefore, in a harbor where many vessels may be afloat, rigidly enforce the safety provisions of law or admiralty rules.

Article 16 of regulations for sailing crafts upon inland waters (30 Stat. p. 99 [Comp. St. 1913, § 7889]), provides:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the cir-

cumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

I think it may be fairly assumed that the claimant, when it heard the echo of the object forward, did stop its engine and navigate with caution; but I am not prepared to say that the echo was heard or the engine stopped and reversed in time to stop the forward motion of the tug. The libelant upon hearing the whistle, immediately stopped its engine and proceeded with caution, but I think was not warranted, under the circumstances, in starting forward again at the time that it did without first locating the whistle that had been heard. The Hypodame, 6 Wall. 216, 18 L. Ed. 794. And while the forward motion was only three or four revolutions of the engine, yet it was of sufficient force to add the momentum which the Rosalie then had to the speed that had been given prior to the stopping of the engine, and the reversing of the engine after the alarm signal was given was too late to stop the forward movement of the boat prior to the collision. I believe, from the testimony in this case, that the engines of both crafts were reversed, but that they had not operated for a sufficient length of time to stop the forward movement of either of the crafts, and that both boats were still going forward at the time of the collision.

"The liability for damage is upon the ship or ships whose fault causes the injury; but when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing 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." The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148.

This rule applies where a proper lookout is not provided (The George W. Childs, supra; The Arthur M. Palmer, supra; McCabe v. Old Dominion Steamship Co. [D. C.] 31 Fed. 234; The Lyndhurst [D. C.] 92 Fed. 681), as well as violations of other recognized rules of navigation.

"It is * * * claimed that, even if the Selja was at fault in not obeying rule 16, such fault was not a contributing cause of the collision. The law is that * * * she must show, not only that probably her fault did not contribute to the disaster, but that it could not have done so." The Beaver (D. C.) 197 Fed. 866.

Both of these vessels were moving vessels. I think both were at fault. The Tillicum did not have a proper lookout, and the Rosalie did not navigate with due caution after hearing a steam vessel forward of her beam. Both vessels, having violated recognized rules of navigation, and not having shown that such fact did not contribute to the disaster, must be held to have contributed to the collision.

The damage to the Rosalie is shown to be $5,116.12; to the Tillicum and scow, $597.30—a total loss of $5,713.42, which should be equally divided. A decree may be presented for libelant in the sum of $2,856.71; each party to pay one-half the costs.

THE WILBERT L. SMITH.

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

No. 4553.

1. COLLISION (§ 8*)—HARBORS—MUNICIPAL ORDINANCES REGULATING ANCHORAGE.

A local ordinance prohibiting the anchorage of vessels within certain limits in a harbor without permission from the harbor master is valid, and a vessel which fails to comply with the same is liable for the consequences.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 7; Dec. Dig. § 8.*]

2. COLLISION (§ 81*)—RULES FOR PREVENTING—DUTY TO MAINTAIN LOOKOUT IN FOG.

Under the general admiralty rules it is the duty of every vessel, when navigating in a fog, to maintain a lookout in a proper position, who shall be charged with no other duty; and every doubt as to the performance of such duty, or the effect of nonperformance, should be resolved against the vessel in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 157–166; Dec. Dig. § 81.*]

3. COLLISION (§ 102*)—MOVING AND ANCHORED VESSEL IN FOG—COMMON FAULTS.

A tug, moving at about five miles an hour in Everett Harbor in a fog, came into collision with a schooner anchored in a part of the harbor forbidden by a local ordinance, and which was not giving the fog signals required by article 15 of the Inland Navigation Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 99 [Comp. St. 1913, § 7888]). There was no lookout on the deck of the tug. *Held*, that both vessels were in fault, the tug for excessive speed and failure to maintain a lookout, and the schooner for violation of the anchorage ordinance and the rule as to fog signals, and were equally liable for the damages.

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

4. COLLISION (§ 77*)—"LOOKOUT"—DUTIES.

A "lookout" is a person who is specially charged with the duty of observing the lights, the sounds, and the echoes, with that thoroughness which the circumstances admit. His sole duty must be that with which he is charged, and he cannot divide this responsibility with the duties of any other person about the ship.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 140–149; Dec. Dig. § 77.*

For other definitions, see Words and Phrases, First and Second Series, Lookout.]

