National Reporter System—United States Series

THE FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 219

PERMANENT EDITION

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

MARCH—APRIL, 1915

ST. PAUL
WEST PUBLISHING CO.
1915

(219 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[1].....Brattleboro, Vt.
Hon. HARLAND B. HOWE, District Judge, Vermont[2].....St. Johnsbury, 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.

[1] Died January 14, 1915.
[2] Appointed February 22, 1915, to succeed James L. Martin.

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. D. S. C.[3].....Charleston, S. C.
Hon. JOSEPH T. JOHNSON, District Judge, W. D. S. C.[4].....
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. WM. WALLACE LAMBDIN, District Judge, S. D. Georgia[5].....Savannah, 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[6].....Sheboygan, Wis.

[3] Assigned to Eastern District by Act of March 3, 1915.
[4] Appointed March 9, 1915.
[5] Appointed March 3, 1915.
[6] Died.

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 HUMPHREY, 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[7].....Red Oak, Iowa.
Hon. MARTIN J. WADE, District Judge, S. D. Iowa[8].....Davenport, 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[9].....Los Angeles, Cal.
Hon. BENJ. F. BLEDSOE, District Judge, S. D. California .....Los Angeles, Cal.
Hon. OSCAR A. TRIPPET, District Judge, S. D. California[10].....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.

[7] Died January 17, 1915.
[8] Appointed March 3, 1915, to succeed Smith McPherson.
[9] Resigned January 31, 1915.
[10] Appointed March 3, 1915, to succeed Olin Wellborn.

CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

MYRICK v. UNITED STATES (two cases).

CUNNINGHAM v. SAME (two cases).

(Circuit Court of Appeals, First Circuit. January 6, 1915.)

Nos. 1034–1037.

1. POST OFFICE ⟸15—SECOND-CLASS MATTER—"LEGITIMATE LIST OF SUBSCRIBERS."

The phrase "legitimate list of subscribers," used in Act Cong. March 3, 1879, c. 180, § 14, subd. 4, 20 Stat. 359 (Comp. St. 1913, § 7306), providing that a publication, in order to be entitled to second-class rates, must be originated and published for the dissemination of information of a public character and have a legitimate list of subscribers, means a list of subscribers taken at more than a nominal price, and that the price must have been paid by the subscriber, or some one in his behalf, or be under obligation to pay the price, and that subscriptions taken at a nominal price or without price do not answer the requirements of the statute in that particular and cannot be counted in making up a legitimate list.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 22; Dec. Dig. ⟸15.]

2. POST OFFICE ⟸15—SECOND-CLASS MATTER—PAID SUBSCRIPTIONS.

On an application to admit a publication to second-class postal rates, evidence that a substantial number of subscriptions are overdue, or that the price paid or agreed to be paid for them is nominal, or that they are paid for by others than the recipients of the publication, or were obtained by the payment of large commissions or in connection with an offer of a premium, or other consideration, is material in determining whether the publication is primarily designed for advertising purposes for free circulation or for circulation at nominal rates, so that the entire publication should be excluded from second-class privilege at a cent a pound.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 22; Dec. Dig. ⟸15.]

3. POST OFFICE ⟸4—REGULATIONS—AUTHORITY OF POSTMASTER GENERAL.

The postmaster general has authority to make postal regulations not inconsistent with the Postal Act, under Rev. St. § 161 (Comp. St. 1913, § 235), providing that the head of each department may prescribe regulations, not inconsistent with law, for the government of his department, conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 3; Dec. Dig. ⟸4.]

---

4. CONSPIRACY ⊂⊃47—DEFRAUDING GOVERNMENT—SECOND-CLASS RATES—APPLICATION—FALSE PROOF.

In a prosecution for conspiracy to submit false evidence to the Post Office Department in support of an application to admit a publication to second-class rates, evidence *held* insufficient to warrant a finding that proofs submitted by defendants as to their subscription list were knowingly false in that facts were omitted which they were informed by the Post Office Department were immaterial.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105–107; Dec. Dig. ⊂⊃47.]

5. CRIMINAL LAW ⊂⊃728—WITNESSES ⊂⊃305—PRIVILEGE OF ACCUSED.

Under the federal rule that cross-examination of a witness is limited to the matters concerning which he has been examined in chief, where accused, being tried on two indictments, testified in his own behalf as to a single fact only with reference to one of the charges, it was error to hold that he thereby waived his constitutional right not to testify as to any and all the matters charged against him and for the district attorney in argument to refer to his failure to testify fully and to draw unfavorable inference therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1689–1691; Dec. Dig. ⊂⊃728; Witnesses, Cent. Dig. §§ 1053–1057; Dec. Dig. ⊂⊃305.]

6. CRIMINAL LAW ⊂⊃402—EVIDENCE—BEST AND SECONDARY EVIDENCE.

A copy of a letter on which the addressee and the writer were designated by initials only, discovered in the Chicago office of a corporation of which defendants were officers, but not found in the possession of either of them, and for the admission of which no legal foundation was laid, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 887, 888; Dec. Dig. ⊂⊃402.]

Putnam, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

Herbert Myrick and James M. Cunningham were convicted of conspiring to commit a misdemeanor, and they bring error. Reversed and remanded.

Edward F. McClennen, of Boston, Mass. (Albert W. Rice and Brandeis, Dunbar & Nutter, all of Boston, Mass., on the brief), for plaintiffs in error.

Asa P. French, U. S. Atty., and James S. Allen, Jr., Asst. U. S. Atty., both of Boston, Mass.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. The plaintiffs in error, hereinafter called the defendants, were jointly indicted in the District Court of the United States for the District of Massachusetts on indictments No. 110 and No. 111, in each of which they were charged with conspiring to commit the misdemeanor denounced by section 223 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1133 [Comp. St. 1913, § 10393]), which provides as follows:

"Sec. 223. Whoever shall knowingly submit or cause to be submitted, to any postmaster, or to the Post Office Department, or any office of the postal service, any false evidence relative to any publication for the purpose of

securing the admission thereof at the second-class rate, for transportation in the mails, shall be fined not more than five hundred dollars."

The defendant Myrick was president and the defendant Cunningham was subscription manager of the Orange Judd Company, of Springfield, Mass., a corporation publishing the Orange Judd Northwest Farmstead, which, prior to January 1, 1911, was a semimonthly and after that date a weekly. This publication was purchased by the Orange Judd Company, about October 5, 1910; it having been published prior to that time at Brookings, S. D., under the name of Minnesota and Dakota Farmer.

November 30, 1910, the defendant Cunningham filed an application with the postmaster at Springfield to have the publication admitted to the mails at the publishers' second-class postage rate. This application is the subject-matter of indictment No. 110. January 19, 1911, he made another application to the postmaster at Springfield to have the same publication, which in the meantime had become a weekly, admitted at the publishers' second-class rate. This application is the subject-matter of indictment No. 111.

As to each of these applications the indictments respectively charge that the defendants conspired to the end that the defendant Cunningham should knowingly and fraudulently submit to the postmaster at Springfield, and to the Post Office Department of the United States, certain false evidence relative to such publication for the purpose of securing its admission to the Springfield post office at the second-class rate of postage. The specific false evidence alleged in the respective indictments is included in certain answers made to interrogatories on a printed form of application (No. 3501, Edition of 1910), issued by the Post Office Department. In each indictment the overt act alleged is the submission by the defendant Cunningham to the postmaster at Springfield of an application upon the blank referred to, which contained, among other things, the alleged false evidence.

The jury found the defendants guilty on both indictments, and sentences were imposed fining each of them $500 on each indictment.

The cases are now here on the defendants' bill of exceptions, and the errors assigned are to the refusal of the court to grant certain requests for instructions, to the admission of certain evidence, to the argument of the District Attorney and the ruling of the court thereon, and to certain instructions given to the jury.

It is contended in behalf of the defendants that the answers made to the questions submitted in the applications were immaterial, and therefore not false evidence, within the meaning of section 223 of the Criminal Code. Whether or not they are material can be determined only by an examination of the statute of March 3, 1879 (20 Stat. 358), as amended by the Act of March 3, 1885, c. 342, 23 Stat. 387 (Comp. St. 1913, § 7358), relating to mail matter of the second class. The Act of March 3, 1879, c. 180, 20 Stat. 358 (Comp. St. 1913, § 7302), provides:

"Sec. 7. That mailable matter shall be divided into four classes:
"First, written matter;
"Second, periodical publications;

"Third, miscellaneous printed matter;

"Fourth, merchandise."

"Sec. 10. (sec. 7304). That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 12 and 14.

"Sec. 11. Publications of the second class except as provided in section 25, when sent by the published thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall be entitled to transmission through the mails at one cent a pound, or fraction thereof, such postage to be prepaid, as now provided by law. Act of March 3, 1885 (Comp. St. 1913, § 7358).

"Sec. 12. (sec. 7305). That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject: Provided, that nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"Sec. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

It thus appears that among the conditions with which a publication must comply in order to entitle it to admission to the second-class privilege at the publishers' rate is that it must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and have a legitimate list of subscribers, and that the subscription price must be more than nominal; that, if the publication is designed primarily for advertising purposes, for free circulation, or for circulation at nominal rates, it cannot be admitted at the publishers' rate.

[1] The phrase "a legitimate list of subscribers" evidently means a list of subscriptions taken at more than a nominal price, and the price must have been paid, or the subscriber, or some one in his behalf, be under obligation to pay the agreed price; and that subscriptions taken at a nominal price, or without price, do not answer the requirements of the statute in this particular and cannot be counted in making up a legitimate list.

[2] While the fact that some subscription contracts may be overdue would not render such subscriptions illegitimate, nevertheless, if it appears as to a substantial number of subscriptions that they are overdue, or that the price paid or agreed to be paid for them is nominal, or that they were paid for by others than the recipients of the publication, or that they were obtained by the payment of large commissions, or in connection with an offer of a premium, prize, or other

consideration, such facts would be material evidence for the Post Office Department to consider in determining whether the publication was primarily designed for advertising purposes, for free circulation, or for circulation at nominal rates, so that the entire publication should be excluded from the second-class privilege of one cent a pound.

[3] The Postmaster General has authority to make regulations not inconsistent with the provisions of the act (Rev. St. § 161 [Comp. St. 1913, § 235]). His department has passed regulations that subscriptions to semimonthlies shall not be counted in the legitimate list of subscribers if they are three months in arrears, and that subscriptions to weeklies shall not be counted if they are one year in arrears, but that they may be mailed at the transient rate of one cent for each four ounces, or fraction thereof, prepaid by stamps affixed. It is argued that these regulations are inconsistent with and curtail the rights given by Congress in the statute above set forth, and our attention has been called to cases in which it has been held that the heads of the executive department of the government, even if expressly authorized to make regulations, cannot make any which curtail rights thus given. United States v. Atlanta Journal Co., 210 Fed. 275, 127 C. C. A. 123; United States v. Symonds, 120 U. S. 46, 49, 7 Sup. Ct. 411, 30 L. Ed. 557; Williamson v. United States, 207 U. S. 425, 461, 462, 28 Sup. Ct. 163, 52 L. Ed. 278; United States v. United Verde Copper Co., 196 U. S. 207, 215, 25 Sup. Ct. 222, 49 L. Ed. 449; Morrill v. Jones, 106 U. S. 466, 467, 1 Sup. Ct. 423, 27 L. Ed. 267.

If the regulations of the Post Office Department above referred to may be said to abridge the rights of publishers under the statute in the entry of mail matter at the second-class rate, and therefore to be unauthorized and void, it is unnecessary for us in this case to pass upon the question, as their validity or invalidity is not here in issue. This is not a proceeding by the government, as in United States v. Atlanta Journal Co., supra, where it was seeking to recover postage at a rate in excess of what had actually been paid, and directly involving the validity of the regulations of the Post Office Department, nor is it a proceeding to restrain the department from enforcing its regulations, but is a proceeding for an alleged conspiracy to violate a statute making it penal for a person to submit, or cause to be submitted, to a postmaster, or to the Post Office Department, any false evidence relative to a publication for the purpose of securing its admission at the publishers' rate. The regulations, therefore, become important, not as regulations of what constitutes a legitimate list of subscribers, but as bearing upon the defendants' knowledge of what information they understood the department required them to give in answering the questions submitted to them as the foundation of their application for the admission of their publication at the second-class rate.

In the first indictment (No. 110) the false evidence of which the government complains as having been submitted to the Post Office Department by the defendants related to two distinct matters. The first consisted of certain alleged false statements made in answers to interrogatories contained in the printed form of application above

referred to, to wit, in answers to interrogatories No. 12 (a), (b), (c), (d), (e), (f), and (g), that the total number of subscribers to the publication on the 25th day of November, 1910, was 41,273, whereas in truth and in fact, according to the allegations of the indictment, as the defendants well knew, the total number of said subscribers was only 26,610; and the second was that the answer to interrogatory 12 (d) was also false in that it was there stated that the commissions paid to agents were 33⅓ per cent., whereas they greatly exceeded that sum.

It appears, on an examination of the application, that question 12 embraces 12 subsidiary and distinct questions, of which (a), (b), (c), (d), (e), (f), and (g) comprise a part, and at the close of these 12 questions is a statement reading, "Total subscriptions set forth above, answer 41,273." The answers to the previous questions disclose that this is a correct total. It is difficult to see wherein this answer could be found to be false. But the Post Office Department, in questions 12 (a) to (m), was evidently undertaking to ascertain how many of the 60,000 printed copies of the issue of November 25th, stated in the answer to question 11, fulfilled the requirements of the questions (a) to (m); and it would seem that the first alleged false statement charged in the indictment must be included in the answers to these questions, rather than in the one calling for the "total subscriptions set forth above."

If this is the interpretation which should be placed upon this allegation of the indictment, it appears from the application that questions (a) to (g) do not state that, in answering the questions, subscriptions that were three months in arrears should not be included, or, if included, the applicant should further state, in answer to each question, the number of the subscriptions included in the answer that were three months in arrears.

The department having stated in these questions the specific matters which it desired the applicant to answer, it would seem that the applicant, in the absence of special instructions calling for additional information, would have the right to understand that the questions, as outlined by the department in the application, called for all the information desired, and that, if the answers to the questions as stated were complete and truthful, the applicant could not be said to have submitted false evidence. The government, however, contends that the department, by one of its regulations, had provided that subscriptions to semimonthlies that were three months in arrears should not be counted in the legitimate list of subscriptions, and that, in answering these questions, the applicants should have understood that their answers were to be made with reference to this regulation. If this is the view that should be taken of the matter, the question is presented whether the evidence discloses that the applicants knew of the regulation of the Post Office Department excluding subscriptions three months in arrears, and understood that, in framing their answers, each of the questions were to be regarded as modified to conform to the regulation.

The evidence introduced by the government, tending to show knowledge on the part of the defendants Myrick and Cunningham, at and before the filing of the application of November 30, 1910, that the regulations of the department provided that subscriptions to semimonthlies three months in arrears should not be counted in making up the legitimate list of subscribers, and that their answers to questions (a) to (g) should be modified by excluding such subscriptions therefrom, is, to say the least, very meager and unsatisfactory. It is unnecessary, however, for us to pursue this line of inquiry, for if the evidence was insufficient to warrant the jury in finding that the defendants knew of the regulation, and that the questions were to be taken as modified accordingly, the evidence offered by the government on the question of commissions paid to agents was sufficient to warrant the jury in finding that the defendants, in answering question 12 (d), falsely stated that the commissions were 33⅓ per cent., when they knew that they were much more. There was evidence tending to show that some of the subscriptions included in defendants' answer to question 12 (d) were taken over from the Minnesota and Dakota Farmer, and that the defendants did not know whether their answer—that the commissions paid to agents for these subscriptions were 33⅓ per cent.—was true or false, and that they made no investigation to ascertain whether it was or not. There was also evidence from which it could have been found that subscriptions were included in the answer which had been procured since the purchase of the Minnesota and Dakota Farmer, and before November 25, 1910, and that the defendants also knew that the commissions paid for these subscriptions greatly exceeded 33⅓ per cent.

[4] As the charge contained in this indictment is conspiracy to submit false evidence to the Post Office Department, and as we are of the opinion that the evidence, taken as a whole, would justify the conclusion that the defendants conspired to procure the admission of their periodical to the second-class privilege by statements that were false, and that their answer to question 12 (d) was knowingly false, the court did not err in submitting the case to the jury upon this indictment.

On January 1, 1911, the defendants concluded to change their publication from a semimonthly to a weekly, which necessitated their making a new application for its admission to the second-class privilege, and on January 19, 1911, they submitted a new application for this purpose. Indictment No. 111 relates to this application, and charges the defendants with having conspired to submit false evidence for the purpose of securing the admission of their publication at the second-class rate, and that the false evidence submitted consisted of a false statement made in their answer to 12 (g) contained in this application, to the effect that the claimed list of subscribers to said publication, whose subscriptions were paid for by others, was 6, when in truth and in fact, as the indictment alleges, the defendants well knew said statement was false in that 6,468 copies of said issue were sent to persons whose subscriptions were paid for by others.

The government's evidence tended to show that the defendants, in answering question 12 (g) in their previous application of November

30, 1910, stated that the number of the issue of November 25th, sent to persons whose subscriptions were paid for by others, was 10,496; that, through repeated interviews and correspondence between the officials of the department and the defendants, the defendants were told that subscriptions paid for by others, where the recipients had not agreed to receive the publication, should not be included in the answer to this question; that on January 13, 1911, the department decided to grant the first application and admit the publication to the mails at the publishers' rate, but, in doing so, excluded the 10,496 subscriptions stated in the answer to question 12 (g), assents from the recipients not having been obtained. It is thus seen that before the filing of their second application, and as late as six days prior thereto, the defendants had received special instructions and information to the effect that in answering question 12 (g), calling for the number of subscriptions paid for by others, they should not include copies where the consent of the recipient had not been obtained. The government offered no substantial evidence warranting a contrary conclusion, and it would be inconceivable how the jury, as reasonable men, could have reached the conclusion that the defendants' answer to this question was knowingly false if it were not for the inferences which the District Attorney was permitted to tell the jury they could draw from the failure of the defendant Cunningham to testify to matters charged in the second indictment, a question hereinafter considered. We are therefore of the opinion that there was no evidence from which it could be found that the answer to question 12 (g) in the second application was knowingly false, and that the court erred in submitting the questions raised by the second indictment to the jury.

[5] Indictments 110 and 111 were tried together (U. S. Rev. Stat. §§ 921, 1024 [1]); and the defendant Cunningham took the stand and testified in his own behalf, confining his testimony to the source from which he obtained the information contained in the answer to question 12 (d) in the first application—that the commissions paid to agents were 33⅓ per cent. The District Attorney, in his closing argument to the jury, said:

"There is one thing that happened in this case, gentlemen, which I submit to you, is, on the part of one of the defendants, a confession as to certain of the allegations in these indictments. Mr. Cunningham was not bound to take the stand in his own behalf. The government could not have called him to the stand and examined him. But he chose to make himself a witness in this case. He had the opportunity offered to him by law, gentlemen, to tell you all the facts within his knowledge, and to deny every allegation which he knew or believed was not true. That was his privilege when he took the stand. He took the stand, charged with three specific wrongful acts. He took the stand, charged with having collaborated with Mr. Myrick, co-operated with him, to make to the Post Office Department three false statements, bearing upon a matter of vital interest to the paper whose interests he and Mr. Myrick represented, and the paper in whose interest their personal interests are very largely concerned. He knew—he is one of the two men in this world, gentlemen, who knows of his own knowledge—whether he conspired, whether he got together with Mr. Myrick or not to violate one of the laws of the United States. Isn't that so? He knows whether there was any understanding, expressed or implied, between them. He knew it when he took the stand. He knew whether, when he wrote that 41,200 and odd as the list of legitimate subscribers—he knew, above all other men in the world, whether

[1] Comp. St. 1913, §§ 1547, 1690.

that statement was true or false, and whether he knew it was true or false. He knew, as no other man in the world does know, and could tell you, whether, when he wrote the figure '6' in reply to that question as to the number of subscriptions to the paper that were paid for by others, that was true or not, or whether he believed it to be true or not. And yet he was asked as to only one of those things, the least important of them all, and that was as to how he happened to write that untrue statement regarding the commissions paid for subscriptions on the first application. In other words, Cunningham knew the information which you want, and wanted, as to whether or not the statement with regard to the 41,000 was true or false; he knew whether that was written in there in accordance with Mr. Myrick's instructions a few days before, when the telegram was received; he knew whether he knew it to be false or not; he knew that he was charged with it; and yet he was not asked to tell you, and he did not tell you, that that was true; and he was not asked to tell you that he didn't know that it was not true when he wrote it. And so, too, with the statement in the second application—absolute silence—charged with a violation of the law, taking the stand in his own cause to give you information—not asked whether, when he said '6,' that was true or false, or whether he knew it to be true or false, or whether it was put there because he and Mr. Myrick had put their heads together for the purpose of getting this newspaper admitted to second-class rates, and because they knew that the postal authorities had objected to that kind of subscription, but, as it appears, he deliberately wrote down something which they knew was not true. Why, gentlemen, take it in ordinary everyday life, suppose you accuse an employé of yours of an act of dishonesty, of a theft, or of a breach of duty of some kind not amounting to a crime, and you say, 'You did so and so,' or, 'I *think* you did so and so,' and he stands before you absolutely silent, not admitting or denying the fact, do you have any hesitation in believing that it is because he *can't* deny it? Is there any other reasonable explanation of his silence except that? Would you be justified in assuming that he was guilty of the charge that you made against him because of that silence alone? How much more so, then, in this case, where the knowledge of the truth or the falsity must have been in Cunningham's possession, as to all three of those allegations, and he is confined in his examination, and I am confined in my examination by reason of that fact, to denial of only one of them—as I said, the least important of them all!"

At the close of this argument, and before the court had entered upon its charge to the jury, and while there was opportunity on the part of the District Attorney to withdraw the comments which he had made with respect to the failure of the defendant Cunningham to testify to certain matters with which he stood charged in the two indictments, counsel for the defendants objected to these comments, and requested the court to deal with them in the course of his charge. The court forthwith, and before delivering his charge, ruled "that a defendant in a criminal case could not waive his constitutional protection piecemeal, and that the defendant Cunningham having taken the stand, and testified as to certain facts in one of the indictments, his failure to testify as to independent facts in that indictment, and as to facts in the other indictment, was the subject of legitimate comment to the jury in argument," and declined to deal with the matter further, except as hereinafter set forth, and the defendants excepted.

In the course of his charge, the court, as to this matter, said:

"As to the defendant Cunningham, a question has come up about his evidence. Well, now, a defendant under our Constitution cannot be compelled to testify against himself. That is one of the most fundamental principles of our system of criminal law, and if he chooses to sit still nobody can criticize him for doing it. That is his right, either to sit still or to come for-

ward and take the stand. But, gentlemen, he can't come forward, so to speak, and take the stand piecemeal. If he waives his constitutional privilege, if he steps outside of the circle which the Constitution draws around him, and comes onto the stand here, he then becomes like a party in a civil case, and his failure to testify upon material points is to be considered by you exactly as you would consider the failure of a party in a civil case to give evidence that apparently lay within his knowledge upon material issues. The failure of a party to give, or to produce evidence within his knowledge or control, and material to the issue, is always proper to be considered by a jury. A jury may infer from the silence upon the matter that the party considered that the evidence would not help him; but that is not a *necessary* inference. It frequently happens that lawyers inadvertently forget to ask questions, material questions; and that ought not to count against the party, or the client, of course, if there is an unintentional omission; but an intentional failure on the part of a party to adduce evidence within his knowledge upon the points in issue, by whatever reason it is prompted, is always a very pertinent matter to be considered by a jury."

To this portion of the charge the defendants likewise excepted.

It is thus seen that upon objection being made to the argument of the District Attorney, at a time when he could have corrected the error, if one had been committed, the court ruled that the argument was proper; "that, the defendant Cunningham having taken the stand and testified as to certain facts in one of the indictments, his failure to testify as to independent facts in that indictment, and as to facts in the other indictment, was the subject of legitimate comment to the jury in argument;" and that later on in his charge to the jury he confirmed his previous ruling, when he stated that it was the right of the accused "either to sit still or come forward and take the stand," but if he did come forward he could not do so "and take the stand piecemeal"; that he waived his constitutional privilege if he stepped outside of the circle which the Constitution drew around him by coming upon the stand, the same as a party would in a civil case.

It cannot reasonably be said that the objection and exception to the argument and the ruling thereon were not seasonably and properly taken, or that the exception to the charge was not sufficiently specific to appraise the court of the ground of the objection. The record discloses that the court fully understood what the nature of the objection was upon which the defendants relied. This appears from what took place at the close of the argument of the District Attorney when this matter was without doubt fully discussed, and the definite and explicit ruling of the court was made. The question is therefore presented whether a defendant, when set to the bar for trial before a jury upon two indictments charging different offenses, by taking the stand and limiting his testimony to a particular charge in one of the indictments, waives his constitutional right with reference to the charge contained in the other indictment, so that inferences may be drawn against him from his failure to testify as to any of the matters there charged. It seems to us that to state the question is to answer it; that it was not the intention of Congress, in the enactment of the law authorizing the trial of an accused person for distinct offenses, at the same time, on two or more indictments, to deprive him of his constitutional right not to have inferences drawn against him by reason of his failure to testify upon one indictment, should he see fit to testify to matters charged

in the other indictment; and that this is especially true where the indictments are not consolidated by an order of the court, as they were not in this case, but were tried as independent and distinct matters, though before the same jury. Betts v. United States, 132 Fed. 228, 229, 230, 234, 235, 65 C. C. A. 452.

The exception taken to the ruling of the court made in answer to the objection of counsel to the argument of the District Attorney also presents the question whether, the defendant Cunningham having taken the stand and testified to certain facts in the first indictment, his failure to testify as to independent facts in that indictment was the subject of legitimate comment by the District Attorney in his argument.

This question has never been definitely decided by the Supreme Court. The cases in that court in which the question has been argued have involved the subsidiary question of the right of cross-examination under the federal rule, and have been disposed of either upon the ground that the limit to the right of cross-examination was not exceeded (Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078), or, if exceeded, the answers given were not prejudicial to the respondent (Sawyer v. United States, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269). In Balliet v. United States, 129 Fed. 689, 695, 64 C. C. A. 201, decided in the Eighth Circuit, the defendant excepted to the following statement of the trial judge in his charge to the jury:

"It has been suggested that I have overlooked one thing. I may say you may consider, in determining the question, the fact that the defendant having gone upon the witness stand, if he has not fully explained, or has not explained matters which are material to the issues in this case, and which are naturally within his knowledge, you may consider that as a circumstance tending to show that the facts, if explained, etc., would bear out the contention of the government, and his failure to explain them or give a truthful explanation is against him."

And the court, in commenting upon the charge, said:

"We have not been able to conclude that this instruction states a correct rule of law, or that the giving of it was not a material error."

This instruction, which was held to be erroneous, did not differ materially from the one given in the case under consideration. The court, after discussing the matter at some length, without reaching any definite conclusion, then assumed that, if the defendant, upon taking the stand, waived his right not to have inferences drawn against him for failure to testify as to material matters, nevertheless the instruction in question gave too great latitude to the jury, and subjected the defendant to too great a burden in that "it left the jury to determine what matters which had been given in evidence were 'material to the issues in the case,'" without directions on that point, and gave "equal liberty to determine what matters were 'naturally within his knowledge' and susceptible of explanation."

Judge Sanborn concurred in the result reached in that case, but, it would seem, upon vitally different grounds. He took the position that the right of cross-examination in the federal court was limited strictly

to subjects inquired of in direct examination; that circumstances might arise under which the court, in the exercise of its discretion, might permit the examiner to inquire as to matters which had not been taken up in direct examination; but that this was not cross-examination, and, in doing so, the examiner made the witness his own. He fails, however, to state the conclusion which he intended should be drawn from this view of the matter. But it is evident that he entertained the opinion that, as applied to the case then under consideration, the defendant, by taking the stand, did not waive his constitutional right to be free from unfavorable comment, except as to matters to which his direct testimony particularly related, and that as to other matters he did not waive his privilege, and did not subject himself to unfavorable comment in this respect, if he declined or failed to testify as to them. And this is the view entertained by Judge Cooley. Cooley's Constitutional Limitations (3d Ed.) p. 317, note. In some jurisdictions, where the right of cross-examination is unlimited, it is held that a defendant, by taking the stand in a criminal case, waives his right not to have unfavorable inferences drawn against him, if he fails to testify to any material matter. State v. Ober, 52 N. H. 459, 13 Am. Rep. 88; Commonwealth v. Smith, 163 Mass. 411, 431, 40 N. E. 189; People v. Tice, 131 N. Y. 651, 655, 30 N. E. 494, 15 L. R. A. 669; Commonwealth v. Morgan, 107 Mass. 199, 205; Commonwealth v. Nichols, 114 Mass. 285, 19 Am. Rep. 346; State v. Wentworth, 65 Me. 234, 20 Am. Rep. 688; State v. Witham, 72 Me. 531. And in jurisdictions where the right of cross-examination is restricted to matters inquired of in chief, that he does not. People v. McGungill, 41 Cal. 429; People v. Sanders, 114 Cal. 216, 238, 46 Pac. 153; State v. Elmer, 115 Mo. 401, 22 S. W. 369; State v. Lurch, 12 Or. 99, 6 Pac. 408. It would seem that the courts, in reaching these conclusions, have been largely influenced by the rule existing in the different jurisdictions as to cross-examination—that if the right were unlimited the accused, by taking the stand under such circumstances, would waive his privilege—but, if it were limited to subjects inquired of on direct examination, his privilege would be waived only to that extent, as he had no reason to understand that his conduct would impose a greater burden. We understand the rule in the federal courts as to cross-examination to be as stated by Judge Sanborn in the Balliet Case, and are of the opinion that the defendant Cunningham, by taking the stand and testifying as to the commissions paid to agents, did not waive his constitutional right to be free from unfavorable comment on matters to which his testimony did not relate, and as to which he said nothing.

[6] Subject to the defendants' exception, the government was allowed to introduce in evidence a paper purporting to be a copy of a letter written at Chicago, on November 14, 1910, to "J. M. C.," and signed "H. B. C.," the contents of which disclosed that it was written in answer to a letter sent by J. M. Cunningham to H. B. Clark, which had been previously introduced in evidence. It appeared that H. B. Clark, at or about the time this letter was written, was the manager of the Orange Judd Company's Chicago office. The paper was identified as having been found in the files of the Orange Judd Company's

office in Chicago. It was not found in the possession of either Myrick or Cunningham, and there was no evidence that the original letter was ever addressed or mailed to Cunningham, or that it ever came into his possession. The defendants were not called upon to produce the original if they had it, and no legal basis was laid for the introduction of the copy. The evidence was of vital importance in support of the government's contention, for the contents of the paper disclosed that, if the original letter was received by Cunningham, he knew that a large number of the subscriptions to the Minnesota and Dakota Farmer, which he had included in his answers (a) to (g), in the first application, were three months or more overdue. Under the circumstances, the court erred in allowing the paper to be introduced in evidence.

We have examined the other exceptions taken by the defendants, and are of the opinion that they raise no question calling for special consideration.

The judgments ordered against the plaintiff in error Myrick, in Nos. 1034 and 1036, are reversed, the verdicts therein are set aside, and the cases are remanded to the District Court for further proceedings not inconsistent with this opinion.

The judgments ordered against the plaintiff in error, Cunningham, in Nos. 1035 and 1037, are reversed, the verdicts therein are set aside, and the cases are remanded to the District Court for further proceedings not inconsistent with this opinion.

PUTNAM, Circuit Judge (dissenting). On its face, the most difficult proposition in behalf of the respondents, raised by the opinion of the court, is that based on the admission of what is apparently a copy of a letter, signed H. B. C., addressed to J. M. C., dated November 14, 1910. This was put in by the United States under objections which were sufficiently specific and yet sufficiently general to cover every possible objection. No objection raised by the respondents seems to have been waived. It is admitted by the respondents that this paper was identified as having been found in the files of the Orange Judd Company's office in Chicago; but it is said that:

> "It was not found in the possession of either Myrick or Cunningham, and that there was no evidence that the original letter was ever addressed or mailed to Cunningham, or that it ever came into his possession."

If improperly admitted, it was fatal in its character, and the exception taken would demand a new trial for Cunningham, if not for Myrick. Moreover, as the indictments here rest on conspiracy between Cunningham and Myrick, with no other conspirator, a new trial of either would require a new trial of both respondents, because without both no conspiracy could be established.

The expressions that these papers were not found in the possession of either Myrick or Cunningham, and that there was no evidence that the original letter was ever addressed or mailed to Cunningham, or that it ever came into his possession, must be qualified, although perhaps in one sense true.

First of all, it is not questioned that J. M. C. meant Cunningham,

and that H. B. C. meant Clark. It is, however, no matter whether H. B. C. meant Clark, for the true question is what information the paper brought to Cunningham or Myrick; and, so far as that is concerned, it is of no importance whom it came from. That would not affect the admissibility, but only the weight. H. B. Clark was the agent at the time in charge of the Chicago office, where this letter or copy was found. It was objected to because it "was not properly proved, was not an original, and because there was no notice to produce the original given until the moment of the offer" of the paper in proof, "and because the original was not present in court or then procurable." The court avoided all these objections, and it is not clear on what ground the paper was admitted. Therefore we have to determine whether any of the objections stated were effectual.

The substance of the matter is that the paper was not put into the case as a letter, but as a paper obtained from the possession or imputed possession of the respondents, which brought to their notice certain facts essential to the prosecution by the United States. Whether the paper was an original or a copy affected its weight, and not its relevancy. If proved as an original, the jury might have thought it to have been an authentic statement of the facts it contained, supported by the full weight which the personality of the author could have given to it. If a copy, it might have been of more or less weight, according to the belief of the jury on the question whether either of the respondents personally saw it, and on the further question whether they credited it.

One witness, Fred E. Clark, employed by the respondents, identified the paper as having been found in the files of the Orange Judd Company's Chicago office. While there was no direct proof as to who the writer was, or whether it had ever been delivered to anybody, there was the fact that this particular paper had been retained on the files at Chicago, as said, which was sufficient to justify a jury in giving it a certain authenticity; and determining whether or not either of the respondents had any connection with it would be a matter for the jury, in view of other facts to which we will call attention. It must be remembered, however, that Cunningham's office was in Springfield, Mass.; and there is no proof that this particular paper had ever been in Springfield.

Several representatives of the United States, known as post office inspectors, seem to have made a somewhat protracted investigation of the transactions involved in this litigation, which covered a considerable space and time subsequent to the date of the paper signed H. B. C., of November 14, 1910, herein involved. In connection with that investigation, Cunningham, in February, 1911, at Springfield, Mass., met Stice, one of the inspectors engaged therein, and also met Myrick at Springfield for the first time on March 3, 1911. Stice had protracted conversations with both Cunningham and Myrick in February and March; and in one of the conversations Stice told Cunningham that the inspectors were assisting the postmaster, probably meaning the postmaster general, in the examination of the evidence relating to the applications now involved, and "asked him for the evidence."

Thereupon Cunningham said that he would furnish it; "that everything was wide open to the department"; and that he would furnish all the evidence pertaining to the matter. It appeared also that the files and lists of the Orange Judd Company "had been unreservedly open for inspection," and that this "would seem to furnish all the information bearing upon this case." Marles, another inspector, testified that he had to do with the investigation, and that he met Cunningham on February 6, 1911, "and Cunningham stated that everything they had was wide open to the inspectors."

The paper in question here was found, as we have said, in the files of the Orange Judd Company's Chicago office, and apparently was admitted by the court on the ground that it appeared to be a part of a batch of papers of which another letter, not objected to, had been admitted. It is to be observed, however, that the examination of these files, and the production of the papers which they contained, were not mere cursory matters, or merely incidental, but were in consequence of these offers by Myrick and Cunningham of the files of the Orange Judd Company, at Chicago at least, for the purpose of exhibiting to the officers of the United States exactly what Myrick and Cunningham, or one or both of them, had done in this connection, or for the purpose of enabling the United States to understand the detailed facts in reference thereto. Consequently, the paper in question was thus indirectly produced by one or both of the respondents voluntarily. Though this was not in court, yet the paper was produced in such way that it became a part of the respondents' case, or the case of the United States, by the express consent of the respondents, for the purpose, especially, of showing on what information the respondents had acted in securing a second-class rate for their publication. Therefore, the whole transaction was entirely outside of the question of production of the originals. The question was not the contents of the originals, but was what information the respondents Cunningham and Myrick, one or both of them, had acquired from the papers on file to which the officers of the United States had been given access. This has no connection whatever with the matter of giving notice to produce the originals.

The respondents had given their consent to the use of the papers in these files by the United States, but it may be objected that Myrick and Cunningham had not thereby given consent to the use of this particular paper, because it may be objected that they did not know that this particular paper was on the files; but their consent was a universal one, and no discrimination of that kind can properly be made, and no discrimination was relied on. Under the circumstances of the case, which were very complex and numerous, it could not have been necessary to prove facts of that kind with reference to any special paper when a universal consent had been given as to all of them.

Moreover, under the circumstances, the jury had a right to infer, and there was evidence enough to enable them to find properly, that Cunningham was familiar with everything that was on file relating to this topic. If he had not been, it was proved that Myrick had that familiarity, as pointed out in the brief of the United States, where it is

shown that in a letter written by Myrick, signed by his initials, on January 5, 1911, he referred to a copy of a letter of November 10th from Cunningham, to which copy the paper in question had been physically attached; the United States thus showing that Myrick knew of the second paper, which was the letter from Cunningham of November 14, 1910. Myrick's knowledge of the letter of November 10, 1910, presumptively carried with it the belief that he knew of this identical paper of November 14, 1910. As Myrick is one of the conspirators, and the question was as to the extent of the knowledge of either conspirator of the facts subsequently brought by the conspirators to the post office authorities, the paper in question became evidence, whether it affected either or both conspirators.

The other important question is the notice taken by the opinion of the court of the observations of the District Attorney as to the testimony of Cunningham. The respondents failed to avail themselves of the summary way of objecting to improper observations by counsel in the manner pointed out by this court in Odell Mfg. Co. v. Tibbetts, 212 Fed. 652, 655, 129 C. C. A. 188. On the other hand, they submitted formal requests for instructions by the court in its charge as to the extent of cross-examination permissible with reference to an accused person who testifies voluntarily. That precise request was not followed literally; but a more suitable ruling was given by the court which avoided certain errors in the request, and which was indeed more liberal for the respondents than the request as properly interpreted. At any rate, the charge as given was clearly so correct for the most part that, if there was any error in it, a general exception would not lie; but it was the duty of counsel to bring the specific matter to the attention of the court.

The respondents particularly urge that the witness was testifying only as to one indictment, while the jury was allowed on this point to apply the inference on which the United States relied to the two indictments. There is a strange error here. It is true that the indictments in these cases were not consolidated in the proper sense, as permitted by Revised Statutes of the United States, § 1024 (Comp. St. 1913, § 1690); but they were in the condition of being tried together, the same as the indictments in Betts v. United States, before this court in August, 1904, reported in 132 Fed. 228, 65 C. C. A. 452. Nevertheless, when the respondent was sworn as a witness, he was sworn to both indictments, and he was testifying as to both indictments. There was only one oath, and he was testifying as though in a single case.

In discussions of this kind, merely verbal or literal slips are not to receive attention, except as they are signs of underlying error; as, for example, where it is erroneously said that the court had ruled that the argument of the District Attorney in this case "was proper." There was likewise a more serious discrepancy in omitting from respondents' statement of what occurred between court and counsel the words then used by the court in closing what was said, namely, "decline to deal with the matter in the charge save as hereinafter set forth." It was also erroneous to assume that the exceptions of the respondents were to the "charge," when, indeed, they were laid to what was said by the

court before the charge was given, without express reference to the charge as it was in fact given.

We do not here question the complicated condition of the issues as put forward by the respondents. We have only sought to discuss those statements which call for a reversal, which we are of the opinion cannot justly be demanded. We do not mean to be prejudiced by any omission to refer to matters not herein discussed. It is enough for us to say further that we regard the conviction as a legal one, and one that ought to be sustained.

HARVEY v. STOWE.

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

No. 2401.

1. CORPORATIONS ⟸125—TRANSFER OF STOCK—NECESSITY OF REGISTRATION.
Registration of a transfer of stock on the books of the corporation is not essential to a valid transfer of title, and an indorsement and delivery of the certificates of stock, with continued possession thereafter by the transferee, is sufficient under Civ. Code Cal. § 3440, which makes a transfer of personal property invalid as against creditors unless accompanied by an immediate delivery and followed by a continued change of possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 470–473, 477; Dec. Dig. ⟸125.]

2. CORPORATIONS ⟸125—TRANSFER OF STOCK—VALIDITY—CONTINUED POSSESSION BY TRANSFEREE.
Where a husband indorsed certificates of stock in a corporation issued in his name and delivered the same as a gift to his wife, who retained possession of them during several years, except on two occasions when she redelivered them to her husband for temporary purposes, after which they were returned to her, such temporary redelivery did not break her continuity of possession so as to invalidate the transfer under Civ. Code Cal. § 3440, which requires a continued change of possession.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 470–473, 477; Dec. Dig. ⟸125.]

3. BANKRUPTCY ⟸303—GIFT FROM BANKRUPT TO HIS WIFE—VALIDITY.
Evidence considered, and *held* to sustain the claim of a bankrupt's wife to the ownership of stock, which was transferred from his name to hers on the books of the corporation when he was insolvent, on the ground that the certificates were indorsed and delivered to her as a gift several years before, when they were first issued, and when he was solvent, and that she retained possession of them at all times thereafter and kept them in a private safe to which he did not have access.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458–462; Dec. Dig. ⟸303.]

Appeal from and in Error to the District Court of the United States for the Northern District of California; E. S. Farrington, Judge.

Suit by B. S. Stowe, as trustee in bankruptcy of J. Downey Harvey, against S. G. Harvey. Decree for complainant, and defendant appeals and brings error. Reversed.

Charles S. Wheeler and John F. Bowie, both of San Francisco, Cal., for appellant and plaintiff in error.

Bert Schlesinger, E. H. Williams, and A. E. Shaw, all of San Francisco, Cal., for appellee and defendant in error.

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

WOLVERTON, District Judge. J. Downey Harvey, having been adjudged a bankrupt by involuntary proceedings, B. S. Stowe was, on November 17, 1911, duly elected trustee of his estate, and subsequently qualified as such. On January 11, 1912, the trustee instituted a suit in equity against Harvey and S. G. Harvey, his wife, to set aside a transfer previously made by Harvey to his wife of 546 shares of the capital stock of the Shore Line Investment Company, claiming said stock to be an asset of Harvey's estate.

The complaint avers that Harvey gave the stock to his wife on the 26th day of November, 1909, and at the time was insolvent, and that the gift was without consideration, fraudulent, and inoperative as to his creditors.

Mrs. Harvey answers denying that a gift was made to her of the stock on the date stated, but affirms that Harvey, in consideration of natural love and affection, gave her 300 shares of such stock on or about June 26, 1905, 66 shares on or about August 29, 1905, and the remaining 180 shares on or about September 25, 1905, and indorsed and delivered to her the certificates representing such shares when the gift thereof was made; that at the time stated Harvey was solvent and able to pay his debts from his own means; and that his assets taken at a fair valuation were sufficient in amount to pay his just debts and liabilities.

That Harvey was wholly solvent during the year 1905 and for two years or more thereafter there can be no dispute, and that he was insolvent on November 26, 1909, is admitted.

Mrs. Harvey, claiming to have deraigned title from her husband, the common source, has the burden of establishing it in herself. This depends upon whether the gift of the stock was made to her, as she alleges, and at the time or approximately the time stated, and upon the good faith attending the transaction. If the stock was given or transferred at the time as averred by plaintiff, then it is utterly without legal effect and void as to the creditors of Harvey's estate.