In Admiralty. Suit for collision by the Everett City Tugboat Company, owner of the tug Mountaineer, against the American schooner Wilbert L. Smith. Both vessels held in fault, and decree dividing damages.

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

H. R. Clise, of Seattle, Wash., for claimant.

NETERER, District Judge. Libelant's tug Mountaineer, of 55 tons gross, proceeding from the Improvement Company's dock at Everett, crossed Everett Harbor to Priest Point, on October 16, 1911, and came

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

into collision with the schooner Wilbert L. Smith, laden with a cargo of 900,000 feet of lumber, anchored west of the Great Northern dock, upon ground forbidden by city ordinance of the city of Everett. There was no lookout on the deck of the tug. The master, assisted by the mate, was in the pilot house. The usual speed of the tug was eight miles per hour. At the time of the collision it was making about five miles per hour. The sea was calm and the tide was flooding. The captain of the tug said:

"I squared around and shaped my course, and when I blew the long whistle I was about 500 or 600 feet, or something like that, off the end of the dock."

He states that the atmosphere was—

"perfectly clear where we were, and probably—well, I should judge—we were about 500 or 600 feet from the edge of the fog bank. Just as we entered the fog, I put up my hand to blow a third blast. However, I didn't blow it, because I saw a dark object in front of me, and I said to the mate—I said, 'There is something ahead of us; a schooner of some kind.' I pulled the wheel around aport and gave the engineer the danger signal in the engineer's room. The collision happened about 15 or 20 seconds afterwards."

The impact caused the boiler to shift, broke the steam pipes, permitting the steam to escape, "the steam valve blew the floor" over the boiler "up into the room," and the concussion killed the dog which was in the room. Libelant seeks to recover $2,016.09 damages resulting because of necessary repairs and demurrage.

It is contended that the schooner had anchored on forbidden ground, and gave no fog signals of any kind, and solely because of these overt acts recovery should be had. An examination of the testimony convinces me that claimant did not ring any bell or sound any fog whistles as required, or at all. While there is testimony of the watchman that he did ring the bell every minute from midnight until the time of the collision, the testimony, to my mind, is overwhelming against this contention. While positive testimony should always receive greater consideration and have greater weight than mere negative testimony, yet from the facts of this case it is established that at least 13 witnesses, some of them disinterested parties, who were in a position to hear, testified that they did not hear any bell or signal of any kind. The crew upon the schooner, who were in a position to hear, did not testify as to hearing the bell, and yet one of the members of the crew was called and testified at the hearing, but was not asked as to the ringing of the bell, nor is any reason given why they did not testify. The fact that this boat was attached in this proceeding on the very day of the collision emphasized the incident in the minds of all who knew with relation to it. The circumstances surrounding a case where the action is commenced immediately charge the minds of the persons who know with relation to the matter with the facts as they actually occurred; whereas, if the action had not been commenced until some time subsequent to the collision, the court would give very little, if any, weight to the negative testimony, unless it was shown by circumstances surrounding that the facts were impressed upon the minds of the witnesses.

[1] I likewise think that the testimony establishes by a fair preponderance that the schooner was on forbidden ground. That the provisions of such an ordinance will obtain, and seamen must regulate their conduct with relation to it, is sustained by The James Gray, 62 U. S. (21 How.) 184, 16 L. Ed. 106, in which the court says:

"The power of the city authorities to pass and enforce these two ordinances is disputed by the libelants. But regulations of this kind are necessary and indispensable in every commercial port, for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time. * * * They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them."

The same court, in United States v. Transportation Co., 184 U. S. 255, 22 Sup. Ct. 350, 46 L. Ed. 520, said:

"Anchoring vessels of the United States in an unusual and improper position in a harbor, in total disregard of usages and requirements of the court requiring notice to the harbor master of the intention to anchor, constitutes negligence on the part of the officers of the vessel, which will render the United States liable in the Court of Claims for damages thereby caused to other vessels navigating the harbor."