The Shore Line Investment Company was organized in May or June, 1905. J. Downey Harvey was chosen one of its directors, and on January 3, 1906, he was also elected president, and since held these positions up to the time he became a bankrupt. Prior to the incorporation of this company, Harvey testifies that he, in company with his wife and others, visited certain lands which were to become the property of the corporation, and its principal holdings, and, continuing, he says:

"I told her at that time that I was going to give her my stock that I would acquire in that land company. After the acquisition of the land, and the organization of the company, the stock was issued to me in June, 1905, one lot, another lot in August, 1905, and two lots in September, 1905. Stock

certificates were issued to me, and when I received them I indorsed them and gave them to Mrs. Harvey in conformity to what I told her I was going to do. I took them and handed them to her and told her that they were the certificates of the Shore Line Investment Company that she was interested in as I had promised her, and I told her to keep them and take care of them, that they were of value, and that they were indorsed. And I said to her that the reason I am retaining them in my name is that I am very largely interested in the Ocean Shore Railroad, and these two companies are associated in the development of one another; one depends upon the success of the other. If I keep this stock in my name, which I will want to do, I will show the people that the Ocean Shore Railroad is interested in the success of this land company, and that I am a large holder in it, and that at all times I will be ready to help out the Granada as much as we can. * * *

"In April, 1907, I paid a $10 assessment on that stock. I had no conversation with Mrs. Harvey in regard to the assessment. Mrs. Harvey was East with one of my daughters, and I wrote her the assessment had been levied and that when she returned I would get the stock and have the receipt entered on it. When she returned I did get the stock. I did not say anything to her regarding whether or not I would pay the assessment. When I gave her the stock no assessment was contemplated, and I naturally felt that, since I had given her a gift at that time, I ought to follow it up and pay the obligations that would fall on it. I did pay the assessment and wrote her to that effect to New York when she was there. My intent in paying the assessment was to make an additional gift which would naturally follow this present of stock. I told her if I acquired more stock I would give it to her, and I felt it my duty to take care of the assessment and make a gift of it, as I had of the certificates themselves. The total paid by me for the stock, including the assessment, was $23,000 and some odd dollars, I think $650, or something like that."

The stock, as Harvey affirms, has been in her possession ever since, except at one time, at his request, she delivered to him a block of 66 shares which he had put in the name of one J. A. Folger in order to qualify him to act as a director of the company. As to this he says:

"It was in December, 1906, that I first got this stock from Mrs. Harvey. It was transferred from my name unto that of J. A. Folger, where it remained until December, 1907, when it was retransferred into my name and was indorsed and delivered to Mrs. Harvey by me. Mrs. Harvey had Mr. Folger's certificate indorsed by him. The transfers were attended to by me. I got the certificate on each occasion from Mrs. Harvey and took it to the secretary and returned it to her. There was no other transfer of this stock between the time that I gave it to Mrs. Harvey and its actual transfer in November, 1909. At that time I had the stock in my possession; that is, I did not have it in my possession except for that purpose."

And at another time, when the company was negotiating for a loan, being early in November, 1909, it was contemplated that the stockholders would be required to sign an agreement pledging themselves with their stock to meet the obligations. Of this Harvey testifies:

"I was then notified by the general manager that it would be necessary for me to produce these certificates of stock, as he wanted to see how much stock he could acquire for this purpose. * * * I got the stock from Mrs. Harvey and turned it over to Mr. Fay, general manager of the Shore Line Investment Company, who was negotiating for the loan. * * * I gave this stock to Mr. Fay. They were in my name, but had my indorsement on them. I received them back from Mr. Fay around the 26th of November, or a little before. As negotiations were still going on, and the same obligation would be insisted upon by any bank making a loan, I had the stock transferred to Mrs. Harvey's name.

"I receipted for the stock, but Mr. Corbet said: 'I will have to have Mrs. Harvey's receipt. I will give you a receipt.' He dictated one to his stenographer, which he handed to me, and which I took or sent to Mrs. Harvey. This was returned to me and the certificates were given to Mrs. Harvey later. The negotiations for the loans kept up until some time in December. On December 9th we levied an assessment. We did not make the loan, because our payments commenced to come in and we were able to discharge our obligations and collect sufficient money to satisfy our creditors. It was while these negotiations were pending that I had the stock transferred to Mrs. Harvey's name. At the conclusion of the negotiations I sent the stock to Mrs. Harvey. I either sent the stock to Mrs. Harvey, or took it down to her myself to Del Monte. I have never had the certificates in my possession, except as I have testified here, from the time they were first delivered until this action was commenced."

On cross-examination Harvey further said:

"The reason that I did not have these shares of stock transferred to Mrs. Harvey in 1905 was, as I have testified, that we had just formed these two companies, and the Shore Line Investment Company depended upon the building of the Ocean Shore Railroad. I was the largest stockholder in both companies, and thought that my association and prominence would help the Shore Line Investment Company. There was a great deal of rivalry down that way as to this land business, and, if we could make an association between the two, it would make the people who purchased at Granada feel that they were going to get a good railroad service, and, if there was any favoritism or help to be had from the association with the railroad, we wanted to get it. If I was not connected with the Shore Line Investment Company, its position would be just the same as the other companies not associated with the railroad. * * * It afterwards turned out to be of immense benefit that I retained my identity as a stockholder in the Shore Line Investment Company. As a matter of fact, the men who furnished the money to build the Ocean Shore Railway Company put up the money to finance the Shore Line Investment Company.

"There was a close connection between the two companies through the people who formed them. There was no money connection between the two companies. The original stockholders were the same."

Mrs. Harvey first gave her testimony before the referee in bankruptcy. On the subject of the gift she says:

"In 1905 Mr. Harvey told me he was going to give me some stock in the Shore Line Investment Company, and he gave me in June of that year 300 shares. He told me as he acquired more he would give it to me. The reason that he kept the shares in his own name was because he was a big holder in the Ocean Shore Railway Company and that would show his interest in the Shore Line Investment Company if he kept them in his name. In August he gave me 66 shares. In September he gave me 160 shares and 20 shares, and I put them in my box. In 1906 Mr. Harvey asked me for the certificate for 66 shares in order to make Mr. Folger a director of the company. In 1907, Mr. Harvey wrote me—I was then in New York—there was an assessment on the Shore Line Investment Company of $10 which he paid, and when I returned in July I gave him the certificates and he had the assessments indorsed on them. In December, Mr. Folger went out of the directorship of the Shore Line Investment Company and I got the certificate indorsed by Mr. Folger and gave it to Mr. Harvey. He gave me another one indorsed by himself and I put it in my box. Mr. Harvey gave me the stock in the respective months that I have named in 1905; I mean by that he gave me the certificates, and they were indorsed by Mr. Harvey. I put the certificates in the safe deposit of the First National Bank, where I always have a box. I remember the dates on which these certificates were given me, because I put them down on a memorandum. * * *

"In December, 1906, Mr. Harvey stated he wanted the stock certificate for 60 shares to make Mr. Folger a director. I went to my box and got the certificate and gave it to Mr. Harvey. I received it back again indorsed by Mr. Folger's name and put it in my box. * * *

"As a matter of fact, I delivered all those shares of stock according to Mr. Harvey's directions. There was not much direction given me, but I was at all times willing to act in accordance with his suggestion. I never repaid Mr. Harvey the amount he advanced for assessments, because he never asked me. He said it was a gift along with the others. I never had any discussion with Mr. Fay in regard to the Shore Line Investment Company. Never spoke to him about it in my life. Mr. Harvey told me Mr. Fay was to manage at Granada. He never told me anything else about him. Mr. Harvey never asked me for possession of my stock so that he could deliver it to Mr. Fay. He never asked for the possession of the stock at any time except for Mr. Folger, and except that in 1909 he asked me for the stock again because there was a second assessment.

"Mr. Harvey told me that since I was the owner of the stock the bank absolutely demanded that I should sign the note. He said that since I was the owner and holder of the stock he deemed it advisable to have it put in my name, and therefore he had it put in my name. Up to that time he had always appeared on the books of the corporation as a stockholder. I always knew that the stock stood in Mr. Harvey's name on the books of the corporation, and was familiar with the fact that he was acting as president of the company and was managing its affairs. I was cognizant of the fact that there had been an assessment on the stock, but never made any offer to return that money to him."

This testimony was given on or prior to December 19, 1911. On January 5, 1912, she went on the stand again and testified, in effect, that she kept a safe deposit box at the First National Bank during the year 1905 and up until 1910, but that she had a safe of her own, with a combination lock, which she kept at her home at 2555 Webster street, San Francisco, Cal., and that she kept the stock in that safe and not in the safe deposit box at the bank, as she first stated. She changed safes in 1907, but always had a safe of her own and kept the stock in there. As to this she says:

"I did not have any shares of stock of the Shore Line Investment Company in that box during the year 1905. I made a mistake in my testimony, that is the reason I want to correct it. I never had any shares of stock of the Shore Line Investment Company in my box at any time. I kept that stock in my safe."

And further on she continues:

"On thinking it over I kept this stock in my own safe in my house."

In this relation it is of interest to note that Mrs. Harvey, at the instance of one of her attorneys, wrote a letter, of date December 19, 1911, to E. H. Williams, Esq.,,attorney for plaintiff, which was delivered to him by her husband under the following circumstances: One J. K. Moffitt was on the witness stand, and, when Mr. Williams began to question him in regard to the records of Mrs. Harvey's visits to the safe deposit vaults, Harvey handed the letter to Williams. She states in the letter, among other things:

"I do not myself know the exact dates of my visits (to the safe deposit box). I have of course been there a number of times since 1905; but I have at all times had a safe of my own wherever I have been living, whether here or at Monterey, and I kept many of my papers in these safes, and as I think it over I am positive I kept my certificates of stock there instead of in my

safe deposit box. * * * Should you or Commissioner Kreft wish me to correct my testimony in these particulars, I will of course do so gladly."

The letter was offered in evidence by plaintiff while Mrs. Harvey was on the witness stand.

This, in brief, is the substance of Mr. and Mrs. Harvey's testimony touching the alleged gift of this stock by Harvey to his wife in the year 1905, and with it, considering the corroborating and discrediting testimony otherwise adduced, Mrs. Harvey's title must stand or fall.

[1] In this relation we may pause to consider the point made by appellee that the alleged gift is in contravention of section 3440 of the Civil Code of the state of California, which provides that every transfer of personal property, with certain exceptions, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest, of such creditors. This statute received early construction by the Supreme Court of California in Stevens v. Irwin, 15 Cal. 503, at page 506 (76 Am. Dec. 500). The court says:

"A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property, the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee."

This construction, as we understand, has been uniformly adhered to by that court. Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200; McKee Stair Building Co. v. Martin, 126 Cal. 557, 58 Pac. 1044; Sequeira v. Collins, 153 Cal. 426, 95 Pac. 876.

[2, 3] Registration of a transfer of the stock upon the books of the corporation is not essential to a valid transfer of the title, and this even though the certificate recites that it is transferable only on the books of the company and a surrender of the stock. Nat. Bank of the Pacific v. Western Pacific Ry. Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391. In view of this holding, if the testimony of Mr. and Mrs. Harvey is to be credited, there was a complete and actual transfer by indorsement and delivery of this stock by the donor to the donee, and the donee has continued in the sole possession and dominion thereof with the two exceptions noted, which, in our judgment, does not break the continuity and good title vested in the donee. This, as we say, would be so if the parties to the transaction are to be credited. Of this we will now inquire.

It will conduce to the clarity of the situation by considering those

things, and the testimony attending them, which go to the corroboration of the testimony of Harvey and wife separately from those that tend to discredit such testimony, or to a disparagement of Mrs. Harvey's title.

Mr. Burke Corbet, who was secretary of the Shore Line Investment Company and held the office since the company's organization, testifies that prior to the issuance of any stock to Harvey he had a discussion with Harvey as to how his stock should be issued; he then having indicated that he was buying the stock for his wife.

"I suggested," says the witness, "to him then that if this was true the stock should be issued in Mrs. Harvey's name. Mr. Harvey said that he preferred to have it issued in his own name because he wanted to be a director of the corporation, and wanted to participate actively in the management of the corporation. I told him at that time, and at a number of other times when subsequent stock certificates were issued in his name, that I thought the stock ought to be issued in the name of Mrs. Harvey, if she was the owner of the stock, and advised him at different times to that effect. At all of those times before any stock was ever issued in the name of Mr. Harvey, he stated to me that he had given the stock to Mrs. Harvey. After the stock was issued, we discussed it a number of times, and he told me he had given it to Mrs. Harvey."

Corbet further testifies that from the first to the last Harvey owned upon the books of the company 556 shares in all. The additional certificate for 10 shares went into his name on the books on June 1, 1909.

On April 13, 1907, an assessment was paid by Harvey upon the 546 shares of stock and appears upon Harvey's private books in this language: "April 13, 1907, to cash assessment No. 1, 546 shares at 10, $5,460."

As to this Mr. Wasserman, who was Harvey's bookkeeper from 1896 to the middle of 1908, testifies:

"At the time the assessment of the stock was paid—I do not know the exact date, but it would show in the book—I remember distinctly about asking Mr. Harvey about a receipt or entry for that assessment, and he told me that Mrs. Harvey (she, I think, was away at the time), that when she came back he would have the receipt entered on the stock. It was my habit, when Mr. Harvey paid an assessment, to have the receipt entered on the back of the stock. Mr. Harvey told me that Mrs. Harvey had possession of the stock at this time when the assessment was paid. This date was April 13, 1907. I made the entry on page 44 of Mr. Harvey's ledger showing the payment of the assessment."

Witness further testifies that during the time that he was in Harvey's employ he had full access to all compartments of his safe wherein he kept his stocks and bonds, save one which was held held by a friend of his, and went frequently to Harvey's safe deposit box, and during each year checked up his securities in the box; and that at the time of the San Francisco fire he went to his office, opened the safe, and gathered up all their securities that he thought were valuable, and took them to Harvey's home. One block of papers he carried around for some time in a wallet, being the same within which Harvey had his securities, insurance policies, and other valuable papers, and that he never saw any stock of the Shore Line Investment Company

in his custody, either in his office safe, in his safe deposit box, or at the time he took the securities to his home.

James W. Crosby, who was Harvey's bookkeeper from the spring of 1908, as he says, up to the time at which his testimony was given, testifies concerning assessment No. 1, alluded to by Wasserman, which appears on the books of Harvey as paid April 13, 1907, that at the time he was auditor and assistant secretary of the Shore Line Investment Company, and had a conversation with Harvey as follows:

"I do not remember the exact conversation, but he brought me a check in payment of the assessment. He told me at that time that it was to pay the assessment on Mrs. Harvey's stock, that Mrs. Harvey was away at the time and consequently he could not get the certificates, but he would bring them to me later to have the notation 'assessment paid' stamped or written on the back of the certificate. This was done at a later day. I do not recall how long afterwards. I do not recall Mr. Harvey's wording, but I understood that the stock belonged to Mrs. Harvey. I do not know whether he said the stock belonged to Mrs. Harvey in so many words or not. He told me the stock was Mrs. Harvey's at that time."

Mr. Charles W. Fay, who has held the position of general manager of the Shore Line Investment Company since January, 1906, testifies:

"I met Mr. Harvey very frequently. My business called me into consultation with him constantly, almost every day, and about that time he informed me— (Interrupted by objection.) Mr. Harvey told me at this time that this stock was Mrs. Harvey's. This was in 1906. I recall the circumstance of a negotiation with reference to paying off some indebtedness of the Shore Line Investment Company, in 1909. As general manager of the Shore Line Investment Company, I was authorized to negotiate for a loan to clean up this indebtedness. I negotiated with a certain banking institution here, and one of the conditions was that the stock of the various stockholders, or at least 90 per cent. of them, was called for, for the purpose of securing this loan. Also, that an agreement should be signed by the owners of the stock, holding themselves proportionately liable for the amount to be borrowed. I called on Mr. Harvey and asked him for the stock held in his name in this company, explaining my purpose. He said he would get the stock; that it was Mrs. Harvey's stock. I asked him how long it would be, and he said he would have to send for it; I believe that Mrs. Harvey was then at Del Monte. Two or three days subsequently I called on him and he gave me the certificates of stock standing in his name, indorsed. They did not remain so very long in my possession. I was collecting it for the trustee who was to hold the stock. I judge that it was either in my possession, or in his, for probably 30 days. The negotiations did not go through, and subsequent to that time there was an assessment levied on account of the demand of the French Bank for a payment on their loan. I gave the stock, I think, to Mr. Guggenheim, who was to hold this and the other stock. I do not recall whether I returned it to Mr. Harvey, or whether he got it back from Mr. Guggenheim direct."

Continuing on cross-examination, he further states:

"I first had physical possession of these shares of stock in October or November, 1909. I received them from Mr. Harvey."

Now, on the other hand, we may advert to such testimony as seems to be in disparagement of Mrs. Harvey's title, or that has a tendency to refute the testimony adduced in support thereof.

Harvey kept a set of private books, wherein were contained accounts of his private affairs, among which are to be found memoranda

under the head, "Family Gifts and Allowances." His individual account shows from the first—that is, from the date of the purchase of these shares of stock—until March 31, 1910, that they were posted to his credit, and not charged to "Family Gifts and Allowances." The entries with reference to the stock are beneath the numerals "1905," and are as follows, having allusion, no doubt, to the time of purchase:

June 20.	To cash	$ 7,500 00
Aug. 22.	To cash Fentin interest B. Corbet	1,000 00
Aug. 24.	To cash Fentin interest A. D. Bowen	650 00
Sep. 22.	To cash 170 shares at $50	8,500 00
Sep. 26.	To cash 10 shares at $50	500 00
Total		$18,150 00

Then, as Wasserman says, for bookkeeping purposes this balance was brought down under date January 1, 1907. Then follows the entry: "April 13, 1907, to cash assessment No. 1, 546 shares at 10, $5,460"—which amount added to the above balance aggregates $23,610.

Subsequently, under date of March 31, 1910, and under the heading, "Family Gifts and Allowances," appears this entry in the journal:

"To Shore Line Investment Company $23,610, transfer to Mrs. S. G. H. of S. L. stock. J. D. H. states this stock was originally purchased for Mrs. H."

Crosby says:

"I made this entire entry at my own volition, and not at the request of any person, but in accordance with the facts of which I was cognizant. It was about the time that Mr. Harvey's bankruptcy proceedings were pending, and he asked me to make up a statement for him during the time I kept his books." And "was made" as he further states "to wipe the amount off his books in accordance with a statement or request, made some time before, that I make a notation at the head of the account in the ledger covering the stock of the Shore Line Investment Company, that the stock did not belong to him. * * * He instructed me prior to March, 1910, to make an entry of this gift to Mrs. Harvey."

Wasserman testifies that at page 162—we take it that this is the ledger—under the caption, "Family Gifts and Allowances," appears this entry, "March 31, 1910, S. L. I. stock, $23,610," the caption being in witness' handwriting; and Crosby testifies:

"I made the entry on page 44 of Mr. Harvey's ledger reading, 'March 31st, 1910, F. G. & A. (meaning, Family Gifts and Allowances) 546 shares, $23,610.'"

Harvey's trial balance book, made up by his bookkeeper, shows that in February, November, and December of 1906, and on February 1, 1907, the balance as to this stock standing to his account was $18,150, and that on February 29, 1908, it was $23,610. This latter balance manifestly includes the assessment No. 1 of $5,460, although that item appears to be posted of date April 13, 1907. As to subsequent entries touching the account, Crosby, who seems to have made them, says:

"I entered in this trial balance book, referring to ledger folio 44, Shore Line Investment Company's stock, under date of October 31, 1909, on the debit side, $26,110, and under date of March 31, 1910, in the debit column of the same ledger folio and heading I entered $2,500. The trial balance of October 31, 1909, was the first that I took. The sum of $26,110 was the

balance shown in the ledger prior to the time that I made the entry transferring Mrs. Harvey's stock to the Family Gifts and Allowance account. The balance for $2,500 was the amount appearing in the ledger representing stock which Mr. Harvey himself owned."

This $2,500 item represented 10 shares of stock which went into his name on the books of the company June 1, 1909. These specific shares have gone into the hands of the trustee in bankruptcy.

In Harvey's cashbook, under date of September 9, 1905, appears in the handwriting of Harvey a pencil memorandum, opposite the words "Shore Line Investment Company," "Property of S. G. H." A like memorandum appears on each of pages 27, 35, and 41 of the cashbook. Also, another memorandum from the cashbook under date September 23, 1905, wherein the words, "Property of S. G. Harvey," appear written after the designation, "Shore Line Investment Company," also in the handwriting of Harvey, was introduced.

As further illustrative of entries under the heading, "Family Gifts and Allowances," we have the following:

1907.	January 11.	To cash, Mrs. Harvey	$200 00
	January 28.	To cash, Mrs. Harvey	300 00
	February 21.	To cash, Mrs. Harvey, O. S. assessment No. 3	500 00

—"O. S." meaning Ocean Shore Railway Company.

On September 22, 1907, manifestly at the instance of Harvey, Wasserman made up a statement of his affairs giving his liabilities and monthly interest charges; also, his monthly income, as well as a list of his properties and assets, showing his liabilities to be $745,944.37, and his assets, $1,383,287.47. Following a long list of properties aggregating in estimated value $993,394.30, appears this statement:

"Besides the above, you should take into consideration the following:

"Due from Rogers for three assessments paid Ocean Shore stock secured by stocks and bonds. $13,420.00.

"Ocean Shore Railway Company, cash put in not including assessment No. 3, $283,613.17.

"Ocean Shore bonds given in payment Assessment No. 3, $55,000.00.

"Shore Line Investment Company, $23,610.00."

The letter advised careful study of the statement with a view to disposing of such of the assets as Harvey might be able to, and paying off the debts as fast as possible.

From Corbet's testimony it further appears that on December 20, 1906, certificate No. 30 for 66 shares of the Shore Line Investment Company's stock was surrendered and canceled, and on the same date a certificate for the same number of shares was issued to J. A. Folger. This was part of the 546 shares in controversy. These shares remained in Folger's name until December 19, 1907, when a new certificate, No. 70, was issued to J. Downey Harvey for the same number of shares.

Another item of testimony which may be mentioned is the memorandum made by Mrs. Harvey, and which was given in evidence purporting to give the date when received and number of shares of stock given her by her husband. It is as follows:

"300 shares delivered June 26th, 1905.
"On August 22, 1905, received 40 shares.
"On August 22, 1905, received 26 shares.
"On September 22, 1905, received 180 shares."

This memorandum was made up from slips which the witness says were made at the time, as was her custom, on the receipt of gifts, and was made up in response to a request of the court, the witness further saying, "At that time I used the slips I spoke of, afterwards destroying them." Further, the witness says, in another place, that, in making up the slips on receipt of the certificates, "I took the dates of the certificates and not the dates of their receipt."

Further, the testimony tends to show that Mrs. Harvey was in New York City about the date of June 26, 1905, and did not return until early in July, and that there were three admissions to her safe deposit box between June 1, 1905, and December 31st of the same year, which was in each instance by Lizzie Anderson, Mrs. Harvey's maid, namely, July 15, July 17, and November 8, 1905.

It is important to keep in mind what was done by Harvey in making the alleged gift to his wife. He, according to his own testimony, and that of Mrs. Harvey, indorsed his name upon the certificates of stock and handed them to her. But at the same time the stock was retained in his own name upon the stock books of the company and so carried the entire time up until November 26, 1909, when they were regularly transferred to her on such books, and a certificate was issued to her direct. Harvey's reason for so retaining the stock in his own name upon the stock books was that the success of the Shore Line Investment Company was dependent in large measure upon the building of the Ocean Shore Railroad, and he, being the largest stockholder in both companies, thought his association and prominence in each company would serve to help the other. But the possession of the stock certificates with the indorsement of Harvey's name thereon showing transfer of title, according to the testimony of Harvey and wife, passed to Mrs. Harvey about the date of the certificates. That Harvey intended giving this stock to his wife, and that he had given it to her, is shown by the evidence of reliable witnesses other than the parties interested. According to Mr. Corbet, Harvey told him at the time he was buying the stock that he was giving it to Mrs. Harvey, and then came up a discussion and suggestions as to how the stock should be issued. But Harvey preferred that it should be issued in his own name, because, as Corbet says, Harvey wanted to be a director of the corporation and to participate actively in its management. Wasserman, Harvey's bookkeeper for many years, has a distinct recollection that Harvey mentioned to him at some time that this stock was Mrs. Harvey's property. This is in relation to a receipt or entry for the assessment paid by Harvey, when Harvey told him that Mrs. Harvey was away at the time "and that when she came back he would have the receipt entered on the stock." Crosby, who became Harvey's bookkeeper later some time in 1908, says he was given to understand by Harvey that the stock belonged to Mrs. Harvey. He (Harvey) directed that certain entries be made in his books concerning such stock, which entries were accordingly made. But a significant

transaction occurred prior to the time that Crosby became Harvey's bookkeeper, and while he was assistant secretary of the Shore Line Investment Company, which had relation to the payment by Harvey of assessment No. 1 upon this stock. About the 13th of April, 1907, Crosby asked for the stock so that he might indorse the payment thereon, and Harvey told him then that the stock belonged to Mrs. Harvey, and that she was away at the time, but that he would get the certificates from her and bring them in and have the indorsement made. This was done later. Then Mr. Fay, who became manager of the corporation at the same time that Harvey became president, says that Harvey told him at the time, in 1906, that the stock was Mrs. Harvey's. A subsequent transaction tends strongly to substantiate Fay's statement, for, when he wanted Harvey to put the stock into third hands for the purpose of security, Harvey was unable to produce it until he obtained the same from his wife.

The testimony of these witnesses as it relates to what Harvey said about the stock can hardly be considered to be self-serving, for the statements he made to Corbet and Fay were at about or prior to the time that he delivered the stock to his wife, and evinced his purpose in that respect. First Nat. Bank v. Holland, 99 Va. 495, 39 S. E. 126, 128, 55 L. R. A. 155, 86 Am. St. Rep. 898. And what he said to Wasserman, Crosby, and Fay when it was desired that the stock be produced in the one case for indorsement of the assessment thereon, and in the other for placing the certificates in the hands of a third party for security purposes, was relevant and pertinent, as it related to a specific transaction when the presence or production of the stock certificates was required.

But Wasserman's testimony to the effect that he had full access to the depositaries where Harvey kept his stocks and bonds and securities of all kinds, and that he gathered together his papers and effects after the fire, and that he saw nothing of these stocks in all the time is very significant, as its strong tendency is to establish the pertinent fact that Harvey did not, during the time that Wasserman was his bookkeeper, have this stock in his possession.

The fact, as the testimony shows, that Harvey procured from his wife 66 shares of this stock, had a certificate issued to Folger for the same, had the same indorsed by Folger and returned to his wife, and afterwards had the stock transferred on the books to his own name, and then returned that stock, with his name indorsed on the certificate again to his wife, is but in keeping with his declaration from the first that he desired that the stock remain in his name on the books of the company, and is in harmony with what was done and designed to be done in the first instance. So of his procuring the stock from his wife at the instance of Mr. Fay for the purpose of using it for security purposes, and so also of his voting and signing the stock at stockholders' and directors' meetings of the corporation.

Concededly it is a strong circumstance against Mr. and Mrs. Harvey's claim that Harvey should have carried this stock on his private books as if it were his own, and so of the assessment No. 1, as if it had been paid by him individually and for his own account and not

for the account of Mrs. Harvey. We place no stress on the fact that Harvey made certain entries in his books in pencil indicating that the stock belonged to Mrs. Harvey. These are self-serving. It is true that manifestly his books were not scientifically kept, and it is sought to cast reflection upon his bookkeepers for the manner in which the stock account was so posted and carried as an asset of Harvey. But the bookkeepers were the agents of Harvey, and he must be chargeable with their delinquencies where not accompanied with fraud against him; and, further, he is presumed to know what is in his own books.

There are other entries in his books, however, relating to "Family Gifts and Allowances" account which would seem to indicate that there might have been a mistake on his part or that of his bookkeeper in not posting the stock to the account of Family Gifts and Allowances, or that it was not considered of particular importance that it should have been so posted. The stock was transferred to Mrs. Harvey on the books of the company on November 26, 1909. All are agreed as to this. Yet it is a fact that the asset was not transferred on Harvey's books, or charged to Family Gifts and Allowances until March 31, 1910. Then again, Harvey made a gift to Mrs. Harvey of a lot on Pacific avenue on February 28, 1905, at which date the deed was actually made to Mrs. Harvey; but the lot was carried on Harvey's books as his asset until July 31, 1905, and was not dropped from the trial balance book until December, 1905.

The letter of Wasserman adds emphasis only to the supposed fact that Harvey knew that the stock was being carried on his books as his individual asset. Another thing which seems to militate against the accuracy of Mrs. Harvey's testimony is the fact that she first testified that she kept this stock in her safe deposit box at the First National Bank. She so stated positively and unequivocally. But later she changed her testimony and affirmed that the stock was kept in her own private safe at her residence or where she lived elsewhere. This was a matter about which she may have made a candid mistake. Women are usually not so careful in business dealings as men, and ordinarily do not keep as strict trace of their business affairs as men do. And it might well be that Mrs. Harvey made her private safe the depositary of these bonds. Again, the memorandum of Mrs. Harvey touching the time when she received this stock seems to discredit her; but she explains by saying she used the date of the certificates, rather than the actual date when she received the stock, in making the record, and this reconciles the receipt of the first 300 shares with the fact that she was probably away in New York on the date of its issue. The memorandum which was put in evidence was made up in response to the request of the court. She then destroyed the original slips.

Now, upon this record, what are we to say is the fact as to whether Harvey gave this stock to his wife? Harvey affirms that he indorsed and delivered the stock with the intent and purpose of giving it to her, and Mrs. Harvey affirms that he did not only indorse and deliver the stock to her, but that she received it and accepted the same as a gift, and that she has continued in the actual possession and dominion ever since. As we have indicated, the retaining of the stock in Har-

vey's name upon the stock books of the company was in harmony with his primary purpose so that he could continue as a director of the corporation. This casts no discredit upon his statement touching what was done in making the gift; and, while the stock was carried upon his private books as an asset of his own, we think it does not destroy the verity of his statement respecting the initial fact of indorsing and delivering the stock as a gift to her. We are still bound to believe what he said as to that, and what his wife said as to it. The manner in which he carried the stock on his private books tends, undoubtedly, to an impairment of the credit of his statements as to the gift, because inconsistent therewith; but, when all the attending circumstances are considered, we are convinced that the statements are true notwithstanding, and that the book entries were not made because he considered the stock his own, but most likely because he deemed it in consonance with the fact that the stock stood in his name upon the stock books.

At the time of the indorsement and delivery of the stock to Mrs. Harvey, Harvey was entirely solvent, and could have had no motive whatever for covering up or concealing his property, or any of it, from his creditors. He remained solvent for a long while thereafter, so that no ulterior purpose can be ascribed to his action at that time.

But a gift once made cannot be recalled without the consent of the donee, and what Harvey may have done by way of book statements as to the asset subsequently could not affect Mrs. Harvey's title. Nor do we think that he so intended to affect her title, nor in any way to withdraw or modify his primary purpose of giving her the stock; nor is it a fact established in any way that Mrs. Harvey held the stock subject to Harvey's dictation or control.

It is true, as is said in Bauernschmidt v. Bauernschmidt, 54 Atl. 637–643:

> "There can be no gift which the law will recognize where there is reserved to the donor, either expressly or as a result of the circumstances and conditions attending the transaction, a power of revocation or a dominion over the subject of the gift. There can be no locus penitentiæ, and there is always a locus penitentiæ where the supposed donor may at any moment undo what he has done."

But there is no such element in this case. Mrs. Harvey's testimony that she received the stock from Harvey, and that she continued in the sole possession with the two exceptions mentioned, we think must be taken as the true statement of the fact. She first thought that she kept the stock in her safe deposit box at the bank, but she was afterwards convinced that she kept it in her own private safe—a lapse of memory. But the crucial fact remains that she had and continued in the sole possession, no matter where she kept it. Her private safe was provided with a combination lock, and her husband did not have access to the safe. The stock was as much under her dominion in that safe in her own home secure from the intrusion of her husband as it would have been in the safe deposit vault, and it was secure from his control or dominion in either event. The further discrepancies in Mrs. Harvey's narrative which have been heretofore noticed

are of no greater moment than often happens with perfectly truthful and candid witnesses. Mrs. Harvey's memory, she admits herself, is not always to be trusted. But the corroboration that her testimony has received we think so fortifies the statements as to the material and potential fact that she received the stock as a gift from her husband and continued in the actual possession and dominion of the same until surrendered for exchange on November 26, 1909, for another certificate as to render them entirely worthy of belief. We cannot think that Mr. and Mrs. Harvey deliberately and corruptly devised the story about what took place, and that they have sworn falsely for the sake of saving this stock from the wreck of Harvey's business affairs for the wife's benefit.

We therefore conclude that the decree of the court below should be reversed and the cause dismissed.

We have not overlooked the rule invoked by counsel for appellee that the finding of the chancellor or the trial court upon conflicting evidence is presumably correct. In this case, however, not all the evidence was taken in open court. Indeed, the principal part of Mrs. Harvey's evidence was taken before the referee and read upon the trial. We think, however, that a serious mistake was made by the trial court in giving undue importance to the carrying of the stock in Harvey's name on the stock books, to the minutes of the corporation meetings, and to Harvey's private books, and that the strong weight of the testimony is against its findings.

VON BAUMBACH, Collector of Internal Revenue, v. SARGENT LAND CO.

SAME v. SUTTON LAND CO. SAME v. KEARSARGE LAND CO.

(Circuit Court of Appeals, Eighth Circuit. December 9, 1914.)

Nos. 4081–4083.

(Syllabus by the Court.)

1. INTERNAL REVENUE ⊂⊃9—CORPORATION TAX—"INCOME."

The owners of lands practically valuable only for the ore in them, years before January 1, 1909, when the Corporation Tax Act took effect, made mining leases thereof by which they granted the absolute right to dig and have the ore therein and to remove it within long terms, such as 25 and 50 years, and the lessees covenanted to pay yearly fixed amounts, such as 25 or 30 cents a ton for the ore extracted, and minimum yearly amounts to be credited on ores subsequently extracted in case sufficient amounts were not extracted to come to the minimums in any year. Thereafter, in the year 1906, these owners, for the purpose of collecting their claims against the lessees under their covenants to pay for the ores, and for the purpose of converting their property into money and distributing it among themselves, organized three corporations, conveyed these claims and the land to them in three lots, one lot to each corporation, and took from them therefor all the stock of these corporations in proportion to their undivided interests in the property. The corporations engaged in no mining, or trading, or other like business, but confined their operations to collecting the claims against the lessees, protecting and preserv-

ing the property, converting it into money, and distributing the proceeds among its stockholders. In 1909, 1910, and 1911 the corporations collected the amounts which fell due in those years on the claims against the lessees under their covenants in the leases, which amounted to several hundred thousand dollars, and received some small amounts for the sale of some stumpage and a few town lots.

Held, the amounts thus received by the corporations were not included in "income," within the meaning of that word in the Corporation Tax Act, but were parts of the property or capital of the corporations in a different form.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.

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

2. INTERNAL REVENUE ⟸9—CORPORATION TAX—ALLOWANCE FOR DEPRECIATION.

If the amounts collected by the corporations on the claims against the lessees under their covenants were income, then the property or capital of the corporations was reduced in amount and value by those amounts, and the corporations were entitled to an allowance thereof for the depreciation of their property.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.]

3. INTERNAL REVENUE ⟸9—CORPORATION TAX—"DOING BUSINESS."

Corporations that are the owners of property not engaged in business with themselves, that are engaged in no mining, trading, or other like business, but confine their operations to acts necessary or incidental to the protection and preservation of their property, to its conversion into money, and the distribution thereof among its stockholders, are not "doing business," within the meaning of the Corporation Tax Act, and are not subject to the tax it prescribes.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

4. MINES AND MINERALS ⟸62—MINING LEASES—SALES OF THE ORE.

Mining leases, whereby the lessees are granted the absolute and exclusive right to extract and have the ore in the land and to remove it during terms, such as 25 and 50 years, so long as to be practically equivalent to unlimited times, are in reality sales of the ore, and the royalties reserved in the leases are in fact the purchase prices thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 173, 175–180; Dec. Dig. ⟸62.]

5. APPEAL AND ERROR ⟸854—GROUND FOR REVERSAL—ERRONEOUS REASON.

A right judgment, which is warranted by the record and the facts, and was rendered without error in the trial or rendition, may not be reversed on the sole ground that the trial court gave a wrong reason for the just judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. ⟸854.]

(Additional Syllabus by Editorial Staff.)

6. INTERNAL REVENUE ⟸9—CORPORATION TAX—"INCOME."

The word "income" is used in Corporation Tax Act of Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), in contradistinction to property and invested capital. It is not synonymous with the word "re-

ceipts," and does not include receipts from the conversion, without profit, of the corporate property into money.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂⊃9.

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

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

Action by the Sargent Land Company, a corporation, the Sutton Land Company, a corporation, and the Kearsarge Land Company, a corporation, against Fred Von Baumbach, Collector of Internal Revenue. Judgments for plaintiffs, and defendant brings error. Affirmed.

For opinion below, see 207 Fed. 423.

These writs of error are sued out to reverse judgments against the collector of internal revenue for the recovery of moneys which he exacted from the three corporations, plaintiffs below, over their protest as excise taxes for the years 1909, 1910, and 1911, under the corporation tax act of August 5, 1909 (36 Stat. 111, 112, c. 6, § 38). The court below found and held that the Commissioner had measured these taxes by the amounts of the receipts by the corporations of moneys derived by them from the conversion of parts of their respective properties or capitals into money, instead of by their receipts from their gains or incomes as required by the act.

Many years before that act was passed these corporations had become, and were at the time it went into effect, and during the years 1909, 1910, and 1911, the owners of lands on the Mesaba Range, which were valuable only for the iron ore in them beneath the surface, and of the rights to collect and receive the portions of the royalties on the ore which came due during those years under mining leases whereby the ore had all been granted to lessees prior to the year 1908 for fixed prices per ton of the ores extracted and yearly minimum amounts. The receipts of moneys during those years by which the Commissioner measured the taxes consisted of the payments of amounts of these royalties which came due during those years and of a few sums so small and insignificant as to be negligible in the discussion of the issues here for decision, which were received from the sale of a few town lots and lands and a little stumpage. From the sum of the receipts from these sources the Commissioner deducted nothing for depreciation of the plaintiffs' property or for conversion of parts, of that property into money or for anything else except the expenses of the corporations, the taxes they paid, and the $5,000 specified by the act itself. For example, he found the receipts of the Sargent Company from the collection in 1909 of the royalties on the ores, the sales of lots and lands, and stumpage to be $395,732.90; from this amount he deducted only $5,458.83, the expenses of operating the corporation, and $540.38 taxes paid by it during the year and the $5,000 specified in the act, which left $384,733.69, and he caused 1 per cent. of this amount to be collected as the excise tax upon the corporation. The amounts collected of each of the companies for each of the years were measured and found on the same basis, and it is these amounts which the court below found that the companies were lawfully entitled to receive back.

The errors assigned are that the court should have found and held that the royalties received by the companies during the years 1909, 1910, and 1911 constituted gross income of the companies during those years, and that the Commissioner was authorized to collect 1 per cent. thereof, without any deduction for the depreciation of the property or capital by the collection of these royalties or the conversion of parts of their capital into money and the distribution of the proceeds to the stockholders of the companies. The facts material to the questions now at issue in this case are these:

The companies are not and never have been mining companies; they never have operated any mines in any way; they never made but one lease, and

the terms of that lease were agreed upon before the corporation lessor was organized, and after its organization it signed the legal contract on these terms. These corporations are and always have been mere owners of the rights to collect from the lessees the fixed amount per ton of ores mined by the lessees under leases made before the corporations were organized and of the lands leased whose only substantial value was the value of the ore therein. The origin of these corporations, the purpose of their organization and existence, and the character and extent of their operation are disclosed by the following facts:

In the years between 1870 and 1880, George A. Pillsbury, John S. Pillsbury, and Charles A. Pillsbury became the owners of immense tracts of timber land in Minnesota, from which they removed and sold the timber. John M. Longyear and Russell M. Bennett, about 1890, procured an option from them for such lands, exclusive of the timber thereon, as they might select on account of the ore therein. After exploration they selected the lands now held by the three companies, and pursuant to the contract for the option these lands were so deeded in 1892 that the parties above named thereby became the owners of the following undivided interests in them: Bennett, one-fourth; Longyear, one-fourth; J. S. Pillsbury, one-sixth; George A. Pillsbury, one-sixth; and Charles A. Pillsbury, one-sixth. By the year 1900 all three of the Pillsburys had died and their interests in this property had been devised or had descended to many parties, so that the interests of some of the owners were as small as $1/108$. The original parties and their successors in interest had made all the leases ever made on the property but one, and had agreed upon the terms of that one. It had become very difficult to get legal deeds or contracts from all of the owners, on account of the minority of some and the age and location of others. These owners were not operating mines, or doing anything with this property, but that which was necessary to sell it, convert it into money, and distribute the proceeds among themselves. The customary and the most beneficial way of converting into money land containing iron ore, which is without substantial value in the absence of the ore, is to sell the ore by means of a mining lease at a fixed price per ton, and it was for this purpose that the owners had made the leases of this property. These leases were for long terms, such as 25 years and 50 years, or an indeterminate term. By these leases the owners granted to the lessees the full and exclusive right to extract and have all the ore in the land described in the leases, and by them the lessees agreed to pay annually for the ore extracted fixed prices per ton, such as 25 cents per ton, or 30 cents per ton, and to pay specified minimum amounts annually. The parties agreed by the leases that each annual minimum payment should be credited to the lessees in payment of the ore subsequently extracted by them in case they did not extract in any year a quantity of ore sufficient to amount, at the contract rate, to the minimum payment. Thus it was that these numerous owners of undivided interests in the claims for the moneys which the lessees had covenanted by these leases to pay for the ore in these lands and of the lands themselves had become so numerous and were of such ages that it was impracticable for them to make legal contracts or conveyances, and were likely to become still more numerous.

Thereupon in the year 1906 they agreed to vest their ownership of these claims against the lessees and of the land, subject to the leases, in the three corporations, plaintiffs below, for the sole purpose of collecting these claims, which in reality constituted the only real value in all this property, and distributing the proceeds of the collections among themselves. They vested their ownership in three corporations, because the law of Minnesota prohibited any single or any two corporations from holding so many acres of land. They made the capital stock of each of the companies $108,000, although the value of the property they conveyed to each was much greater than that amount because the smallest part of the property owned by any one was $1/108$, and they issued all the stock to the owners of the property so that each one received as many thousands of dollars of the stock at par value as he owned $1/108$ths, and on July 19, 1906, they conveyed both their claims and rights to the moneys the lessees had covenanted to pay for

the ore, and the leased lands in three lots, one lot to each of the corporations.