A vessel failing to comply with local harbor requirements with relation to anchorage is liable for consequences of such violation. The Amiral Cecille (D. C.) 134 Fed. 673. Section 1 of Ordinance No. 845, City of Everett, provides:

"It shall be unlawful for the master or person having charge of any ship * * * to allow the same to be moored or lie at anchor in the waters of Port Gardner Bay within the jurisdiction of the city of Everett without first having permission in writing from the harbor master within the following limits."

The vessel was within the prohibited limits. No permission of the harbor master was obtained.

A vessel not on prohibited ground, but in a fairway, failing to give warning of her presence, is liable for resulting damages. The Fristad (D. C.) 51 Fed. 766. And the precautions to be taken must be commensurate with the danger such vessel presents to shipping. The Europe (D. C.) 175 Fed. 596.

Article 15 subdivision (d) of Pilot Rules for Inland Waters, prescribed by the government (30 Stat. p. 99), provides:

"A vessel when at anchor shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds."

Article 16 of the same act provides that:

"Every vessel shall, in a fog, * * * go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

[2] It is strongly contended that the libelant, not having a proper lookout and moving at an excessive rate of speed, was the direct cause

of the collision. It has, in admiralty, long been the established rule of due care that vessels navigating in a fog, or in the nighttime, shall have a competent lookout.

"Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must actually be employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose, on the forward part of the vessel; and the pilot house in the nighttime, especially if it is very dark, and the view is obstructed, is not the proper place." The Ottawa, 3 Wall. 269, 18 L. Ed. 165.

[4] A lookout is a person who is specially charged with a duty of observing the lights, the sounds, and the echoes, with that thoroughness which the circumstances admit. His sole duty must be that with which he is charged, and he cannot divide this responsibility with the duties of master or that of any other person about the ship. And it is the duty of the courts charged with admiralty jurisdiction to give the fullest effect to such duty when the circumstances are such as to call for its application, and every doubt as to the performance of the duty or the effect of nonperformance should be resolved against the vessel in the fault until the contrary is shown by the testimony. The Ariadne, 13 Wall. 475, 20 L. Ed. 542; Wilder's Steamship Co. v. Low, 112 Fed. 172, 50 C. C. A. 473; J. C. Ames (D. C.) 121 Fed. 918.

Article 29 of the regulations for preventing collisions upon harbors, rivers, and inland waters in the United States, supra, provides:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences * * * of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seaman, or by the special circumstances of the case."

"The lookout should be charged with no other duty than that to which he is assigned, and in that duty he should be actually, vigilantly, and continuously employed, without having his attention distracted by any other services." City of Philadelphia v. Gavagnin, 62 Fed. 617, 10 C. C. A. 552.

"The tug had no lookout, and the question is whether she has sufficiently excused herself for the omission. In the proper exercise of his duties, the lookout should have been located about 15 feet ahead of the pilot house, where the pilot was stationed while navigating the vessel. The lookout would have had a somewhat better view ahead than the pilot, and should have been exclusively engaged in watching." Erie R. Co. v. Oceanic Steam Nav. Co. (D. C.) 121 Fed. 440.

"The statement that it is not customary for tugs to maintain a more vigilant lookout than this tug had is immaterial. The law determines their duty in this respect, and they cannot avoid it without becoming responsible for the consequences." The George W. Childs (D. C.) 67 Fed. 272.

"If tugs will go about the harbor without lookouts, they may not expect that the court will conjecture nicely what would have happened if a lookout had been in his place, doing his duty, when a collision occurred." The Arthur M. Palmer (D. C.) 115 Fed. 417.

"There is no exception to the rule requiring a lookout in favor of craft capable of committing injuries, on account of size." The Marion (D. C.) 56 Fed. 271.

The presumption of law is against the moving vessel in collision cases, and the burden is upon such moving vessel to show that it was not at fault, but that the fault was the result of the negligence of the anchored vessel. Hughes on Admiralty, page 261; The Minnie (D. C.) 87 Fed. 780; The Worthington (D. C.) 19 Fed. 836; The Northern Queen (D. C.) 117 Fed. 906, 914. And where there is a reasonable doubt as to which party is at fault, the loss must be sustained by the party on whom the burden rests. Lockwood v. Grace Girdler, 74 U. S. (7 Wall.) 196, 19 L. Ed. 113.

[3] The testimony in this case does not vindicate the libelant from culpability. While the claimant was negligent in anchoring the vessel in the forbidden ground, and also in failing to give the signals as required, I am not prepared to say that the libelant's tug was not moving at a greater speed than the circumstances warranted, under the law and the condition of the fog, and, further, that the failure to have a lookout on its bow would not have avoided the collision. I therefore think that the parties were equally culpable, and that this is a proper case for the division of damages; each bearing one-half of the damage and paying one-half of the costs.

A decree may be presented accordingly.

WRIGHT v. ANKENY et al.

(District Court, W. D. Washington, N. D. October 23, 1914.)

No. 44.

1. REMOVAL OF CAUSES (§ 48*) — SEPARABLE CONTROVERSY — SUIT AGAINST STOCKHOLDERS.

The liability of each stockholder of an insolvent corporation is distinct and separate, and may be enforced by a receiver for the corporation by a separate action; and the fact that he seeks recovery against a number in single action does not change the separable character of the controversies, nor deprive a defendant, otherwise entitled, of the right to remove the cause as to him into a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. § 48.*]

2. REMOVAL OF CAUSES (§ 61*)—SEPARABLE CONTROVERSY—HOW DETERMINED.

For the purposes of the removal of a cause into the federal court, the cause of action is the subject of controversy, and that is whatever the plaintiff declares it to be in his pleading.

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

3. REMOVAL OF CAUSES (§ 48*)—SEPARABLE CONTROVERSY—PARTIES ENTITLED TO REMOVE.

The receiver of an insolvent corporation commenced an action in a state court against a number of defendants to enforce their liability on unpaid stock subscriptions. The complaint alleged that three of the defendant stockholders had entered into a conspiracy with a fourth defendant to defraud plaintiff, pursuant to which they had conveyed lands situated in the state of suit to the fourth defendant. The lands were attached, and their sale under the attachment prayed for.. All of such defendants were citizens and residents of another state, and as to one stockholder the

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

amount involved was sufficient to give a federal court jurisdiction. *Held*, that the cause of action so alleged was separable from that alleged against other defendants, and that under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), which provides that in such case "either one or more of the defendants actually interested in such controversy may remove said suit," all of the defendants so named might join in its removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. § 48.*]

In Equity. Suit by Elias Wright, receiver of the Lak-A-Taka Company, against R. V. Ankeny and others. On motion to remand to state court. Denied.

See, also, 217 Fed. 988.

William Brueggerhoff, of Seattle, Wash., for plaintiff.

Peters & Powell, of Seattle, Wash., for petitioning defendants.

NETERER, District Judge. This is an action commenced in the state court by the receiver of an insolvent corporation to enforce the liability of a stockholder on unpaid stock subscription. Many persons are made defendants, all of whom are citizens of the state of Washington except the petitioning defendants, who are residents of Wisconsin. Recovery is sought against Frank H. Parker for $5,000, Lawrence A. Olwell for $2,500, and Wilfred C. Parker for $1,000. Lands in Washington have been attached, and foreclosure of the attachment lien sought, and application of the proceeds of sale to the satisfaction of these claims. It is alleged in the complaint:

"That the said Frank H. Parker, Wilfred C. Parker, and Lawrence A. Olwell, on or about the 13th day of April, 1914, formed a conspiracy with one Walter S. Droppers for the purpose and with the intent of evading their liability and indebtedness to the receiver on their respective stock subscriptions above stated, and conspired together * * * to carry out the intents and purposes of absolving themselves from their indebtedness by placing their properties in the state of Washington beyond the process of law."

And it alleges in substance that the real estate attached is the property of the Parkers and Olwell, and that the title thereto was, as the result of said conspiracy, placed in the name of Walter S. Droppers for the purpose of concealing the same from the plaintiff and creditors; and it further alleges that Jane Doe Droppers is the wife of Walter S. Droppers, and that the said Parkers and Olwell and their wives made said transfer to Walter S. Droppers with intent to delay and defraud the receiver and creditors of the said Parkers and Olwell. On petition, the action was removed to this court. A motion to remand has been made, which is now under consideration.