The articles of incorporation of each company declared that the general nature of its business should be "the buying, owning, exploring, and developing, leasing, improving, selling, and dealing in lands, tenements, and hereditaments." But in December, 1909, these articles were amended in each case by substituting for that declaration this one: "The general purpose of the corporation is to unite in one ownership the undivided fractional interests of its various stockholders in lands, tenements, and hereditaments, and to own such property, and, for the convenience of its stockholders, to receive and distribute among them, the proceeds of any disposition of such property at such times, in such amounts, and in such manner as the board of directors may determine." Neither of the three corporations has ever bought, explored, developed, leased, or improved any lands, tenements, or hereditaments, or dealt therein, except that shortly after they were incorporated, and years before the Corporation Tax Act was passed, one of them made a lease which its stockholders had agreed to make before its incorporation, and another took the title to 40 acres of land which its stockholders had agreed to purchase before its incorporation, and except that one of them expended $990 in exploring 40 acres of land it owned to be certain there was no ore in it preparatory to a contemplated platting of it into lots for sale, although the land was never in fact platted or sold, and except the following:

The leases provided that the lessees should mine and remove all the merchantable ore wherever they wrought, and that they should conduct their operations in the way and leave the lands in the condition required by the rules and practices of good mining, and each of the three corporations employed a corporation engaged in the business of inspecting mines properly to inspect the operation of the lessees to see that they performed their part of their contracts. One of these corporations employed Mr. Longyear, when the Great Western Mining Company was making explorations of some of its land, to take samples and classify them, in order that it might know what ore the Great Western Company found. A few tracts of the land had been platted into lots before they were conveyed to the corporations, and the corporations took them under a prior contract with Longyear & Co. that the latter might sell the lots, and one of the companies conveyed lots so sold and received the proceeds thereof. The timber on the land in 1892 had been reserved by the Pillsburys, and they removed it; but after the incorporation of the companies a small amount of stumpage was sold, doubtless from trees growing meanwhile. The companies leased a few lots to squatters near towns, in order to evict them from the land more easily; but all these things were incidental to and a part of the duties of these corporations as owners of the claims for the royalties on the ores and of the lands to care for their property as owners, and convert it into money, and to distribute the money to their stockholders. They conducted no other business and did nothing more. As fast as they received the moneys owing under the leases and the small amounts they realized from the sale of lots, land, and stumpage, they deducted their necessary expenses and distributed the remainder among their stockholders. The lessees extracted the ores from the lands from year to year, and exhausted and paid in full for the ores covered by many of the leases before the act of 1909 took effect. There remained, however, at that time several leases which had not been fully exhausted, and it was the royalties collected in 1909, 1910, and 1911 on the ores extracted under these leases which the Commissioner deemed gross income of these corporations, by which he measured the taxes he exacted from them. So it was that when the act of 1909 took effect these corporations were the owners of claims against the lessees for royalties on ores in lands in Minnesota under leases made years before that act took effect, and of the lands themselves, which had no substantial value without the ore, they collected parts of those claims in 1909, 1910, and 1911, and an excise tax of 1 per cent. on the amounts so collected and on small amounts they received from sales of some lots, lands, and stumpage they owned, has been collected, on the ground that these amounts constituted

the gross income of the corporations, and no reduction has been allowed for the conversion of parts of their property or capital into money, or the depreciation of the values of their property by these collections, and the distribution of the amounts they received to their stockholders.

Charles C. Houpt, U. S. Atty., of St. Paul, Minn., for plaintiff in error.

John R. Van Derlip, of Minneapolis, Minn. (Fred B. Snyder and Edward C. Gale, both of Minneapolis, Minn., on the brief), for defendants in error.

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

SANBORN, Circuit Judge (after stating the facts as above). [1] For doing business in a corporate capacity the Tax Corporation Act of August 5, 1909 (36 Stat. 112, § 38), imposes upon every corporation organized for profit having capital stock represented by shares an annual excise tax equivalent to 1 per cent. of its net income above $5,000. It provides that such net income shall be ascertained by the deduction from "the gross amount of the income of such corporation * * * received within the year from all sources" by it (1) its expenses of operation paid out of income; (2) its losses including a reasonable allowance for the depreciation of its property; (3) certain interest paid by it; (4) taxes paid by it; and (5) dividends on stock of corporations subject to the excise tax. The basis of the standard or measure by which the amount of the tax is to be determined is "the gross amount of the income of such corporation * * * received within the year from all sources," not the gross amount received by the corporation from all sources, and from this amount of its income is to be deducted its expenses paid out of its income, not any expenses paid out of its capital or property, and an allowance for depreciation of its property.

[6] That the word "income" in this act is not synonymous with the word "receipts," and that it does not include receipts from the conversion without gain or profit of any part of the property of the corporation into money, or into any other form, is demonstrated by the fact that this word "income" appears in the clause "the gross amount of the income of such corporation," and segregates and designates a specific part, and not all, of the receipts of the corporation as the basis of the measure of the tax, by the fact that only those expenses paid out of income, none of those paid out of capital or property, are to be deducted, by the fact that a deduction for depreciation of property is to be made, by the evident purpose and the whole tenor of the act. This word "income" is used throughout the statute in contradistinction to "property" or "invested capital," and it was neither the intention of the Congress nor is it the legal effect of the act to impose any tax on account of the amounts received by a corporation that is not engaged in the business of buying, selling, or trading in property, from the conversion of its property without gain into money or into any other form. These corporations were never engaged in any such business. And it is not doubtful that the small amounts of money received by them from the sales of the lots and lands that were conveyed to them at their

organization in 1906 were not income, but were mere proceeds of parts of their property on account of which they could not be lawfully taxed.

[4] But were the royalties which had been owing to these corporations by the lessees since 1906, and which these corporations collected and received in 1909, 1910, and 1911, as they fell due, income by the amount of which the taxes upon them must be measured under the tax act, or were they the mere proceeds of the conversion without gain or profit of parts of their property into money and no part of the measure of their lawful tax? The lands, and hence the property, of the corporations, had no substantial value without the rights to collect the royalties the lessees had covenanted to pay. The leases had been made by the former owners prior to 1907, and if there was any gain, profit, or income from the making of the leases, that income accrued years before the Tax Act took effect, and the corporations are exempt from any taxation on account of it. The lessors by the leases granted to the lessees the exclusive right to dig, remove, and have all the iron ore in the lands and the right to remove it during terms such as 25 or 50 years, so long in fact that they were in effect a grant of the right to take it without limit of time or quantity. The lessees had covenanted to pay annually certain fixed amounts such as 25 cents or 30 cents a ton for the ore they extracted and to pay fixed minimum amounts every year whether they extracted ore or not which were contracted to be and were credited on their liability for ore subsequently taken whenever in any year they failed to extract sufficient ore to come to the minimum amounts. In 1906 and 1907 these corporations took from the lessors the latter's claims and rights to collect and receive from the lessees the royalties they had covenanted to pay for the ore, and the title to the lands and issued their stock therefor. If there was any gain, profit, or income in this transaction it was made in 1906 and 1907, at least two years before January 1, 1909, when the Tax Act took effect, and the corporations were exempt from taxation on account of that income. Merchants' Ins. Co. v. McCartney, Fed. Cas. No. 9,443, 17 Fed. Cas. 46.

On January 1, 1909, when the act took effect, and for years before that date, these corporations were the owners of the claims and rights to collect and receive the amounts which the lessees had covenanted by the leases to pay for the ore in the lands and of the lands themselves. These things were their absolute property on January 1, 1909, and none of them was any part of their subsequent income, gain, or profit. The land was practically worthless; the rights and claims to collect the amounts the lessees had covenanted to pay for the ores were practically all there was of value in their property, and these were worth hundreds of thousands of dollars. If they had sold these claims in 1909 for cash for their actual value, for no more and no less than their actual value, no part of that cash could have been gain, profit, or income. It could not have escaped being a mere different form of their property, of their capital, and the corporations could not have been taxable on account of it. If prior to 1909 A. had bought promissory notes secured by mortgages worth their face, payable without interest during the years 1909, 1910, and 1911, and had collected them during those years, the moneys thus collected could not have been his gain, profit, or in-

come. It could not have escaped being simply a different form of his property or capital. If in 1906 the owner of land had sold it for the promissory notes of B. secured by mortgages worth their face, payable without interest 10 per cent. annually during ten years, and had contracted to convey the land upon the payment of the notes, and A. had purchased the notes prior to 1909, and had collected the amounts due on them during the years 1909, 1910, and 1911, the moneys so paid could not have been income. They must have been but a part of A.'s property in another form, for the amount and value of his property would be the same the moment after he collected any of them that it was the moment before. The only difference would have been that the moment before it would all have been in notes, and the moment after part of it would have been in notes and part of it in cash. So when the parts of the rights and claims of these corporations which the lessees covenanted by the leases to pay for the ores came due and were received by the corporations in 1909, 1910, and 1911, the value of their property was neither increased nor diminished. The amount and the value of their unpaid claims was diminished by the amount that the value of their cash was increased by the payments, and the moneys received became a part of their property.

In the application of this Tax Act to the numberless and varied situations which different cases present, the actual facts of each case and their real consequences must be considered and given legitimate effect, regardless of misleading names and forms. The fact that the amounts which the lessees covenanted to pay are called rents or royalties in the leases or elsewhere must not be permitted to blind us to the true nature of the transactions which those leases evidenced. They were negotiated, and all but one of them was executed, by the individual owners of the lands prior to 1907. The land, including the right to the ore in it, was worth hundreds of thousands of dollars. Without the right to the ore it was worth practically nothing. By the leases the owners of the land granted to the lessees the absolute and exclusive right to take out and have all the ore in the land, and to remove it at any time within 25 to 50 years, a time so long that it was ample to enable them to remove all of it, and was equivalent to an unlimited time, and the lessees agreed to pay the yearly fixed amounts per ton for all the ore they should take, and to pay the minimum amounts annually whether the ore was taken or not. The result was that the lessors granted a part of the corpus of the property, that by the grant the lessees were made the owners of the ore and the lessors the owners of the claims and of the rights to collect the amounts the lessees covenanted to pay for the ores, and the transactions were in reality sales of the ore for covenants to pay the purchase price thereof. A mining lease, whereby the lessee is granted the absolute and exclusive right to dig for, remove, and have the mineral in the land during terms sufficiently long to enable him to remove it, is in reality a sale of the ore, and the royalties reserved are in fact the purchase price of it. Stoughton's Appeal, 88 Pa. 198, 201, 202; Scranton v. Phillips, 94 Pa. 15, 22; Coltness Iron Co. v. Black, 6 Appeal Cases, 315, 335 (where Lord Blackburn says: "It was said by Lord Cairns in Gowan v. Christie, 3 Ex. D. 23, that a lease of mines 'is not in reality a lease at all in the sense in which we speak of an agri-

cultural lease. There is no fruit; that is to say, there is no sowing and reaping, in the ordinary sense of the term and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land.' I think this is a perfectly accurate statement"); Eley's Appeal, 103 Pa. 300; Delaware, L. & W. R. R. Co. v. Sanderson, 109 Pa. 583, 1 Atl. 394, 396, 58 Am. Rep. 743; Hope's Appeal (Pa.) 3 Atl. 23; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760; Harlan v. Lehigh Coal & Navigation Co., 35 Pa. 287, 292; Tiley v. Moyers, 43 Pa. 404, 410; Fairchild v. Fairchild (Pa.) 9 Atl. 255, 257.

It is true that there is a decision in apparent conflict with this rational and established rule. State v. Evans, 99 Minn. 220, 223, 225, 227, 108 N. W. 958, 9 Ann. Cas. 520. But that was a decision ex necessitate, and its effect must be limited to its special facts. The Constitution of Minnesota prohibited any sale of any part of the school or swamp lands of the state otherwise than at public sale. A statute of the state had authorized mining leases of these lands. The state had made leases of many of them, upon the faith of which more than $2,400,000 had been invested, when one of them was assailed on the ground that the statute was unconstitutional and the lease was void. Thereupon the court saved the leases and the statute on the grounds that if there was any doubt of the constitutionality of the law it was their duty to uphold it, that the state officers had acted upon the theory that it was valid, that it had been before the Supreme Court four times and they had rendered decisions based upon it without any challenge of its constitutionality and that it was not so clear that it was unconstitutional that it was their duty to strike it down. That decision is not persuasive in the case at bar.

If the purchase price of the ores, called "royalties" in the leases, ever became income, it must have been when the leases were made. But the truth is that the leases merely changed the form of the property of the lessors from the ores to the rights and claims to the purchase price of the ores, which the lessees covenanted to pay under the name of "royalties," and the receipts by the corporation of the payments of the parts of those claims which fell due in 1909, 1910, and 1911, were but another substitution of the cash received for the parts of the claims paid. If the sums paid were gain, profit, or income, they might have been withdrawn and expended by the corporations without diminishing the value or amount of their property; but the claims are in fact diminished in amount and value by the amounts paid on them, and the property of the corporations is depreciated by the same amounts, unless the moneys so paid are substituted for the parts of the claims paid and remain the property of the corporations. As the claims are paid, their amounts and their values decrease.

All the ore sold by some of the leases has already been extracted, the claims for its purchase price or royalties have been paid in full, and the claims for them have become worthless. The ore under one of the leases was exhausted in 1911, and the claim for its purchase price or royalties then became worthless. If the amounts paid under the name of royalties for the ore taken under the exhausted leases had been income, the claims for the royalties would still have been of their original

value, notwithstanding the payments, and the same is true of claims which have been paid in part only. These considerations compel the conclusion that these payments on the claims were not income, but parts of the capital of the corporations.

There is another view of these cases sustained by the record that leads to the same conclusion. The proof is plenary and uncontroverted that the sole purpose of the owners of the claims for the royalties and purchase price of the ores and of the lands in organizing the corporations and making them the owners thereof was to collect by means of them those claims, convert the property into money, and distribute it among the grantors to the corporations; that this was the sole purpose of the stockholders of the corporations and their directors and officers in receiving the ownership of the property; and that the corporations have confined their operations to so converting into money and distributing the proceeds of this property. The reason for these acts was that the interests of the owners were undivided, that they were so numerous and of such ages and conditions that a partition of the property in kind or by a conversion into money and a distribution of it had become imperative, and the owners determined to effect it. Any one of these owners had the equitable right to such a partition. If one or more of them had petitioned the proper court for such relief, and the court had appointed a receiver or master to collect the claims for the purchase price of the ore or royalties, and to convert the property into money and distribute it among the owners according to their respective interests, could any court lawfully have held that the proceeds thus obtained were the gain, profit or income of the equitable owners? These corporations stood in the same relation to the claimants for the purchase price of the ore, or the royalties and the moneys they collected from them, and to the equitable owners of the property, their stockholders, that such a receiver would have stood. In reality they received and held these claims and the moneys collected from them in trust to distribute them among the equitable owners of the property, and the moneys they have collected were no more the income of the corporations or of their stockholders than is any part of the claims that are not collected or any other part of their property. Those collections were simply another form of the property of the corporations and of the stockholders substituted for the parts of the claims paid.

The considerations which have now been stated have convinced that there was no error in the decision of the court below that the moneys collected by the corporations in 1909, 1910, and 1911 under the mining leases on the claims for the royalties on or the purchase price of the ore were not either gross or net income within the meaning of the Tax Act, and that corporations that were, when the Corporation Tax Act took effect on January 1, 1909, the owners of claims purchased years earlier for royalties on ores under mining leases made by their grantors, whereby the absolute right to dig and have all the ore in the lands leased, which without the ore were worthless, and to remove it at any time during terms so long as to be equivalent to an unlimited time, was granted to lessees, and they covenanted to pay therefor yearly fixed amounts per ton for the ore extracted, and minimum amounts yearly to be credited on ore subsequently removed in case sufficient to come

to the minimum was not extracted in any year, are not taxable on account of the amounts coming due and received by the corporations in partial payment of those claims during the years 1909, 1910, and 1911, where their property was formerly owned and was conveyed to them by their original stockholders, and the sole purpose of the conveyance and of their organization was to enable them to collect these claims, to convert the property conveyed to them into money, and to divide the proceeds among their stockholders, and the corporations have not engaged in mining, trading, or any other business, but have strictly confined their operations to the accomplishment of that purpose. Stevens v. Hudson's Bay Co., 101 Law Times Reports, 96, 97, 98, 99; Foley v. Fletcher, 3 H. & N. 769, 774, 778, 783, 787; Secretary of State for India v. Scoble, 89 Law Times Rep. 1, 3; Tiley v. Moyers, 43 Pa. 404, 410; Gibson v. Cooke, 1 Metc. (Mass.) 75.

Before assenting to these conclusions, the arguments of counsel for the United States and the following authorities cited by him were read and considered:

Stratton's Independence, Limited, v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285: But the decision in that case rests on the conceded proposition that a corporation that is engaged in mining its own property is presumed to be using its property or capital and the labor it employs in the business of mining for profit or income, and that the proceeds of that business, less its expenses, must be presumed, in the absence of evidence to the contrary, to contain gain or income derived by the company from the business of mining from which a reasonable allowance for depreciation of the property may be deducted to find the net income which exactly measures its tax. The extent of that decision was (1) that corporations actively engaged in the business of mining their own property are subject to the corporation tax; (2) that the proceeds of ores mined by a corporation from its own premises include presumptive gain or income from its mining business, and are therefore included in its gross income, within the meaning of the tax Act; and (3) that the allowance to be made for the depreciation of its property by reason of the extraction of the ore so mined is not the exact difference between the proceeds of the mining, less the expenses thereof, because such an allowance excludes the possibility of gain from the mining business the existence of which is presumed. 231 U. S. pages 418, 421, 34 Sup. Ct. 136, 58 L. Ed. 285. The decision applies to the corporations that are the lessees and are conducting the business of mining the ores sold through these leases in the cases in hand, but it is inapplicable to the plaintiffs below, because they do not and cannot get the gain or income from the mining which the lessees receive, and they have not been and are not conducting the business of mining, or doing any other business for gain, but have been, were, and are confining their operations to the collection of their claims, and the conversion of their property into money, and dividing its proceeds among the equitable owners thereof, their stockholders.

Flint v. Stone Tracy Co., 220 U. S. 107, 145, 146, 170, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312: In these cases the Supreme Court held that the rents received by a corporation engaged for profit in the business of owning and leasing taxicabs, or build-

ings, or ore lands, constituted a part of its gross income within the meaning of the tax act. But the plaintiffs below never have been engaged in any such business. They never negotiated a mining lease. If there ever was any gain from owning and leasing any of their property, it was made by their grantors more than two years before January 1, 1909, and had become a part of the property, the capital they were organized to and have confined themselves to converting into money and dividing among the equitable owners thereof, the cestuis que trust, and the facts of this case exclude them from the operation of the principles on which the Flint Cases rest and from the effect of that decision.

Authorities to the effect that a devise of rents and profits of mineral lands with power to an executor to make leases thereof was intended by the testator to and did carry the royalties under such leases to the devisees. Daly v. Beckett, 24 Beavan's Rep. 114; Eley's Appeal, 103 Pa. 300, 305, 307; McClintock v. Dana, 106 Pa. 386; Appeal of Shoemaker et al., 106 Pa. 392; Raynolds v. Hanna (C. C.) 55 Fed. 783, 800, 801. But these decisions are irrelevant to the construction of the Corporation Tax Act or its application to the facts of this case, because the intent of the testator drawn from the terms of his will and his situation necessarily determined the decision in each case, and the terms and purpose of each will was too far aside from the terms and object of the Tax Act, and because the testators of these wills contemplated and authorized the business of mining by the executor by means of which he could make long or short leases. But the plaintiffs below neither mined nor made leases, but confined their operations to the mere collection of claims for royalties or the purchase price of the ores and the conversion of their property into money and its distribution, without gain to themselves, among those for whom they held it in trust before the Corporation Tax Act took effect.

Authorities to the effect that a lessee corporation engaged in the business of mining is not forbidden, by the general law that corporations conducting business for profit may not pay dividends out of capital, from paying dividends out of the net proceeds of their mining business. Lee v. Neuchatel Asphalte Co., 41 Chan. Div. 1, 27; Excelsior Water & Min. Co. v. Pierce, 90 Cal. 131, 140, 27 Pac. 44. But these decisions are inapplicable to the cases in hand for the same reasons as is the Case of Stratton's Independence.

Authorities to the effect that the proceeds of the operation of mining and selling ore from lands owned or leased by the operating company, less the expenses of operation, are subject to taxes imposed by statute on "net earnings or income," or on "profits." Commonwealth v. Ocean Oil Co., 59 Pa. 61, 63, 64; Commonwealth v. Penn Gas Coal Co., 62 Pa. 241, 242; Coltness Iron Co. v. Black, 6 Appeal Cases, 315, 335, 336; People v. Roberts, 156 N. Y. 585, 51 N. E. 293. But these decisions, like that of Stratton's Independence, apply only to companies actively engaged in the business of mining. The plaintiffs were not so engaged. They confined their operations strictly to the collection of claims against lessees for the purchase price of or royalties on the ore, and the conversion of their property

acquired years before the Tax Act took effect into money and its distribution among their stockholders, the equitable owners of it. They do not fall under the decisions in the cases cited by counsel for the United States, nor under the rules or reasons on which they rest. They are far within the established principle that the collection of a good claim, or the conversion of property by sale or otherwise into its true value in money, does not transform the proceeds into income, but merely substitutes them for the claim so collected, or the property sold, and leaves them in a different form, a part of the capital or property from which they were derived. A reading of the opinions of the courts, study and meditation on the terms and meaning of the Tax Act, on the facts of these cases, and the reasons for the propositions of counsel, have convinced that such was the nature of the moneys received by the plaintiffs during the years 1909, 1910, and 1911 from their collections of their claims against the lessees for the purchase price of or the royalties on the ore, that those amounts were not a part of either the gross income or of the net income of the corporations, and that the judgments of the court below were right.

It is interesting to note here, though, for the reasons stated, it is not material to the decision of this case, the ground upon which Lord Blackburn, who delivered the main opinion in the leading case of Coltness Iron Co. v. Black, 6 Appeal Cases 315, 330, 336, placed the decision in that case that the proceeds of an operating mining company were taxable as income under the English Income Tax Act. He did not place it on the ground that such proceeds were gains or profits, but on the ground that the statute, which imposed a yearly tax "for every 20s. of the annual value thereof, the sum of 7d.," and provided that "the annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year (and of the property of mines for five years), of the profits received therefrom within the respective times herein limited," must be construed in the light of previous English tax legislation and practice to mean that the proceeds of the mines were the measure of this taxation. Pages 334, 335. In order to reach this conclusion he reviewed the history of English taxation from the times of Elizabeth, and showed that, long before any income tax was imposed, coal mines were rated for taxation on the basis of their production (pages 330, 331), that this practice had been followed under the earlier statutes, whether they imposed property or income taxes, and from this long practice and this earlier legislation he drew the conclusion that such must have been the intention of the legislators who enacted the income tax statute, and overruled an earlier decision to the contrary (pages 335, 336; Knowles v. McAdam, 3 Ex. D. 23). Repeated readings of this opinion and the other opinions in that case lead to the conclusion that they are not even persuasive of the true interpretation and application of our Corporation Tax Act, because they are dominated by a long practice in taxation and a course of legislation that have never existed in this country.

[2] There are still other reasons than those which have been stated why the judgments below should not be reversed. If there were er-

ror in the conclusion that the receipts of the companies from their collections of the amounts of their claims against the lessees which came due in 1909, 1910, and 1911 for the purchase price of or the royalties on the ore were not included in their gross income, if they were a part of that gross income, then the companies would have been entitled to "a reasonable allowance for depreciation of property" by the reduction of the values of their claims by these payments. Stratton's Independence, Limited, v. Howbert, 231 U. S. 399, 418, 34 Sup. Ct. 136, 58 L. Ed. 285. And as the payments on these claims unavoidably reduced and depreciated their value, as has been shown, by the amounts paid, there would have been no net income from them on account of which an excise tax could have been lawfully exacted. United States v. Nipissing Mines Co. (D. C.) 202 Fed. 803, 805; Stevens v. Hudson's Bay Co., 101 L. T. Rep. 96, 97, 98.

[3] Again, this excise tax was imposed on corporations for doing business in a corporate capacity. It is imposed on corporations "doing business," and on those only. Corporations that are the owners of property not used in business, that themselves engage in no trading, mining, or other like business for gain, but confine their activities to acts necessary or incidental to the protection of their property and its conversion into money, are not "doing business" within the meaning of the Corporation Tax Act. These companies were such owners during the years 1909, 1910, and 1911, and, as has been shown, they not only so confined their operations, but in 1909, by an amendment of their articles of incorporation, they disabled themselves from conducting any other operations or doing any business within the true interpretation of the Tax Act. They were not, therefore, taxable under that act, and for that reason the judgments below are right. McCoach v. Minehill Ry. Co., 228 U. S. 295, 305, 306, 309, 311, 33 Sup. Ct. 419, 57 L. Ed. 842; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 190, 31 Sup. Ct. 361, 55 L. Ed. 428; United States v. Nipissing Mines Co., 206 Fed. 431, 433, 434, 124 C. C. A. 313.

[5] It is true that the court below took the opposite view of the last proposition, and the companies sued out no writs of error. But there was no error in the course of the trial of the cases, nor in the judgment, and a right judgment, which is warranted by the record and the facts, may not be reversed on the sole ground that the trial court gave a wrong reason for it. Smiley v. Barker, 83 Fed. 684, 687, 28 C. C. A. 9, 12; Baker v. Kaiser, 126 Fed. 317, 318, 61 C. C. A. 303, 304; Buster v. Wright, 135 Fed. 947, 959, 68 C. C. A. 505, 517.

Let the judgments below be affirmed.

KENTUCKY COAL LANDS CO. v. MINERAL DEVELOPMENT CO.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1914.)

No. 2487.

1. COURTS ⟸7—NATURE OF ACTION—"LOCAL" OR "TRANSITORY ACTION."
An action of ejectment under the Kentucky Code, which permits also the recovery of damages for detention, is a "local" and not a "transitory action."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14, 16, 22–31; Dec. Dig. ⟸7.

For other definitions, see Words and Phrases, First and Second Series, Local Action; Transitory Action.]

2. COURTS ⟸269—JURISDICTION OF FEDERAL COURTS—LOCAL ACTIONS.
Under Judiciary Act March 3, 1875, c. 137, §§ 1, 8, 18 Stat. 470, 472, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (Comp. St. 1913, §§ 991 [1], 1039), as before their enactment, a federal court of the district in which the property, which is the subject-matter, is situated, has jurisdiction of the local actions described in said section 8, where the necessary diverse citizenship exists, without regard to the residence of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. ⟸269.]

3. BOUNDARIES ⟸40—LOCATION OF LINES—QUESTIONS FOR JURY.
The location of the lines of a survey *held*, under the evidence, a question of fact for the jury, under the Kentucky rule of decision that, where the language used is ambiguous, the lines the surveyor intended to describe by such language must govern.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 196–204; Dec. Dig. ⟸40.]

4. COURTS ⟸96—RULE OF STARE DECISIS.
Under the rule of stare decisis, a decision of the Circuit Court of Appeals in a suit in equity, in which it considered the questions of both fact and law, determining the lines of an old survey, is binding only as to the matters of law decided, and in a subsequent action at law between different parties, but involving the same survey, where there is additional evidence raising new questions of fact, the prior decision does not preclude the submission of such questions to a jury.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 328, 334; Dec. Dig. ⟸96.]

5. WORDS AND PHRASES—"JURISDICTION."
Jurisdiction is the power to proceed by authorized service.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction.]

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

Action by the Kentucky Coal Lands Company against the Mineral Development Company. Judgment for defendant, and plaintiff brings error. Reversed.

For opinion below, see 191 Fed. 899.

E. C. O'Rear, of Frankfort, Ky., and R. D. Silliman, of New York City, for plaintiff in error.

S. B. Dishman, of Barboursville, Ky., and E. L. Worthington, of Maysville, Ky., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The plaintiff in error brought what was called an action of ejectment in the state court against the defendant in error. The parties will be named herein as they were called below. The defendant removed the case into the court below upon the ground of diverse citizenship; its petition for removal showing that plaintiff was a citizen of New York and defendant was a citizen of Virginia. The plaintiff moved to remand; its motion being based on the ground that neither party was a resident of the Eastern District of Kentucky. The motion to remand was denied, and plaintiff assigns error thereon.

When the case came on for trial on the merits before a jury, it developed that the Kentucky patent on which plaintiff's title depended was the same one which had been involved and had been considered by this court in Mineral Co. v. Tuggle Co., 151 Fed. 450, 81 C. C. A. 34; and the District Judge, thinking that the question here was only the construction of the patent and so was a question of law, and that it had been decided by this court in the former case, directed a verdict for defendant. Error is also assigned upon this ruling.

Having in mind that a suit cannot be removed from a state court to the United States District Court of a district in which it could not have been brought (Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164), it is apparent that the right of removal in this case depended on the answer to this question:

"Was the general grant of jurisdiction found in the earlier part of section 1 of the act of March 3, 1887, covering cases where the matter in controversy exceeds the jurisdictional amount, and is between citizens of different states, so limited by the later part of the same section that such an action as this could not be brought at all in the federal courts, unless the land involved lay in the district of the residence of the plaintiff or the defendant?"

[1] The common-law action of ejectment was classified as mixed rather than as either real or personal; but the actions which are commonly called by that name, when brought under Codes like that of Kentucky, are purely actions to recover the property. As is said of the Code action in Pomeroy on Code Remedies (3d Ed.) 294:

"It far more nearly resembles, in all of its essential features, the ancient real actions which were displaced in use by ejectment. * * * It does not bear the slightest resemblance to the action of ejectment as that was contrived by the old judges and lawyers, and only confusion and misconception result from applying to it that name."

While the petition in this case prays both that plaintiff be adjudged the owner of the described tracts and that it recover damages for the

unlawful detention, yet the action to recover the land itself is none the less a real action because there is united with it, under the permission of the Code, another action which is personal; and it is enough for the present inquiry if there is disclosed on the record one separable controversy properly removable to the federal courts, since in that case it is immaterial that another nonremovable controversy is joined. Barney v. Latham, 103 U. S. 205, 210, 26 L. Ed. 514. The distinctive character of the action makes it clear that it is a local and not a transitory action, because that is true even of a common-law ejectment. Northern Indiana Co. v. Michigan Central Co., 56 U. S. (15 How.) 233, 242, 14 L. Ed. 674.

[2] Assuming then, as we must, that the present action is local, not transitory, we meet the question whether it is affected by the limitation as to residence found in the latter part of the section, or whether that limitation pertains only to transitory actions. The Supreme Court has several times said that this clause or its predecessor in the statutes is not one pertaining to jurisdiction, but rather to venue or to territorial distribution (In re Hohorst, 150 U. S. 653, 660, 14 Sup. Ct. 221, 37 L. Ed. 1211; Sweeney v. Carter Co., 199 U. S. 252, 256, 26 Sup. Ct. 55, 50 L. Ed. 178); and yet, as to those classes of actions to which the restriction does pertain, it is hard to see why the failure to distribute the action anywhere is not as fatal as would be the failure to grant jurisdiction at all; so the real inquiry must be whether the limitation does pertain to local actions.

The decision of the Supreme Court in Casey v. Adams, 102 U. S. 66, 26 L. Ed. 52, goes far towards answering the inquiry; perhaps it is a complete answer. One section of the National Banking Law provided that suits against a bank might be brought in any court of the United States within the district in which the bank was established or in any state court held in the county or city where the bank was located. This provision was broad and general, and upon its face applied to any and every action, personal or real, local or transitory. It differed from the residence limitation clause of section 1 of the act of 1887 only in that the prohibition against suits in other territorial divisions was implied instead of expressed; yet, under the rule that whatever is not named in such enumeration is excluded, it would seem clear enough that a transitory action against such a bank could not have been brought in any place not specified in the permission; and the court seems to have assumed that, if the statute applied at all to the action there involved, the suit must be dismissed. However, the court had no difficulty in finding, from the necessity of the case, an exception not hinted at in the language of the statute. Chief Justice Waite said (at page 67 of 102 U. S. [26 L. Ed. 52]):

"This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Section 5136 [Comp. St. 1913, § 9661] subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and

transitory actions is as old as actions themselves, and no one has ever supposed that laws, which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. To give the act of Congress the construction now contended for would be in effect to declare that a national bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States, within which the bank was located. Such a result could never have been contemplated by Congress."

If Casey v. Adams may be distinguished because of the less positive character of the limitation in the Banking Act as compared with that in the act of 1887, it becomes necessary to make further study of the latter.

As matters stood under the Revised Statutes, jurisdiction of cases of diverse citizenship was conferred by section 629, and there was no reference to the residence of either party. The distribution of the jurisdiction (that is, the venue of the action) was taken up generally by section 739, which said that, except in the cases provided in the preceding section and in the following three sections, suits must be brought in the district whereof the defendant was an inhabitant or was found. The preceding section (738) refers to suits "to enforce any legal or equitable * * * claim" against property in the district, and provides for service by publication. Section 740 refers to suits not of a local nature, where different defendants live in different districts of the same state; section 741, to suits of a local nature, where the defendant resides in another district in the same state; and section 742 to suits of a local nature, where the "land or other subject-matter of a fixed character lies partly in one district and partly in another"—providing that in such case suit may be brought in either district, and process be executed "as fully as if the said subject-matter were wholly within the district" in which the suit is brought.

Considering together these sections 629 and 738–742, the arrangement is clear and logical. Section 629 conferred jurisdiction. Section 739 (by itself and by virtue of the reference therein contained to sections 741 and 742) distributed the cases by one method as to local actions and by another method as to other actions; and sections 738, 740, and 741 provided methods of service, where the defendant was not found within the district.

The act of 1875, by section 1, revised section 629, and in the midst of it inserted the substance of section 739. By section 8 of this act there was a revision and re-enactment of section 738. Sections 740, 741, and 742 were neither re-enacted nor expressly repealed. Whether they, and especially section 742, have been repealed by implication, was a question which the Supreme Court suggested but left undecided. Greely v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69; Petri v. Creelman, 199 U. S. 487, 493, 26 Sup. Ct. 133, 50 L. Ed. 281; and Galveston Co. v. Gonzalez, 151 U. S. 496, 499, 14 Sup. Ct. 401, 38 L. Ed. 248. That there was no such repeal, but that the sections, or some of them, continued in force, was held by Judge Speer, at the Circuit

(East Tennessee R. R. Co. v. Atlanta Ry. Co. [C. C.] 49 Fed. 608), by Judge Coxe in Goddard v. Mailler (C. C.) 80 Fed. 422, and by Judge—later Justice—Lurton in Horn v. Pere Marquette Ry. Co. (C. C.) 151 Fed. 626. The reasoning of these cases is forceful, and, if they are rightly decided, they are persuasive that the jurisdiction over local actions continued after 1875 as before. Section 738, as above stated, was substantially re-enacted by section 8 of the act of 1875, and by section 5 of the act of 1887, and has continuously been the law. It has been spoken of as if it directly conferred jurisdiction of the cases to which it refers. Mellen v. Moline, 131 U. S. 352, 365, 9 Sup. Ct. 781, 33 L. Ed. 178; Jellenik v. Huron Co., 177 U. S. 1, 11, 20 Sup. Ct. 559, 44 L. Ed. 647; Citizens' Co. v. Illinois Central R. Co., 205 U. S. 46, 59, 27 Sup. Ct. 425, 51 L. Ed. 703.

[5] Such references are appropriate to the cases where made, because they involved the getting of jurisdiction (i. e., power to proceed) by authorized service; but in the broader sense of the term "jurisdiction," it is quite plain that this section 8 only provides a method of obtaining service in those cases of which it assumes the court already has general jurisdiction. Greely v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69; Tug River Coal Co. v. Brigel (C. C. A. 6) 67 Fed. 625, 629, 14 C. C. A. 577. Its true office in the present inquiry is not to create jurisdiction, but to raise the necessary implication that jurisdiction exists by other statutes, and so to determine the interpetation of those other statutes. Taking for illustration a bill to remove a cloud from real estate—a case clearly within this section—it would be useless to make and carefully preserve this section for serving process in such a case on a defendant who did not live in the district, if no such action could be brought in that district; and the existence of this provision compels us to conclude that when section 1 required suit to be brought only in the district where the defendant lived, it did not refer to a bill to remove cloud. While this reasoning, as applied since 1887, stops short of being conclusive, because section 8 might still have occasional application in those instances where the land was situated in the district of plaintiff's residence, and so the suit could be there brought for that reason, yet considering the history of the various sections, and the exceptional character of this supposed instance, the argument is strongly convincing. It seems hardly necessary to say that section 8 cannot create or imply jurisdiction in a particular district court in cases where resort to substituted service is necessary, and fail to have the same effect in the same case, if by chance the defendant is found in the district. For these reasons section 8 alone strongly implies that the general plan of the Revised Statutes is not intended to be disturbed, and that after the acts of 1875 and 1887, as before, the federal courts had full jurisdiction of local actions where the necessary diverse citizenship existed, and without regard to the residence of the parties. If section 742 continued unrepealed, this inference would seemingly be inevitable.

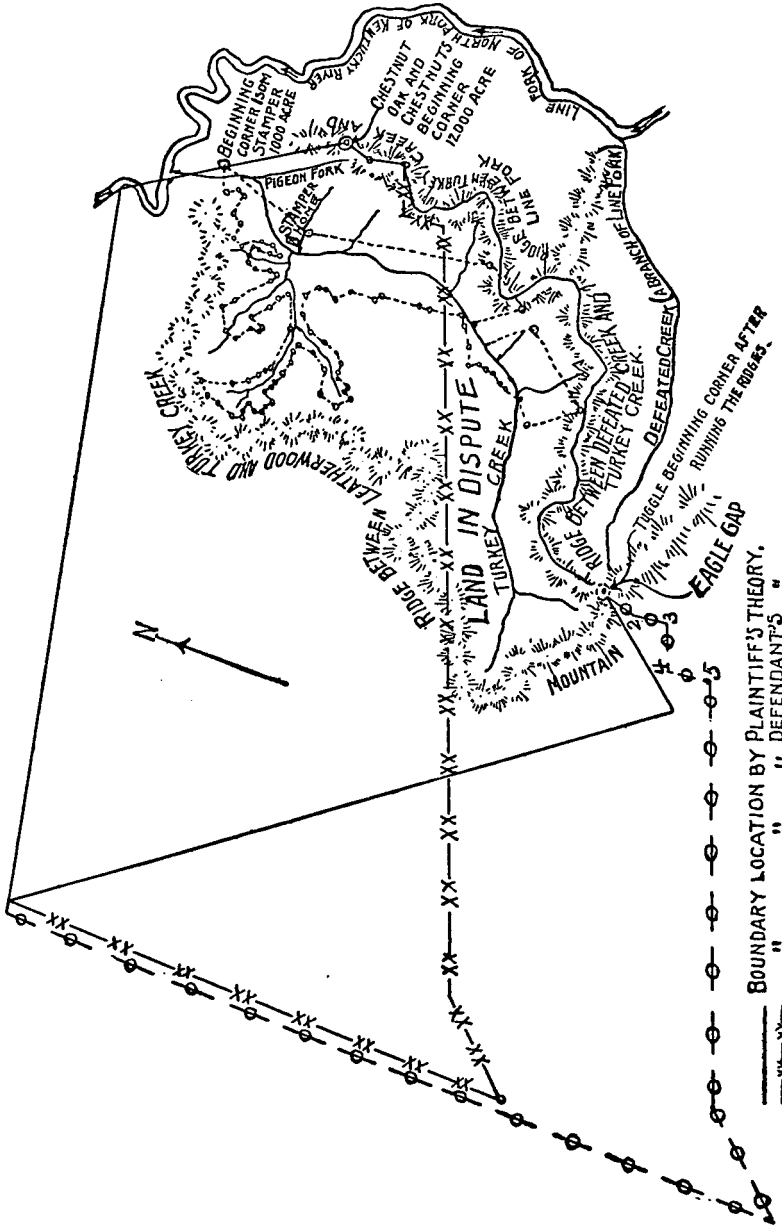
It must be conceded that some doubt is cast upon this broad implication by Ladew v. Tennessee Co., 218 U. S. 357, 31 Sup. Ct. 81, 54 L.

Ed. 1069, and Wetmore v. Tennessee Co., 218 U. S. 369, 31 Sup. Ct. 84, 54 L. Ed. 1073. In the latter case, the plaintiff's land, continuing injury to which was alleged, was in the Eastern District of Tennessee —the district where the federal court was sitting—and the action was of a character often called local. If it was, for the purpose of that case, rightfully to be so considered, then we must infer from the decision that the District Court does not take jurisdiction of a local action, qua local, and probably that section 742 was repealed, and that Horn v. Pere Marquette, supra, is, to that extent, overruled. On the other hand, such an action was surely transitory under the Tennessee rule (Ducktown Co. v. Barnes [Tenn.] 60 S. W. 593), and the federal courts follow the state rule on this subject (Huntington v. Attrill, 146 U. S. 657, 669, 13 Sup. Ct. 224, 36 L. Ed. 1123; Peyton v. Desmond [C. C. A. 8] 129 Fed. 1, 4, 63 C. C. A. 651). However this may be, we need not go to this extent and say that jurisdiction over all local actions is preserved to the local district. It certainly is so continued as to the actions described in section 8; and the present action—at least if we omit the separable demand for damages—we deem clearly within the description of section 8. It has so been held even with reference to the common-law ejectment action in two well-reasoned cases. Spencer v. Kansas City Co. (C. C.) 56 Fed. 741; Elk Garden Co. v. Thayer Co. (C. C.) 179 Fed. 556. The opinions of the Supreme Court in the Wetmore and Ladew Cases, supra, are not to the contrary. It is as hard to see how Wetmore's claim for damages to his land in the district, by the distant operation of defendant's smelter, could be thought within the description of section 8, as it is difficult to understand wherein the present suit to have title adjudicated and to get possession falls short of being a suit "to enforce any legal * * * claim to * * * real or personal property within the district." We, therefore, must conclude that section 8 provides a method of getting service upon the defendant in such an action as this, though the defendant does not live in the district, and whether or not the plaintiff does, and so necessarily implies that the jurisdiction apparently existing because of diverse citizenship is not cut off because neither party lives in the district.[1]

This action was brought before January 1, 1912, when the present Judicial Code went into effect. It is significant that this Code, while retaining the language of the latter part of section 1 of the act of 1887, to the effect that these suits can be brought only in the residence district of one party or the other, goes back to the arrangement of the Revised Statutes. This limiting or distributing clause is no longer found in subdivision 1 of section 24, but takes its place in section 51, and is a complete restoration of section 739 of the Revised Statutes. It is expressly said that this residence limitation shall apply, "except as provided in the six succeeding sections," and one of these succeeding sections (57) is the same as R. S. 738, and section 8 of the act of 1875,

[1] Reference should be had to the exhaustive discussion by Judge Cochran, in the court below, on the motion to remand (C. C.) 191 Fed. 899. See, also, cases cited by Judge Sanford, in Western Union Co. v. Louisville Co. (D. C.) 201 Fed. 932, 943.

and another (55) is the same as R. S. 742. The very enactment of this Code, so clearing up all the confusion that had arisen since 1875 on this point, would be of some force as a legislative declaration of the unbroken meaning of these provisions; but this declaration seems very clear when we consider also sections 294 and 295 of the Code, and the



revisers' notes stating that section 51 "re-enacts existing law." If there was any doubt remaining about the question which has been discussed, it would be removed by the implications which must be drawn from these sections of the Code. United States v. Freeman, 3 How. 556, 564, 11 L. Ed. 724.

[3] Having concluded that the court acquired jurisdiction, it becomes necessary to determine whether it properly directed a verdict for defendant. This depends upon the construction and location upon the ground of the 12,000-acre grant to Isom Stamper, made by the state of Kentucky in 1848, pursuant to the survey in 1846. According as we adopt the contentions of the plaintiff or the defendant, now presented, we will include or exclude from the grant the upper half of the course of Turkey creek and its watershed on both sides. This will be a tract of approximately 2,500 acres. The present suit involves the title to two subtracts out of this 2,500 acres. The trees upon these two subtracts were, in 1903, sold by the plaintiff, then holding and claiming the same title as now, to the Tuggle Land Company; and to prevent interference with such timber, the Tuggle Land Company brought, in the court below, an action in equity against the defendant, then holding and claiming the same title as now. That action reached this court, and its opinion is reported in 151 Fed. 450. It was decided that the Isom Stamper patent in question did not cover these tracts, and the defendant's title thereto was approved. Obviously, if the parties in the present case were the same as in the Tuggle Case, the question now presented would be res judicata; but since there is neither identity nor privity between the plaintiffs there and here, the court below rightly considered that the controlling principle was one of stare decisis—in other words, the court below thought that the former decision of this court amounted to a construction of the contract or a declaration of the legal effect of the terms of the grant and their undisputed environment—and so it held that, as matter of law, the grant was to be located on the ground as the defendant claimed then and now and so as to exclude the land in dispute. This brings us necessarily to the terms of the grant; and since the previous case was in equity, in which this court heard and decided facts as well as law, it also is to be considered how much of the decision was matter of law, which must (at least presumptively) now be followed, and how much was matter of fact, which cannot control the action of a jury in a subsequent case between other parties.

The controversy cannot be well comprehended, except by reference to the map reproduced on the preceding page. This discloses three theories, or contentions, as to how the terms of the survey should be applied upon the ground. As shown by the legend, one line indicates the proper location according to the theory of defendant, another according to the theory of plaintiff, and another according to the theory of the Tuggle Land Company, plaintiff in the former suit. It should be said that all the controversy in the former suit and in this has been with reference to the southern line, and that the true locations of the northern and western lines have not been and are not now involved. The language of the grant is as follows:

"Beginning on three chestnuts and chestnut oak near the head of the Pigeon fork thence running the dividing ridge between Turkey creek and the

Line fork to the Defeated branch thence the dividing ridge between the Defeated branch and Turkey creek S. 10 W. 68 poles to a chestnut, S. 10 E. 98 poles to a chestnut oak and sarvis S. 68 W. 125 poles to a stake, thence S. 5 E. 100 poles to a stake, thence S. 68 W. 2,000 poles to a stake, thence S. 40 W. 320 poles to a stake, thence N. 1,328 poles to a stake, thence N. 77 E. 1,900 poles to a stake, thence S. 33 E. 600 poles to the beginning."

The beginning corner is not in dispute. Aside from such complications as might come from the uncertain location of the stake calls, difficulties arise from the presence of the language "thence running the dividing ridge between Turkey creek and the Line fork to the Defeated branch, thence the dividing ridge between the Defeated branch and Turkey creek." This may refer to two distinct courses, first along one ridge and then along another, or it may refer to one course along a continuous ridge described in terms of its two parts. Under either of these views, doubt arises whether this language is intended of itself to describe and constitute a boundary or boundaries, or whether it is only descriptive of the locality upon which the other boundaries described by course and distance should be located. If the latter, then we see at once that there is no certainty as to when the boundary of stated courses and distances leaves the ridge or ridges, and is to be located independently of that aid. Manifestly, it must leave at some time, but, on the face of the description, there is no indication which stake call is the last one located on the ridge.

If these described ridges constitute of themselves two independent boundaries, then the description has 11 distinct sides, and is an 11-call survey; but if neither of these ridges is itself a boundary, and they constitute only monuments by the aid of which the stake calls are to be located, it is a 9-call survey.

It was the contention of plaintiff Tuggle, in the former case, that the survey had 11 sides; the defendant in that case contended for a 9-sided figure, as shown on the map. This court decided, under the case there presented (and from which the testimony in the present record does not differ, so far as it affects the point now mentioned), that the theory of 11 sides was wholly untenable. The court thereupon adopted the only alternative theory then suggested, viz., the defendant's theory that there were nine boundaries, and that they were located exactly according to the stated courses and distances. By this theory the first two boundaries substantially followed the ridge; the third and fourth followed it approximately; but the fifth, which was a line about six miles long, departed entirely from the ridge and, crossing Turkey creek and leaving out a large part of its valley, led off into the higher mountains to the west.

In the present case, plaintiff insists upon a third theory of construction and locatio, which adopts a figure of nine boundaries, but makes a different location. The first and second boundaries are located along the top of the ridge, just as done by defendant; the third and fourth courses, instead of being run "S. 10 W. 125 poles to a stake," and "thence S. 10 E. 100 poles to a stake," thereby carrying these two stakes partly down the slope of the ridge, are proposed to be run south about 45° west about 125 poles to a distinct bend in the ridge, and thence south about 45° east about 160 poles, thereby

keeping the line approximately upon the summit of the ridge, and bringing the last-named stake to a point where the ridge makes a very sharp, almost right-angled, turn. Instead of then running the fifth boundary, as defendant does, wholly away from the ridges, across the valley and up the opposite mountains on its stated course, plaintiff proposes to run this course winding along the summit of the ridges until it reaches the end of the second ridge, at the point marked on the map "Eagle Gap." The first mile of this course, and after a southerly bend, then again about three miles, will average not far from 68° west, the stated course. The intermediate and the final half miles (approximately) swing sharply south, so that the supposed terminus, Eagle Gap, would be south about 45° west from its supposed starting point, at a distance of about 1,200 poles in a straight line, and about 1,800 poles along the course. The remaining four boundaries, plaintiff proposes to run according to the stated courses and distances, with only such variations as may be thought proper to compensate for the changes made in the first five lines and appropriate to close the figure. Under any method, starting from Eagle Gap and getting to the beginning point, they will inclose all the land in controversy.[2]

It is entirely clear to us, even if it had not been formerly decided, that these ridges were not intended to be of themselves, boundaries, but that they were intended, as said in our former opinion, to serve as aids in locating the opening calls of the survey. Natural objects, thus collaterally named, are not monuments in the sense in which that term is used with reference to termini, but they have no less positive effect. It is settled in Kentucky that where a boundary runs in a stated compass course, and is also said to be along a river or along a ridge, the compass course must yield to the course described by reference to the natural objects, so far as there is necessary inconsistency between the two courses, and following the sinuosities of the stream or ridge or running in a straight line as other considerations may determine. Bramblette v. Howard (Ky.) 93 S. W. 902, and cases cited. So much, viz., that the ridges are not boundaries but are aids in the nature of monuments, is clear upon the face of the grant, when once the court is informed as to the general topography of the country. It is equally sure that at this point certainty ends and ambiguity begins. The ridges are to be used for locating the "opening calls." Does that mean the first two, or the first four, or the first five? The terms of the grant suggest no answer. If it is once conceded, as it is (plaintiff and defendant agree that the first two boundaries were marked on the ground, and the third corner established on or near the summit), that this "aid" applies to more than the first course, it cannot be certainly known that the aid should be abandoned until it has been exhausted by reaching the end of the

[2] Our statements as to the courses and distances of the southern boundaries, when run according to plaintiff's theory, we have estimated by reference to the map made by plaintiff's surveyor. They should therefore be taken only as stating what plaintiff's evidence tended to show, and they are not intended to be mathematically accurate.

ridges. Whether it should leave the ridges at the end of the second course, as defendant contends, or at the end of the fifth course, as plaintiff contends, or at the beginning of the fifth course (a construction satisfactory to neither), must depend upon the question of intent—what land did the surveyor intend to include within the stated boundaries—when did he intend to leave the ridges? Of course, we do not refer to any secret intent, or one not inferable from his chosen words when properly interpreted, and it would be more accurate to say "What did he intend his language to mean?" Doubtless, where the description is clear upon the face of the instrument and is not varied by proof of actual and inconsistent location upon the ground, it will be of no importance that the surveyor intended to include something else; but, where the description is fairly capable of being understood in more than one way, the liberal rule of Kentucky does not pronounce it void, but ascertains the real intent of the language. It is only because intent is, in such cases, the controlling element that a monument controls an inconsistent course or distance, and that the actual running on the ground, when proved, controls the described line. That such intent is thus, in such cases, the ultimate inquiry, is the clear rule in Kentucky.

In Mercer v. Bate, 4 J. J. Marsh, 334, 344, the court said:

"But there is, in this respect, a palpable and essential difference betwixt an actual and an ideal line, or a marked and open line. And as in the one case Madison might be bounded by the marked line wheresoever it might be (if he made no mistake), so in the other he must be restricted to the line as it appeared to be, and as he believed it was when he called to adjoin it. In the first case, he would have a right to the marked line, because, being visible, he knew where it was, and therefore intended that, as marked, it should be his boundary. In the last case, for the very same reason, wherever he supposed the invisible lines to run, he must be bounded, because be intended when he made his survey to be, and therefore was bounded by it."

In Ralston v. McClurg, 39 Ky. (9 Dana) 338, it was said:

"And the cardinal object is to ascertain what the surveyor would have done if he had gone on to complete the work. Beckley v. Bryan, etc. [Ky. Dec. 91; Preston's Heirs v. Bowman] 2 Bibb, 493. This is to be ascertained, not by vague conjecture, but by rational deductions from his report, as compared with the existing facts."

Obviously, such intent will be a question of law for the court, if there is no dispute of fact (though such conflict may lie, not in the primary facts, but rather in the inferenial facts to be deduced therefrom (Watkins v. King [C. C. A. 4] 118 Fed. 524, 534, 55 C. C. A. 290; Kentucky v. Hamilton [C. C. A. 6] 63 Fed. 93, 97, 11 C. C. A. 42; International Co. v. Stadler [C. C. A. 6] 212 Fed. 378, 382, 129 C. C. A. 54); otherwise, the intent will be a question of fact.

On behalf of plaintiff, it is said that the boundaries can be made to follow the ridges to Eagle Gap without any greater variations from stated courses and distances, shape of plat or acreage, than was very common at that time in that locality; that the naming of the two ridges shows that it could not have been intended to leave the ridges before the second one was reached at all; that the sixth course, and the resulting curious form of that part of the plat figure, can be explained

upon plaintiff's theory, but are otherwise unintelligible; that Stamper intended to take in all of this Turkey creek watershed, and supposed he had; that he conveyed various portions by deeds, using the summit of the ridge as a southern boundary, and that his grantees occupied thereunder; that it was generally understood in the community that this was his land, and that such understanding (at least as to most of the land) was never disputed until 1903, when some one made the locations under which defendant mainly claims; and so on. Defendant either disputes these claims or, to destroy their force, offers something else in explanation or rebuttal. Without balancing the force of these things, or deciding which ones are or are not legally pertinent, we think they leave the ultimate fact not clear enough to be decided by the court, as matter of law; they make an issue peculiarly appropriate for decision by a local jury.

In addition to these considerations, most, if not all, of which were urged in the former case, but in the different light caused by the different theory then under discussion, the present case presents some entirely new testimony which is claimed to show that the third, fourth, and fifth courses, as well as the first two, were actually marked on the ground, and are evidenced even yet by a certain line of blazed trees running the summit of the ridge, all the way to Eagle Gap. Defendant meets this by claiming that, so far as such blazed trees exist, they were marked at a much later period and in connection with the making of other surveys. It is, of course, conceded that if, in fact, this line was so run and marked by or under direction of the surveyor and at the time of the survey, plaintiff is right in its theory. The evidence offered for plaintiff on this issue is by no means absolutely convincing. If we were trying the fact, we might or might not think it at all persuasive; about that, we express no opinion; we are satisfied that it so far tended to establish plaintiff's claim that the court could not withdraw that issue from the jury; and we think it follows, for both reasons stated, that the issue of what lines the surveyor actually intended to describe as his southern boundary by the language he used should have been submitted to the jury.

[4] The previous decision of this court did not prevent this result. This is for two reasons: First, because the court was then deciding in part an issue of fact, and on the present trial there is additional, pertinent evidence which must be considered; and, second, because the theory of construction now urged by plaintiff was not presented to, or considered by, the court in the former opinion. True, the facts were there which would have raised the theory, if any one had thought of it; but in applying the rule of stare decisis, as distinguished from res judicata, the subsequent court is bound only in these matters of law which the prior court did in fact consider and decide. It is not bound by any implied holdings dependent on legal questions which lurked in the record but were not observed. New v. Oklahoma, 195 U. S. 252, 256, 25 Sup. Ct. 68, 49 L. Ed. 182. What we intend to hold regarding the present effect of the former decision is this: We consider it to decide, as matter of law, that the language of the survey, read in connection with the facts then and now undisputed, did not call for a survey of

11 sides, but for one of 9, and that the ridges were to serve as aids in locating the course and distance calls. To this extent, it is both entitled to be followed under the rule of stare decisis, and its rightfulness is confirmed by the further study the question has now had. So far as it can be thought by implication to have declared, as matter of law, that defendant's theory of construction and application was right, this declaration must be treated like any other ruling or assumption of law, made when the parties were silent regarding what later turns out to be a controlling consideration, and which therefore practically was taken for granted and by tacit consent, and must yield to a later conclusion to be made in a case between other parties and after actual study of the conflicting arguments. So far as it is a conclusion of fact based upon disputable inferences from the evidence, it pertains to what is, in the present case, a question for the jury, and it is immaterial whether we think it rightly decided.

We are not required to say what the situation would be if such an implied holding or declaration of a matter of law had become a rule of property. No title or right acquired on the faith of the former decision is here involved.

It results that the judgment must be reversed, with costs, and the case remanded for a new trial. Some questions of admissibility and force of evidence are presented upon other assignments of error, but they will not arise again under the same surroundings as on the first trial, and they cannot, with advantage, be now considered.

COURTNEY v. FIDELITY TRUST CO.

In re J. SAPINSKY & SON.

(Circuit Court of Appeals, Sixth Circuit. December 18, 1914.)

No. 2520.

1. BANKRUPTCY ⟸455—CLAIMS—LIEN—ALLOWANCE—REVIEW—APPEAL.

Where a decree in bankruptcy rejected a landlord's claim for rent to accrue for the unexpired term of the lease, but allowed a lien covering a portion of the rent, it was reviewable by appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 916; Dec. Dig. ⟸455.

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY ⟸191—CLAIMS—LIEN—RENT TO ACCRUE.

Ky. St. § 2317, confers on a landlord a superior lien on the personal property of the tenant after possession is taken, but for not more than one year's rent due or to become due, nor for any rent which has been due for more than 120 days, etc. Bankr. Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 (Comp. St. 1913, § 9641), declares that liens given or accepted in good faith, and not in contemplation of or in fraud of the act, and for a present consideration, which have been recorded according to law, when record is necessary, shall to the extent of such present consideration not be affected by the act. Section 63a (1), provides that debts of a bankrupt may be proved and allowed against his estate, and which are a fixed liability, etc. *Held*, that section 57d embraced a lien to secure

rent to accrue during a limited period after bankruptcy, and was not restricted by section 63a (1), so that a bankrupt's lessor was entitled to enforce against the bankrupt's assets a lien for one year's rent to accrue under the lease from the date of bankruptcy, less rent paid by the trustee during such term, and such further sums, if any, as may have been received from other sources during the term and operative to reduce the loss.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. ⊂⊃191.]

3. BANKRUPTCY ⊂⊃334—CLAIMS—FORMAL PROOF.

Formal proof of claims, required by Bankruptcy Act for the most part, if not entirely, has reference to unsecured claims, and has no application to the right of a secured creditor to enforce his lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501–507; Dec. Dig. ⊂⊃334.]

4. BANKRUPTCY ⊂⊃278—CREDITORS' RIGHTS—RIGHTS OF TRUSTEE.

Creditors' rights which are enforceable under state statutes accrue to a trustee in bankruptcy, though not available to him under the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 418, 427; Dec. Dig. ⊂⊃278.]

5. BANKRUPTCY ⊂⊃342—SECURED CLAIMS—ALLOWANCE—ANNULMENT.

Where it is seasonably discovered that a secured claim, which has been partially allowed to enable a holder to participate in creditors' meetings, etc., is in fact fully secured, order of partial allowance may be annulled, or the partial allowance reduced, if it appears that the claim was allowed for too great an amount.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 529; Dec. Dig. ⊂⊃342.]

6. BANKRUPTCY ⊂⊃210—CLAIMS—LIEN—ENFORCEMENT.

Bankruptcy courts have power to adjust and ultimately allow and enforce liens originating prior to bankruptcy and presented within the proving period, according to their merits and at any time before, but not after, the estate is closed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321–323; Dec. Dig. ⊂⊃210.]

7. BANKRUPTCY ⊂⊃191—CLAIMS—LANDLORD'S LIEN—SALE OF PROPERTY.

Where a landlord had a statutory lien on the personal property of the tenant on the rented premises for one year's rent to accrue, the landlord's right extended to the proceeds of a sale of such property by the bankrupt tenant's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. ⊂⊃191.]

Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

In the matter of bankruptcy proceedings of J. Sapinsky & Son. From a decree reversing an order canceling a lease of the Fidelity Trust Company, as executor of the will of John D. Taggart, deceased, and certain individuals, to the bankrupt, and disallowing in whole a claim of the lessors against the bankrupts for rent to accrue during the remainder of the term, and for a lien on the bankrupt's personalty located on the leased premises to secure rent to accrue under the lease for the year following the filing of the bankruptcy petition, R. H. Courtney, as trustee of the bankrupts, appeals. Modified.

D. A. Sachs, Jr., of Eminence, Ky., for appellant.

A. G. Moseley, of St. Louis, Mo., and C. C. Smith, of Louisville, Ky., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from a decree of the court below reversing one order, and in part affirming and in part reversing a second order, theretofore made by a referee in bankruptcy. The first order canceled a lease of the Fidelity Trust Company (as executor and trustee under the will of John D. Taggart) and certain individuals to the bankrupt, Julius Sapinsky, but the lease seems to have been in fact taken over and held by the bankrupt firm, J. Sapinsky & Son; and the second disallowed in whole a claim of the lessors against the estate of the bankrupts for rent to accrue during the remainder of the term of the lease, and for a lien upon the personalty of the bankrupts, located on the leased premises, to secure payment of the rent ($15,000) to accrue under the lease during the year following the date of filing the petition in bankruptcy, viz., April 8, 1912.

[1] The court reversed the first order, and affirmed the second, except as to the lien sought, but allowed the lien only for $13,250, which was the balance of rent that was to accrue in the current year, after crediting rent theretofore paid by the trustee to June 1, 1913, and directed the trustee to pay the sum named to the lessors out of the funds of the bankrupts' estate. The appeal is prosecuted by the trustee in bankruptcy, and was prayed for and allowed on the date of the decree; and since the decree rejects a claim, and allows a lien covering a portion of the rent, we think the case is properly here.

The lease, bearing date February 24, 1912, was for a term of 10 years from November 1, 1912, of certain improved real estate situated on Fourth street in Louisville, Ky., and the rent reserved was $12,000 a year, but for reasons not important here was subsequently increased to $15,000, payable in installments of $1,250 at the end of each month. The petition in bankruptcy was filed against J. Sapinsky & Son, a partnership composed of Jacob Sapinsky and Julius Sapinsky, and the firm and each of the members were adjudicated bankrupts, on April 8, 1913. The firm had been engaged in the clothing business, and, under orders of sale entered by the referee, the goods and effects of the firm within the leased permises were sold, and the purchaser was given until May 31st to remove them. May 30th, it appearing that no bid could be obtained for the leasehold interest, a further order was made by the referee, canceling the lease as of June 1st, and directing the trustee prior to that date to surrender the lease and the realty covered by it to the lessors.

The claim first filed by the lessors was in the usual form, stating, in material part:

> That the bankrupt partnership was "justly and truly indebted" to the deponents "for a sum of money representing the rents to become due according to the terms" of the lease; "that the total amount of said indebtedness is one

hundred and forty-one thousand two hundred and fifty ($141,250) dollars, representing rent that is to accrue between June 1, 1913, and November 1, 1922, at a monthly rental of twelve hundred and fifty ($1,250) dollars a month; * * * that the only security held by deponents is a landlord's lien on the property of the said bankrupt that was on the premises let in said lease, said lien being given by the statute law of the state of Kentucky, which statute gives a lien for rent to accrue or to become due for one year, thereby giving these deponents a lien for fifteen thousand ($15,000) dollars; that these deponents are entitled to a priority of payment out of the assets of this bankrupt in the hands of the trustee, to the extent of fifteen thousand ($15,000) dollars, by virtue of said lien; that they are entitled to a claim for the balance."

Subsequently, in July, 1913, the lessors filed an amended proof of claim, with a stipulation showing that at the time of the adjudication there was on the leased premises personal property belonging to the bankrupts of "far greater value" than $15,000; that the trustee had taken possession of such personalty and sold it for more than the sum last stated; and repeating the claim that deponents were "entitled to a priority of payment out of the assets of this bankrupt in the hands of the trustee to the extent of fifteen thousand ($15,000) dollars by virtue of said lien."

[2] The orders of the referee were based on the theory that the adjudication in bankruptcy terminated the relation of landlord and tenant, following the rule laid down in Re Jefferson (D. C.) 93 Fed. 948, and Re Hays, Foster & Ward Co. (D. C.) 117 Fed. 879. Judge Evans, having rendered the decisions in those cases, explained and modified them in his opinion in the present case. In reversing the order canceling the lease, and affirming the other order so far as it rejected the claim for rent, the court followed the decisions in Re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270 (C. C. A. 2d Cir.), and Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719 (C. C. A. 8th Cir.). The lien claimed and allowed was given by statute of Kentucky, which in terms provides that a landlord shall have a "superior lien" on the "personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease." The lien extends to the personal property located on the leased premises, but "shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days." The particular sections of the statute relied on are part of the chapter entitled "Rent—How Recovered" (Carroll Ky. Stat., Ed. 1909), and appear in the margin.[1] It is conceded that at the time the petition in bankruptcy was filed there was personalty of the bankrupts, located on the leased premises, worth much more than the rent to accrue within the ensuing year, and that this has been converted into money which is in the hands

[1] "Sec. 2317. A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. And if any such property be removed openly from the the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so

of the trustee. In Meyer Bros.' Assignee v. Gaertner, 106 Ky. 481, 489, 50 S. W. 971 (45 L. R. A. 513), the Court of Appeals of Kentucky, having under consideration a question of future rents and sections 2305, 2307, 2314, 2316, and 2317, concerning the statutory lien mentioned, in connection with another statute of that state modifying the rule of the common law touching the construction of statutes, said:

"Construing the sections above quoted under this rule, with a view to promote their object, we think it clear that they give the landlord a superior lien, for not exceeding one year's rent, due or to become due, on all the property of the tenant, subtenant, or assignee on the premises, subject to execution. * * *"

And at the time the present bankruptcy law was enacted, it had been settled by the same court that the lien was enforceable in the courts of Kentucky having jurisdiction of insolvency proceedings under the state laws, and also that no steps need be taken to perfect the lien. Loth & Haas v. Carty, 85 Ky. 591, 595, 4 S. W. 314. True, this latter case had reference to past due rent; but it is not perceived why the rule of informality touching enforcement of the lien should not apply to rent to accrue in the future. See, also, Slack & Perkins v. Koon & Perry, 39 S. W. 26, 18 Ky. Law Rep. 1103, 1104. Our attention has not been called to any decision in Kentucky which purports to change or modify these decisions.

We next come to the question whether this statutory lien is entitled to recognition in a bankruptcy court. Section 67d of the Bankruptcy Act provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, 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."

Applying the provisions of this section to the case in hand, it hardly need be said that a lien created by statute must be treated as having been given in good faith and independently of the Bankruptcy Act; indeed, it is not claimed that this lien was not given and accepted in good faith, nor that it was given and accepted in contemplation of or in fraud of the Bankruptcy Act. Whether the lease was recorded, or not, does not appear in the evidence; it is to be presumed that, if counsel on either side regarded the record of the lease as necessary under the recording act of Kentucky (Carroll Ky. Stat. [Ed. 1909] § 494), to validate the statutory lien, the fact of whether the lease was recorded or not would have been shown; no assignment of error upon

removed for fifteen days from the date of its removal, and may enforce his lien against the property wherever found."

"Sec. 2314. If, after the commencement of any tenancy, a lien be created on the property upon the leased premises liable for rent, the party making or acquiring such lien may remove the property from the premises upon the following terms, and not otherwise: that is, by paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due; what is so paid and secured not being more altogether than a year's rent."

the subject is presented; and we shall, at least for the purposes of this decision, assume that the lease was recorded. If anything more than the lease itself were needed in the instant case to show that a present consideration was given and accepted in respect of the lien so created, it might be found in the fact that the lessors made costly improvements upon the leased building for the use and benefit of the bankrupts.

It would seem to follow that section 67d, standing alone, is broad enough fairly to embrace a statutory lien like the one under consideration. It is not questioned that this would be true as respects rent accrued and unpaid at the time of filing a petition in bankruptcy; but the lien is strenuously resisted as to rent accruing thereafter. Apart from this contention, which is considered later, the very safeguards which section 67d sets up against fraudulent liens indicate a purpose to include all classes of liens that are given and accepted in good faith. It must be remembered that the present lien is in terms imposed upon tangible property; and while it may be said that the lien is imperfect and inchoate unless and until default in rent occurs, still this fact alone is not sufficient to defeat the maturing of the lien upon the happening of the event. In re Bennett, 153 Fed. 673, 677, 82 C. C. A. 531 (C. C. A. 6th Cir.) and citations; In re Southern Hardware & Supply Co. (D. C.) 210 Fed. 381, 382.

That section 67d embraces a lien to secure rent to accrue during a limited time after bankruptcy, which is enforceable in a court of bankruptcy, has been held in respect of a lien created by a statute of Texas, in a well-considered decision of Judge Pardee, in which Judges McCormick and Shelby concurred. Martin v. Orgain, 174 Fed. 772, 778, 98 C. C. A. 246 (C. C. A. 5th Cir.). That court reached a like conclusion in affirming a decision of Judge Foster, where a decree enforcing a similar lien created by a statute of Louisiana was involved (In re Meyer & Bleuler [D. C.] 195 Fed. 653, 654, affirmed in Denechaud v. Tulane Educational Fund, 200 Fed. 1022, 118 C. C. A. 665 [C. C. A. 5th Cir.]); and this rule still prevails in that circuit (In re Gallacher Coal Co. [D. C.] 205 Fed. 183, 187; In re Varley & Bauman Clothing Co. [D. C.] 188 Fed. 761; In re Scruggs [D. C.] 205 Fed. 673, 676, involving a like lien given by a statute of Alabama; In re Southern Hardware & Supply Co., 210 Fed. 381, 382, and citations).

The ultimate contention is, notwithstanding these decisions, that 67d is so restricted by 63a (1) as to forbid enforcement of the lien in a bankruptcy court; and it must be conceded that as respects future rent the question is attended with difficulties. The argument is that, under the Bankruptcy Act, provability of a claim for rent to accrue after bankruptcy is the test of the right to enforce the statutory lien, and that a claim for rent so to accrue is not provable under section 63a (1). Counsel rely upon Watson v. Merrill and In re Roth & Appel, supra, and similar decisions, which are bottomed on the idea that a claim for rent to accrue is not a debt; that is, it was not "a fixed liability * * * absolutely owing at the time of the filing of the petition" in bankruptcy, within the meaning of 63a (1). It is to be

observed, however, that no question of lien was involved in those decisions. And at the hearing below of the instant case the appellee abandoned its claim for all rents accruing after the filing of the petition in bankruptcy, except the portion to accrue within the ensuing year. Although at the hearing in this court the appellee sought to withdraw this act of abandonment, no steps were ever taken by the appellee, and of course no assignment of error is presented by the appellant, to bring before this court any question touching the rejection below of the claim made for such rent. We are therefore not called on to pass upon that question; but, if for the sake of the question it were conceded that a claim simply and solely for such rent is not provable, it would not necessarily follow that actual loss of rent accruing within a limited time, as here, might not be redressed under the statutory lien.

[3] The formal proof of claims required by the Bankruptcy Act has reference for the most part, if not entirely, to unsecured claims. Where questions arise as to the rights of creditors to do certain things, say to unite in an involuntary petition in bankruptcy, or to participate in creditors' meetings (as, for example, in selecting a trustee or in authorizing a trustee to object to a bankrupt's discharge), or to accept a composition or to share in dividends, the right of a creditor formally to prove his claim in whole or in part becomes important; but where admittedly a claim is fully secured by a lien upon property of the bankrupt, such proof is not necessary to the enforcement of the lien (Ward v. First Nat. Bank of Ironton, 202 Fed. 609, 612, 120 C. C. A. 655 [C. C. A. 6th Cir.]; In re Goldsmith [D. C.] 118 Fed. 763, 766, 767; 2 Loveland on Bankruptcy [4th Ed.] pp. 1101, 1103); and this was so under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). See Yeatman v. Savings Institution, 95 U. S. 764, 767, 24 L. Ed. 589. True, the claims involved in those cases were founded on promissory notes, and the questions were not whether the notes were provable as debts, but whether prior formal proofs were essential to the enforcement of the liens; and the purpose of alluding to the rule laid down in those decisions is to show that in seeking the real test of the merits of the instant case too much stress should not be laid on either the form prescribed or the necessity for proving unsecured claims. The lien we are dealing with is in its essence a security; it was under the statute plainly applicable to specific personal property at the date of filing the petition in bankruptcy and also to rent in terms to accrue within one year thereafter. If a state insolvency proceeding had been commenced on that date (and no proceeding in bankruptcy had followed), nothing in the Bankruptcy Act would have prevented the landlord from enforcing this lien in the state court against the tenant's personalty, then on the leased premises, in satisfaction of the very rental now in dispute. Randolph v. Scruggs, 190 U. S. 533, 537, 23 Sup. Ct. 710, 47 L. Ed. 1165. Can it be then that in consequence of the bankruptcy proceeding this rule of state policy was suspended by any federal policy? If so, the intent to suspend must be fairly deducible from the Bankruptcy Act.

[4] It has frequently been decided that creditors' rights, which are enforceable under state statutes, accrue to a trustee in bankruptcy, although such rights are not available to him under the limitations of the Bankruptcy Act (section 70e—Stellwagen v. Clum, decided by this court November 4, 1914, 218 Fed. 730, 134 C. C. A. 408, and citations; section 67f—In re Martin, 193 Fed. 841, 848, 113 C. C. A. 627, and citations following [C. C. A. 6th Cir.]; see, further, as to 67f, Fallows, Trustee, v. Continental & Commercial Trust & Savings Bank, decided by the Supreme Court November 30, 1914, 235 U. S. 300, 35 Sup. Ct. 29, 59 L. Ed. ——; sections 70a and 70e—In re Martin, 201 Fed. 31, at page 38, tit. "Rehearing," 119 C. C. A. 363 [C. C. A. 6th Cir.]); and it is a familiar rule that section 64b (5) recognizes and accords priority to a variety of claims, such as those of materialmen, mechanics, and laborers, pursuant to state statutes (In re Bennett, 153 Fed. at pages 674 to 676, 82 C. C. A. 531; In re Jones [D. C.] 151 Fed. 108, 111; In re Worcester County, 102 Fed. 808, 815, 816, 42 C. C. A. 637 [C. C. A. 1st Cir.]; In re Mercer, 171 Fed. 81, 96 C. C. A. 185; In re New Galt House Co. [D. C.] 199 Fed. 533; In re Southern Co. [D. C.] 180 Fed. 838; In re Chaudron & Peyton [D. C.] 180 Fed. 841). The reciprocal rights and advantages thus recognized as existing under the applicable state and federal legislation disclose an intent in the Bankruptcy Act to employ, as also to give effect to, pertinent state legislation, wherever it serves, on the one hand, to secure to the general creditors an equal distribution of the bankrupt's property, and, on the other, to protect, in addition to priorities existing under state laws, all liens created or given and accepted for a present consideration and in good faith before bankruptcy. And in considering this legislative intent it is to be remembered, as respects the present bankruptcy, that appellee is seeking to enforce a pre-existing lien, and not to have a lien created (Metcalf Bros. v. Barker, 187 U. S. 165, 174, 23 Sup. Ct. 67, 47 L. Ed. 122; In re Huxoll, 193 Fed. 851, 855, 856, 113 C. C. A. 637 [C. C. A. 6th Cir.]); and this is a distinguishing feature between the instant case and the cases of In re Martin, before cited, 193 Fed. at page 846, 113 C. C. A. 627, and 201 Fed. at page 38, 119 C. C. A. 363.

Furthermore, in Martin v. Orgain, supra, it was not found necessary definitely to decide that the claim for rent to accrue after bankruptcy was either required to be proved or that it might not be proved under sections there mentioned; but it was decided that a number of the sections, so pointed out, should be construed in connection with section 67 (relating to liens) and to the effect that a state statutory lien accepted in good faith should be allowed and given priority; Judge Pardee saying (174 Fed. 778, 779, 98 C. C. A. 252, 253):

"If a contract and a statute can fix a liability, it must be conceded that it was fixed in this case. Without conceding that appellant's claim is required to be proved under section 63, or that it may not be provable under clause 1 or 4 of that section as a fixed liability founded upon an express contract evidenced by an instrument in writing and absolutely owing at date of filing petition, we are of opinion that section 63 relates principally to unsecured debts, and that all creditors who wish to participate in creditors' meetings and dividends must bring their cases under some one of the heads therein specified, but that in relation to claimed liens, such as here presented, section 57, Proof and Allowance of Claims, section 63, Debts Which may be

Proved, section 64, Debts Which Have Priority, and section 67, Liens, should be construed together and to the effect that a lien under a state law given in good faith, not impaired or affected by the bankruptcy law, should be allowed and given its legal priority."

In Re Caloris Mfg. Co. (D. C.) 179 Fed. 722, 723, under a covenant of a lease in substance permitting the landlord, upon condition broken, to relet the premises for the whole or any part of the remainder of the term, and obligating the first tenant to pay the landlord each month the difference between the amount of rent originally reserved and the amount of rent collected and received by him monthly from the second tenant during the residue of the term, Judge McPherson, in passing upon a claim of the landlord embracing rent to accrue after bankruptcy of the tenant, held:

"Even although the landlord's claim * * * was not a fixed liability" under 63a (1) "when the petition [in bankruptcy] was filed, it was liquidated within the year, and thus became provable, as a claim founded upon a contract express or implied under section 63a (4)."

The case of In re Keith-Gara Co. (D. C.) 203 Fed. 585, involved a landlord's claim for rent to accrue after bankruptcy of the tenant—certainly in the sense that the rent was not earned and in material part might never be. The lease provided, among other things, that in the event of the lessee becoming bankrupt the whole rent for any unexpired portion of the term should "at once become due and payable as if by the terms of this lease it were payable in advance. * * *" The claim of the landlord was based on this covenant, and also on the statute of Pennsylvania which in effect provides that goods and chattels of the lessee upon the leased premises shall be liable for payment of not to exceed one year's rent. 1 Brightly's Purdon's Dig. Laws of Pa., p. 752. Judge McPherson, after referring to decisions of the Supreme Court of Pennsylvania upholding the state statute, and considering quite a number of federal decisions showing the contrariety of opinion on the subject, sustained the claim of the landlord, saying (203 Fed. 587):

"In our opinion, however, the Bankruptcy Act is not only not in conflict with the law of Pennsylvania on this point, but is in harmony therewith. Section 64b (5) provides that among the debts to have 'priority shall be * * * (5) debts owing to any person who, by the laws of the state or the United States, is entitled to priority.' If, then, the landlord's claim now in dispute is a 'debt owing to any person,' the question must be answered in the landlord's favor. Now, a 'debt' is defined by the act to mean 'any debt, demand, or claim provable in bankruptcy'; and the question, therefore, may be stated in this form: Is the foregoing claim to priority provable in bankruptcy? At this point the decisions diverge and cannot be reconciled. Some courts hold that a landlord's claim under such a provision in the lease is essentially contingent, and therefore is incapable of proof. * * * While other courts permit the claim to be proved, holding that section 63a (4) is broad enough to cover it. * * * In this circuit, as I think, the latter opinion has been more frequently followed, although dissatisfaction is apparent now and then. * * * Of course, if a landlord retakes possession of the property, his right to claim priority can no longer be enforced. * * * In the present case, therefore, following what I understand to be the prevailing current of decision, I hold that when the adjudication was entered the landlord had a valid provable claim for the remaining portion of the term, that he did not destroy or impair his claim by resuming possession of the premises, and that

under the Pennsylvania law he is entitled to priority of payment for the period referred to."

In both of these cases reliance was placed upon Judge Acheson's analysis of 63a in Moch v. Market St. Nat. Bank, 107 Fed. 897, 898, 47 C. C. A. 49, 50 (C. C. A. 3d Cir.), where the question was whether the liability of a bankrupt indorser of commercial paper, whose liability had not become absolute until after bankruptcy, might be proved against his estate after the liability had become fixed, and within the time limited for proving claims:

"If it can be affirmed that such an unmatured liability is not a 'debt,' in a technical sense, certainly it is a 'demand' or 'claim,' and comes, it seems to us, within the scope of the fourth subdivision of section 63 of the act. * * * We are unable to agree to the proposition that subdivision 1 qualifies, and is to be carried down and read into, subdivision 4. On the face of the act they are distinct. Moreover, reasonable effect can be given to both by treating them as separate and independent clauses. * * *"

[5] In addition to this construction of 63a, the intent to adapt the Bankruptcy Act to the conditions of insolvent estates and the circumstances attending their settlement may be further seen in 57e and 57k, which in effect permit tentative allowances of both secured and unsecured claims. It cannot be doubted, for instance, that if it were seasonably discovered that a secured claim which had been partially allowed to enable the holder to participate in creditors' meetings was in truth fully secured, the order of partial allowance could be annulled; and this would hold true if the partial allowance should require reduction instead of annulment. In re Ashland Steel Co., 168 Fed. 679, 681, 94 C. C. A. 165 (C. C. A. 6th Cir.); In re Cathcart, 1 Loveland Bankr. p. 705, note.

[6] It would seem clear enough then that the bankruptcy courts are invested with power to adjust and ultimately to allow and enforce liens, originating prior to bankruptcy and presented within the proving period, according to their merits and at any time before but not after the estates have been closed.

We are therefore unable to discern any sufficient reason why—as respects a subsisting lease, with its premises and improvements intact—a statutory lien like the one in question should not be enforced at least to the extent that the landlord sustains loss of rent within the year next succeeding the date of filing the petition in bankruptcy, wherever, as here, the rent has been paid until that time. This limitation in time is necessitated alike by the period fixed for the duration of the lien sought to be enforced and the settled rule that the title of the trustee to the property of the bankrupt relates to he time of filing the petition in bankruptcy; and the limitation to actual loss of rent is due (a) to the fact that the lien is simply a security, (b) to the possible destruction of the improvements within the life of the lien, in which event the rent reserved was by the lease to be suspended until restoration, and (c) to the fact that the lessors were entitled under the lease to re-enter for condition broken, such as default in payment of rent. We are not unmindful of the contingent character of the liability so created by the lease; but this liability would, through mere lapse of time, be rendered certain in amount, within the proving period fixed by 57n of the Bank-

ruptcy Act, not to speak of the time required to close the estate. Thus, the rate of rent would be fixed by reference to the lease, while recovery would be limited to the loss of rent in fact sustained within the year. This is the character of secured claim, a claim fully secured, that is here involved; and while the supremacy of a federal statute is of course conceded, we cannot believe that it was the intention of Congress, through the Bankruptcy Act, to destroy a state lien of this character or the obligation it was intended to secure.

We should add that section 2314 of the state statute, before quoted, in terms provides that if, after the commencement of any tenancy, a lien be created on the property upon the leased premises liable for rent, the person making or acquiring the lien may remove such property only upon condition that he first pay at least one year's rent secured by the lien. Could not the lessors, in this instance, by prompt and appropriate proceeding have enforced this right against the tenants' personalty, which came into the hands of the trustee in bankruptcy?

[7] The lessors' right against the proceeds of sale is the same as it was against the property sold. First Nat. Bank v. Title & Trust Co., 198 U. S. at page 291, 25 Sup. Ct. 693, 49 L. Ed. 1051; 2 Loveland Bankr. p. 1096, note 48. The tenants were forced into bankruptcy; but as to the year's rent this property stood in their stead; and the trustee in bankruptcy received the property in this plight.

It is said this result will require the general creditors, in effect, to pay the year's rent; but this overlooks the rightful priority of the lien. Moreover, prompt measures might have been taken to relet the leased premises; a landlord could not both claim the year's rent and prevent the trustee from letting the premises, according to the covenants of the lease, for the highest obtainable sum.

An effort has been made, through an affidavit of the trustee, to show that payment of appellee's rent was guaranteed by a surety company; but there is no finding of facts upon the subject, and, moreover, the matter is not properly a part of the transcript and so cannot be considered. However, in the court below, a motion was made by the trustee to refer the case to a special master to take proofs and report the facts concerning the lease and the matters set out in this affidavit. Whether such a reference would reveal any facts upon which further reduction of the amount of recovery should be made, is of course not shown; but we think the court should give opportunity to make a showing in this respect.

In disposing of the case presented by the present record, it should be stated that the portion of the decree below which reversed the order of the referee canceling the lease (like the portion which as before mentioned affirmed his order disallowing the claim for rent to become due), is not involved and so is not passed upon; and that the portion alone of the decree, which allowed and fixed the amount of the lien, is presented for decision. Although we agree with the court below touching the enforcement of the lien for actual loss of rent, we are constrained to believe that this portion of the decree should be reversed without costs to either side; that the cause should be remanded with direction to enter such order or orders as shall seem to the court necessary to secure all the facts pertinent to the adjudication and payment of the amount of the

lien as the same shall be ascertained and fixed on the basis herein stated, and ultimately to enter an order allowing appellee's lien for rent accruing during the year commencing with the filing of the petition in bankruptcy, crediting the estate however with the rent paid by the trustee, and (since the lien is only for indemnity) with such further sums, if any, as may have been received or have been operative or have become chargeable in reduction of the loss; but provision should be made for payment only out of the proceeds of sale above mentioned, and an order will be entered accordingly.

EMERINE et al. v. TARAULT et al.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1915.)

No. 2513.

1. BANKRUPTCY ⊜77—INVOLUNTARY PETITION—"CREDITOR."

Purchase of a claim bought after the filing of an involuntary bankruptcy petition to create an additional creditor does not vest the purchaser with the character of a "creditor," so as to entitle him to be counted in making up the statutory number necessary to maintain an involuntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 55, 101–103, 105, 106; Dec. Dig. ⊜77.

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

2. BANKRUPTCY ⊜91—INVOLUNTARY PETITION—CREDITORS—PURCHASE OF MORTGAGE.

Where a judgment creditor of an alleged bankrupt ascertained that there was a mortgage on certain of the alleged bankrupt's real property, and 21 days before filing the bankruptcy petition such creditor's son purchased the mortgage after consulting with his father, evidence *held* insufficient to show that such purchase was not in his father's interest, so as to entitle the son to occupy the position of an independent creditor, to entitle him to be counted in ascertaining whether the requisite number of creditors had joined in the involuntary petition.

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

3. BANKRUPTCY ⊜77—INVOLUNTARY PETITION—SECURED CREDITORS.

Under Bankr. Act 1898 (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. 1913, § 9640]) § 56b, providing that claims which are secured or have priority shall not be counted in computing either the number of creditors or the amount of their claims, unless the amount of such claims exceeds the values of the securities, and then only for such excess, secured creditors can be counted as involuntary petitioning creditors only to the extent of their provable claims in excess of the value of the security.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 55, 101–103, 105, 106; Dec. Dig. ⊜77.]

4. BANKRUPTCY ⊜330—CLAIMS—SECURED CLAIMS—PROOF—ALLOWANCE.

A distinction is to be drawn between proving a claim under Bankr. Act, § 57a (Comp. St. 1913, § 9641), and its allowance under section 57c, resulting in the right of a creditor to prove a secured claim when the ultimate necessity for its allowance appears reasonable, even though it may turn out to be unnecessary, because the security is adequate to pay it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 517, 519, 521; Dec. Dig. ⊜330.]

Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Involuntary bankruptcy petition of Joseph Tarault. From an order dismissing the petition, and denying an adjudication, Andrew Emerine, Sr., and others appeal. Affirmed.

B. F. James, of Bowling Green, Ohio, for appellants.

H. E. King and Rathbun Fuller, both of Toledo, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal from an order dismissing the petition and intervening petitions for adjudication of bankruptcy. The original petition was filed March 1, 1913, by Andrew Emerine, Sr., as a creditor by judgment for upwards of $12,000. The act of bankruptcy charged was an alleged preferential and fraudulent conveyance by the debtor to his daughter of a farm of about 193 acres. The bankrupt answered, denying insolvency, as well as the alleged act of bankruptcy, and making sufficient showing that his creditors exceeded 12 in number. Thereupon three intervening creditors' petitions were filed: (1) That of Andrew Emerine, Jr., a son of the original petitioning creditor; (2) that of Alonzo Emerine, likewise a son of the original petitioning creditor, on account of a mortgage upon the premises whose conveyance constituted the alleged act of bankruptcy; (3) that of Robert G. Young, receiver, representing as such a claim against Tarault.

Previous to final hearing, the court on its own motion struck from the files the petition of Andrew Emerine, Jr. Upon final hearing, without a jury, Tarault's insolvency was admitted. The court, while intimating doubts as to the bona fides of the claim of Alonzo Emerine, found it unnecessary to determine that question, as it held that the assailed conveyance was not an act of bankruptcy.