[1] In support of the motion to remand, it is contended that this is not a controversy wholly between citizens of different states, nor is the controversy a separable controversy; and Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514, Wilson v. Oswego Township, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70, and Hyde v. Ruble, 104 U. S. 407, 26 L. Ed. 823, are cited. These are cases arising under the acts of Congress of July 27, 1866 (14 Stat. 306, c. 288), and March 3, 1875 (18

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

Stat. 470, c. 137 [Comp. St. 1913, § 1033]), and the court simply held in those cases that there was not a separable controversy wholly between citizens of different states.

Section 28 of the Judicial Code (Act March 3, 1911, 36 Stat. 1094) provides for the removal of causes to this court, of which the court is given jurisdiction by the Judiciary Act, where the defendant or defendants are nonresidents of the state, "* * * and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either *one* or *more* of the defendants *actually interested* in such controversy *may remove* said suit into the District Court of the United States for the proper district. * * *"

[2] All of the defendants seeking removal are residents of Wisconsin. The plaintiff is a resident of Washington. The amount involved as to Frank H. Parker is within this court's jurisdiction. The liability of each stockholder of an insolvent corporation is a distinct and separable liability, which could be pursued by the receiver in separate causes of action. The mere fact that recovery is sought against each in one action does not destroy the separable controversy, but still leaves it to be divided in the several parts which the exigencies of the proceeding may require by demands asserted by the various interested parties, under provisions of law bearing upon their several rights, or the tribunal before whom the several rights shall be asserted. The cause of action is the subject of the controversy, and that is, for all of the purposes of the action, whatever the plaintiff declares it to be in his pleadings. Louisville & Nashville Rd. Co. v. Ide, 114 U. S. 53, 5 Sup. Ct. 735, 29 L. Ed. 63; Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535, 7 Sup. Ct. 1265, 30 L. Ed. 1235; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528.

[3] The plaintiff seeks to foreclose an attachment lien upon real estate in Washington, which the plaintiff charges was, through the conspiracy of the petitioning defendants, transferred from the names of the stock-subscribing petitioners to the other petitioners. All of the parties are necessary to an adjudication of the conspiracy charged as bearing upon the title to this land, the value of which it is sought to apply upon the stock liability, and the cause of action being removable upon any phase of legal approach as to Frank H. Parker (Judicial Code, supra), and it appearing that the issue can be fully determined as to the plaintiff and these defendants in this cause, it may be removed to this court upon such petition (Barney v. Latham, supra).

The motion to remand is denied.

WRIGHT v. ANKENY et al.

(District Court, W. D. Washington, N. D. November 17, 1914.)

No. 44.

1. APPEARANCE (§ 9*)—"GENERAL APPEARANCE" OR "SPECIAL APPEARANCE"—PETITION FOR REMOVAL TO FEDERAL COURT.
The filing of a petition for removal in a state court does not amount to a "general appearance" in the cause, but to a "special appearance" only.
[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42–52; Dec. Dig. § 9.*
For other definitions, see Words and Phrases, First and Second Series, General Appearance; Special Appearance.]

2. COURTS (§ 11*)—JURISDICTION OVER PERSON—SUITS INVOLVING SEPARABLE CONTROVERSIES.
In a suit by the receiver of an insolvent corporation against a number of defendants to enforce their liability on unpaid stock subscriptions the cause of action against each defendant is separate and distinct, and the acquiring of jurisdiction over one defendant does not give the court jurisdiction over another.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 32, 42–44; Dec. Dig. § 11.*]

3. ATTACHMENT (§ 74*)—JURISDICTION OVER PERSON AND PROPERTY.
Under Rem. & Bal. Code Wash. § 204, which requires attachment suits against land to be brought in the county where the land or some part thereof is situated, in an attachment suit brought in a county other than that in which the land is situated, against a nonresident defendant who is not personally served with process, the court acquires no jurisdiction over either the person or subject-matter.
[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 201½; Dec. Dig. § 74.*]

4. ATTACHMENT (§ 209*)—JURISDICTION OF PERSON—SERVICE BY PUBLICATION.
To acquire jurisdiction in an attachment suit through service by publication on a nonresident owner of land under the statute of Washington, the attachment must have been issued and levied before the order for publication is made.
[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 675–687, 690, 691; Dec. Dig. § 209.*]

In Equity. Suit by Elias Wright, receiver of the Lak-A-Taka Company, against R. V. Ankeny and others. On motion by certain defendants to quash service. Motion granted.
See, also, 217 Fed. 985.