[1] In the view we take of the case, it is unnecessary to consider the question whether the conveyance attacked was preferential or fraudulent, for the fact of three competent petitioning creditors does not satisfactorily appear. The claim of Andrew Emerine, Jr., was characterized by the District Court as for "a notary fee incurred in a verification of pleadings in the case out of which such judgment grew, and which was assigned by the notary since the beginning of this case for the purpose of creating a new creditor." We find nothing in the record disturbing the correctness of this statement of fact. The court properly refused to sanction such proceeding; for, passing the question of the notary's power to assign his right to receive the notary's fee, which was part of a judgment, not in his favor, but in favor of the party to whom the notarial service was rendered, we think it clear that the purchaser of a claim bought after the filing of the petition in bankruptcy, and for the purpose of creating an additional creditor, cannot be counted in making up the statutory number. Loveland on Bankruptcy (4th Ed.) p. 383; Stroheim v. Perry & Whitney Co. (C. C. A. 1) 175 Fed. 52, 99 C. C. A. 68.

[2] The claim of Alonzo Emerine stands upon a different footing, in that the mortgage was actually assigned to him previous to the bankruptcy proceedings. But the bona fides of his ownership of the mortgage was directly put in issue on the hearing below. In the opinion of the district judge on final hearing it is said that Andrew Emerine "is at the head of a private bank and is an extremely aged and very feeble old man, whose business is transacted largely by his son Alonzo." It appeared that Andrew Emerine, who held the judgment against Tarault, on learning of the latter's conveyance to his daughter, informed his son Alonzo, and that the latter, acting on his father's behalf and at his request, took out execution upon the judgment and had levy made thereunder upon the farm in question. In looking up the title to the farm, the mortgage in question was discovered of record as a first lien thereon. It was bought, and assigned to Alonzo Emerine February 8, 1913, 21 days before the bankruptcy petition was filed. It is fairly apparent that the mortgage was bought solely in the father's interest, and, presumably, at least as a supposed aid or protection to the judgment levy. The testimony of Alonzo Emerine, taken May 2d upon the application for receivership, and before the intervening petitions were filed, naturally implies, we think, that the purchase was made for the father. In testifying to his arrangement at the bank, on February 8th, for the purchase of the mortgage, he said he was there for his father. To the court's question whether he bought the note and mortgage for his father he answered:

"Yes. Well, I was buying it. I do not know that it was suggested by my father."

The District Judge, who personally heard all the testimony given on both hearings, says in his opinion upon final hearing that:

"The testimony of Alonzo Emerine, taken on the first occasion, tends to suggest his holding of the note and mortgage upon which his intervening petition is based is in the interest of his father, the original petitioning creditor."

Upon final hearing, when the bona fides of his holding was in issue, to the question of his counsel, "I will ask you if you are the owner of a $4,000 mortgage purchased by you from the Oak Harbor State Bank?" he answered, "I am;" and to the question, "Are you still the owner of that?" he answered, "Yes, sir." On cross-examination, he said that with respect to the levy he acted at his father's direction and in his behalf; that "then I counseled with him, talked with him about buying this mortgage"; that he told his father about the result of the examination of the records and about the mortgage, talked it over with his father, and then (at a later date) went to the bank and bought the mortgage. In view of his relations to his father and to the transaction in question, his previous testimony, the issue later raised as to the bona fides of his status as creditor, and the entire history of the case, we think a burden practically rested upon him to show definitely that his holding of the mortgage, when bankruptcy intervened, was not in his father's interest. This burden was apparently recognized, for the second question asked him upon final hearing was the one we have first quoted above. We think his testimony does not fairly sustain the

burden imposed, and it is not helped out by the other testimony. It is significant that he nowhere states in terms that he bought the mortgage with his own money; and his testimony, taken altogether, is not necessarily inconsistent with an original purchase with his father's money, and a taking of the legal title in the son's name, to be held for the father's benefit, nor with the son's acquisition of a completed ownership by arrangement subsequent to the bankruptcy proceedings. Either of these situations would be fatal to the right to count the son as a creditor. Stroheim v. Perry & Whitney Co., supra; In re Tribelhorn (C. C. A. 2) 137 Fed. 3, 69 C. C. A. 601; Leighton v. Kennedy (C. C. A. 1) 129 Fed. 737, 740, 64 C. C. A. 265. In the circumstances stated, we do not feel justified in counting Alonzo Emerine as a creditor, as representing at the institution of bankruptcy an interest separate and distinct from that of his father, the original petitioning creditor.

[3] Another aspect of the case leads to the same result. Section 56b of the Bankruptcy Act provides that claims which are secured or have priority shall not "be counted in computing either the number of creditors or the amount of their claims, unless the amount of such claims exceeds the value of such securities, and then only for such excess." Accordingly secured creditors may be counted as petitioning creditors to the extent of their provable claims in excess of the value of the securities held, but only to such extent. Loveland on Bankruptcy (4th Ed.) §§ 186, 187, and 282; Remington on Bankruptcy, vol. 1, p. 175, § 220; In re Sampter (C. C. A. 2) 170 Fed. 938, 96 C. C. A. 98; In re Quinn (C. C. A. 8) 165 Fed. 144, 91 C. C. A. 178; In re Smith (D. C.) 176 Fed. 434. The intervening petition of Alonzo Emerine did not waive the right to the mortgage security, but expressly reserved it. The only allegation respecting the value of the mortgage security is this:

"That the said 197 acres of land above set forth as security, as this intervening petitioner is informed, may not be sufficient to secure said claim, for the reason of the defect in and clouds upon the title to said land securing said mortgage; and it may be necessary for intervening petitioner to not only prove but have allowed in this court any deficiency existing in his favor against the said Joseph Tarault, after the said land has been subjected to payment of the amount due intervening petitioner herein upon said mortgage."

[4] There is apparently a distinction between the proving of a claim under section 57a of the Bankruptcy Act and its allowance under section 57c, resulting in the right to prove a secured claim when the ultimate necessity for its allowance appears reasonably possible, even though it may turn out to be unnecessary because the security proves adequate to pay the debt in full. See In re Hornstein (D. C.) 122 Fed. 266, 277; In re Stansell, Fed. Cas. No. 13,293; In re Ashland Steel Co. (C. C. A. 6) 168 Fed. 679, 681, 94 C. C. A. 165; Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595, decided by this court December 18, 1914. The answer of the alleged bankrupt to the intervening petition in question denied, among other things, that "said intervening petitioner has any claim against him, and that he is a creditor of his," and alleged that at the time of the filing of the petition the intervener "was not entitled to demand from him the sum of $4,000 on

the mortgage described, or any other sum." Whether or not the answer sufficiently raised an issue over the adequacy of the mortgage security, there is plausible ground for thinking that the intervener so accepted it, for he put in on the hearing testimony of the existence of controversy over the title of the mortgaged premises, the purpose of which it is difficult to understand unless intended to prove allegations in the petition respecting the security's sufficiency. But the testimony came in substance only to this: That while, according to the record, Mrs. Tarault owned a life estate and her husband the fee of the land, subject to that estate and the mortgage mentioned, Mrs. Tarault claimed that equitably she owned the fee, instead of merely a life estate. The mortgage, however, was given by "Joseph Tarault and Maria Tarault, husband and wife, in consideration of four thousand dollars to us paid," etc. The grant and the warranty of title are made in terms by both mortgagors, and the mortgage note was signed by both. So far as shown by the record, the mortgage was a first lien against the premises, regardless of Mr. and Mrs. Tarault's rights as between themselves; and we have found nothing suggesting that Mrs. Tarault claims that her rights are superior to the mortgage. If the issue as to the sufficiency of the security is to be treated as existing and tried out, it is plain that the mortgage debt was adequately secured, and Alonzo Emerine thus not entitled to rank as a petitioning creditor, for there is no suggestion in the petition or elsewhere that the farm is not worth enough to pay the mortgage debt; on the contrary, the brief of petitioning creditors, in discussing the conveyance constituting the alleged act of bankruptcy, states that the farm was worth "perhaps" $18,000. But assuming that this issue was not actually raised or tried, and that the existence of a title superior to that held by the Taraults is not here foreclosed, the ultimate result is the same; for if the mortgaged premises were not sufficient security for the mortgage debt, the conveyance could not have been an act of bankruptcy, and but one act of bankruptcy was alleged. Excluding the two sons, there remained but two petitioning creditors.

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

MAGRUDER et al. v. BELLE FOURCHE VALLEY WATER USERS' ASS'N.

(Circuit Court of Appeals, Eighth Circuit. December 8, 1914.)

No. 4150.

(Syllabus by the Court.)

1. INJUNCTION ⇐114—PARTIES—RECLAMATION ACT.

A corporation with which, as the representative of its shareholders, who are parties accepted by the United States as holders of water rights in a project under Reclamation Act June 17, 1902, c. 1093, 32 Stat. 388 (Comp. St. 1913, §§ 4700–4708), the United States makes a contract for the benefit of such shareholders relative to the supply of water to and the dues to be paid by the shareholders, and which covenants in the contract to collect dues for the United States and guarantees the payment

thereof, is a proper party plaintiff in a suit to enjoin officers of the United States from collecting unlawful charges from the shareholders turning the water from their lands, and canceling their water rights and homestead rights because they fail to pay such charges.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220; Dec. Dig. ⟸114.]

2. CONSTITUTIONAL LAW ⟸67, 72—EXECUTIVE DEPARTMENT—DECISIONS—CONCLUSIVENESS ON COURTS.

The decisions of officers of an executive department of the United States of questions of law are not conclusive upon the courts. It is the function and duty of the officers of the judicial department to exercise their own judgments in the determination of questions whether or not acts of executive officers are authorized by law, even though such officers have already decided them. The questions whether or not the charges alleged to be illegal and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water and canceling their water rights and homestead rights for failure to pay such charges, are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 123, 133; Dec. Dig. ⟸67, 72.]

3. UNITED STATES ⟸125, 127—"SUIT AGAINST UNITED STATES"—INTERFERENCE WITH RIGHTS.

A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a "suit against the United States," nor is it or the injunction sought objectionable, either on the ground that they interfere with the property or the possession of the property of the United States, or on the ground that they compel specific performance of its contracts.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 113, 114, 116; Dec. Dig. ⟸125, 127.]

4. EQUITY ⟸46—RIGHT TO REMEDY—REMEDY AT LAW.

The remedy at law which will preclude a suit in equity must be as prompt, efficient, and adequate as the remedy in equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159–163; Dec. Dig. ⟸46.]

5. APPEAL AND ERROR ⟸954—INJUNCTION ⟸135, 161—INTERLOCUTORY INJUNCTION—DISCRETION—APPEAL.

The granting or dissolution of an interlocutory injunction is intrusted to the discretion of the court of original jurisdiction, not to the discretion of the appellate court.

In the absence of a violation of the principles and rules of equity established for the guidance of the court of original jurisdiction, the action of that court in such interlocutory matters must be sustained, unless there is clear proof of an abuse of its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818–3821; Dec. Dig. ⟸954; Injunction, Cent. Dig. §§ 304, 347; Dec. Dig. ⟸135, 161.]

6. INJUNCTION ⟸136 — INTERLOCUTORY INJUNCTION — GROUNDS — MAINTENANCE OF STATUS.

An interlocutory injunction to maintain the existing situation may properly issue, whenever the questions of law or fact to be ultimately determined in the suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss

or inconvenience to the opposing party will be comparatively small if it is granted, and may be indemnified by a proper bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig ⊂⊃136.]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit by the Belle Fourche Valley Water Users' Association against Frank C. Magruder and others. From an order refusing to set aside a restraining order and granting an interlocutory injunction, defendants appeal. Affirmed.

Ethelbert Ward, of Denver, Colo. (Robert P. Stewart, U. S. Atty., of Deadwood, S. D., and A. R. Honnold, of Denver, Colo., on the brief), for appellants.

Chambers Kellar, of Lead, S. D. (O. E. Farnham, of Newell, S. D., and James G. Stanley, of Lead, S. D., on the brief), for appellee.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

SANBORN, Circuit Judge. The appellant Frank C. Magruder is the manager of the Belle Fourche project and the appellant R. F. Walter was the project engineer and is the supervising engineer. They were defendants below, and the plaintiff was the Belle Fourche Valley Water Users' Association, a corporation organized under the laws of South Dakota to represent and act for the holders of water rights in the project, to collect the lawful dues from them, and to guarantee the payment of these dues. The Belle Fourche project is a project for the storage of water and the irrigation of land under the Reclamation Act of June 17, 1902, and the acts amendatory thereof. 32 Stat. p. 388, c. 1093. This is an appeal from an order refusing to set aside a restraining order and granting an interlocutory injunction against the defendants, forbidding them to exact from holders of water rights in the project charges alleged to be illegal, and from depriving them of the use of the water, of their rights to the water, and of their rights to their land because they failed to pay such charges.

The appellants assail the order on three grounds—that the association is not a proper party plaintiff, that the court below had no power to grant any relief upon the facts stated in the complaint, and that on the evidence the order was erroneous. Counsel for the appellants argue that the association was not a proper party plaintiff, because it had no interest in the suit, and was not one of a numerous class having a common interest in the subject of the suit, within the meaning of rule 38 in equity (198 Fed. xxix, 115 C. C. A. xxix). But rule 37 in equity (198 Fed. xxviii, 115 C. C. A. xxviii) provides that a party with whom and in whose name a contract has been made for the benefit of another may sue in his own name without joining that other. On October 25, 1905, the United States made a contract with this association, for the benefit of those who held or should there-

after hold water rights under the Belle Fourche project, to the effect, among other things, that only those who were or should become shareholders of the association should be accepted as entrymen of homesteads on the public domain included within the project, or as applicants for rights to the use of water provided for irrigation thereunder, that the payment for water rights to be issued to the shareholders of the association should be divided into not less than 10 equal payments, the first whereof should be payable at the time of the completion of the proposed works, or within a reasonable time thereafter, that the cost thereof should be apportioned equally per acre among those acquiring such rights, that the association would collect and pay to the United States, and did guarantee the payment, of that part of the costs of the works that should be apportioned to each of its shareholders and that parties otherwise eligible might, on the designation of the Secretary of the Interior, become members of the association. In the rules and regulations promulgated by the Secretary through the Director of the United States Reclamation Service we read:

"The execution of the contract between the water users' association and the Secretary of the Interior may be regarded as the completion of the organization of the water users' association. * * * The execution of this contract formally fixes the relation of the association to the government as the representative of the water users and as a medium of communication between the water users and the government."

It is to prevent the violation of the law applicable to the construction and execution of the foregoing contract, and the alleged irreparable injury to the shareholders of the plaintiff and to the plaintiff that may result from such violation, that this suit was instituted. The contract was made in the name of the corporation for the benefit of its shareholders, who number about 600, and the association was clearly the proper party plaintiff under rule 37 in equity, and also because, as contractor to collect and as guarantor of the payment of the lawful charges against its shareholders for the cost of the works and the use of the water, and as the holder of the first lien upon the property of these shareholders under Laws S. D. 1909, p. 155, upon their water rights respectively for the repayment of their deferred payments which it should pay, it had a vital interest in preventing the levy or collection of unlawful charges against them, or their deprivation of their water rights or their property because they failed to pay such charges.

Did the amended complaint state facts sufficient to invoke the jurisdiction and power of a court of equity to grant relief? In the discussion of this question the allegations of the complaint must be taken to be true. Material averments of the complaint were that these were the facts:

The shareholders of the plaintiff had applied for water and had been accepted as water users under the Reclamation Act, the contract of October 25, 1905, and written applications in accordance with its terms. They were either the owners of lands whose title had been vested in them, or homesteaders upon public lands irrigable under the project, and the owners of water rights for use upon such lands.

The project was conceived prior to 1905, and since that time the government has been constructing, but has never completed, the works. The contract of 1905 provided that the payments for the water rights to be issued to the shareholders should be divided into not less than 10 equal payments, the first of which should be payable at the time of the completion of the works or within a reasonable time thereafter. Before these works were completed, and for each of the years 1908, 1909, and 1910, the defendants demanded of the shareholders the payment of an installment of $3 per acre of their alleged irrigable land on account of the construction of the works, and the payment of 40 cents per acre of such land on account of the operation and maintenance of the works, and before the works were completed, for each of the years 1910 and 1911, they demanded the payment of $3 per acre of their irrigable land for construction, and 60 cents per acre of such land for operation and maintenance. The lands of the shareholders on account of which these payments were demanded amounted to about 12,000 acres for the year 1908, about 12,000 acres for the year 1909, about 35,000 acres for the year 1910, and about 47,000 acres thereafter. Notwithstanding the demand of these charges, water sufficient to irrigate these lands was not furnished in 1908, 1909, 1910, or 1911. The shareholders occupied these lands, prepared them for crops, and seeded them; but the crops generally failed from lack of water, and the shareholders generally lost much of their labor and expense. The defendants demanded of the shareholders 60 cents per acre of their irrigable land for operation and maintenance for the year 1913. This charge was made up in part of charges for services and other expenses not incurred or made in connection with the Belle Fourche project. Many thousands of dollars had been charged against the shareholders on account of the salaries of a large and expensive administration force annually as a part of these operation and maintenance charges.

The defendants were attempting to collect of the shareholders, as a part of these operation and maintenance charges, about $78,000 as betterments, which were and are in reality a part of the expense of construction, and are included within the $3 per annum per acre for the 10 years, amounting to $30 per acre, to which amount many of the shareholders by their accepted applications limited their liability for the construction of the works. During these years many of the shareholders paid some of the foregoing charges, although they deemed them illegal, because only by such payments could they get water from the project, and they paid each year to get sufficient water to enable them to raise crops. But in the year 1913 many of them had become financially exhausted by repeatedly preparing their land for crops which failed for lack of water, and by their payment to the United States of some of the charges which have been described, and yet many of the charges remained unpaid. Thereupon, after they had prepared their lands for the crop of 1913, and after the water had been turned onto the lands and the crops were growing, the defendants threatened and were about to turn the water from the lands of these shareholders unless they paid the operation and maintenance

charges for 1913, and the defendants further threatened and were about to recommend for cancellation and to cause the cancellation of the homestead entries and the water rights of the shareholders who had not paid all the charges against them, because they had failed to do so. The turning of the water from the lands would have ruined the crops of 1913. The cancellation of the homestead entries and the water rights of the shareholders would have driven them, with their few domestic animals, away from their homes. The relief sought was an injunction against the turning of the water from the lands, against collection of the charges for construction before the completion of the works, against the collection, as operation and maintenance charges, of expenses for betterments, against the collection of operation and maintenance charges for the year 1913, and against the cancellation of the homestead entries and water rights of the shareholders because these various charges have not been paid.

[1] Counsel for the appellants argue that this suit should be dismissed, and the injunction should be dissolved, because the facts which have been recited present no cause of action for any relief in equity. Let us see. The complaint is that the defendants without authority of and in violation of law demand of the holders of water rights charges for construction that are not due, charges for operation and maintenance composed in part of items for betterments and in part of items for expenses not made in connection with the Belle Fourche project for which they are not legally liable, and that the defendants are about to deprive the shareholders of the use of the water and of their water rights and homestead rights because they do not pay these charges. There can be no doubt that these acts and threatened acts of the defendants are and will be, not only unauthorized by, but contrary to, law. But counsel contend, nevertheless, that these facts give a court of equity no jurisdiction to grant any relief to the shareholders or the plaintiff, because the Secretary of the Interior had and exercised the discretion to determine that all these charges and acts were lawful. But the rights to the homesteads and to the water rights of the shareholders were substantial, valuable, and, against all but the Congress of the United States, vested rights. Counsel cite authorities to the effect that the United States may withdraw lands subject to homestead and pre-emption at any time before patent. But that power, whatever its extent, is vested in the Congress of the United States alone, not in the executive officers of the United States. The former may under some circumstances make laws to withdraw such lands from pre-emption or homestead although pre-emption or homestead rights have been initiated. But the officers of the executive department of the government may not. They are subject, not superior, to existing laws, and they may not lawfully destroy or unjustly affect the water rights or homestead rights, or other valuable rights of this nature, in violation or disregard of the laws of the land. Hemmer v. United States, 204 Fed. 898, 904, 123 C. C. A. 194, and cases cited.

[2] It is a question of law whether the proposed destruction of the homestead rights and water rights of the shareholders, and the re-

fusal to permit them to use the waters of the project because they do not pay the charges alleged to be illegal is or is not authorized by law. And a decision of a question of law by the officers of the executive department is never conclusive upon the courts. Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71; United States v. Grand Rapids & I. R. Co. (C. C.) 154 Fed. 131, 136; Northern Pacific R. Co. v. Sanders (C. C.) 47 Fed. 604, 609–612.

It is the function and duty of the officers of the judicial department of the United States, a function and duty which they may not renounce, to exercise their own independent judgments in the determination of the questions whether or not acts of executive officers are authorized by law, even though such officers have already decided the questions. Deming v. McClaughry, 113 Fed. 639, 640, 641, 51 C. C. A. 349, 350, 351; Hartman v. Warren, 76 Fed. 157, 162, 22 C. C. A. 30, 36; Webster v. Luther, 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179; United States v. Tanner, 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321; Merritt v. Cameron, 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772; United States v. Graham, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; Swift Co. v. United States, 105 U. S. 691, 26 L. Ed. 1108. The facts stated in the amended complaint were ample to invoke the jurisdiction of the court below to determine the question whether or not the defendants were authorized by law to collect the charges it was alleged they demanded, and whether or not they were authorized by law to destroy the water rights and homestead rights for the failure of their owners to pay these charges.

[3] Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts. If the acts of the defendants done and threatened were authorized by law, they might be the acts of the United States against which a court of equity would grant no relief. But if the averments of the complaint are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. They are, therefore, not the acts of the United States, and a suit to enjoin their performance is not a suit against the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts. It is a suit to enjoin officers of the United States from unlawfully interfering with and diverting its water from those persons lawfully receiving and entitled to receive it, from unlawfully preventing the United States from discharging its duties and performing its contracts, to the irreparable injury of the plaintiff and its shareholders. That an executive officer is committing or about to commit acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is a good cause of action against such officer for injunctive relief.

A suit against him for such a cause is neither a suit against the United States nor is it, or the injunction against such acts of the officer, objectionable either on the ground that it interferes with the property of the United States, or its possession, or compels the specific performance of its contracts by the latter. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 110, 111, 23 Sup. Ct. 33, 47 L. Ed. 90; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 32 Sup. Ct. 340, 56 L. Ed. 570; Garfield v. Goldsby, 211 U. S. 249, 261, 29 Sup. Ct. 62, 53 L. Ed. 168; Pennoyer v. McConnaughy, 140 U. S. 10, 12, 17, 11 Sup. Ct. 699, 35 L. Ed. 363; Baker v. Swigart (D. C.) 196 Fed. 569, 571; Id., 199 Fed. 865, 866, 118 C. C. A. 313; Swigart v. Baker, 229 U. S. 187, 192, 33 Sup. Ct. 645, 57 L. Ed. 1143; United States v. Cantrall (C. C.) 176 Fed. 949, 954.

[4] The only other objections to the complaint are that it fails to show that the plaintiff or its shareholders will suffer irreparable injury from the unauthorized and illegal acts of the defendants, and that it does disclose the fact that they have an adequate remedy at law. The remedy at law which counsel assert the plaintiff and its shareholders have consists of actions at law against the United States for the damages they have sustained by their deprivation of water and by the cancellation of the water rights and homestead rights of the shareholders because they failed to pay the illegal charges. But the remedy at law which precludes relief in equity must be as prompt, efficient, and adequate as the remedy in equity. To determine the amounts of the unauthorized charges for operation and maintenance may and probably will require the examination of the accounts of the receipts and disbursements on account of the entire project. To determine the amounts, if any, owing by the shareholders, may and probably will require the examination of the accounts between each of the complaining shareholders and the project. The consideration and settlement of issues dependent upon the taking of accounts composed of many items is one of the great heads of equity jurisprudence, and the probable necessity for such an accounting is in itself sufficient to sustain the jurisdiction of this suit by a court of chancery. Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 13, 14, 76 C. C. A. 516, 521, 522, 8 Ann. Cas. 660. Nor is the remedy of an action, or several actions, at law for damages that will be sustained by the infliction of the wrongs alleged on account of the collection of the unlawful charges, or the destruction of the homestead rights and water rights for a failure to pay them, as prompt, or as efficient, or as adequate, as the prevention by this suit in equity of the collection of the unjust charges and the enforcement of the illegal forfeitures, and the adjudication in this single suit of the legal rights and duties of all the parties and all the shareholders by a court of equity, which, with its power to apply to the questions at issue the learning and experience of its chancellor and of a trained accountant as a master, is so much better equipped than a jury to find and render a just decree upon such issues. The plaintiff and the shareholders have no adequate remedy at law for the wrongs charged in this complaint.

Do the averments of the complaint set forth facts which show an imminent danger of irreparable injury to the plaintiff and its shareholders from the acts of the defendants? Those averments disclose these facts: The shareholders of the plaintiff are farmers, each with a small number of domestic animals, with modest homes and limited means, trying to cultivate arid lands which they have been induced to occupy by the representations of the defendants that they would be supplied with water from the project to raise crops upon these lands. The United States made a contract with the plaintiff and with many of these shareholders, with all of them who applied for water rights before 1911, that water would be supplied to them in consideration of their agreements to pay for the construction of the works after their completion, and to pay their just share of necessary operation and maintenance charges. The defendants have demanded and collected construction charges not due, operation and maintenance charges unnecessary and unauthorized, and have failed to furnish the requisite water to enable these farmers to raise crops for several years, until some of them are financially exhausted and cannot pay many of the charges, and for their failure so to do the defendants threaten to deprive them of the use of the water and to take steps to destroy their water rights and their homestead rights. The plaintiff, the association, has guaranteed the payment of the legal charges against its shareholders, and has a lien on their rights for such charges that it pays, and it depends upon assessments upon its shareholders to maintain itself and to discharge its duties. The injury to these farmers by their threatened loss of their rights to the water and the land, by turning them and their families with a few domestic animals from their homes and their hopes of a comfortable living therein, may not be measured by the few dollars in damages they might recover after the delay and expense of trials by jury to recover the salable value of their rights to the land and the water which have been depreciated and are being constantly depreciated in value by the alleged acts of the defendants, nor could the damage to the association be fairly measured or recovered by such actions at law. The irreparable injury to the plaintiff and the shareholders by the acts of the defendants is fairly shown by the allegations in the amended complaint, and that complaint presents facts sufficient to state a good cause of action and to invoke the established power of a court of chancery to grant equitable relief. The suit may not be lawfully dismissed on account of the insufficiency of the complaint.

In the consideration of the questions thus far discussed the presumption has necessarily been indulged that the averments of facts in the amended complaint are true. But counsel for the defendants contend that they are not true, and that the evidence before the court below at the time the injunction was granted established this fact so clearly that the court below ought to have dissolved the restraining order and to have denied the injunction. The restraining order was made by the state court on July 19, 1913. On August 6, 1913, after the removal of the case to the court below, the defendants gave notice of a motion to dismiss the suit and to dissolve the order,

which was heard on August 28, 1913, and resulted in an order that the plaintiff might file an amended complaint and the defendants might renew their motion. On October 8, 1913, the amended complaint was filed. Thereupon the defendants renewed their motion, and the plaintiff made a motion for an additional restraining order. These motions were heard on the complaint, the affidavits presented by the respective parties, and the arguments of counsel for three days, commencing about November 30, 1913, and then the court granted the order for the injunction which is challenged by this appeal. The complaint was verified on information and belief by the secretary of the association and by 124 of its shareholders. It was supported by 37 other affidavits. In opposition to this evidence the defendants produced the affidavits of the defendants Magruder and Walter. About 40 exhibits, consisting of the contracts between the United States and the plaintiff, the articles of incorporation of the plaintiff, the forms of the applications used by the shareholders, the circulars and notices respecting the project issued by the Secretary of the Interior and his subordinates, were also introduced in evidence. When the case was heard below the defendants had not answered the complaint, so that as a pleading its allegations stood admitted. The defendants Magruder and Walter, however, in their affidavits denied all the averments of material facts in the complaint which tended to show illegal charges, demands, or threats by them, or any of the defendants, except the allegations of the demand for the payment of construction charges prior to the completion of the project from those who applied for water rights prior to January 24, 1911. They asserted in their affidavits that these shareholders had, by a contract they made through the association with the United States on that date and by their subsequent action, estopped themselves from relying on the contract of October 25, 1905, and their applications regarding this matter. The defendants Magruder and Walter testified that no illegal or excessive charges for operation and maintenance had ever been demanded, either on account of expenses not necessary or relevant to the operation of the Belle Fourche project, or on account of betterments. They denied threats of cancellation of water or homestead rights on account of failure to pay such charges.

In addition to the averments of the amended complaint, the plaintiff produced the affidavit of its secretary that the defendant Magruder had been violating the restraining order by giving notices to shareholders, dated October 25, 1913, that they would suffer the penalty of 1 cent per acre per month for the unpaid operation and maintenance charge for one year after July 21, 1913, of 2 cents per acre per month for two years of such unpaid charges, 3 cents per acre per month for three years of such unpaid charges, and so on; that in compliance with a request for an itemized statement of the expenditures to be charged against the project the defendants furnished one in December, 1911, or January, 1912, which contained an item of $78,000 for betterments; and that the plaintiff had been furnished with statements of expenses incurred in detached offices not

connected with the project. The plaintiff insisted that the provision of the contract of January 24, 1911, between the plaintiff and the United States, which provided for a modification of the stipulation of the contract of October 25, 1905, to the effect that the charges for construction should fall due after the completion of the contract, upon which provision the defendants relied in part for the estoppel they claimed, was unauthorized by the shareholders, and produced a copy of the resolution of the shareholders on which the contract of January 24, 1911, was founded, which seems to give no such authority.

[5] From this brief statement of the course of this suit and of the evidence before the court below, it appears that the order for the injunction was not made hastily, but after elaborate argument and deliberate consideration, that there had been no answer made to the complaint, that there were many issues of fact involved, and their decision was conditioned by conflicting testimony. The discussion which appears in the earlier part of this opinion and the legal questions suggested by the evidence leave no doubt that the questions of law to be ultimately determined in this suit are grave and difficult, and the situation of the parties disclosed by the complaint and the affidavits was such that it might well have appeared to the court below that the injury of the plaintiff and its shareholders would be certain, great, and irreparable if the injunction should not be issued, while the inconvenience and loss to the defendants would be inconsiderable if the injunction was granted. Now the question in this court is not whether or not it would have issued or would issue the injunction upon the evidence before it. The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and when that court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the appellate court without clear proof that it abused its discretion. It is to the discretion of the trial court, not to that of the appellate court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 206, 120 C. C. A. 644, 648, and cases there cited.

[6] The controlling reason for the existence of the right to issue an interlocutory injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before these claims can be investigated and adjudicated. A preliminary injunction maintaining the existing situation may properly issue whenever the questions of law and fact to be ultimately determined in the suit are grave and difficult, and injury to the moving party will be certain, great, and irreparable if the motion is denied, while the loss and inconvenience to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is issued. City of Newton v. Levis, 79 Fed. 715, 718, 25 C. C. A. 161, 164; Love v. Atchison, T. & S. F. Ry. Co., 185 Fed.

321, 332, 107 C. C. A. 403, 414; King Lumber Co. v. Benton, 186 Fed. 458, 459, 108 C. C. A. 436, 437; Carpenter v. Knollwood Cemetery (C. C.) 188 Fed. 856, 857; Henry Gas Co. v. United States, 191 Fed. 132, 136, 111 C. C. A. 612, 616.

A careful reading and thoughtful consideration of the amended complaint, of each of the affidavits and exhibits, in the light of these established principles of equity, have convinced that there is no such proof in this case of an abuse of discretion by the court below by its issue of the injunction as would warrant a reversal of its order.

The order from which the appeal was taken must accordingly be affirmed; and it is so ordered.

HASTINGS v. MURCHIE, U. S. Marshal.

(Circuit Court of Appeals, First Circuit. January 6, 1915.)

No. 1085.

1. CRIMINAL LAW ⊜242—REMOVAL TO ANOTHER DISTRICT FOR TRIAL—JURISDICTION OF COMMISSIONER.

Under Rev. St. § 1014 (Comp. St. 1913, § 1674), providing that for any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of the Circuit Court to take bail, agreeably to the usual mode of process against offenders in the state where he may be found, be arrested and imprisoned or bailed for trial before such court of the United States as by law has cognizance of the offense, and that, where any offender is committed in any district other than that in which the offense is to be tried, it shall be the duty of the judge of the district where the offender is imprisoned to issue a warrant for his removal to the district where the trial is to be had, a commissioner has no authority to order the removal of an accused person to another district, but has authority only to issue a warrant committing him to the custody of the marshal for trial in the district to which he is to be removed, until a warrant for his removal is issued by the District Judge, or until he is otherwise dealt with, according to the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 509, 510; Dec. Dig. ⊜242.]

2. CRIMINAL LAW ⊜242—REMOVAL TO ANOTHER DISTRICT FOR TRIAL—PROCEEDINGS ON APPLICATION FOR REMOVAL—EVIDENCE.

Under Rev. St. U. S. § 1014 (Comp. St. 1913, § 1674), and the Massachusetts practice before committing magistrates, a person arrested for a crime against the United States, triable in another district, must, either before the commissioner on whose warrant he is arrested, or before the District Judge on application for his removal to such other district, be afforded an opportunity to present evidence to show a want of probable cause for believing him guilty, as the indictment is prima facie evidence only of probable cause, and the procedure contemplated by Rev. Laws Mass. c. 217, § 28, providing that a warrant, issued against a person indicted in one county, shall run throughout the state, and that, if the offender is found in another county than the one in which the indictment was obtained, he may be there apprehended, and section 29, providing that, if defendant requests to be taken before a magistrate of the county in which he is arrested for the purpose of entering into recognizance without a trial or examination, it shall be the duty of the officer to take him

before a magistrate of such county, is not the procedure referred to in section 1014.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 509, 510; Dec. Dig. ⊂⊃242.]

Putnam, Circuit Judge, dissenting.

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

Habeas corpus by Walter O. Hastings against Guy Murchie, U. S. Marshal. From a decree dismissing the petition, petitioner appeals. Reversed and remanded, with directions.

Robert G. Dodge, of Boston, Mass. (Storey, Thorndike, Palmer & Dodge, of Boston, Mass., on the brief), for appellant.

Asa P. French, U. S. Atty., of Boston, Mass. (Daniel A. Shea, Asst. U. S. Atty., of Boston, Mass., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. The appellant, Walter O. Hastings, was indicted in the District Court for the District of New Jersey, at the November term, 1913, for knowingly and willfully soliciting, accepting, and receiving from the Erie Railroad Company a concession with respect to the transportation of certain merchandise in interstate commerce, whereby said merchandise was transported at a lower rate than the rate and charges lawfully applicable to said shipment as published, filed, and posted by said railroad company, and in violation of the federal statute commonly known as the Elkins Act, amended by section 2 of the Hepburn Act (34 Stat. at Large, 586 [Comp. St. 1913, § 8597]). On November 28, 1913, a complaint was filed at Boston, before the United States commissioner for the district of Massachusetts, wherein it was charged that Hastings had been indicted in the District Court of New Jersey for knowingly and willfully soliciting, accepting, and receiving a concession as aforesaid, with respect to the transportation of certain merchandise in interstate commerce, that he was beyond the jurisdiction of the District Court of that district, was in the district of Massachusetts, had never been held to answer the indictment, and was a fugitive from the justice of the district of New Jersey, and praying that a warrant issue for his apprehension, and that he be held to answer to the indictment. A warrant was issued by the commissioner, on which the appellant was apprehended and brought before him for hearing. At the hearing the government offered in evidence a certified copy of the indictment, together with a certified copy of a warrant and return of the marshal of the district of New Jersey showing that the appellant could not be found in that district. The appellant admitted that he was the person named in the indictment, that the indictment properly charged an offense against the United States, and that the District Court of New Jersey had jurisdiction of the offense charged. He offered evidence to show that he did not know the rate applicable to said merchandise; that he inquired of the Boston agent of the railroad company as to the rate applicable thereto, and learned from him that it was 44 cents for each 100 pounds;

and that, believing the same to be the true, lawful rate chargeable therefor, caused the merchandise to be transported at that rate. He also offered to show that for these and further reasons he was not guilty of the offense charged in the indictment, and that there was not probable cause for believing him guilty thereof. The commissioner rejected the offer of proof, and ruled, as a matter of law, that, inasmuch as the identity of the accused, the sufficiency of the indictment, and the jurisdiction of the court in which the indictment was found were admitted, probable cause to believe the prisoner guilty was conclusively established. He thereupon ordered the appellant to furnish bail for his appearance before the District Court for the District of New Jersey, and, upon his failure to do so, that he be committed to the custody of the respondent, a United States marshal for the district of Massachusetts, for removal to the district of New Jersey for trial on the indictment. The appellant forthwith petitioned the District Court for a writ of habeas corpus, alleging that the order of commitment was null and void, and in violation of his rights under the Constitution and laws of the United States.

A hearing was had in the District Court upon the petition for a writ of habeas corpus, at which the facts here stated were admitted; and the District Judge, being of the opinion that the ruling of the commissioner, rejecting the evidence offered by the appellant, was in accordance with the practice in many cases in that district, dismissed the petition, and this appeal was taken.

[1] The removal proceedings begun before the commissioner were brought under section 1014 of the Revised Statutes of the United States, which reads as follows:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of the circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had."

It does not appear that an application was made to the District Judge for an order directing the removal of the appellant to the district of New Jersey, where the trial was to be had, or that the District Judge passed upon the question whether the accused should be removed to that district. It is agreed, however, that the commissioner made an order committing the appellant to the custody of the respondent for removal to the district of New Jersey for trial on the indictment. It is not contended, and we do not understand this order means, that the respondent was authorized to remove the accused to the district of New Jersey without first applying to the District Judge and obtaining a war-

rant directing him to do so, or that such has been the practice. The statute confers upon the commissioner no authority to order the removal of an accused person, but merely authority to issue a warrant committing him to the custody of the marshal for trial in the district to which he is to be removed, until a warrant for his removal is issued by the District Judge, or until he is otherwise dealt with according to law.

[2] It appears from the opinion of the District Court that it has been the practice in the Massachusetts district in "many cases" of this nature not to allow the accused to introduce evidence tending to show want of probable cause. But, if this is so, there is reason to doubt whether the course pursued has been in accordance with the practice in that district as customarily observed and practiced from an early date. In re Alexander, 1 Low. 530, Fed. Cas. No. 162; United States v. Pope, Fed. Cas. No. 16,069.

The case of In re Alexander, supra, was a removal case in which the meaning of the clause, "agreeably to the usual mode of process against offenders in such state," as found in section 1014 of the Revised Statutes, was involved. Judge Lowell, in discussing the question (1871) said:

"The point taken by the defendant is that he ought to be confronted with his witnesses before the magistrate, as well as at the final trial. The law of Massachusetts seems to require this (Gen. St. c. 170, § 10, et seq.), and it is copied from Rev. St. c. 135. I have been unable to trace it further back than the Revised Statutes, and I am informed that the practice, both here and in Maine, is, and, so far as is known, always has been, to receive affidavits and other written evidence in proper cases on these preliminary hearings before commissioners. Such a course was sanctioned by the Supreme Court of the United States in Bollman's Case, 4 Cranch, 128 [2 L. Ed. 554]; and this decision was acted on and explained by Chief Justice Marshall in Burr's Trial, pp. 11, 15, 97, Fed. Cas. No. 14,692. Judge Conkling, in his Treatise, p. 631, represents this to be the true practice, and it has been usually followed, I believe, in the several circuits, as appears by the following cases: In re Clark, Fed. Cas. No. 2,797; U. S. v. Shepard, Fed. Cas. No. 16,273. * * * The precise question undoubtedly is, What evidence was admitted in such cases in Massachusetts in 1789? U. S. v. Reid, 12 How. (53 U. S.) 361 [13 L. Ed. 1023]. But the law of Massachusetts may be presumed, in the absence of evidence to the contrary, to have been the same with that of New York and Virginia, and with the common law of England, of which the cases cited are evidence; and the practice conforms to this view: Although it has been usual, both in England and America, to examine witnesses before the committing magistrate in the presence of the accused, yet this has never been an essential prerequisite to holding an accused person for trial. He might always be arrested on the warrant of a coroner or of a court upon an ex parte examination before a coroner's jury or grand jury. The indictment in the district in which it is found is an ex parte proceeding, but since it is found upon oath, and after examination of witnesses, it has a presumption of validity. Before the commissioner it is only a piece of evidence, to be sure, and may be met and controlled, but when it stands by itself, and uncontradicted, it seems to be enough according to our practice to authorize the warrant."

And in United States v. Pope, supra, a decision rendered by Judge Lowell in 1878, it was said:

"The mode adopted to procure the attendance of a defendant, who is found out of the district where the offense is said to have been committed, is to apply to a commissioner or judge under Judiciary Act, § 33 (1 Stat. 91),

now re-enacted in Rev. St. § 1014, and produce before him the evidence of criminality precisely as if the defendant's crime was alleged to have been committed within the district. * * * The usual course is to produce either witnesses or affidavits in behalf of the United States. It has been seriously doubted whether a copy of an indictment is evidence in such an examination. I decided in Alexander's Case * * * that it is. This was a very convenient decision for the United States, and a sound one, but it rests rather on long usage than on any principle of law, because, generally speaking, an indictment is evidence of nothing but its own existence, unless there is some statute giving it a greater effect. It is but secondary evidence, after all, or rather a statement of the result of evidence, and the better practice is to give primary evidence, of criminality. * * * Congress not having seen fit to authorize a bench warrant to issue out of the court in which the indictment is found, it becomes the duty of the magistrate to examine the evidence carefully as in any domestic case."

It thus appears that in the Massachusetts district, in rendition hearings before a commissioner, it was not the practice, from 1798 to 1878, to confine the evidence to the indictment found in the district to which removal was sought, and that such an indictment, if offered on the question of probable cause, was received as prima facie evidence only, and could be met and controlled by other evidence.

In Re Dana (D. C.) 68 Fed. 886, 892, 893, Judge Addison Brown, in speaking of section 1014, says:

"The whole structure of this section, its provisions in regard to bail, recognizances, witnesses, and commitment, and the express provision that the proceeding shall be 'agreeably to the usual mode of process against offenders in such state,' show that the familiar common-law proceeding upon complaint for the arrest and commitment of offenders by committing magistrates was intended to be adopted and followed, subject to the provision adopting the procedure of the several states"; that the clause—"usual mode of process"—"must embrace the preliminary examination usual in the state, including the taking of evidence, depositions, and the examination of witnesses, and the duty of the magistrate in finding probable cause, because, aside from this clause, there is no rule on those subjects, and it cannot have been intended that the proceedings should be conducted arbitrarily, and without any rule at all"; that "in making this provision for an observance of the practice in use in the state where the arrest is made, it may be reasonably presumed that the intention of the Judiciary Act was to prevent the hateful appearance of employing summary and arbitrary methods of removal, and to avoid creating prejudice against the new government which would be likely to be engendered through courses of procedure to which the people of the several states were not accustomed, and against which they had just successfully fought."

The procedure authorized by sections 28 and 29, c. 217, R. L. Mass., is not analogous to that called for in section 1014. Section 28 provides that a warrant issued against a person indicted in one county shall run throughout the state, and that if the offender is found in another county than the one in which the indictment was obtained he may be there apprehended. And section 29 provides that, if the crime charged in the warrant is not punishable by death or imprisonment in the state prison, and the defendant requests to be taken before a magistrate of the county in which he is arrested for the purpose of entering into a recognizance "without a trial or examination," it shall be the duty of the officer to take him before a magistrate of that county for the purpose of giving bail. It is apparent that the procedure contemplated by these sections has no relation to hearings before committing magis-

trates, for it is expressly provided in the latter section that the magistrate to whom the application is made shall proceed without a trial or examination, and he is not authorized to commit, but simply to take bail.

In Tinsley v. Treat, 205 U. S. 20, 27, 29, 32, 34, 27 Sup. Ct. 430, 432 (51 L. Ed. 689) it was held:

> That the provision in section 1014, as to the "usual mode of process," etc., has relation only to the inquiry before the commissioner for the apprehension and detention of the accused. "It has no relation to the inquiry on application for removal" to the District Judge. When the offender against the United States "has been indicted, * * * in a district in another state than the district of arrest, then, after the offender has been committed, it becomes the duty of the District Judge, on inquiry, to issue a warrant of removal. * * * In such cases the judge exercises something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same. 'The liberty of the citizen, and his general right to be tried in a tribunal or forum of his domicile, imposes upon the judge the duty of considering and passing upon those questions.'"

It was also held in this case that the indictment was not conclusive, but only prima facie evidence of probable cause; that evidence tending to show that no offense triable in the district to which removal was sought had been committed by the accused in that district should be received; and that to decline to receive it "involved the denial of a right secured by statute under the Constitution." See, also, United States v. Black, 160 Fed. 431, 87 C. C. A. 383.

The government relies largely upon the decision in Beavers v. Henkel, 194 U. S. 73, 84, 85, 24 Sup. Ct. 605, 48 L. Ed. 882, to support the ruling of the commissioner that the New Jersey indictment was conclusive evidence of the existence of probable cause; but all that case decided was that the indictment was prima facie evidence of probable cause, and that it was unnecessary, on the facts presented, to determine whether it was or was not conclusive.

The case of Henry v. Henkel, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. ——, decided by the Supreme Court on November 30, 1914, does not take up the question here considered. It appears from the opinion that the accused in that case had a full hearing on the question of probable cause.

As the case stands, there was evidence from which the commissioner could find probable cause for the commitment and detention of the appellant. Whether this evidence would have been overcome, had the appellant been permitted to introduce the evidence which he offered before the commissioner is entirely problematical; but if he is afforded an opportunity to present the evidence, either before the commissioner or before the District Judge on application for removal, his rights will be fully preserved.

The decree of the District Court in this proceeding is reversed, and the case is remanded to that court, with directions to discharge the appellant unless he is afforded an opportunity, either before the commissioner, or on an application to the District Judge for his removal, to present evidence of the want of probable cause, if he so desires.

PUTNAM, Circuit Judge (dissenting). Whatever may have been my individual impressions, they have been swept away by the broad expressions of the Supreme Court in Henry v. Henkel, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. ——, announced November 30, 1914. These expressions are so broad that they go beyond the particular circumstances of Henry v. Henkel, and announce a general policy of the Supreme Court to which I am bound to submit, and to hold that we have no power to reverse in the present case. The opinion fully justifies the broad expressions of the syllabus found in the report of the case. I will add that the uniform practice in the New England circuit has been as stated by the learned judge of the District Court in his opinion in this case.

FIFTH THIRD NAT. BANK et al. v. JOHNSON et al.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1915.)

No. 2650.

1. FRAUDULENT CONVEYANCES ⟸115—PREFERENCES—STATUTES.
Rev. St. Ohio, § 6343 (Gen. Code, § 11104), preserves the distinctions between (1) fraudulent conveyances and (2) preferences. A conveyance may not be set aside as a preference upon the issue whether it is fraudulent.
[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 370, 375–377; Dec. Dig. ⟸115.]

2. CORPORATIONS ⟸545—CONVEYANCE BY CORPORATION—FRAUD.
Nor is a conveyance by a corporation, which has not ceased to do business or surrender its property to its creditors, fraudulent under that section, as construed by the Ohio courts, merely because it prefers certain creditors, whose claims are guaranteed by the controlling directors of the corporation, since the assets of the corporation do not become a trust fund for the creditors, so long as it is a going concern.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170–2175; Dec. Dig. ⟸545.]

3. CORPORATIONS ⟸542—POWERS—CEASING TO DO BUSINESS.
A corporation which had been engaged in the business of manufacturing certain machinery, and also in selling similar machinery manufactured by others, which discontinued its manufacturing business and sold its plant, but intended to continue its sales business, was still a going concern, though the manufacturing part of its business was the larger part, so that the sale of its plant was not necessarily fraudulent as to creditors.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. ⟸542.]

4. CORPORATIONS ⟸542—INSOLVENCY—ACTUAL FRAUD—SALE TO DIRECTOR.
Where a manufacturing plant was openly sold for a fair price to one of the directors, and the proceeds of the sale applied to the payment of corporate debts, which were guaranteed by the controlling directors, there was no actual fraud upon the creditors which will avoid the sale, though the corporation was insolvent at that time.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154–2160; Dec. Dig. ⟸542.]

5. APPEAL AND ERROR ⟸1177—DISPOSITION OF THE CASE—REMAND.
Where the trustee in bankruptcy sought to recover property conveyed by the bankrupt, on the grounds that the sale was an illegal preference and was fraudulent, and the trial court was of the opinion at the trial

that the bill did not sufficiently allege a preference, but erroneously allowed recovery on the ground of fraud, so that the parties did not have a full opportunity to be heard as to the allegations of preference, the trustee's bill will not be dismissed on appeal, but the case will be remanded for further proceedings, with opportunity to amend the bill as to the allegations of preference.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597–4604, 4606–4610; Dec. Dig. ⊂⊃1177.]

6. APPEAL AND ERROR ⊂⊃1199—REMAND—PROCEEDINGS IN LOWER COURT—RIGHTS OF PARTY NOT APPEALING.

Where an appeal was taken by part of the defendants before the court had lost control of its decree, the power of the trial court over the decree was suspended pending the appeal, and after remand it can vacate or revise its decree, so far as it affected the defendants who did not appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674–4676; Dec. Dig. ⊂⊃1199.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Bill by Edgar M. Johnson, trustee of the Cincinnati Equipment Company, a bankrupt, against the Fifth Third National Bank and others. Decree for the complainant, and certain defendants appeal. Reversed and remanded, with leave to amend the bill.

The Cincinnati Equipment Company was an Ohio corporation, engaged in manufacturing, repairing, and selling contractors' machinery and equipment, and also engaged in buying and selling, on commission, such machinery and equipment made by others. The business had been large, and at times profitable. It owned a plant, consisting of buildings and several acres of land, with railroad tracks and switches, near Cincinnati, and equipped with suitable power and appliances. In August, 1911, the company, on its direct paper and on its indorsement of customers' paper, owed to the Fifth Third National Bank about $75,000, to the Citizens' National Bank about the same sum, and to the Second National Bank $42,000. The chief stockholder—the one who, in fact, controlled the company—was Isaac Joseph, reputed to be a wealthy man. P. B. Warner, who had represented the company in the East, had come back to Cincinnati, and had for some time been active in the management. Joseph and Warner were directors. In the summer of 1910, it appeared that the manufacturing business was not continuing to be profitable, and it was more or less definitely decided to sell the plant on opportunity. Some offers were declined; but in the summer of 1911 it was arranged that the plant and the good will of the manufacturing business should be sold for $50,000 to Warner, or to a company which he was to organize. After some delays, the matter took definite shape, and it was settled that he was to pay the purchase price by canceling a $10,000 indebtedness from the company to him, by paying $10,000 cash, and by giving his notes for the remaining $30,000, secured by mortgage back on the plant. An understanding was also reached with the three banks that the $10,000 and these notes would be divided equally between them; the notes to be held as additional security, and the money to be applied on the debts. The banks were already secured on the customers' paper by the makers' liability, and on the direct paper by bonds signed by sureties. Joseph was surety on the bond at each bank, and Warner was surety only on the bond of the Fifth Third.

The transaction was closed by the acceptance, at a stockholders' meeting, August 15, 1911, of Warner's written proposition. The deed and bill of sale to Warner from the company and the mortgage back are dated September 1, 1911. Between September 13th and September 20th the $10,000 cash and the $30,000 notes were divided equally among the three banks. The real estate

mortgage was recorded September 27th, but the deed not until October 26th. The equipment company collected accounts, and sold personal property, and undertook to continue the other department, the brokerage part, of its business; but about November it became known that Joseph was in bad shape financially, and the insolvency of the equipment company became clear and public. January 22, 1912, it was adjudicated a voluntary bankrupt, and Edgar M. Johnson became trustee. He thereupon filed this bill in the District Court, making defendants thereto the three banks and Joseph and Warner and Warner's subsequent corporation, to which he had transferred title. The bill sought to set aside the conveyance to Warner and the distribution of the notes and money among the banks.

It is alleged in general terms that the deed, mortgage, and note distribution constituted a conveyance to hinder, delay, and defraud creditors, and constituted a preference by an insolvent, and that they were invalid under the laws of Ohio and under the bankruptcy law of the United States. It did not allege that any act of preference was committed within, or that any essential recording was delayed so as to reach a date within, four months before the bankruptcy adjudication, nor did it in terms say that the banks had reason to know they were getting more than would be received by other creditors of like class. The answers made denials suited to meet both the fraudulent conveyance theory and the preference theory of the bill. Testimony was taken in open court, and, on filing his opinion, the District Judge held, apparently following an announcement at the hearing, that because of its failure to allege all the facts necessary to state a case of voidable preference the bill must be treated as presenting only the proposition that the conveyance was one operating to hinder, delay, and defraud creditors. Recognizing that under the bankruptcy law a deed could not be considered fraudulent merely because it was a preference (Coder v. Arts, 213 U. S. 223, 241, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008), and that it was doubtful whether the proof established fraud, as distinguished from preference, in the sense required by the decision just cited, the District Judge further held that he would treat the case solely as one arising under that part of the Ohio statute of fraudulent conveyances [1] which relates to the intent to hinder, delay, or defraud, and the importation of this statute into the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1913, § 9654]) by section 70e; that the transaction was constructively fraudulent, and so, under Ohio decisions, violated the Ohio statute; and that the deed and mortgage must be set aside, the banks must return to the trustee the $30,000 of notes and the $10,000 of cash, and the trustee (subject to certain reserved matters) must return these to Warner. From a decree accordingly, the banks and Joseph appeal. Warner and his corporation did not appeal.

Lawrence Maxwell and Murray Seasongood, both of Cincinnati, Ohio, for appellants.

W. B. Mente and S. G. Stricker, both of Cincinnati, Ohio, for appellee.

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

DENISON, Circuit Judge (after stating the facts as above). [1] The Ohio statutes invalidate a conveyance made with intent to de-

[1] "A sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency with a design to prefer one or more creditors to the exclusion in whole or in part of others, and a sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors, shall be void as to creditors of such debtor, or debtors at the suit of any creditor or creditors. * * *" (Section 11104, Gen. Code of Ohio; Rev. St. § 6343).

fraud creditors. The Bankruptcy Act (section 67e) does the same thing in the same language, except that there is a four-months limitation. It is not clear that the same words can mean one thing in the Bankruptcy Act and mean another thing in the state law, and that at the same time the federal law can be contemplated as establishing a uniform system of bankruptcy throughout the United States; but, however that may be (and we return to the subject hereafter), we are not satisfied that as a matter of settled Ohio construction the words have any different sense from that given to them by the Supreme Court of the United States in Coder v. Arts, supra, and reaffirmed with emphasis and elaboration in Van Iderstine v. National Discount Co., 227 U. S. 575, 582, 33 Sup. Ct. 343, 57 L. Ed. 652.

The discussion in the two cases just cited makes very clear that, as matter of accepted general construction and by the inherent meaning of the words, a preference is not, merely because it is a preference, a fraudulent conveyance, and that from the same viewpoint a conclusion of intent to "hinder, delay or defraud creditors," based only on the accomplishment of a preference among honest creditors, cannot stand. It follows that, before we can accept the contrary construction as part of the law of Ohio which we must follow in applying the statutes of that state, it must have been clearly declared by its courts. In support of this contrary construction, we are cited to two Ohio cases. Jamison v. McNally, 21 Ohio St. 295; Stivens v. Summers, 68 Ohio St. 421, 438, 67 N. E. 884. These do hold that a deed is obnoxious to this Ohio statute, if it is constructively fraudulent as well as if it is actually fraudulent; but this rule does not reach a conveyance free from criticism, except because it is a preference. Such a conveyance is, for that reason alone, no more constructively fraudulent than it is actively fraudulent. It is not fraudulent at all, unless some statute makes it so, constructively. As was said by Mr. Justice Lamar in the Van Iderstine Case, speaking of intent to prefer and intent to defraud (227 U. S. 582, 33 Sup. Ct. 345, 57 L. Ed. 652):

"But the two purposes are not of the same quality, either in conscience or in law, and one may exist without the other. The statute recognizes the difference between the intent to defraud and the intent to prefer, and also the difference between a fraudulent and a preferential conveyance. One is inherently and always vicious; the other innocent and valid, except when made in violation of the express provisions of a statute. One is malum in se and the other malum prohibitum, and then only to the extent that it is forbidden."

Stivens v. Summers, 68 Ohio St. 421, 438, 67 N. E. 884, was an attack on a deed made by an insolvent without adequate consideration, and therefore constructively fraudulent against existing creditors. Obviously it does not reach a deed merely preferential. Jamison v. McNally was the same kind of a case. So far as the conveyance secured a debt, and was thereby apparently a preference, it was sustained. It was pronounced constructively fraudulent and within this statute only as to the surplus value above the debt secured; that is, only to the extent that there was no consideration. This decision, therefore, furnishes no support for thinking that, in Ohio, a merely preferential conveyance is obnoxious to the "hinder, delay or

defraud" clause; and we find no later decisions of the Ohio Supreme Court more closely applicable. It is to be noted that since the Ohio statute above quoted took practically its present form in this respect, in 1898 (93 Ohio Laws, p. 290), all preferential transfers by an insolvent have been forbidden as expressly and absolutely as are fraudulent conveyances, and so there has been no occasion to expand, by construction, the prohibition of the latter so as to reach the former. In the absence of any statutory forbidding or regulating of preferences by insolvents, cases have frequently arisen where the preference given has seemed unconscionable, and of such character are most, if not all, of the decisions which have treated particular preferences as within the statute of fraudulent conveyances in its original form; but where preferences are expressly forbidden by law, or where some are forbidden and some permitted, so that they are directly affected and controlled by one statutory provision, there seems no occasion nor room for resorting to the constructive and indirect effect of another provision in the same or in another statute.

[2] It is next said, because the corporation was in fact insolvent, and because Joseph and Warner were controlling directors and were by this transaction personally indemnified on account of their suretyship for their corporation, that there was a constructive fraud, and that Rouse v. Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644, compels this conclusion. As a construction of the Ohio statute, this case must be followed by this court; but the Supreme Court of the United States has said that this decision "proceeded in part upon a theory that the property of an insolvent corporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence." Smith Co. v. McGroarty, 136 U. S. 237, 241, 10 Sup. Ct. 1017, 34 L. Ed. 346. The Supreme Court again expressed its disapproval of the extreme doctrine when, speaking by Mr. Justice Brewer in Sanford Co. v. Howe Co., 157 U. S. 312, 318, 15 Sup. Ct. 621, 623 (39 L. Ed. 713), it said:

"Are creditors, who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also an indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation because, forsooth, they have also the guaranty of some of the directors or stockholders, whose guaranty may or may not be worth anything?"

And see full review of decisions in Hollins v. Brierfield Co., 150 U. S. 371, 385 (14 Sup. Ct. 127, 37 L. Ed. 1113).

From the same point of view, Judge (later Mr. Justice) Lurton, speaking for this court, said in Rickerson v. Farrell, 75 Fed. 554, 565, 23 C. C. A. 302, 313:

"This court has not adopted the theory that the assets of a corporation become a trust fund in the hands of its directors, for equal distribution among all creditors upon the occurrence of insolvency. * * * If such a corporation may prefer a stranger who is a creditor, it may, likewise, prefer one of the corporators."

To the same effect see Judge Taft's opinion in Brown v. Grand Rapids Co., 58 Fed. 286, 292, 7 C. C. A. 225, 22 L. R. A. 817.

These cases admonish that Rouse v. Bank must not lead us beyond the real point there decided, which seems to be that the trust which makes it a constructive fraud to prefer one creditor over another arises when a corporation has abandoned the objects of its organization, yielded up dominion of its property to its creditors for administration and ceased to be a going concern. This interpretation and this limitation are confirmed by Damarin Co. v. Huron Co., 47 Ohio St. 581, 590, 26 N. E. 37, and were adopted by this court in Haines v. Bank, 203 Fed. 225, 121 C. C. A. 431.

[3] The record does not justify a conclusion that when the deed and mortgage were given, or that when the notes and money were distributed the equipment company had ceased to be a going concern. It was doubtless insolvent, and it was discontinuing a part—the larger part—of its business; but it was retaining assets having a book value of more than $200,000 and having actual value such that the later bankruptcy appraisal showed $37,000. Its debts above those to the banks were comparatively small. It had a large amount of personal property to sell and of accounts receivable to liquidate in connection with the branch of business discontinued, and it intended to continue another branch which had been profitable and might be again. In short, instead of yielding up dominion over all its property and going out of business, it was retaining dominion for the purpose of making its own present and future arrangements with creditors, and it was continuing its corporate operations, expecting to avoid a collapse for some little time, and hoping to do so permanently. Since the Supreme Court in the Brierfield and Sanford Cases disapproved the extreme application of the trust fund theory, we find no authoritative or persuasive decision authorizing its use in a case like this. Instances of application have been either where there had been complete abandonment of the status of "going concern," or where, as in the Rickerson Case, the managing directors had taken advantage of their position to mislead the unsecured creditors.

Rev. St. § 6343 (Gen. Code, § 11104) also invalidates any preferential conveyance by an insolvent, and this provision is said to inure to plaintiff's benefit through the operation of section 70e. If it were necessary to pass upon this question in order to decide this case, it so far suggests conflict between the Ohio statute and the purpose of the Bankruptcy Act to establish a uniform rule, and is so closely analogous to the matter involved in Stellwagen v. Clum, 218 Fed. 730, 134 C. C. A. 408 (opinion filed November 4, 1914), that we might find it necessary to certify the question, as we did there; but, for reasons to be stated, we think that should not be permitted to be, on this review, the controlling issue.

[4] The question of preference being passed, and the question of constructive fraud because of preference or because of the trust fund theory being eliminated, there remains the question of actual fraud, as defined in the Van Iderstine Case. The District Court did not make any finding on this subject. We think the record forbids the

conclusion that there was any unfairness in the transaction, unless unfairness is inherent in a preference by an insolvent corporation of a bank debt upon which its directors and managers are personally liable. The agreed price, $50,000, was a fair price; it was much less than the book value, but it was more than any offer which had ever been received after months of effort to sell; and the record strongly indicates that it was a good bargain for the seller and a bad one for the purchaser. Warner and the Warner Company have not appealed from the decree, which took the property away from them and relieved them from the payment of the purchase price. True, if there was a value in the property and good will above the purchase price, Warner would get a benefit from it; but no one would buy such a property who did not expect to make a profit—and a large one—and Warner was the only person in sight specially fitted to take the property over and carry on the business. His connection with the transaction was entirely open, and there accrued to him no concealed advantage and no actually unfair advantage—nothing save the preferential benefit. Neither the equipment company nor Joseph retained any interest of any kind in the property or had any advantage from the deal, except that the corporation debts were reduced and Joseph's suretyship liability correspondingly modified. Upon the theory of actual fraud, the bill must fail; and, from what has been said, it is evident that the decree below must be reversed.

[5] This would, ordinarily, lead to a direction that the bill be dismissed; but we are not satisfied to make that final disposition of the case. The theory that there was a preference in violation of the Bankruptcy Act (or of section 6343, Rev. St. Ohio) discloses, upon the facts proved, a meritorious controversy that ought to be decided, and that might better be decided in this case than in another case to be now commenced. This theory does not necessarily affect the conveyance and notes as much as it does the later distribution of the notes and money, and yet the two are closely involved. The deed has been set aside as against Warner, and he has not appealed. That it should be invalid as to him and yet valid to the extent of the interest of the banks suggests complications. Further, it would seem that a final decree now made or directed by us would be appealable to the Supreme Court, and that court might think that the pleadings sufficiently raised the issue of preference under the Bankruptcy Act, and might finally decide the case on that issue. Since the District Court sustained the defendants' contention that this issue was not on trial, it is probable that they did not take their full proofs on that subject, and a final decision on the present record might be unjust. Under these unusual conditions, we see no way to insure that the full controversy shall be finally decided, in this case and upon a proper record, save to direct that the decree be reversed as to appellants and the case remanded; that the plaintiff have opportunity to amend his bill so as sufficiently to allege a case of preference both under the state law and the Bankruptcy Act; that, if he does so, the defendants have opportunity to amend their answer, and that both parties take further proofs, if desired, on these issues; and that a de-

cree be entered thereupon as to the District Court shall seem proper. If plaintiff does not care to amend, his bill shall be finally dismissed as against appellants. Appellants will recover costs of this court.

It should be understood that we look upon that part of Rev. St. § 6343 (section 11104, Gen. Code), above quoted as covering two measurably distinct subjects, which, until 1898, had always been found in separate sections. So far as the section affects preferential conveyances by an insolvent we have refrained from any discussion, reserving that subject for future consideration and decision or certification, if it shall eventually seem to present a controlling question. So far as this section invalidates conveyances for other reasons than because preferential, we do consider it, and we reverse the case upon that issue alone.

[6] Since the court below had not lost control of its decree when this appeal was taken, and its power has been suspended pending the appeal, we think (without intimating any opinion as to the rightful course) that it will now have power to vacate or revise its decree as to Warner, if it shall think justice requires such course.

BANKERS' SURETY CO. v. TOWN OF HOLLY.†

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4085.

1. PROCESS ⟸158—MOTION TO QUASH SERVICE—SPECIFICATION OF DEFECTS.
   A motion to quash the service of summons for the reason that it was not valid nor authorized might properly have been overruled on the ground that it presented nothing upon which the trial court could rule, as such a motion must definitely point out the defects in the service, and nothing beyond the scope of the motion will be considered.
   [Ed. Note.—For other cases, see Process, Cent. Dig. §§ 218–220; Dec. Dig. ⟸158.]

2. APPEAL AND ERROR ⟸677—REVIEW—MATTERS NOT RULED ON BELOW.
   Where a motion to quash the service of the summons was insufficient to present anything upon which the trial court could rule, and the record did not show that it was not overruled on this ground, there was nothing for the Circuit Court of Appeals to review.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2877; Dec. Dig. ⟸677.]

3. INSURANCE ⟸627—FOREIGN CORPORATIONS—SERVICE OF PROCESS—TECHNICAL DEFECTS.
   In an action against a foreign surety company, an objection to the service of the summons because made upon the deputy commissioner of insurance, instead of the commissioner, appointed by defendant as its attorney upon whom service might be made, pursuant to statute, was very technical, and did not appeal favorably to a court of justice, where defendant had received the summons and complaint.
   [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1573, 1574; Dec. Dig. ⟸627.]

4. INSURANCE ⟸627—FOREIGN CORPORATIONS—SERVICE OF PROCESS—STATUTORY PROVISIONS.
   Under Laws Colo. 1907, p. 447, § 22, requiring foreign insurance companies, before transacting business in the state, to appoint the commis-

---

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 31, 1915.

sioner of insurance their attorney upon whom process may be served, and to stipulate that such authority shall continue in force so long as any liability remains outstanding against the company in the state, where a foreign surety company, after filing a power of attorney irrevocably consenting that process might be served upon the commissioner, withdrew from the state, and its withdrawal was accepted by the commissioner of insurance, but it never attempted to revoke such irrevocable consent, and it thereafter executed outside the state a bond to secure performance of a contract with a town in Colorado, which the contractor delivered to the town within the state, the execution and delivery of such bond was a transaction of business in the state, and authorized the service of process in a suit thereon upon the commissioner of insurance, as the bond did not become legally binding until accepted by the town.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1573, 1574; Dec. Dig. ⊂⊃627.]

5. INSURANCE ⊂⊃627 — FOREIGN CORPORATION — SERVICE OF PROCESS — ESTOPPEL.

Where a foreign surety company, which executed an appointment of the commissioner of insurance as its attorney upon whom process might be served in consideration of the privilege of doing business in a state, after withdrawing from the state executed a bond to secure the performance of a contract, attached to and made a part of the bond, and providing that a bond should be given by a surety company regularly incorporated and authorized to operate in the state, the surety company was estopped to deny that it was authorized to do business in the state and was doing business therein, so as to authorize the service of process upon the commissioner of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1573, 1574; Dec. Dig. ⊂⊃627.]

6. PLEADING ⊂⊃236—AMENDMENT—DISCRETION OF TRIAL COURT.

The allowance of amendments to the complaint is a matter within the discretion of the trial court.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. ⊂⊃236.]

7. LIMITATION OF ACTIONS ⊂⊃127—AMENDMENT OF PLEADINGS.

A provision in a contractor's bond that suits brought thereon must be instituted within six months after the breach of the contract did not prevent the amendment of the complaint in an action thereon after the six months had expired, where the amendment stated no new cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. ⊂⊃127.]

8. APPEAL AND ERROR ⊂⊃173—REVIEW—MATTERS NOT RAISED BELOW.

In an action on a contractor's bond, where the point that no notice was given to the surety of any act on the part of the contractor involving a loss for which it would be responsible immediately after the occurrence of the act was neither pleaded nor otherwise presented to the trial court, it could not be considered by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1089, 1091–1093, 1095–1098, 1101–1120; Dec. Dig. ⊂⊃173.]

In Error to the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Action by the Town of Holly against the Bankers' Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. E. Clark, of Denver, Colo., for plaintiff in error.

John H. Fry, of Denver, Colo. (Pershing & Titsworth and Caldwell Martin, all of Denver, Colo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. The town of Holly, Colo., brought suit against the Bankers' Surety Company, an Ohio corporation, and recovered a judgment therein in the sum of $10,000 upon a bond executed and delivered to the town November 15, 1909, to secure the faithful performance of a contract made and entered into between the town and the W. K. Palmer Company, engineers, July 24, 1909, covering certain engineering work in connection with the installation of a sewer system for said town. The surety company claims that the trial court never obtained jurisdiction over it to render such judgment, for the reason that the summons and complaint issued in said action was never served upon it.

We will first consider the record for the purpose of ascertaining what the surety company did in the trial court in the way of raising the question of jurisdiction. The action was commenced in the district court of Prowers county, Colo., September 30, 1910. October 27, 1910, the surety company filed the following motion in the state court:

"Comes now the defendant, the Bankers' Surety Company, by W. E. Clark, its attorney, and appearing especially for the purpose of this motion, and for no other purpose, moves the court to quash the service of the summons herein, for the reason that said defendant is not doing, nor is it authorized to do, any business within the state of Colorado, nor has it been at any time during the year A. D. 1910. W. E. Clark,

"Attorney for Defendant, the Bankers' Surety Company."

This motion was never ruled upon, and need not be further considered. November 16, 1910, the cause was removed by the surety company to the United States Circuit Court for the District of Colorado. August 28, 1911, counsel for the surety company filed in the Circuit Court the following motion:

"Comes now the defendant, The Bankers' Surety Company, by W. E. Clark, its attorney, and appearing specially for the purpose of this motion and for no other purpose, moves the court to quash the service of summons herein for the reason that the same is not valid nor authorized.

"W. E. Clark,

"Attorney for the Defendant, the Bankers' Surety Company."

November 17, 1911, this motion was denied and the surety company ordered to either demur within 10 or answer within 20 days. November 27, 1911, the surety company under protest filed a general demurrer to the complaint. December 21, 1911, the demurrer was overruled, and the surety company ordered to answer within 15 days. January 13, 1912, the surety company answered under protest. The answer alleged that the surety company had done no business in Colorado since October 23, 1909, and set forth the correspondence had between the surety company and the commissioner of insurance of Colorado, which it was claimed had the effect of excluding the surety company from the state on the date mentioned.

When the case came on for hearing February 12, 1913, 2 years and 4 months after its commencement, counsel for the surety company read a formal protest against being compelled to go to trial, first, because

the summons and complaint was served upon the deputy commissioner of insurance, instead of the commissioner himself; second, because the surety company had withdrawn from doing business in the state of Colorado prior to the execution of the bond in suit. The protest was overruled and exception allowed. The town of Holly introduced its evidence in support of the complaint, the surety company taking no part in the trial of the merits, but at the close of the plaintiff's evidence introduced evidence which showed that the commissioner of insurance of Colorado accepted the withdrawal of the surety company from that state October 23, 1909; that A. W. Grant, deputy commissioner of insurance received a copy of the summons issued in the action September 30, 1910, and on the same day mailed said copy, together with a copy of the complaint in the action, also served upon him, to the Bankers' Surety Company, Cleveland, Ohio; and that the surety company acknowledged the receipt of the letter. Counsel for the surety company then moved to dismiss the action for want of jurisdiction. The motion was overruled and exception allowed.

The contract to secure the performance of which the bond was given contained this language:

"The company shall give a bond, acceptable to the town, running to the town of Holly, Colorado, in the sum of ten thousand dollars ($10,000.00), for the faithful performance of this agreement, and guaranteeing that the sewer systems when completed shall be practical, efficient sewer systems in every respect. Said bond to be given by a surety company regularly incorporated, and authorized to operate in Colorado."

The bond itself contained the following recital:

"Whereas, said principals have entered into a certain written contract, a copy of which is hereto attached and made a part hereof, bearing date the 24th day of July, 1909, covering certain engineering work in connection with the installation of a sewer system in the town of Holly, Colorado, and supervising the work of construction."

Palmer, of the W. K. Palmer Company, delivered the bond to the town of Holly, and it was accepted by said town. The proof of service of the summons and complaint was as follows:

"State of Colorado, City and County of Denver—ss.:

"Myles P. Tallmadge, being first duly sworn, deposes and says that he is over the age of twenty-one years and is not interested in or a party to the within entitled action; that he received the within summons, together with a copy of the complaint in the within stated action, on the 30th day of September, A. D. 1910, and personally served the same upon William L. Clayton, commissioner of insurance of the state of Colorado, by leaving with Alexander W. Grant, deputy commissioner of insurance of said state, and chief clerk of said commissioner of insurance, personally, in the office of said commissioner of insurance in the capitol building of said state of Colorado, between the hours of three and four o'clock in the afternoon of said last-mentioned day, a true copy of the within summons, together with a copy of the complaint in the action therein mentioned, thereto attached; and deponent further says that he knows the person served as aforesaid to be the duly authorized agent of the Bankers' Surety Company, a corporation of the state of Ohio, for the purpose of service of process on said surety company, the person mentioned and described in said summons as one of the defendants in the action therein mentioned. Myles P. Tallmadge.

"Subscribed and sworn before me this 30th day of September, A. D. 1910. My commission expires February 26, A. D. 1913.

"[Seal.] Alexander C. Hitzler, Notary Public."

Section 22, Session Laws of Colorado of 1907, page 447, reads as follows:

"Sec. 22. (Appointing Commissioner—Attorney.) No foreign insurance company shall, directly or indirectly, issue policies, take risks or transact business in this state, until it shall have first appointed, in writing, the commissioner of insurance to be the true and lawful attorney of such company in and for this state, upon whom all lawful processes in any action or proceeding against the company may be served with the same effect as if the company existed in this state. Said power of attorney shall stipulate and agree, upon the part of the company, that any lawful process against the company which is served on said attorney shall be of the same legal force and validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding against the company in this state. A certificate of such appointment, duly certified and authenticated, shall be filed in the office of the commissioner, and copies certified by him shall be deemed sufficient evidence, and service upon such attorney shall be deemed sufficient service upon the principal."

The appointment by the surety company of the superintendent of insurance of the state of Colorado as a person upon whom service of process in suits against it might be served, reads as follows:

"Know all men by these presents, that the Bankers' Surety Company, a corporation created by and organized under the laws of the state of Ohio, and thereby authorized to transact the business of fidelity and guaranty insurance, desiring to transact such business within the state of Colorado, pursuant to the laws thereof, does by these presents irrevocably consent that actions may be commenced against said company in the proper court of any county in the state of Colorado in which the cause of action shall arise, or in which the plaintiff may reside, by service of process upon the superintendent of insurance of the state of Colorado; and the said the Bankers' Surety Company does hereby, in consideration of the privilege of doing business in the state of Colorado as aforesaid, stipulate and agree that such service of process shall be taken and held in all courts to be as valid and binding as if due service had been made upon said company according to the laws of said state of Colorado, or of any other state. And that the authority shall continue so long as any liability remains outstanding against the company in the state of Colorado.

"In witness whereof, the said company, in accordance with a resolution of its board of directors, duly adopted by said board on the eleventh day of July, A. D. 1902 (a certified copy whereof is hereto attached), hath to these presents affixed its corporate seal and caused the same to be subscribed and attested by the president and secretary, at the city of Cleveland, in the state of Ohio, on the eleventh day of July, 1902.

"Harvey D. Goulder, President."

[1, 2] The motion to quash the service of the summons made in the federal court presented nothing upon which the trial court could rule. It was equivalent to a motion to quash the service for the reason that the service was not good. The trial court would have been fully justified in overruling it for this reason, and nothing appears in the record to show that it did not do so. As the record presents no question upon which the trial court ruled, there is no question for this court to review. Board of Com'rs v. Sutliff, 97 Fed. 270, 38 C. C. A. 167; Railway Co. v. Henson, 7 C. C. A. 349, 351, 58 Fed. 530, 532; Philip Schneider Brewing Co. v. American Ice Mach. Co., 23 C. C. A. 89, 100, 77 Fed. 138, 149; Manufacturing Co. v. Joyce, 4 C. C. A. 368, 370, 54 Fed. 332, 333.

A motion to quash the service of process must distinctly point out the defects in the service, and nothing beyond the scope of the motion will be considered. Cheney v. Chicago City Nat. Bank, 77 Ill. 562; Smith v. Delane, 74 Neb. 594, 104 N. W. 1054; Bucklin v. Strickler, 32 Neb. 602, 49 N. W. 371; Brown v. Goodyear, 29 Neb. 376, 45 N. W. 618; Freeman v. Burks 16 Neb. 328, 20 N. W. 207; Smelt v. Knapp, 16 Neb. 53, 20 N. W. 20; Perkins v. Mead, 22 How. Prac. (N. Y.) 476; Thibault v. Connecticut Valley Lumber Co., 80 Vt. 333, 67 Atl. 819; Barrows v. McGowan, 39 Vt. 238.

[3-5] The point that the service of the summons was bad because made upon the deputy commissioner of insurance, was first made in a so-called protest read when the case was called for trial about 2 years and 4 months after its commencement. As the surety company received the summons and complaint the objection appears to be very technical, and does not appeal favorably to a court of justice. It is doubtful whether having made a motion to quash the service of the summons without specifying therein the defects in the service, the surety company could again be heard to question such service. But, laying this proposition aside, we come to consider whether the evidence introduced at the trial by the surety company shows that it was not doing business in Colorado on September 30, 1910, the date of the service of the summons, or had not done business in Colorado with reference to the subject-matter of the litigation prior to the date of said service. It is true that the withdrawal of the surety company from the state of Colorado was accepted by the commissioner of insurance on October 23, 1909, but it also appears that it never attempted to revoke its irrevocable consent that actions might be commenced against said company in the proper court of any county in the state of Colorado in which a cause of action should arise or in which the plaintiff might reside by service of process upon the superintendent of insurance. The bond in question was executed by the surety company at Kansas City, Mo., and delivered by the principal obligor to the town of Holly in Colorado, and did not become legally binding until it had been so accepted by said town of Holly, and the contract, which was attached to the bond and made a part thereof, provided that the bond should be given by a surety company regularly incorporated and authorized to operate in Colorado.

We are of the opinion that the execution and delivery of the bond in question to the town of Holly, in Colorado, for the purpose of securing the faithful performance of a contract to be performed in Colorado, was a transaction of business in Colorado, and authorized the service of process in a suit brought upon the bond upon the commissioner of insurance. We are further of the opinion that, the bond having been executed, delivered, and accepted with full knowledge of the language of the contract, which required said bond to be signed by a surety company regularly incorporated and authorized to operate in Colorado, the surety company is estopped from asserting that it was not doing business in said state. The execution and delivery of the bond, with the contract attached thereto and made a part thereof, was a representation to the town of Holly that the surety com-

pany was authorized to do business in Colorado and was doing business therein. Having executed and delivered the bond under that representation, it may not now, when sued upon the bond, allege that it was not authorized to do business in Colorado at the time it executed and delivered the bond. That the execution and delivery of the bond to secure the performance of the contract in question was the transaction of business in Colorado is supported by the following authorities: Mutual Life Insurance Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; Equitable Life Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; Mutual Life Insurance Co. of New York v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181; Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. Upon the question of estoppel the following cases may be cited: Ehrman v. Teutonia Insurance Co. (D. C.) 1 Fed. 471; Phœnix Ins. Co. v. Pennsylvania R. R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405, and cases cited; Sparks v. National Masonic Acc. Assn. (C. C.) 73 Fed. 277; Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357; Railroad Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354; Foster v. Charles Betcher Lumber Co., 5 S. D. 57, 58 N. W. 9, 23 L. R. A. 490, 49 Am. St. Rep. 859; Barricklow v. Stewart, Executor, 31 Ind. App. 446, 450, 68 N. E. 316; Berry et al. v. Knights Templars' & Masons' Life Indemnity Co. (C. C.) 46 Fed. 439, 440; Sparks v. Accident Association, 100 Iowa, 458, 69 N. W. 678; John Deere Plow Co. v. Wyland et al., 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304, and John Deere Plow Co. v. Spatz, 69 Kan. 255, 76 Pac. 863; Stewart v. Harmon et al. (C. C.) 98 Fed. 190, 191; Diamond Plate Glass Co. v. Minneapolis Mut. Fire Ins. Co. (C. C.) 55 Fed. 27, 29; Minneapolis Fire & Marine Ins. Co. et al. v. Norman, 74 Ark. 190, 85 S. W. 229, 230, 109 Am. St. Rep. 74, 4 Ann. Cas. 1045.

We have examined Hunter v. Mutual Reserve Fund Life Ass'n, 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; Territory of New Mexico ex rel. Caledonian Coal Co. v. Baker, 196 U. S. 432, 25 Sup. Ct. 375, 49 L. Ed. 540; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; Cooper Mfg. Co. v. Ferguson & Harrison, Partners, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137—cited by counsel for the surety company, and find that they are clearly distinguishable from the case at bar in their facts, and in principle sustain the position here taken. None of the cases cited by counsel present a case where a citizen or municipal corporation of a state with whom a foreign corporation has transacted business is seeking to enforce a liability under such a state of facts as presented by this record. We conclude that the trial court, upon the record before it, had jurisdiction to proceed and adjudicate the rights of the parties.

[6] It is assigned as error that the court erred in allowing the

plaintiff below to amend its complaint. No exception was taken to the order allowing the amendment, and there was no error in making the order, as it was a matter within the discretion of the trial court, which was wisely exercised.

[7] The bond provided that suits at law or proceedings in equity brought on the bond to recover any claim thereunder, must be instituted within six months after the breach of the contract. It is claimed that at the time the complaint was amended, the six months had expired, but the amendment stated no new cause of action, and the point is without merit; furthermore the point was never presented to the trial court in any way.

[8] There was no error in overruling the demurrer to the amended complaint as it stated a good cause of action. The point that no notice was given to the surety company of any act on the part of its principal in the bond which would involve a loss for which the surety company would be responsible immediately after the occurrence of such act was neither pleaded by the surety company nor otherwise presented to the trial court, and therefore cannot now be considered. The point that the evidence did not support the verdict was in no way presented to the trial court.

It results from what has been said that the judgment below must be affirmed.

And it is so ordered.

CHICAGO, ST. P., M. & O. RY. CO. v. BANCROFT DRAINAGE DIST.

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

No. 4146.

DRAINS ⊜76—DRAINAGE BOARD—NOTICE OF HEARING—PUBLICATION.

Under the rule of decision in Rev. St. Neb. 1913, § 1877, relating to the apportionment of benefits for a drainage improvement, and providing that "a notice shall be inserted for at least one week in a newspaper published at the county seat stating the time when, and the place where, the directors shall meet for the purpose of hearing all parties interested in the apportionment of benefits by reason of the improvement, the word "for" is equivalent to "during," and notice is required to be published at least during the week immediately preceding the meeting. If the publication is made in a weekly paper and the first publication is more than a week before the date of the meeting, it must be continued in the subsequent issues until that time.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81; Dec. Dig. ⊜76.

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

Reed, District Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; Wm. H. Munger, Judge.

Action by the Bancroft Drainage District against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Wymer Dressler, of Omaha, Neb. (George W. Peterson, of St. Paul, Minn., and Edgar R. Hart and A. A. McLaughlin, both of Omaha, Neb., on the brief), for plaintiff in error.

P. M. Moodie and O. C. Anderson, both of West Point, Neb., for defendant in error.

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

HOOK, Circuit Judge. This case involves the validity of an assessment levied by the Bancroft drainage district in Nebraska against the right of way and lands of the railway company. The gross cost of the work was charged against the property in the district and apportioned among the several tracts and parcels according to units of benefit. A statute of Nebraska required that:

"A notice shall be inserted for at least one week in a newspaper published at the county seat, stating the time when, and the place where, the directors shall meet for the purpose of hearing all parties interested in the apportionment of benefit by reason of the improvement." Section 1877, R. S. Neb. 1913.

The directors of the district fixed their meeting for September 11, 1909. The notice was published in a weekly newspaper of the issue of September 3d, but not in the next issue of September 10th, the day before the hearing. It is conceded that the railway company had no actual knowledge of the organization or proceedings of the district or of the hearing referred to. The principal question here is of the sufficiency of the publication. The district contends that the statutory requirement is satisfied by one publication in a weekly newspaper if made at least one week before the hearing regardless of a longer time intervening. The railway company contends that, if the first publication is more than one week before the hearing, it should be followed by insertions in each issue of the newspaper up to the date fixed, and therefore in the present instance there should have been a publication on the 10th of September. The trial court with some doubt held with the district.

In Nebraska such statutes must be literally complied with. The publications required are jurisdictional. Leavitt v. Bell, 55 Neb. 57, 64, 75 N. W. 524; Wakeley v. Omaha, 58 Neb. 245, 78 N. W. 511. There are two lines of decisions of the Supreme Court of that state each resting upon the peculiar statutory phrase employed. In Lawson v. Gibson, 18 Neb. 137, 24 N. W. 447, the phrase was "for at least thirty days before the day of sale, by advertisement in some newspaper." The court adopted the doctrine of Whitaker v. Beach, 12 Kan. 493, and held that:

"The notice must be first published at least thirty days before the day of sale, and continued in each successive issue of the paper up to the day of sale."

In the Kansas case the court held that "for" meant "during." It said:

"Such is a common signification of the word, and unless it have that meaning here it is entirely superfluous. If the Legislature intended that a single insertion in the paper should be sufficient, they would have expressed this

intention much more clearly by omitting 'for,' and saying only 'at least thirty days.'"

In Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524, the expression was "for at least six days prior." The court said:

"The word 'for' in that phrase means 'during,' and the phrase must be construed as though it read that the city council shall give notice of its sitting as a board of equalization at least during the six days immediately prior to the date of its so convening."

Lawson v. Gibson, supra, was followed, and the court approved Scammon v. Chicago, 40 Ill. 146, where the statute provided:

"Notice shall be given by said commissioners by six days' publication in the corporation newspaper."

State v. Cherry County, 58 Neb. 734, 79 N. W. 825, involved the publication of a proposition to issue bonds to be voted upon at an election. The statute required the question with a statement of the details "to be published for four weeks in some newspaper published in the county." It was inserted in four successive weekly issues, but the election day was less than a week after the last. The court again announced the equivalence of "for" and "during" and said:

"The statute is not complied with unless the notice is published during four weeks preceding the election. Four weeks must intervene between the first publication and the election."