William Brueggerhoff, of Seattle, Wash., for plaintiff.
Peters & Powell, of Seattle, Wash., for moving defendants.

NETERER, District Judge. This is a bill in equity, filed in the King county state court by the receiver of an insolvent corporation to recover the amount of unpaid stock subscriptions of each of the defendants, and others, except as to Walter S. Droppers and wife. Plaintiff also alleges a conspiracy on the part of defendants Parker and Olwell with defendants Droppers to place their properties in Grant county, Wash., beyond the process of law by fraudulent conveyance to Droppers. In his prayer the receiver asks for judgment

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

against all of the defendants on their respective stock subscriptions, and for judgment foreclosing the attachment lien levied upon the property described in the proceeding, and decreeing the deed and transfer to Droppers as fraudulent and void.

On August 20, 1914, defendants Parker and Olwell, "appearing specially," filed in the state court their motion to quash the attempted service of summons upon each of them for the following reasons and upon the following grounds:

"(1) That each and all of said defendants are nonresidents of the state of Washington, and are and have been during the institution of this suit without the state of Washington, and the only service attempted to be made upon them is by publication of summons based upon attachment of their alleged interest in certain real property situated in Grant county, state of Washington, said attachment being issued out of King county, which proceeding is erroneous in this: That the suit under such circumstances could only be commenced in Grant county, where the lands lie.

"(2) Because proceedings for publication of summons and publication of summons were commenced before any lien by way of attachment had been created.

"(3) Because the affidavit for the basis of service by publication filed by the plaintiff fails to state or to show that the court had jurisdiction of the subject of the action.

"(4) Because neither the affidavits filed as a basis for the action nor the summons shows the property attached or defines the object or purpose of the action as required by statute."

On the same date, August 20, 1914, said defendants petitioned the court for a removal to this court, on the ground of a separable controversy between citizens of different states; plaintiff being a citizen of Washington, and the defendants citizens of Wisconsin. The action was thereupon formally removed, and the motion to remand denied by decision of this court filed October 23, 1914. The motion to quash is now presented, and it is contended by the plaintiff that, a general appearance having been entered by the defendants for the purpose of removal, waiver of the objection to the jurisdiction was thereby made.

[1] This is disposed of by the Supreme Court of the United States against the contention of the plaintiff, in which the court, through Chief Justice Fuller, in Wabash W. Ry. Co. v. Brow, 164 U. S. 271, at page 279, 17 Sup. Ct. 126 at page 128 (41 L. Ed. 431) said:

"The Circuit Court of Appeals held that a petition to remove, without more, was tantamount to a general appearance, but that this result could be avoided by a special appearance accompanying, or made part of, the petition, which would not be waived by or be inconsistent with the general appearance because the application was analagous to an objection to jurisdiction over the subject-matter. We do not concur in this view. By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way, because he prefers another forum, to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court, in the sense of declining to submit to it, and not necessarily otherwise. We are of opinion that the filing of a petition for removal does not amount to a general appearance, but to a special appearance only."

The contention of the defendants that, the land attached being in Grant county and plaintiff's suit prosecuted in King county, the court, not having jurisdiction of the defendants, did not obtain jurisdiction over the land described, must be determined by section 204, Rem. &

Bal. Code, vol. 1, under which the land was attached, which provides that:

"Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

"1. For the recovery of * * * or for the determination of all questions affecting the title or for any injuries to real property."