It may be observed that, when not otherwise provided, a publication may be made in either a weekly or a daily newspaper. One publication in a weekly covers the period until the next issue; but if a daily is selected the insertion must be in each daily issue during the time. In Shannon v. Omaha, 72 Neb. 281, 100 N. W. 298, a special assessment was held invalid for lack of sufficient notice of a meeting of the city council to equalize the levy. The statute required a notice of the sitting "for at least six days prior thereto." Publications were made seven consecutive days ending with March 20th. The court cited Leavitt v. Bell, supra, and said:

"According to this rule the notice should have been published for the six days immediately prior to the 24th day of March, and, this not having been done, the notice was invalid."

In the other class of cases the statutory phrases are held to signify the number of publications instead of the duration of time. In Davis v. Huston, 15 Neb. 28, 16 N. W. 820, the statute read, "The publication must be made four consecutive weeks in some newspaper." It was held that:

"The notice should be printed in a weekly newspaper for four weeks successively, etc., and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion."

The requirement in Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065, was a publication "three weeks successively" previous to the time appointed, and it was held to have been complied with by a publication once each week for three successive weeks—three weekly publications.

In Claypool v. Robb, 90 Neb. 193, 133 N. W. 178, the phrase was "the publication must be made four consecutive weeks." A publication in a weekly newspaper once each week for four weeks successively was held sufficient; also, that the publication should be made in all the issues per week of the newspaper selected, if there were more than one.

State v. Hanson, 80 Neb. 724, 115 N. W. 294, involved a publication of a notice of election under another section of the drainage statute. It required the county clerk to "publish a notice once each week for three weeks in a newspaper." The court held that the phrase meant the number of publications rather than the duration of the notice. Various decisions of the court were reviewed with this conclusion:

"There is no conflict in the authorities cited. Where the time mentioned by the statute expresses the duration of the notice, the same must be published for and during the time mentioned. Where, however, the time mentioned indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned. It is apparent that the phrases, 'shall publish a notice once each week for three weeks' and 'a notice shall be given for three weeks by publication,' have different meanings. In the first 'for three weeks' limits the number of publications, and in the other phrase 'for three weeks' fixes the period of time during which the publication must be made."

The expression "for at least one week" in the statute before us falls in the first class of cases mentioned and signifies the duration of the notice; and a week or more of publication should be the week or more immediately before the time of hearing. Leavitt v. Bell, supra. As said in State v. Hanson, supra, the notice must be published "for and during" the time. If in the judgment of the directors of the district the conditions require a longer notice than one week, the publication should be made for and during the longer period. In other words, the statute would not be satisfied by one insertion of the notice long in advance of the day fixed. No step in all the proceedings of the drainage district is more important to the property owners than the decision upon the units of benefit and the apportionment and charging of the cost of the improvement against their property. The clash of individual interests arises then in which the judgment of the public officials, not their discretion, is invoked, and notice to the property owners with opportunity to be present and to be heard in protection of their relative rights is a vital part of the machinery prescribed by the statute. The distinction between the two kinds of publications is suggested in the very section of the statute in which the one before us occurs. The publication or insertion of a notice of the hearing "for at least one week" is first required. Next, the directors must file with the county clerk their completed apportionment and publish a copy of it "once each week for three consecutive weeks in a newspaper." Other sections of the same article are similarly significant. Whether a drainage district shall be formed and, if so, who shall be its directors, is determined at an election on a day fixed by the county clerk. Section 1870 provides that the clerk shall "publish a notice once each week for three weeks in a newspaper," stating among other things the time and place of the election. Section 1882 requires that the board of directors "shall

give notice by publication once each week for three consecutive weeks" of a proposed issue of bonds; and section 1914 requires the publication of "a notice once each week for three consecutive weeks" of an election to vote whether certain work shall be done and the liability incurred.

It is contended that the distinction drawn in the decisions is between giving notice and publishing notice, but we are unable to find where the state court has so held. Cuming County v. Bancroft Drainage District, 90 Neb. 81, 132 N. W. 927, is cited. It did not involve the question here. The expression in the opinion of the court that "due notice of the filing of the report was given" refers to the report made after the meeting at which the benefits were apportioned. The question here is as to the notice of the meeting. None is made as to the subsequent notice of the report filed with the county clerk. Several cases of the publication of city ordinances are cited, but they are not in point. Our attention is also directed to a recent opinion of the Supreme Court of Nebraska in White v. Papillion Drainage District (Neb.) 147 N. W. 218. The court said:

"The notice of apportionment of benefits must be published at the county seat of each county, in which the lands of the district lie, for at least one week, but it is not necessary that it be published daily; if it is published in a weekly paper one week before the meeting for apportionment, it is sufficient."

Counsel also present a copy of the printed record in that case to show there was the same omission in publication as in the case at bar; that is to say, the insertion was in but one issue of a weekly newspaper more than a week before the meeting. We are not authorized to go into the record in that case. The opinion of the court is what is authoritative, not what it might have decided had its attention been directed to some other matter. Obviously the objection was that the publication should have been made in a daily instead of a weekly newspaper, and the court correctly denied it.

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

REED, District Judge (dissenting). I am unable to concur in the conclusion reached in the foregoing opinion. The statute in question requires a notice of the meeting of the directors to apportion benefits to be "inserted for at least one week in a newspaper published at the county seat" stating the time when and the place where the meeting shall be held. The directors of the drainage district selected a weekly newspaper published at the proper county seat in which the notice should be published, and a sufficient notice was published in such paper in its regular issue of Septmber 3, 1911; but it was not published in the succeeding issue of September 10th, which was the day before the time fixed for the meeting. The opinion holds that the meeting of the directors on September 11th, and the apportionment of benefits then made were unauthorized and void because the notice was not also published in the paper of September 10th. A weekly newspaper may rightly be selected in which to publish the notice; and one publication in a regular issue of such paper would satisfy the requirement of the statute if it was one week before the time fixed for

the meeting. Was the publication of September 3d one week before the meeting of September 11th? A statute of Nebraska 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; if the last be Sunday, it shall be excluded." Section 1841, Cobbey's Annotated Statutes of Nebraska, 1909.

And this act applies to publications of legal notices. Pelton v. Drummond, 21 Neb. 495, 32 N. W. 593. In the cited case a petition was filed in the office of the village board on the 3d day of June, 1886, for a license to sell liquors in the village. The statute provided:

"No action shall be taken upon said application until at least two weeks' notice of the filing of the same has been given by publication in a newspaper published in said county."

A sufficient notice of the application was published in the proper newspaper in its issues of June 5th, 12th, and 19th, stating that the applicant would apply to the village board for a license on the third Friday in June, which was the 18th day of that month. The board met on the third Friday in June in regular session, and Tuesday, the 22d day of June, commencing at 7 o'clock p. m. was appointed for the hearing upon said application. The court said:

"What action could the board take until the expiration of that time? Simply none. The Civil Code provides that: '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. If the last day be Sunday it shall be excluded.' The language of this act requires the application of this rule in the computation of the time during which notice is to be given. Saturday the 5th day of June must be excluded. Two weeks then would expire with Saturday, the 19th. As Sunday must be excluded, Monday, the 21st, would have been the first day on which the board could have taken any action whatever in the premises."

Reviewing the decisions of the Supreme Court of Nebraska, the majority holds that the word "for" in a statute similar to the one in question, when it expresses the duration of the time of the publication requires that the notice must be published during the time mentioned; but, when it indicates only the number of times the notice is to be published, the statute is satisfied if the notice is published the number of times specified, and such is the holding of the Nebraska courts.

The meeting of the board of directors in question was fixed for September 11th. The notice was published in the regular issue of the paper on September 3d. The requirement of the number of publications was therefore satisfied; and, if the period of time during which the notice must be published is also satisfied, then the meeting of September 11th was authorized and the apportionment of benefits lawfully made. The day of the publication, September 3d, must be excluded in computing the time of the publication, and the week during which the notice was required to be published expired with September 10th. Pelton v. Drummond, above. The meeting of the board of directors was therefore fixed for the earliest possible date that it could be under the Nebraska statute, and the notice thereof published for the full time required by the statute. In the cited cases of the majority opinion, meetings of the city councils and of boards of directors, and the dates of judicial sales as the case may be, were in all cases held be-

fore the notice thereof was published for the time required by the statute in the particular case. In State v. Hanson, 80 Neb. 724, 115 N. W. 294, the question of the requirement of publication of notice under the drainage statute of Nebraska was involved. The opinion reviews the prior decisions of the Supreme Court of that state and says:

"It is apparent that the phrases 'shall publish a notice once each week for three weeks,' and 'a notice shall be given for three weeks by publication,' have different meanings. In the first 'for three weeks' limits the number of publications, and in the other phrase 'for three weeks' fixes the period of time during which the publication must be made. Alexander v. Alexander, above, is in point and should be followed."

In Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065, a statute requiring the publication of a notice for three successive weeks previous to the time for a hearing upon the probate of a will was involved, and it was held that publication once each week for three successive weeks was sufficient, though the last publication was less than 21 days from the first. The hearing was 16 days later than the first publication.

It is said that the notice in question falls within the first class of notices mentioned in State v. Hanson; if so, the statute is fully satisfied by one publication in a weekly newspaper; and, if such publication is "at least one week" before the apportionment meeting, the requirement of the statute is satisfied as to the duration of the publication. The statute does not require that the meeting shall be held upon the last day of the week for which the notice is required, and the meeting may rightly be held the day following the expiration of the week after the publication. Pelton v. Drummond, above. Of course, a meeting for the apportionment of benefits held long after one publication of a notice in a weekly newspaper as suggested, though that be for one full week, would not be a compliance with the statute; neither would a meeting held long after any number of publications, if more than one was required; but a meeting fixed for and held the day following the expiration of one week is not, it seems to me, vulnerable to such a criticism.

See, also, White v. Papillion Drainage District (Neb.) 147 N. W. 218, where it clearly appears that the sufficiency of the notice of the meeting for the apportionment of benefits was called in question, and the court says:

"The notice of apportionment of benefits must be published * * * for at least one week, but it is not necessary that it be published daily; if it is published in a weekly paper one week before the meeting for apportionment, it is sufficient."

I think that the number of publications of the notice and the duration thereof were in strict compliance with the requirements of the statute, and that the judgment should be affirmed.

CENTRAL TRUST CO. OF NEW YORK v. DENVER & R. G. R. CO. et al.

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

Nos. 4078, 4079.

1. RAILROADS ⟸167—MORTGAGES—CONSTRUCTION—PROPERTY INCLUDED.

A railroad company owned a portion of the stock and a lease jointly with another company on the property of a junction railroad company. On a foreclosure sale of its property, both the stock and leasehold interests were sold and conveyed, by specific reference in the deed, to the purchaser, who, in conveying to a new company, included the leasehold interest but omitted the stock interest, as well as other property acquired by him at the sale. The new company executed a trust deed to complainant to secure an issue of bonds, which covered specifically the railroad and telegraph lines so acquired, together with all after-acquired property, and also "all the property, right, title, and interest of the railway company in and to the following railroads and railroad properties leased by the railway company," followed by a description of the property of the junction railroad company. *Held*, that although the mortgagor had acquired by delivery from the purchaser at foreclosure sale, and then owned the stock interest in the junction company, it was not covered by the mortgage, nor did it pass under the after-acquired property clause, and that complainant had no interest in such stock which would support a suit to question the disposition made of it by the mortgagor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 519–533; Dec. Dig. ⟸167.]

2. RAILROADS ⟸169—INSOLVENCY—RIGHTS OF MORTGAGEE IN UNMORTGAGED PROPERTY.

A mortgagee of a railroad company has no such interest in its unmortgaged property as a general creditor as will support a suit to enjoin a transfer thereof, although the mortgagor is insolvent, where it is not shown that the mortgaged property is insufficient to pay the mortgage debt.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536–548; Dec. Dig. ⟸169.]

Amidon, District Judge, dissenting.

Appeals from the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Suit by the Central Trust Company of New York, trustee, against the Colorado Midland Railway Company, the Denver & Rio Grande Railroad Company, the Rio Grande Junction Railway Company, and George Jay Gould. From a decree dismissing the bill as to the two last-named corporations, complainant appeals. Affirmed.

On December 13, 1912, the appellant brought suit against the Colorado Midland Railway Company, hereafter called the Midland Company, praying the appointment of receivers for all its property under a mortgage or deed of trust to the complainant, as trustee, to secure certain bonds of the Midland Company, and if the earnings proved insufficient, under the receivership, to pay the interest on the bonds, a decree of foreclosure be entered, and that complainant have general equitable relief. On the same day service was had of the subpœna and the District Court, upon appearance of the defendant by solicitors, appointed Mr. George W. Vallery, then president of the defendant, as receiver of all its property. On March 7, 1913, the receiver filed a petition for leave to pay rent to the Rio Grande Junction Company. In this petition he said: "That the total outstanding stock of said Junction Company is

20,000 shares, of which the Midland Company, up to a comparatively recent time before the commencement of this receivership, owned 7,371½ shares; that a much larger number of shares of said stock theretofore belonged and still belongs to the Denver Company; that said 7,371½ shares, heretofore the property of the Midland Company, as aforesaid, had prior to the appointment of your receiver been pledged by said Midland Company as security for a loan, and upon the nonpayment of said loan were sold by the pledgee and purchased by the Denver Company; that at the present time said Denver Company holds and claims to own said 7,371½ shares of the stock of said Junction Company, which together with other stock of said Junction Company, held and claimed to be owned by said Denver Company, comprises all the stock of said Junction Company, with the exception of a few hundred shares, the exact amount of such outstanding shares being unknown to your receiver; that complainant herein, and as well certain of the bondholders of the Midland Company, and as well certain creditors of said company, have claimed, and still claim, that said sale of said pledge stock was and is invalid and void, on the ground that said stock was and still is subject to the lien of the mortgage to secure bondholders, given by the Midland Company to complainant herein, and upon the further ground that if said stock was a free asset, and not covered by the lien of said mortgage, the sale was for divers reasons nevertheless invalid and void and said stock is still the property of the Colorado Midland Railway Company, and that said company or your receiver alone is entitled to any dividends which may be declared and paid thereon, and that your receiver is in grave doubt as to the validity of said sale and whether or not said pledged stock is legally the property of the Denver Company or whether the Midland Company is still the legal owner thereof."

On March 19, 1913, the complainant, having obtained leave to file an amended bill of complaint, did so, making defendants, not only the Midland Company, but the Denver & Rio Grande Railroad Company, hereafter called the Denver Company, the Rio Grande Junction Railway Company, hereafter called the Junction Company, and George Jay Gould. In this bill were set up substantially the facts in the original bill, and also those hereafter stated in relation to the stock once held by the Midland Company in the Junction Company, and that it was subject to complainant's mortgage, and prayed that an injunction issue against the Denver Company, the Junction Company, and George Jay Gould. The new defendants all appeared. On April 9, 1913, the Denver Company and the Junction Company filed separate motions to dismiss the bill as to them. On May 9, 1913, on leave granted, the complainant filed its second amended bill of complaint, and the court ordered that the motions of the Denver Company and the Midland Company to dismiss the bill do stand and be taken as motions to dismiss the second amended bill. On June 26, 27, and 28, 1913, the application for temporary injunction was fully submitted to the court upon numerous affidavits and by it taken under advisement. On July 15, 1913, with leave of court, the complainant filed its third amended and supplemental bill of complaint. It covers 25 pages of the present record. This bill contained allegations showing the jurisdiction of the federal court, and then alleged the existence of two mortgages upon the lines of the Colorado Midland Railway Company, hereafter called the Old Midland Company; a consolidation in 1893 of the Old Midland Company with the Aspen Short Line Railway Company under the name of the Colorado Midland Rail*road* Company; that the mortgages upon the property of the Colorado Midland Railroad Company were foreclosed and the property sold and conveyed to Frederick P. Olcott, who in turn conveyed it to the New Midland Company, and it gave this complainant the deed of trust in suit. The origin and history of the Junction Company is set out in full, from which it appears that the Junction road was constructed by the Junction Company under an agreement with the Denver and the old Midland Companies, by which the Junction road was leased for 50 years to the two railroads (that is, the Denver and Midland), and that each of said roads became the owner of 7,371½ shares of its stock, its total stock being 20,000 shares, of which originally outside parties held 5,257 shares; that the Midland's certificate of shares, after being included in complainant's

deed of trust, was taken by the Midland Company and deposited in pledge with the Equitable Trust Company of New York to secure a loan; that this certificate was sold by the Equitable for nonpayment of its loan and bought by the Denver Company. The bill in effect charges fraud on the part of the Denver Company in this transaction. It closes with the prayer that the Denver Company be enjoined from voting or drawing dividends upon the 7,371½ shares of stock in the Junction Company, acquired through sale by the Equitable, and that it likewise be enjoined from drawing dividends or voting upon any stock acquired by it out of the 5,257 shares originally owned by outside parties, and from exercising any acts of ownership over same, and from claiming that it is not covered by the Midland trust deed, and from, through the Junction Company, collecting any rents on the Junction road from the Midland Company, and from declaring a forfeiture of its lease therein, and, as against the Junction Company, that it be enjoined from transferring the Equitable Trust Company stock, and from paying any dividends thereon, except to some one representing the Midland Company, and from collecting from the Midland Company any arrears of rent, and from declaring any forfeiture of the lease.

This brief synopsis, while lacking many elements of the bill, will be sufficient for an understanding of the opinion of the court. By the order permitting its filing it was provided that the separate motions of the defendants the Denver & Rio Grande Railroad Company and the Denver & Rio Grande Junction Railway Company, to dismiss the bill of complaint herein, stand and be taken as motions to dismiss the third amended and supplemental bill of complaint filed herein this day. This motion of the Junction Railway Company was as follows: "The defendant the Rio Grande Junction Railway Company hereby moves that the bill of complaint in the above-entitled suit, and the whole thereof, be dismissed as against this defendant for insufficiency of fact to constitute a valid cause of action in equity against said defendant in this: (1) It appears by the plaintiff's own showing by said bill that it is not entitled to the relief prayed by the bill against this defendant. (2) It appears by the said bill that certificates for the 7,371½ shares of this company's capital stock formerly held by the defendant the Colorado Midland Railway Company, as set forth in said bill, have never been delivered to the plaintiff; and it also appears by said bill, and especially by the mortgage (Exhibit A) thereto attached and made part thereof, that the plaintiff has not and has never had any lien upon, or any right, title, or interest whatsoever in, said 7,371½ shares of stock, or any portion thereof. * * * (4) That there is in the said bill of complaint no allegation of fact as to any action taken or proposed by this defendant which would entitle the plaintiff to any relief whatsoever as against this defendant."

The motion of the Denver Company was as follows: "The defendant the Denver & Rio Grande Railroad Company hereby moves that the bill of complaint in the above-entitled suit, and the whole thereof, be dismissed as against this defendant for insufficiency of fact to constitute a valid cause of action in equity against said defendant in this: (1) It appears by the plaintiff's own showing by said bill that it is not entitled to the relief prayed by the bill against this defendant. (2) It appears by the said bill that the alleged cause of action as against this defendant is based wholly on the acquisition by this defendant of certain 7,371½ shares of the capital stock of the Rio Grande Junction Railway Company formerly held by the defendant the Colorado Midland Railway Company; and it also appears by the said bill, and especially by the mortgage (Exhibit A) attached to and made a part of said bill, that the plaintiff has not and has never had any lien upon, or any right, title, or interest whatsoever in, said 7,371½ shares of stock, or any portion thereof."

On September 23, 1913, the court, without special reference to the application for a temporary writ of injunction, sustained the motion of the Denver Company and the Junction Company to dismiss as to them, and pursuant thereto dismissed the action as to said defendants. The complainant perfected two appeals: First, from the failure to allow a temporary writ of injunction; and, second, from the order of dismissal. The appellees have filed

in this court a motion to dismiss the appeal from the failure to grant a temporary writ of injunction. This motion has been submitted with the case.

C. C. Dorsey, of Denver, Colo. (Albert Rathbone, Arthur H. Van Brunt, and Albert Stickney, all of New York City, Gerald Hughes, of Denver, Colo., and Joline, Larkin & Rathbone, of New York City, on the brief), for appellant.

Joel F. Vaile, of Denver, Colo. (Elroy N. Clark and Russell G. Lucas, both of Denver, Colo., on the brief), for appellees.

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

SMITH, Circuit Judge (after stating the facts as above). This case has been submitted upon the correctness of the ruling on the motions to dismiss and the refusal to pass upon the application for a temporary injunction with an elaboration and care that is to be approved. It has been examined with great care, but it cannot be expected that this court will in an opinion review all the hundreds of authorities cited.

The motions to dismiss were filed under rule 29 (188 Fed. xix, 109 C. C. A. xix) of those in force February 1, 1913, and have the force and effect of demurrers. In the consideration of such motions the court cannot consider affidavits filed by defendants on disputed questions of fact. This additional difficulty is met with at the outset that, while many affidavits were introduced and are in the record offered by both the complainant and defendants, they were offered on the application for a temporary injunction and not on the motion to dismiss.

Inasmuch as it seems desirable that the court first pass on the motions to dismiss, the court, in considering them, can only consider the third amended and supplemental bill, including, however, the exhibits incorporated therein and such additional matters as are conceded by the complainant.

[1] No allegations were made as the basis of reformation of the mortgage (see 27 Cyc. 1093), and no specific prayer or argument therefor has been made. The question, then, is whether, under the allegations of the petition, the plaintiff had a mortgage on the stock in the Junction Company owned by the New Midland Company or could maintain this action without such mortgage. In its argument the complainant says:

"Like the deed from Mr. Olcott to the Midland Company this mortgage did not expressly describe the Junction stock nor any corporate stock whatever."

This requires a critical examination of the mortgage to see what, if any, language therein includes the stock. The mortgage provides that:

"Whereas, the railway company has, by virtue and in pursuance of the authority granted it by the laws of the state of Colorado and its certificate of incorporation, purchased and acquired and now owns, holds, maintains and operates the lines of railroad formerly held, owned, maintained and operated by the Colorado Midland Railroad Company."

And later provides that:

"Whereas, the railway company, in the exercise of the powers in that behalf possessed by it under the laws of the state of Colorado, and its certificate

of incorporation, and for the purpose of paying and discharging its obligations and indebtedness created and incurred in the purchase of the said property of said the Colorado Midland Railroad Company, and of paying and discharging other obligations and indebtedness created by it, and in order to provide for the payment, funding, exchanging, and retiring of the said mortgage bonds issued by said the Aspen Short Line Railway Company, and to provide for the purchase of the railroad and railroad property of said the Busk Tunnel Railway Company, in case it shall be deemed advisable and proper to make such purchase, and for its other lawful corporate purposes, and in accordance with resolutions duly adopted by its stockholders and by its board of directors at meetings of said stockholders and of said board of directors, duly and regularly called and held, has determined to make and issue its first mortgage gold bonds to the aggregate amount of ten million dollars ($10,000,000)," and "hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the trustee, party of the second part, and to its successor or successors in the trust herein, all the railways, railway property and franchises of the railway company, party of the first part, of every kind and nature, whether now owned or hereafter to be acquired, and however owned, held or enjoyed, and more particularly described as follows: The railway and lines of telegraph formerly owned by the Colorado Midland Railroad Company, now owned by the railway company. party of the first part. * * * All the property, right, title and interest of the railway company in and to the following railroads and railroad properties *leased* by the railway company: * * * (3) The railroad of the Rio Grande Junction Railway Company, a corporation of the state of Colorado, extending from a connection with the said road of said the Denver & Rio Grande Railroad Company at or near the mouth of Rifle creek aforesaid, in a southwesterly direction to a connection with the said road of said the Denver & Rio Grande Railroad Company on the east line of the northwest quarter of section twenty-three (23), township one (1) south, range one (1) west of the Ute meridian, county of Mesa, state of Colorado, being about sixty-two and eight hundredths (62.08) miles in length, more or less. * * * Also all corporate franchises of every nature whatsoever, relating to said lines of railroad and telegraph, owned or leased by the railway company as aforesaid, together with all and singular the income, endowment, advantages, tenements, hereditaments and appurtenances to said lines of railway and telegraph belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, profits and issues thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, present or prospective, of the railway company, in and to the said lines of railway and telegraph above described and owned or leased by the railway company, and every part of the same and every parcel thereof, with the appurtenances."

It is apparent that the Old Midland Company and the New both held at least two valuable claims in the Junction property: First, the stock interest for 7,371½ shares; and, second, a lease jointly with the Denver Company of its visible property. In the foreclosure proceeding of the Old Midland of 1897 the master's deed to Frederick P. Olcott transferred all the property held under the receivership. This was on the 8th day of September, 1897. In this deed was the following description:

"Stock of the Rio Grande Junction Railway Company, seven thousand three hundred seventy-one and one-half (7,371½) shares, par value one hundred dollars ($100.00) per share."

There was also included in this deed the Busk Tunnel Railway Company property. When Olcott came to deed the property over to the New Midland Company there was omitted both the stock in the Junc-

tion Company and the Busk Tunnel Railway, and both were omitted from the trust deed to the complainant, but there was specifically carried therein the leasehold interest in the Junction Railway.

The primary question is whether the trust deed accurately and specifically described the property here chiefly in question, viz., the stock in the Junction Company. Thompson on Corporations (2d Ed.) par. 2571. It is claimed that the whole transaction gave the Old Midland Company an equitable interest in the Junction Company and its property. As sustaining this, the appellant cites the unpublished opinion of the presiding judge of this court in the case of Ames et al. v. Union Pacific Railway Co. et al.; National Waterworks Co. v. Kansas City (C. C.) 78 Fed. 428; Guaranty Trust Co. v. Atlantic Coast Electric R. Co. (C. C.) 132 Fed. 68; Id., 138 Fed. 517, 71 C. C. A. 41; New England Waterworks Co. v. Farmers' Loan & Trust Co., 136 Fed. 521, 69 C. C. A. 297; In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609; Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; and numerous other cases.

Let it be conceded that this position is correct, and let it further be conceded that the same equitable interest passed to the New Midland Company. There is nothing to prevent an owner of such a character from subdividing its interest and conveying one part to one vendee and another part to another. The deed to Frederick P. Olcott conveyed both the stock interest in the Junction Railway and the lease upon that railway. When he came to deed to the New Midland Railway he deliberately omitted the stock and the Busk Tunnel Railway, and they were omitted from the trust deed to the complainant, but said trust deed expressly covers the lease upon the Junction Railway. If the New Midland Railway ever acquired this stock it acquired it, not by the deed from Olcott, but by delivery to the New Midland Company. It appears that on December 8, 1897, Mr. George W. Ristine, president of the New Midland Company, sent the certificate for these shares of stock to the secretary and treasurer of the Junction Company, with a request that a new certificate be issued and sent to him. This was done, and the stock has always been in the possession of the New Midland Company until pledged to the Equitable Trust Company.

From these undisputed facts it is clearly apparent that the trust deed to the complainant never covered it. The truth is that this stock had always been carried on the books of the Old Midland Company at a valuation of $1. It had paid no dividends up to the first foreclosure and was at that time regarded as of substantially no value, except for its control over the Junction Company. If the New Midland Company had not only a lease upon but a stock interest in the Junction Company, and in addition thereto had some general equity in the property of the Junction Company, by deliberately striking the stock from the description in the trust deed it distinctly evidenced its purpose to separate its interests in the Junction Company, and the complainant, having no mortgage upon the stock cannot, maintain an action to determine where the title to the stock is or to enjoin any proceedings in connection therewith under its trust deed.

In what has been said there has been no reference to the difference

between existing property in a railroad company at the time of the execution of a mortgage and after-acquired property. The latter is always of necessity covered by some general language, as no one knows what the specific description of after-acquired property is to be. It is therefore essential that no specific description of it be inserted, but that it be covered by a general description. But in this case the stock in question had been in existence for eight years as the property of the Old Midland Company. It and the leasehold had both been specifically described in the deed to Olcott. When the company came to give its trust deed to complainant, it left the leasehold in the description but struck out the stock. As this property was in existence and the property of the railroad, there can be no reason assigned why a specific description of the leasehold was inserted and the stock omitted and why this stock was at all times allowed in the custody of the railroad company, except the quite manifest one that it was not then regarded as of intrinsic value.

[2] It is claimed, however, that the complainant has the rights of a creditor and that it can maintain the action in its capacity as a general creditor of the New Midland Company, and attention is called to the fact that the complaint alleges that the New Midland Company is insolvent, but it is not alleged in the complaint that the property mortgaged is not sufficient to ultimately realize the amount of the trust deed; and the mere fact, if it be a fact, that the Midland Company owes other parties would not entitle the complainant to maintain this suit, if its own security is adequate to meet the obligations due it, nor is there anything in the case of Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696, 127 C. C. A. 184, which would tend to sustain any such right upon its part. No reason is given in the final bill why the Junction Company could not declare a forfeiture of the lease under its terms, if the stipulated rent is not paid and there is no basis for any other of the injunctive relief sought.

The motions to dismiss were properly sustained. This does not amount to a holding that the allegations of the bill if made by the New Midland Company or its receiver might not be sufficient.

The motions to dismiss having been sustained, there was nothing on which to issue an injunction, and, without passing on the motion to dismiss the appeal from the failure to grant an injunction, the action of the court in both matters is affirmed.

AMIDON, District Judge, dissents.

MACKAY v. UINTA DEVELOPMENT CO.

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

No. 3411.

PUBLIC LANDS ⇐19—RIGHT OF PASSAGE FOR STOCK—UNLAWFUL OBSTRUCTION.

Act Feb. 25, 1885, c. 149, § 3, 23 Stat. 322 (Comp. St. 1913, § 4999), which provides that "no person by force, threats, intimidation, or by any fencing or inclosing or any other unlawful means, * * * shall prevent or obstruct free passage or transit over or through the public lands,"

prohibits every method that works a practical denial of access to and passage over the public lands either by persons or stock, and the owner of a large quantity of railroad grant lands, comprising the odd-numbered sections, while the alternate sections are public lands, the entire tract being uninclosed, cannot by a warning notice deprive a stock owner of a reasonable right of way for his stock across the tract, or make him a trespasser and liable in damages because, in crossing, his stock necessarily passes over and consumes grass from some of the land of the private owner.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. ⟸19.]

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action at law by the Uinta Development Company against John C. Mackay. Judgment for plaintiff, and defendant brings error. Reversed.

Barnard J. Stewart, of Salt Lake City, Utah, for plaintiff in error.

John W. Lacey, of Cheyenne, Wyo. (T. S. Taliaferro, of Rock Springs, Wyo., and Herbert V. Lacey, of Cheyenne, Wyo., on the brief), for defendant in error.

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

HOOK, Circuit Judge. The Uinta Development Company sued Mackay for damages for trespass by trailing his sheep across and depasturing its lands in Wyoming. Mackay denied that his acts constituted a trespass, asserted a right to cross the public lands and to do what was necessary for its exercise, and counterclaimed for damages because the company obstructed his passage and wrongfully caused his arrest and criminal prosecution for trespassing. Upon a trial by the court without a jury, a general finding was made and judgment rendered for the company. There were no special findings.

For the purposes of this case the company may be regarded as the owner by purchase of all the odd-numbered sections in a large tract of land formerly a part of the land grant by the United States in aid of the construction of the Union Pacific Railroad. Almost all of the intervening even-numbered sections remained unoccupied public domain. The tract of land in question with its odd and even numbered sections extended 20 miles from north to south. The particular description in the petition of the company's holdings indicates that the tract was 15 miles from east to west. One of its witnesses testified that the distance was about 58 miles. The lands of the company and the public lands were open and unfenced, and there was nothing on the face of the earth by which they could be readily distinguished from each other without a knowledge of surveying. The country was adapted and largely devoted to the sheep industry. The company was so using its property and also the intervening and adjacent public lands. Mackay was likewise in the sheep business. His spring, summer, and fall ranges were north and northwest of the tract in ques-

tion. To the south of it was an unbroken tract of public land and also Mackay's winter range. The season required Mackay to take his band of sheep, about 3,500 head, from the north to his winter range on the south. The customary method was to drive sheep 10 or 12 miles a day, allowing them to graze on the way. The company warned Mackay not to cross its lands. It served a notice on him, setting forth its ownership "of all the odd-numbered sections" in the stretch of country indicated, and forbidding all persons from "trespassing thereon or from grazing or herding or driving any sheep or live stock thereon or across any of said lands, and from in any manner occupying or making use of any portion thereof." Mackay nevertheless started across with his sheep and at the company's instance was arrested on the way. This action for damages followed.

At the conclusion of the evidence Mackay asked the court for a declaration of law that, if it found from the evidence that the company was in the rightful possession of the odd-numbered sections and did not designate a course for him to follow, then as a licensee of the government he was entitled to select a reasonable way over which to trail his sheep, and if it further found that the way he selected was a reasonable one, and was used for the purpose of driving his sheep to and upon the public domain, then, as matter of law, he would not be liable in damages for crossing the company's sections. The court refused the request. There was substantial evidence of all the facts assumed, and upon a trial without a jury the request was a proper way to raise the question of law. Though the arguments have taken a wider range, it is the only question we need decide. Mackay claimed the right to trail his sheep over the even-numbered sections of the public domain and to do what else was necessary to secure it without subjecting himself to a charge of trespass. The company admitted his right as to the public domain, but warned him not to go over any of its lands on penalty of prosecution for trespass. The odd-numbered sections touch at their corners and their points of contact, like a point in mathematics, are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, unsurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights and responsibilities of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an equal right of use of the public domain, which cannot be denied by interlocking lands held in private ownership.

Section 1 of the act of February 25, 1885 (23 Stat. 321, U. S. Comp. Stat. 1913, § 4999), declares unlawful, with some qualifications not material here, all inclosures and assertions of right to the exclusive use and occupancy of any part of the public lands of the United States. Section 3 provides "that no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, * * * shall prevent or obstruct free passage or transit over or through the public lands." Section 4 makes disobedience a misde-

meanor. This statute has been construed to prohibit every method that works a practical denial of access to and passage over the public lands. The offending person is held to have intended the natural consequences of his acts. Some thought at first that, notwithstanding the statute, they might accomplish the result prohibited by erecting fences on their own land not physically touching the public domain, and that any obstruction was an allowable incident of the exercise of a private right. But the Supreme Court said in Camfield v. United States, 167 U. S. 518, 525, 17 Sup. Ct. 864, 867 (42 L. Ed. 260):

"If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all 'inclosures' of public lands, by whatever means, that the act becomes of any avail."

Nor can the obstruction or inclosure be lawfully secured by connecting with the fences of other persons, or by taking advantage of natural obstacles, as by fencing to precipitous bluffs or ravines, or to bodies of water, thickets, etc. Thomas v. United States, 69 C. C. A. 157, 136 Fed. 159; Hanley v. United States, 108 C. C. A. 581, 186 Fed. 711; Lillis v. United States, 111 C. C. A. 362, 190 Fed. 530; Stoddard v. United States, 131 C. C. A. 18, 214 Fed. 566. In the recent Stoddard Case it was argued that section 3 of the statute prohibited the obstruction of free passage or transit over public lands of persons only, not of stock. We held otherwise, saying:

"It is a well-known fact that the free herding and grazing of cattle on the public lands is a legitimate use to which they may be put, and we think Congress must have had the preservation and protection of this use in mind in the enactment under consideration."

This case illustrates the conflict between the rights of private property and the public welfare under exceptional conditions. It is difficult to say that a man may not inclose his own land, regardless of the effect upon others; but the Camfield Case, supra, has been recognized as sustaining the doctrine that "wholesome legislation" may be constitutionally enacted, though it lessens in a moderate degree what are frequently regarded as absolute rights of private property. Interstate Railway Co. v. Massachusetts, 207 U. S. 79, 87, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555. This large body of land, with the odd-numbered sections of the company and the even-numbered sections of the public domain located alternately like the squares of a checker-board, remains open as nature left it. Its appearance is that of a common, and the company is so using the contained public portions. In such use it makes no distinction between them and its own holdings. It has not attempted physically to separate the latter for exclusive private use. It admits that Mackay had the right in common with the public to pass over the public lands. But the right admitted is a theoretical one, without utility, because practically it is denied except on terms it prescribes. Contrary to the prevailing rule of construction, it seeks to cast upon the government and its licensees all the disadvantages of the interlocking arrangement of the odd and even numbered sections because the grant in aid of the railroad took

that peculiar form. It could have lawfully fenced its own without obstructing access to the public lands. That would have lessened the value of the entire tract as a great grazing pasture, but it cannot secure for itself that value, which includes as an element the exclusive use of the public lands, by warnings and actions in trespass.

It is contended that the act of February 25, 1885, is applicable only when the government complains, and not in an action between private litigants. We think, however, that a private litigant cannot recover from another for an invasion of an alleged right founded upon his own violation of the statute. The erection of fences to accomplish what they sought by intangible means would have been a nuisance and a misdemeanor. Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618, was a suit by cattlemen who owned the odd-numbered sections of a railroad land grant to enjoin sheepmen from entering their lands to get at the intermingled sections of the government domain. Its authority here cannot be denied on the ground argued that it was a suit in equity, while this was an action in trespass at law. The result in the case cited did not go upon the ground of an adequate remedy at law. On the contrary, the court went to the root of the principles governing the rights of the parties. The complainants' claim, which was denied, is thus described:

"It seems to be founded upon the proposition that while they, as the owners of the 350,000 acres thus scattered through the whole area, are to be permitted for that reason to exercise the right of grazing their own cattle upon all of the land embraced within these 1,440 square miles, the defendants cannot be permitted to use even the lands belonging to the United States, because in doing this their cattle will trespass upon the uninclosed lands of plaintiffs. In other words, they seek to introduce into the vast regions of the public domain, which have been open to the use of the herds of stock-raisers for nearly a century without objection, the principle of law derived from England and applicable to highly cultivated regions of country, that every man must restrain his stock within his own grounds, and if he does not do so, and they get upon the uninclosed grounds of his neighbor, it is a trespass for which their owner is responsible."

Nor does the case at bar involve a deliberate intent to obtain the benefit of another's pasturage, as in Lazarus v. Phelps, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 363. The question here, which we think should be answered in the affirmative, is whether Mackay was entitled to a reasonable way of passage over the uninclosed tract of land without being guilty of trespass.

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

SANBORN, Circuit Judge (dissenting). The general finding of the trial court, in view of the evidence in the record, in my opinion establishes these facts:

The plaintiff below was the owner of the odd sections and the United States was the owner of the even sections in the tract of land described in the opinion of the majority. For the purpose of taking his sheep from his summer ranch on the north of that tract to his winter ranch on the south of it, the defendant drove his sheep, over the protest and prohibition of the plaintiff, upon and along a strip of land three-fourths of a mile wide upon and across the entire length

or width of some of the plaintiff's sections of land, and caused his sheep to consume nine-tenths of the grass thereon, which was stored by it for the winter for the use of the plaintiff's animals, to the damage of the plaintiff in the sum of $25. Upon this state of facts the court rendered a judgment against the defendant for $25 and costs, and refused to make the declaration of law requested by the defendant and set forth in the opinion of my Associates.

The owner of land is not deprived of his right to recover the damages he sustains by the taking by another of his grass, growing grain, or timber from his land, or the mineral out of it, even if the taker has the right to cross his land; nor is the owner of land deprived of his right to recover his damages for the taking of such grass, timber, or mineral because he fails to point out to the taker where he can rightfully cross his land. I am unable to assent to the view that the refusal of the request in question was error: (1) Because, even if the defendant below had the right to cross the plaintiff's land with his sheep, it was, in my judgment, neither the duty of the plaintiff nor a condition of its right to recover for the consumption of its grasses by the sheep of the defendant that it should select and designate for him a route for him to drive his sheep over the plaintiff's land; and (2) because the declaration requested was immaterial to the plaintiff's right to recover for the taking of the grass, and it clearly appears that the refusal to give it could not have prejudiced the defendant. Whether the defendant had such a right to cross with his sheep or not, he had no right to drive his sheep over, to hold them upon, and to cause them to consume the grasses on a strip three-fourths of a mile wide, and the plaintiff was entitled to the $25 damages which the court found the plaintiff sustained thereby. The taking of these grasses over so wide a strip across the width or the length of such sections of land was not, and the general finding for the plaintiff was, in my opinion, in effect a finding that it was not, a reasonable way for the defendant to cross these sections, and even if it was the defendant could not take the grasses of the plaintiff over so large a tract of land without liability for the damages for the taking.

For these reasons, it seems to me that the declaration of law requested was immaterial to the right of the plaintiff to recover and to the amount of the recovery, and the failure to give it could not have been prejudicial to the defendant. There was no prejudicial error in the trial, and the judgment below should be affirmed.

MACKAY v. UINTA DEVELOPMENT CO.

STEWART-HARDING SHEEP CO. v. UINTA DEVELOPMENT CO.

(two cases).

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

Nos. 3412-3414.

In Error to the Circuit Court of the United States for the District of Wyoming.

Actions at law by the Uinta Development Company against Daniel Mackay and against the Stewart-Harding Sheep Company. Judgments for plaintiff and defendants bring error. Reversed.

Barnard J. Stewart, of Salt Lake City, Utah, for plaintiffs in error.

John W. Lacey, of Cheyenne, Wyo. (T. S. Taliaferro, of Rock Springs, Wyo., and Herbert V. Lacey, of Cheyenne, Wyo., on the brief), for defendant in error.

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

HOOK, Circuit Judge. The controlling features of these cases are like those of John C. Mackay v. Uinta Development Co., 219 Fed. 116, 135 C. C. A. 18, just decided. The same conclusion accordingly follows.

SANBORN, Circuit Judge, dissents.

AMUNDSON v. FOLSOM.

(Circuit Court of Appeals, Eighth Circuit. November 25, 1914.)

No. 4156.

FRAUDULENT CONVEYANCES ⇐108—TRANSACTIONS SUBJECT TO ATTACK BY CREDITORS.

A firm, consisting of a father and son, and each of its members, were insolvent, and its creditors were pressing for payment. Defendant was the president of a bank, which had received for collection many drafts on the firm, most of which were returned unpaid, and he was also an indorser on a note of the firm. The father, at a meeting of the creditors, agreed to take an inventory in support of his claim that the firm had more goods than the creditors admitted, but immediately sold his interest in the firm property, worth over $10,000, to the son for his equity in real estate worth about $350. The son immediately traded the stock and fixtures to defendant for a farm belonging to defendant's brother, title to which was held by the bank as security for a debt; the note on which defendant was an indorser being also deducted from the value of the stock and fixtures. Though in connection with this trade an inventory was taken, the representative of the creditors was excluded. There were no buildings on the land conveyed to the son, but in the month of January he moved thereon a building formerly used as a boathouse, and early in February occupied it and claimed the land as a homestead. *Held* that, though each transaction may have been lawful in itself, findings were justified that the various transactions were parts of a plan to hinder, delay, and defraud the creditors, and to enable the son to secure from the partnership assets a personal exemption in the impending bankruptcy proceedings, which, except for the dissolution of the firm, he could not have obtained, and that defendant, knowing the situation, secured a preferential payment of the note on which he was indorser, and aided the debtors in accomplishing their design.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 333–336; Dec. Dig. ⇐108.]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by N. J. Folsom, as trustee in bankruptcy of Davis & Son and others, against Albert Amundson. From a decree for plaintiff, defendant appeals. Affirmed.

George M. Caster, of Lake Andes, S. D., for appellant.

P. G. Honegger and H. S. Snyder, both of Sioux Falls, S. D. (Bailey & Voorhees and T. M. Bailey, all of Sioux Falls, S. D., and Sears & Snyder, of Sioux City, Iowa, on the brief), for appellee.

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

HOOK, Circuit Judge. This suit was brought by Folsom, as trustee in bankruptcy of the partnership estate of Davis & Son, and the individual estates of Ernest Davis and Ernest B. Davis, the members of the firm, against Albert Amundson, to set aside a transfer to him of a stock of merchandise and fixtures as having been made with intent to hinder, delay, and defraud creditors (Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [Comp. St. 1913, § 9651]), and to recover the property or its value. The case was referred to a master, who made exhaustive findings of fact in favor of the trustee. The trial court approved the findings and rendered a decree against Amundson, the defendant, for the value of the property and interest. This appeal followed.