[2] It is asserted by the plaintiff that, this being an action for the enforcement of a stock subscription liability against many defendants, the court having acquired jurisdiction of some defendants in King county and the action, being a separable one, may be, under the rule of the Supreme Court of Washington, prosecuted as one action, and that the state court thereby acquired jurisdiction of all defendants for all purposes. This contention is disposed of by this court upon the motion to remand (217 Fed. 985), in which this court said:

"The mere fact that recovery is sought against each in one action does not destroy the separable controversy, but still leaves it to be divided into the several parts which the exigencies of the proceeding may require by demand asserted by the various interested parties, under the provisions of law bearing upon their several rights, or the tribunal before whom the several rights shall be asserted. The cause of action is the subject of the controversy, and that is, for all of the purposes of the action, whatever the plaintiff declares it to be in his pleading. Louisville & Nashville Rd. Co. v. Ide, 114 U. S. 53 [5 Sup. Ct. 735, 29 L. Ed. 63]; Thorn Wire Hedge Co. v. Fuller, 122 U. S. 535 [7 Sup. Ct. 1265, 30 L. Ed. 1235]; Torrence v. Shedd, 144 U. S. 527 [12 Sup. Ct. 726, 36 L. Ed. 528]."

[3] The state court cannot acquire jurisdiction over all defendants by reason of jurisdiction over one or more defendants, and each person is protected in the relation which he bears to the proceeding by the facts applicable to himself. Section 204, Rem. & Bal. Code, supra, is brought forward from section 48 of the laws of Washington Territory of 1877. The Supreme Court of the territory, in Wood v. Mastick, 2 Wash. T. 69, 3 Pac. 612, held that all actions commenced under that section must be commenced in the county or district in which the subject of the action lies. This rule has not been modified or reversed.

"Attachment suits must be brought where defendant can be found or his property located. When the debtor is a nonresident of the state, the action may be brought in any county where property may be found." 4 Cyc. 461, 462.

"If land is to be subjected, it must be in the court of that county in which the land is situated; if a debt or effects of a nonresident are to be subjected, it must be in the county in which his debtor, or the holder of his effects resides or is served with process, or in that county in which his effects are situated, if they be in the possession of no one who can be sued." Milward v. Lair, 13 B. Mon. (Ky.) 207.

"It is a rule of law, in order to give the court jurisdiction in an attachment case, there must be service on the defendant or his property, and the action must be commenced where the defendant has property, or where he can be found." Hinman v. Rushmore, 27 Ill. 509.

To the same effect: Fuller v. Langford et al., 31 Ill. 249; Huxley v. Harrold, 62 Mo. 516; Monarch Rubber Co. v. Hutchison, 82 Mo. App. 606.

[4] It is also urged that, at the time that the publication of summons was initiated, no lien by way of attachment had been created.

The record shows that the affidavit upon which the first summons for publication was predicated was filed June 19th, and the affidavit for attachment was filed on the same day, and attachment issued, but was not levied by the sheriff in Grant county until the 22d day of June. The affidavit of mailing shows that summons for publication was mailed to the Parkers and Olwells on the 19th of June. On June 25th plaintiff filed his motion for leave to amend and make Walter S. Droppers and wife parties defendant. On the same day amended affidavit of attachment was filed, and attachment issued. This was levied on the 26th day of June. On June 25th order for summons for publication was made, based upon affidavit of the same date, and summons mailed to the defendants. At the time of the filing of the affidavit for summons by publication and obtaining the order therefor, no attachment had been levied and no attachment lien had been created. The Supreme Court of Washington, in Cosh-Murray Co. v. Tuttich, 10 Wash. 450, 38 Pac. 1134, says:

"Sections 8, 9, of the new act, provide for service by publication against nonresidents having property in the state, and it must have been in the contemplation of the Legislature that in such a case an attachment would have been *issued and levied* upon the property before service of summons. * * * This is conclusive that the supposition of the Legislature was that writs of attachment would be *issued and levied* before either publication or service of summons."

From the record, I think, first, that it manifestly appears that, the cause of action being separable, the state court could not have acquired jurisdiction of the subject-matter of the controversy, which is the land, the land not being in King county, where the action was commenced; and second, that at the time of the initiating of the constructive service under the statute an attachment lien had not been created, the land not having been levied upon at the time.

END OF CASES IN VOL. 217