The trial court and master found that the scheme of Davis & Son, in which the defendant knowingly aided and participated, was to put the partnership assets so far as they could beyond the reach of their mercantile creditors. The principal facts found were as follows:

The firm of Davis & Son, in which Ernest Davis and Ernest B. Davis, his son, were equal partners, conducted a general merchandise business in the town of Lake Andes, S. D., for several years prior to December 29, 1911. At the latter date their stock and fixtures were worth $10,305, their outstanding credits not exceeding $1,200, and all other property not more than $200. Ernest B. Davis, the son, individually owned a house, with two lots, in the town of Lake Andes, subject to a mortgage of $800, leaving an equity of not more than $350. The firm and also the partners individually were insolvent, and had been so for some time. Creditors were pressing for payment of their claims. The amount of their indebtedness is approximately indicated by the fact that claims aggregating $11,729 were proved and allowed in subsequent bankruptcy proceedings. In addition, Davis & Son were also indebted on an unsecured note for $3,000 given a local bank, of which the defendant was president. A note for that amount had been given in July, 1911. The defendant and the cashier of the bank indorsed it personally, and the bank indorsed it without recourse and discounted it in Iowa. When it matured October 7, 1911, it was not paid by Davis & Son, but was renewed, indorsed in the same way, and again discounted. The maturity of the renewal note was January 7, 1912. During the year 1911, and until the latter part of December, many drafts drawn by creditors on Davis & Son came to defendant's bank for collection. Most of them were returned unpaid. In December of that year creditors became insistent. On December 28th, Ernest Davis, the father, attended a meeting with some of the creditors in Sioux City, Iowa, where the condition of the firm was discussed. He claimed that the firm had more of a stock than the creditors thought it had, and it was agreed that an inventory should be taken to see whether his claim was correct, and that to assist in the work they would send a representative to Lake Andes the following day.

Davis then returned home, arriving the evening of December 29, 1911. He went at once to the store, and that night verbally agreed with his son to dissolve the firm and to sell him his half interest in the

firm property for the equity in the son's house and ground, which, as already stated, was worth not more than $350. The following forenoon, December 30th, a written contract of dissolution and sale was accordingly drawn and executed. In the same forenoon Ernest B. Davis, the son, then claiming to own all the firm property, traded the stock and fixtures to defendant for 140 acres of land belonging to a brother of the latter, the legal title to which was in the bank as security for a debt. An inventory was to be taken of the stock and fixtures, and from the value so ascertained the amount of the Davis partnership note, on which defendant was an indorser, was to be deducted. Ernest B. Davis was to take the land at $75 per acre, but was to give the bank his note and mortgage for $4,000 on account of the debt of defendant's brother. The papers—bill of sale, deed, and mortgage—were at once drawn and left in the possession of the cashier of the bank. They then worked at the inventory December 30th and 31st and January 1st, being Saturday, Sunday, and New Year's day, and into the nights of those days. The representative of the creditors arrived Saturday evening, as agreed with Ernest Davis at Sioux City, but he was not admitted to the store. The inventory was completed, and the papers in the trade were exchanged Tuesday, January 2, 1912. The value of the stock and fixtures was determined to be $10,305. After deducting therefrom $3,075, the principal and interest of the Davis note, on which defendant was indorser, there remained $7,230. The land at $75 per acre (the trial court and the master found it was worth but $70) came to $10,500, leaving a balance of $6,500, after deducting the amount of the note and mortgage given by Ernest B. Davis to the bank. Defendant then gave Ernest B. Davis his note for $730, the difference between these net sums. He put another similar stock into the store, and thereafter sold from the intermingled goods at retail. On January 4, 1912, creditors commenced involuntary bankruptcy proceedings against Davis & Son and the partners individually, and adjudication followed January 24th. There were no buildings on the tract of land conveyed to Ernest B. Davis. In the latter part of the month of January he moved there over the ice on the lake a structure formerly used as a boathouse, and early in February he occupied it and claimed the land as a homestead.

The trial court and the special master found from the evidence that the various transactions were steps in a single plan designed to hinder, delay, and defraud the creditors of Davis & Son, that the dissolution of the firm and the transfer from the father to the son were intended only to give the latter an apparent personal title to partnership assets, to enable him to secure a personal exemption which otherwise the law allowed neither of them, and that defendant, knowing the situation, not only secured a preferential payment of the note on which he was an indorser, but aided the Davises in accomplishing their own design.

No useful purpose would be gained by reciting the facts in greater detail or pointing out the inferences reasonably to be drawn from specific facts established. We think the evidence fairly sustains the findings of the master and the confirmation of the court. It is too

narrow a view to regard each step in the transaction separately and independently. It may be true, as argued, that creditors of a partnership merely as such have not a lien on partnership assets, as distinguished from an equity in their administration, or that the members of an insolvent firm may lawfully sever their relation, and one sell his interest in the firm property to the other, or that a debtor in failing circumstances can turn business assets into exempt property and hold it, or that one may lawfully purchase a stock of goods in bulk from another, or, finally, that it is not in itself fraudulent for an insolvent debtor merely to make a preferential transfer, or for his creditor to receive it. But all such things, especially when in close consecutive association, are to be considered, with what else appears, in determining whether the result was the consummation of a preconceived purpose to hinder, delay, or defraud creditors. As in the case of a preference (Van Iderstine v. Nat. Discount Co., 227 U. S. 575, 582, 33 Sup. Ct. 343, 57 L. Ed. 652), the other acts recited are often incidents or methods of a scheme to defraud. Transactions apparently innocent when separately regarded may take on a different signification when seen in their true connection with others. And it is not always safe to venture a prohibited course on a mosaic of sound, but unrelated, rules of law. The dissolution of Davis & Son and the transfer of the firm property to the son was by itself an ordinary occurrence and seemingly lawful; but in view of what preceded and followed, and the doubtful character of the consideration, the reasonable inference is that, knowing failure was at hand, and that under the laws of the state neither partner had an exemption in partnership assets (In re Abrams [D. C.] 193 Fed. 271, 273), they sought a color or appearance of individual title to enable them to evade their creditors.

Counsel invoke the indulgence with which courts regard the homestead right (In re Letson, 84 C. C. A. 582, 157 Fed. 78), but it may be pushed to an unconscionable extreme. The right is not upheld when secured by the fraudulent conversion of nonexempt assets. The case here is materially different from Sargent v. Blake, 87 C. C. A. 213, 160 Fed. 57, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58. There it was affirmatively found that the dissolution of the firm was without fraudulent intent, and that the subsequent preference of the individual creditor was neither fraudulent nor voidable. We agree with the trial court that the defendant here knew of the insolvency and the purposes of the Davises, or, which is legally equivalent, willfully closed his eyes to information within his reach. By indorsement of their note he was their creditor (Kobusch v. Hand, 84 C. C. A. 372, 156 Fed. 660, 18 L. R. A. [N. S.] 660), and to obtain a payment of the note, which was unsecured, except by his indorsement and that of the cashier of his bank, he knowingly aided them in what they set out to accomplish. The trial court correctly saved defendant the right to prove a claim on the note in the bankruptcy proceedings.

We have considered the other questions presented, and think no error was committed with respect to them.

The decree is affirmed.

COX et al. v. WALLACE.

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

No. 1285.

BANKRUPTCY ⊂=143 — PROPERTY PASSING TO TRUSTEE — ESTATE BY THE CURTESY.

Under the law of Virginia, as established by decision that, where a husband has conveyed or caused to be conveyed to his wife land which becomes her statutory separate estate, a presumption arises from the nature of the transaction of an intent on his part to relinquish all his interest in the property, present or prospective, unless some interest is reserved in the conveyance itself, a husband, who had paid the consideration for land which he caused to be conveyed to his wife without reservation, after her death has no interest in such land as tenant by the curtesy, which on his subsequent bankruptcy passes to his trustee, and it is immaterial that a part of the consideration, for which she gave a trust deed at the time of the conveyance, was paid by him after her death, but when he was solvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213–217, 223, 224; Dec. Dig. ⊂=143.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of Fred Cox, bankrupt; Maxwell G. Wallace, trustee. From an order of the District Court, Levey C. Cox, Snow S. Cox, and Mamie J. Casper appeal. Reversed.

Robert H. Talley, of Richmond, Va., for appellants.

John B. Lightfoot, Jr., and S. S. P. Patteson, both of Richmond, Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The record presents this question: Has the bankrupt, Fred Cox, an interest as tenant by the curtesy in the real estate which belonged to his wife at the time of her death?

The real estate in question, which consists of about three acres of improved land in Henrico county, Va., near the city of Richmond, was conveyed to Fannie V. Cox, wife of the bankrupt, on May 24, 1905. The consideration received by the grantors was $2,500, all of which was paid at the time. Of this sum $1,500, or thereabouts, was paid by Cox out of his own funds, and the balance raised on the note of Mrs. Cox, secured by deed of trust on the property. Mrs. Cox died intestate December 2, 1906, and was survived by her husband and three children. The note and deed of trust were then outstanding and unpaid. On February 17, 1908, Cox paid this note with his own money and had the trust deed released to his wife, although she was dead, as it seems he might do under a Virginia statute. Something over five years later on June 16, 1913, Cox was adjudged a voluntary bankrupt, and shortly afterwards a trustee was appointed. The trustee claimed that Cox had an interest in the land in question as tenant by the curtesy, and he sought to recover that interest as an asset of the bankrupt's

estate. The children claimed that they inherited this property in fee simple upon the death of their mother, and that neither the bankrupt nor his trustee had any interest therein. Accordingly they filed their petition in the bankruptcy proceedings for an order to that effect. The matter was thereupon referred to the referee in bankruptcy, who heard the evidence and made a report that the bankrupt had no interest as tenant by the curtesy or otherwise in this real estate of his deceased wife. This report contains a statement of the facts, and discusses quite fully the question of law involved. Upon review of the referee's report, the District Court held that the bankrupt had the interest claimed by the trustee, and ordered the amount to be ascertained. From this decision the heirs have appealed to this court. No opinion was filed, and we are therefore not advised of the grounds upon which the learned District Judge based his conclusion.

The only witness before the referee was the bankrupt himself. He testified in substance that he caused this property to be conveyed to his wife, and paid $1,500 of the purchase price from his own funds, with the purpose and intent of giving the same outright to his wife. The record quotes him as saying: "I gave it to her absolutely." In the referee's report the transaction is summed up as follows:

"It plainly appears—in fact there is no dispute as to the facts in this matter—that Cox paid for this property out of his own funds, but had it conveyed to his wife, a portion of the purchase price being paid when the deed of conveyance was made to his wife and the balance of $1,104 being paid subsequent to her death; and upon this statement of facts both the heirs of Fannie V. Cox and the bankrupt's trustee base their respective claims to this property."

Accepting this version of what took place and the purpose which Cox had in view, since nothing was shown of contrary import, we come at once to the question to be decided. Whatever may be held in other jurisdictions, the law to be followed in this case is the law of Virginia. Bondurant v. Watson, 103 U. S. 281, 289, 26 L. Ed. 447; St. Anthony Falls Water Power Co. v. St. Paul Water Com'rs, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497. And it seems to be the settled law of that state, under existing statutes, that the husband can convey real estate directly to his wife, and in so doing divest himself of any interest therein, the same as though the conveyance were made to a stranger. The rule is clearly laid down that the execution of such a conveyance operates by the act itself to deprive him of any right of curtesy in the lands transferred, although all the common law requisites of that right may thereafter exist. Thus, in Jones v. Jones' Executor et al., 96 Va. 749, 752, 32 S. E. 463, the Supreme Court of Appeals says:

"But where the equitable separate estate is created by the husband, the intention to exclude is presumed or results from the transaction itself, except so far as he may have reserved his marital rights in the instrument creating the separate estate. The law attaches to every absolute conveyance complete alienation of the entire interest of the grantor, so far as the alienation is permitted by the principles of law and equity. Upon this principle, the law presumes that a husband, by an absolute conveyance creating an equitable separate estate in the wife, intended to vest in her his entire interest in the subject conveyed, including all his marital rights, present and future, and

the conveyance is so construed. Consequently a husband has not an estate as tenant by the curtesy in land conveyed by him in such manner as to create an equitable separate estate in his wife, whether the conveyance be made directly to her, or to another person for her, in the absence of a reservation in the conveyance of his right thereto at her death."

The underlying basis of this decision, as we understand it, is that a presumption arises *from the nature of the transaction* of an intent on the part of the husband to relinquish all his interest in the property, present and prospective, unless some interest is reserved in the conveyance itself. But what difference does it make, under this rule of law and the reason upon which it rests, whether the husband conveys to his wife land then owned by himself, or causes to be conveyed to her the land of another, for which he pays the entire consideration? If in the one case he grants so completely that no interest survives the decease of his wife, upon what theory can it be claimed that in the other case he acquires an inchoate right which upon her death ripens into a life estate? With reference to the retention of any interest by the husband, we find it impossible to distinguish between his direct conveyance to his wife and a conveyance to her by a third party at his instance. In the latter case, quite as much as in the former, the presumption of intent arises from the nature of the transaction. And this appears to be decided by the Virginia court of last resort in the later case of Ratliff v. Ratliff, 102 Va. 887, 47 S. E. 1009, where the proposition is stated as follows:

"This court has held that a husband is not entitled to curtesy in the equitable separate estate of his wife, which he has created for her benefit; that he is excluded by the nature of the transaction. Jones v. Jones, 96 Va. 749, 32 S. E. 463. We are of opinion that the reasons given in the case cited for excluding the husband from curtesy in the equitable separate estate, which he has created, with equal force deny his right to curtesy in lands that he has conveyed, or caused to be conveyed, to her without reservation of his marital rights, where such lands constitute, as in the case at bar, statutory separate estate."

This subject is ably discussed and the same views expressed in a thoughtful monogram entitled "Burk's Separate Estates." The conclusion of the learned author is summed up, at page 18, in the following paragraph:

"The husband's marital rights are not only excluded in deeds made by himself to his wife, or to a third person for her benefit, but also in deeds made by third persons, where the consideration moves from the husband and the conveyance is at his instance. In such case the conveyance stands on the same footing as if it had been made by the husband himself."

But the appellee argues that the property rule in question applies only to a completed gift, and that this gift to the wife was not completed, because the husband did not at the time pay the full purchase price. We do not perceive the force of this contention. How does the fact that part of the consideration was left unpaid affect the intention of the husband, which is the point in dispute, to donate this property to his wife, or operate to make the amount of his payment any less a gift to her? It is altogether illogical to say that the husband may create for his wife a separate estate in lands conveyed to her, if the whole consideration is then paid by him, but cannot relinquish his curtesy

rights if a part of the purchase price remains unpaid. We entertain no doubt that in Virginia a husband can convey real estate to his wife subject to an existing incumbrance, and completely divest himself of any interest, present or future, in the equity transferred to her. And if this may be done with land which he himself owns, subject to an outstanding lien, it seems beyond question that he may do the same thing in respect of land conveyed to her at his request by a stranger. Surely it can make no difference whether the real estate purchased is already incumbered, or whether it is pledged by the wife as security for the balance of the consideration. In our judgment, the inheritance of appellants is not made subordinate to a life estate in their father by the circumstance that he did not pay the entire purchase price when he caused this property to be conveyed to his wife.

Nor do we see any reason why Cox could not after his wife's decease pay off the debt which she had secured by a deed of trust on this property. He was solvent at the time, and had the right as against subsequent creditors to do what he pleased with his money. The discharge of this obligation inured to the benefit of his children and was in effect a gratuity to them. If it had happened that the interest of a tenant by the curtesy survived to him upon the death of his wife, he would have been at full liberty to convey that interest to the appellants, and we are convinced that he was equally at liberty to free their inheritance from the lien by which it was then incumbered.

Applying the law of Virginia to the facts found by the referee, which are wholly undisputed, we are constrained to hold that the bankrupt has no interest as tenant by the curtesy or otherwise in the real estate in question. It follows that the decree appealed from must be reversed, and the matter remanded for further proceedings not inconsistent with this opinion.

Reversed.

CRESCENT SPECIALTY CO. v. NATIONAL FIREWORKS DISTRIBUTING CO.

(Circuit Court of Appeals, Sixth Circuit. January 15, 1915.)

No. 2710.

1. APPEAL AND ERROR ⊜954—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

On appeal from an order granting or refusing a preliminary injunction, the single question is whether the action complained of was clearly an improvident exercise of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818–3821; Dec. Dig. ⊜954.]

2. PATENTS ⊜297, 298—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

There is no inflexible rule that a preliminary injunction should not be granted restraining infringement of an unadjudicated patent, nor need infringement be shown beyond reasonable doubt; but where complainant's title is clear, and the record shows a fair probability that the patent is valid, and there is a sufficient showing of public acquiescence therein, and that infringement exists, the same considerations relating to the exercise of discretion in issuing injunctions in equity causes generally pertain in patent causes.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 478, 481–488; Dec. Dig. ⊜297, 298.]

3. PATENTS ⊜303—VALIDITY AND INFRINGEMENT—TOY PISTOL.

The granting of a preliminary injunction against infringement of the Wertz patent, No. 926,308, and the Clark patent, No. 991,956, each for a toy pistol, *held* within the discretion of the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 496–498, 502, 503; Dec. Dig. ⊜303.]

Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge.

Suit in equity by the National Fireworks Distributing Company against the Crescent Specialty Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

H. A. Toulmin, of Dayton, Ohio, for appellant.

Nathan Heard, of Boston, Mass., for appellee.

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

KNAPPEN, Circuit Judge. This is an appeal from an order of the District Court granting a preliminary injunction against infringement of the Wertz patent (No. 926,308, June 29, 1909) and the Clark patent (No. 991,956, May 9, 1911). Both patents relate to toy pistols. All of the pistols here involved are of the magazine type, by which a tape carrying patches of fulminating material at intervals on its surface is automatically fed to the anvil through a movement of the trigger. According to both the Wertz and Clark patents, the tape, which, in the form of a roll, is mounted upon a pin in the hollow handle of the pistol, is held in place by a spring attached to the lower wall of the handle; the drawing back of the hammer causing another spring, which lies in the handle below the tape-holding spring, to feed the tape

to the anvil, formed by the upper end of the removable back of the pistol. Infringement is denied, as well as the validity of each of the patents sued upon, in view of the prior art.

[1] Upon appeal from an order granting or refusing preliminary injunction, the single question is whether the action complained of was clearly an improvident exercise of discretion on the part of the court whose action is assailed; the rule being that the order should not be disturbed unless it clearly appears that the court below has exercised its discretion upon a wholly erroneous conception of pertinent facts or law. We cite in the margin several of our decisions declaring this rule.[1]

Claim 6 of the Wertz patent, which is the only claim involved here, is given in the margin.[2] The validity of the Wertz patent, upon the record presented here, depends largely upon which of the two conflicting theories of the respective parties, as to what was the prominent or novel feature of the combination disclosed, is the correct one. The drawings show a hammer integral with the trigger, and defendant insists that that is the only feature of the combination which it can plausibly be thought gave inventive novelty to the claim. Plaintiff contends that the prominent element resides in the tape-holding and tape-feeding springs, which, in the form used, are so disposed as to prevent back-firing when the explosion occurs, and consequent injury to the operator. The District Judge was plainly of opinion that the magazine and springs so feeding and regulating the ammunition tape constituted essential and valuable features of the invention. This conclusion seems amply sustained by the record, for the specification states that:

"The spring *14* performs a very important function, as it retains the tape in its proper position along the back *4* and prevents the tape from slipping rearwardly down into the magazine or handle of the pistol when the feed spring *17* works down for feeding the tape in the path of the hammer. It also prevents the back fire from the exploding cap from flashing back and exploding the rest of the ammunition or tape."

Adopting this conclusion of the District Judge, as we must upon this record and for the purposes of this hearing, we think the state of the art does not show the claim invalid. The prior patents relied upon are Crump (No. 370,378, September 27, 1887), Rightmyer (No. 624,543, May 9, 1899), and Troxler (No. 707,036, August 12, 1902). Neither of these patents shows what seems from the evidence the retaining spring and feeding spring of Wertz. The magazine in each of the three patents mentioned is shown in the chamber or barrel in front of the hammer, instead of in the handle, and the feeding and retaining device

[1] Duplex Printing Press Co. v. Campbell Printing Press & M. Co., 69 Fed. 250, 252, 16 C. C. A. 220; Shelbyville v. Glover, 184 Fed. 234, 238, 106 C. C. A. 376; Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 894, 116 C. C. A. 454; Acme Acetylene Co. v. Commercial Acetylene Co., 192 Fed. 321, 323, 112 C. C. A. 573; Louisville & N. Ry. Co. v. Western Union Tel. Co., 207 Fed. 1, 4, 124 C. C. A. 573.

[2] "6. A toy pistol comprising a magazine adapted to receive an explosive tape therein, a spring for guiding the tape, a trigger, a hammer on the trigger and a spring on the hammer adapted to engage the tape for feeding it in the path of the hammer as the hammer is actuated preparatory to striking the tape."

does not appear to be the equivalent of the Wertz device; nor is it apparent that they furnish substantial security against the danger of explosion from back-firing.

Assuming that each of the elements of the claim in question other than the Wertz tape-holding and tape-feeding springs were old when the Wertz patent issued, the claim is nevertheless valid, provided by the use of these springs a new result is accomplished or a better result accomplished in a distinctively new way; and the evidence fairly indicates that the Wertz invention has accomplished a new and better result by practically eliminating danger from back-firing, at least when proper ammunition is used.

The Clark patent seems to be the result of improvements made upon the Wertz device by plaintiff's president, after the purchase by plaintiff of the Wertz patent. The Clark device retains both the tape-holding and tape-feeding springs of the Wertz device, differing from the latter, in the respect most material here, that, instead of having the hammer and trigger integral, those elements are separate. The single claim of the Clark patent is printed in the margin.[3] None of the pistols presented as evidence of prior use contain, so far as shown, the tape-holding and tape-feeding springs of Wertz and Clark or their equivalent.

[2] What has been said regarding the prior art as affecting the validity of the Wertz patent has more or less pertinency to the Clark patent. It is urged, however, that preliminary injunction should not issue in the absence of adjudication of the validity of the patent sued on. No such hard and fast rule pertains in this court; nor is it imperative that infringement be shown beyond a reasonable doubt. Where plaintiff's title to a patent is clear (as is the case here), and the record shows a fair probability that the patents are valid, and there is a sufficient showing of public acquiescence therein, and that infringement exists, the same considerations relating to the exercise of discretion in issuing injunctions in patent causes pertain as in equity causes generally; that is to say, injunction should be granted or withheld according as, upon a balancing of convenience and inconvenience, seems necessary to the protection of the rights of the parties. Blount v. Société Anonyme du Filtre Chamberland Systême Pasteur, 53 Fed. 98, 101, 3 C. C. A. 455; Grand Rapids v. Warren Bros. Co., supra. We think a substantial showing of acquiescence on the part of the public in the

[3] "A toy pistol comprising a casing, an anvil at the upper end of said casing, a support for a roll of fulminate strip at the lower end of said casing beneath said anvil, enabling the strip to pass in a direct course from the roll over the anvil, a strip-holding flat spring engaging the strip near the anvil to prevent retrograde movement thereof, a hammer pivoted in the casing, provided with a side beveled shoulder, a spring actuating the hammer against the anvil to explode the fulminate, a flat feeding spring carried by the hammer with its edge in engagement with the fulminate strip and acting upon the cocking movement of the hammer to feed the strip over the anvil, a trigger pivoted in the casing and provided with a head co-operating with the said shoulder, and a spring to retract the trigger whereby when the trigger is pressed its head will engage the said projection, cock the hammer, and passing therefrom release the hammer, and then when itself released will return to normal position."

case of both the Wertz and Clark patents is shown. Plaintiff's pistol, manufactured under the Wertz patent, had been on the market for about five years, and its manufacture under the Clark patent about three years, when defendant began its alleged infringement. During that time, so far as shown by the record, no other manufacturer has employed the tape-holding and tape-feeding spring devices of the Wertz and Clark structures. This acquiescence is a proper element entering into the exercise of judicial discretion with respect to the issue of preliminary injunction.

If the District Judge took the proper view of the validity of the two patents involved, there was room to find infringement. While defendant claims to have manufactured under the Bean patent (No. 1,098,215, May 26, 1914), it does not appear to employ the tape-retaining and tape-feeding springs of Bean. It does, however, use the precise flat springs commercially used by plaintiff, and which seem within the disclosures of plaintiff's patents; for while the Wertz patent does not describe the two springs in question as flat, the Clark patent does specifically so describe them. True, defendant's hammer is not integral with the trigger, while the Wertz hammer is; but we think the claim in question is not necessarily limited to a trigger integral with the hammer, especially as the record indicates that it was old to form the hammer and trigger in one piece. Indeed, the examiner so declared in connection with the history of the Wertz patent. This being so, infringement is not avoided by making the hammer and trigger separate from each other. It is true, also, that defendant's hammer and trigger differ from that of Clark, in that the latter has a beveled shoulder from which the trigger extension slides by way of releasing the hammer, effecting what is called a "wobbling movement," while defendant employs a wire trigger projecting below the guard, the resiliency of the wire aiding the trigger in slipping past the hammer; but, so far as appears from this record, these changes are not necessarily controlling, for there seems a reasonable probability that they may ultimately be found to represent substantial equivalents.

A number of considerations were properly addressed to the court's discretion, including an alleged cutting of price by defendant and the sale by it of inferior ammunition, which facts, if established, might materially affect plaintiff's toy pistol trade. The public favor with which the Wertz and Clark pistols have been received has a bearing upon the question of invention, when otherwise in doubt.

[3] Complaint is made that the injury to defendant from the issue of injunction is disproportioned to the injury plaintiff would suffer from its denial. But in view of the showing as to the extent of plaintiff's business, and the lack of as definite showing of defendant's loss as might be desired, we cannot say that the District Court, taking the entire case into account, improvidently exercised a discretion in favor of injunction.

It is also complained that the court refused to require of plaintiff a bond for stipulated damages, according to the practice recognized in Grand Rapids v. Warren Bros. Co., supra. This question was likewise addressed to the discretion of the District Judge; and the case presented fails to show that the discretion was improvidently exercised.

It should be unnecessary to say that we are not deciding the ultimate rights of the parties as they may be developed on final hearing, and perhaps on fuller testimony.

It results from these views that the order complained of should be affirmed, with costs. The affirmance will be without prejudice to such further application, if any, as defendant may be advised to make, upon proper and sufficient showing, for reconsideration of the order complained of with reference to the matter of bonds by the respective parties, which would probably be within the competency of the court without the reservation stated.

THE BEAVER. †

(Circuit Court of Appeals, Ninth Circuit. January 4, 1915.)

No. 2365.

COLLISION ⊂=82—STEAMSHIPS IN FOG—VIOLATION OF RULES.

Article 16 of the International Rules (Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326 [Comp. St. 1913, § 7854]), providing that 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, imposes a positive duty, and, where a vessel violates the rule and a collision follows, she cannot avoid liability without showing, not merely that her fault probably did not contribute to the collision, but that it could not have done so.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170–174; Dec. Dig. ⊂=82.

Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; R. S. Bean, Judge.

Suit for collision by Olaf Lie, master of the Norwegian steamship Selja, on behalf of himself and the owners, officers, and crew, against the steamship Beaver; the San Francisco & Portland Steamship Company, claimant. From the decree, libelant appeals. Affirmed.

For opinion below, see 197 Fed. 866. See, also, 219 Fed. 139, 135 C. C. A. 37.

E. B. McClanahan, S. H. Derby, and Louis T. Hengstler, all of San Francisco, Cal., for appellant.

William Denman and Ira A. Campbell, both of San Francisco, Cal., for appellee.

McCutchen, Olney & Willard and Denman & Arnold, all of San Francisco, Cal., advocates.

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

ROSS, Circuit Judge. The record in this case is very voluminous and has been very carefully examined, as have also been the elaborate and able briefs of the respective parties. The case grew out of a collision between the steamships Selja and Beaver near Point Reyes

---

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 8, 1915.

on the coast of California. The collision resulted in the sinking of the Selja and the bringing of three suits against the Beaver—the main one by the master of the Selja on behalf of her owner, officers, and crew, to recover for the loss of the ship and her equipment and for the loss of the personal effects of her officers and crew; the second, an intervening libel on behalf of the owners of the Selja's cargo; and, the third, an independent suit by the charterers of the Selja against the owners of the Beaver to recover for loss of freight. The three cases were consolidated and tried together, resulting in both vessels being held in fault by the trial court and in an interlocutory decree providing, among other things, that the damages sustained by them be apportioned under the usual rule of cross-liabilities, subject to certain specified offsets; that the master of the Selja have and recover from the Beaver on behalf of the officers and crew of the Selja, excluding himself, the full damages suffered by them, without offset of any kind, and also have and recover from the Beaver on behalf of the owners and underwriters of the cargo of the Selja the full damages sustained by its cargo, without offset of any kind, and reserving for final adjudication other questions of damages until after proofs should be taken before a commissioner, to whom the cases were referred for the purpose of taking such proofs, ascertaining and computing the damages in accordance with the interlocutory decree, and with directions that he report to the court such damages, together with all of the evidence produced before him.

Subsequent to the making of the order of reference, the respective parties entered into such stipulations and agreements as enabled the trial court to fix the various items of damage as a matter of law, which it did in and by the following finding:

1. Cargo owners	$260,344 41
2. Officers and crew of Selja:	
Alfred Halvorsen, 1st officer	643 50
Alfred Larsen, 2d officer	372 00
Arvid Bjorn, 3d officer	249 90
Rambek Eggen, Chief engineer	458 28
Axel Andersen, 2d engineer	349 30
Pedar Hansen, 3d engineer	292 50
Wong Hai, steward	791 10
Choi Hoy, carpenter	284 75
3. Damages of Olaf Lie, master of the Selja	1,973 23
4. Damages of William Jebsen, owner of the Selja:	
Value of the Selja exclusive of the items hereinafter mentioned	171,000 00
Spare gear of the Selja	3,056 00
Engine-room stores of Selja	951 51
Deck-room stores of Selja	950 63
Provisions for Chinese crew of Selja	261 45
Cost of keeping Chinese crew in San Francisco, pending their return to China	160 63
Cost of returning Chinese crew to China	1,771 20
Cost of maritime declaration made by the master of the Selja	43 00
5. Damages to the Beaver	31,829 18
6. Damages of the Portland & Asiatic Steamship Company, charterer of the Selja:	
For loss of pending freight	10,742 21
Bunker coal, flour slings, etc.	3,209 04

It was admitted that the several amounts above specified should bear interest at 6 per cent. per annum from the date of the collision to the entry of the final decree, and that the cargo owners and the officers and crew of the Selja, other than her master, were entitled to judgment against the Beaver for their full damages without offset, and that the damages of the owner and master of the Selja and of the Beaver be apportioned, "and that, if any balance be found due from the steamship Beaver to said libelant, Olaf Lie, individually and also on behalf of the owners of said steamship Selja, there be deducted therefrom one-half of all damages awarded under clauses 2, 3, 4, and 5 of this (interlocutory) decree, and that, if no balance be then due, no damages be recovered by said libelant for himself individually or for the owners of said steamship Selja, but that, if any balance be found due, said libelant have and recover said balance from said steamship Beaver for himself and the owners of said Selja in proportion to the respective amounts of their claims."

As half of the cargo damages were more than the half damages awarded to the Selja, the result was that the master and owner of that ship recovered nothing; and to that effect, in part, was the final decree. The appeal is from that portion of that decree, and from the further provision thereof that the costs be divided.

It is conceded by the appellant that, if the trial court was right in holding both vessels in fault, the decree appealed from is correct. It is, however, strenuously contended on its behalf: First, that the Selja was not in fault; and, secondly, that if so her fault did not contribute to the collision, and hence that the libelant should have been awarded the full amount of damages suffered, with interest and costs.

At the time of the collision, and for some time before, a dense fog prevailed. The Beaver, which was a passenger as well as a freight ship was on her regular run from San Francisco, Cal., to Portland, Or., and was proceeding, according to the contention of the appellant, at about 15 knots an hour, and according to the contention of the appellee at about 12 knots an hour. That either was excessive speed under the circumstances prevailing is conceded by the proctors for the appellee, so that in that respect, at least, the Beaver was clearly in fault. That fact, of course, attached to her some liability. Was she solely responsible for the collision? is the question. It occurred at 3:16 p. m. of September 22, 1910. The Selja was bound for San Francisco from Yokohama, Japan, in command of the libelant, Capt. Lie. She encountered the fog at 1 a. m. of the day of the accident. Except for the fog the weather was good, and the sea was calm, with a long, rolling swell. When she entered the fog, the third officer, then on watch, called the captain to the bridge, where he remained practically continuously, directing the navigation of the ship up to the time of the collision. He testified, among other things, substantially that from 1 o'clock a. m. to 3:05 p. m. of September 22d, the Selja was running at half speed; that at 2:50 he heard a whistle that sounded loud and clear from three to four points on his port bow, which he thought was the Point Reyes whistle; and that he continued to hear that whistle at intervals of 35 seconds to the time of the col-

lision; that at 3 o'clock, or a very short time after that, he heard the first whistle of the Beaver, "about right ahead," the Selja then still going at half speed, which speed was maintained until 3:05 p. m.; that the first whistle of the Beaver "sounded faint but distinct" and "sounded far off," and that he at first thought it might be one of the "fog horns off Golden Gate"; that at 3:05 he came to the conclusion that the whistle ahead was that of an approaching steamer; and that thereupon he reduced the half speed of the Selja, which was 6 knots an hour, to "slow." When asked why he did not stop the engines of the Selja when he heard the first whistle of the Beaver, his answer was:

"Well, because the sound was located as good as could be located in a fog, and showed absolutely no danger of a collision."

From 3:05 to 3:15 the Selja was kept at slow speed. At 3:15, according to Capt. Lie's testimony, the Beaver loomed in sight, and at 3:16 the collision occurred. The witness further testified that when he first saw the Beaver at 3:15 he thought the Selja was making practically no headway, which, though unimportant, could not have been true, since manifestly her speed of 3 knots or more an hour at 3:15 must necassarily have carried her forward a considerable distance. One minute thereafter she collided with the Beaver. Capt. Lie also testified that when the Beaver first loomed in sight at 3:15 he heard her blow three whistles, at which time he also ordered three whistles and full speed astern—all of which was ineffectual, for the vessels collided at 3:16. Had the master of the Selja stopped her engines when he first heard the whistle of the Beaver, practically right ahead, as he himself testified, or at almost any time thereafter during the ten or more minutes that the Beaver was sounding her whistle every 35 seconds, manifestly the collision could not have occurred, for at the rapid and unlawful speed at which the Beaver was going she would necessarily have passed the point of collision. But the uncontradicted evidence shows that the Selja's engines were certainly not stopped prior to 3:10—at least 10 minutes after her master had heard the first whistle of the approaching vessel. No amount of argument, no matter how ingenious and clever, can justify a court in ignoring the plain provisions of statute law. Article 16 of the act of Congress entitled "An act to adopt regulations for preventing collisions at sea" provides, among other things, that:

"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." 26 St. L. 326.

That the captain of the Selja did not know the position of the Beaver until she came in sight, only one minute before the collision, is perfectly manifest from his testimony. And that he was familiar with the requirements of article 16 above referred to is also apparent; he having testified in effect that, as published in his own country, it required the stopping of his engines, under the circumstances of this case, upon the hearing of the first whistle, until the location of the approaching vessel could be "surely or exactly located."

We regard it as clear that decisions based upon article 18 of the

Revised International Regulations for Preventing Collisions at Sea are inapplicable to the present case. That article provided as follows:

"Art. 18. Every steamship, when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse, if necessary." Act March 3, 1885, c. 354, 23 St. L. 438, 441.

That rule, as said by the court below, did not require any specific act to be done or left undone in a given case; still, under it, good judgment and good seamanship was required, as is thoroughly settled. But article 18 of the Revised International Regulations was subsequently superseded by article 16, first herein referred to, imposing a positive duty upon every vessel hearing, apparently forward of her beam, the fog whistle of another vessel the position of which is not known, to, so far as the circumstances of the case admit, immediately stop her engines and then navigate with caution until the danger of collision is past. In the present case it is not pretended that any circumstances existed which prevented the stopping of the Selja's engines when the first whistle of the Beaver was first heard by the master of the Selja, apparently right ahead. So far as anything to the contrary appears, not only was there no reason why he should not immediately have stopped his engines upon hearing the first whistle of the Beaver, as positively required by the express provision of Rule 16, but his action in continuing to go forward in a dense fog at a speed of 6 knots an hour from the time he first heard the Beaver's whistle at 3 p. m., until 3:05 p. m., and then at slow speed until 3:15 p. m., cannot be reconciled with good seamanship. Although the Beaver's whistle was being sounded every 35 seconds, it is manifest from Capt. Lie's own testimony that he knew nothing of the location of the Beaver until the latter loomed in sight, only one minute before the collision. The cases are very numerous in which an approaching whistle which sounded far off was really very close, and in which the sound seemed to come from one direction while in fact it came from another. Indeed, it is a matter of common knowledge that sounds in a dense fog are very deceptive.

The foregoing views are well supported by The El Monte (D. C.) 114 Fed. 796; The Rondane, 9 Asp. M. C. 108; The Brittania, 10 Asp. M. C. 67; The St. Louis, 98 Fed. 750, 39 C. C. A. 201; The Admiral Schley, 142 Fed. 64, 73 C. C. A. 250.

The further contention on the part of the appellant that, even if the Selja was in fault in the particulars indicated, such fault was not a contributing cause to the collision, cannot be sustained. As pointed out by the trial court, the law is that, where a vessel has committed a positive breach of a statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. The Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148; The Ellis, 152 Fed. 981, 82 C. C. A. 112; The Davidson v. American S. B. Co., 120 Fed. 250, 56 C. C. A. 86; The Dauntless (D. C.) 121 Fed. 420; The Admiral Schley, 142 Fed. 64, 73 C. C. A. 250; Hawgood T. R. Co. v. Mesaba S. S. Co., 166 Fed. 697, 92 C. C. A. 369.

So far from the Selja having sustained that burden, it is perfectly apparent that had she observed the statutory rule, or even the rule of good seamanship, the Beaver would necessarily, as has already been observed, have passed the point of collision before the Selja could have reached it. The record shows that the Beaver did not hear the Selja's whistle until about 3:13 p. m., when her engines were immediately reversed full speed astern—too late, however, to avoid the collision three minutes later.

We agree with the court below that the two ships were equally in fault, and, accordingly, affirm the judgment.

Judgment affirmed.

THE BEAVER.

(Circuit Court of Appeals, Ninth Circuit. January 4, 1915.)

No. 2383.

1. SHIPPING ⟸40—CONSTRUCTION OF TIME CHARTER—DEMISE OR CONTRACT FOR SERVICE.

A provision in a time charter party that the master and officers, although appointed by the owner, shall carry out the orders of the charterer as regards employment, agency, and other arrangements, and the handling of cargo, does not make the charter a demise of the vessel nor vest the charterer with any control over her navigation.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. ⟸40.

Demise of vessel, see note to The Del Norte, 55 C. C. A. 225.]

2. COLLISION ⟸114—RIGHT OF ACTION—"TIME CHARTER."

A charterer of a vessel by a "time charter," which is not a demise of the ship but merely a contract of affreightment under which the owner retains possession and control over its navigation, is not responsible for her faults of navigation; and, where she is sunk in a collision for which both vessels were in fault, he may recover his entire loss from the other vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 243; Dec. Dig. ⟸114.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Robert S. Bean, Judge.

Suit for collision by the Portland & Asiatic Steamship Company, charterer of the steamship Selja, against the steamship Beaver; San Francisco & Portland Steamship Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 197 Fed. 866. See, also, 219 Fed. 134, 135 C. C. A. 32.

William Denman, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant.

E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., for appellee.

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

ROSS, Circuit Judge. The appeal in this case is from that portion of the judgment just affirmed in the case entitled Olaf Lie, Master, etc.,

v. San Francisco & Portland Steamship Company, a Corporation, Claimant of the American Steamship Beaver, 219 Fed. 134, 135 C. C. A. 32, which awarded the present appellee full recovery against the present appellant for the loss of its bill of lading freight through the sinking of the Selja and for the value of the bunker coal, flour slings, house flag, and dunnage wood and mats belonging to the appellee, and which also went down with that ship.

The parties to this appeal are agreed as to the value of those respective items, but the appellant contends here, as in the other case, that the disaster was caused by the joint fault of the two ships, and that because of the fault of the Selja the appellee is entitled to recover only subject to the rule of cross-liabilities.

It is conceded that at all of the times in question the appellee held a time charter from the owner of the Selja, which was not a demise of the vessel, but a contract of affreightment merely, for the carriage of passengers, live stock, and merchandise; that the appellee procured to be shipped on board the Selja certain goods, wares, and merchandise, and gave bills of lading therefor on which the total freight was the amount that the appellee was awarded by the court below; and that the bunker coal was furnished the Selja by the appellee for steaming purposes under the requirements of the charter party; and that the flour slings were likewise furnished that vessel by the appellee for loading and discharging her cargo, and the dunnage wood, mats, etc., for the proper stowing of the cargo. The property in question having been lost by the improper navigation of the Selja, in connection with the like improper navigation of the colliding ship Beaver, as has just been adjudged in the case above referred to, the real question here manifestly is whether the charterer of the Selja, whose contract with her owner was simply one of affreightment, can be properly held in any way responsible for the navigation of that ship. The court below held, and we think rightly, that the charterer had no control whatever over the officers of the ship, or over its navigation, and cannot be properly made to suffer for her master's negligence.

[1] In Leary v. United States, 14 Wall. 607, 610, 20 L. Ed. 756, the court said:

"If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel. In examining the adjudged cases on this subject, we find some differences of opinion, especially in the earlier cases, as to the effect to be given to certain technical terms used in the charter party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such

command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer."

In 36 Cyc. 66, it is said:

"If by the terms of a charter, or necessary intendment of the parties, the entire vessel is left to the charterer, with a transfer to him of its command and possession, and consequently of control over its navigation, he will generally be considered as owner pro hac vice, that is, as owner for the voyage or service stipulated, as to parties dealing with him in such capacity, whether the letting is in writing or by parol. The general owner is not a common carrier, but a bailee to transport for hire, and the charter is a contract for the lease of the vessel. The officers and crew are servants of the charterer, and the charterer becomes the carrier of the goods shipped, and in procuring freight the master is then the agent of the charterer, and the general owner is not responsible for the contracts of the master or charterer if the creditor has notice of such charter party, particularly where the charter expressly makes the master the agent of the charterer. If the charter party lets only the use of the vessel, the owner at the time retaining the command and possession and control over its navigation, the charterer is regarded as a contractor for a designated service, the charter party being a mere contract of affreightment and the duties and responsibilities of the owner are not changed, and the charterer is not clothed with the character or responsibility of ownership. A special ownership does not pass, although the terms of the instrument are 'let and hired,' and the hirer agrees to pay a gross sum. Under these circumstances, the master is the owner's agent and the latter is charged with his acts and contracts. So, although the charterer agrees to provide and pay all port charges, it has been held that the owner is liable for delay to the vessel or a fine imposed for failure of the master to secure a bill of health. Where the officers of the vessel are agents of the owners as to certain matters, and of the charterers as to others, they will be regarded as agents of one party or the other according to the work on which they are engaged. The inclination of courts is to construe a charter party as a contract of affreightment, charging the shipowners as carriers, and not as a demise of the vessel, unless its tenor clearly calls for the latter construction; and the general owner of a ship will be deemed owner for the voyage where the intention of the parties in that respect is indefinite on the face of the charter party; and a charter party will not be construed as a demise of the ship, unless the possession is transferred to the charterer, even where the whole capacity of the vessel is let. But where the entire capacity of the vessel is chartered to one party, the owner becomes a special and not a common carrier, and may contract against consequences of his servants' negligence."

See, also, Scrutton on Charter Parties and Bills of Lading (6th Ed.) p. 1 et seq., in which it is also shown that the modern tendency is against the construction of a charter as a demise or lease.

There is nothing in this case to show that the charterer had anything to do with the navigation of the Selja. On the contrary, it is expressly conceded that the contract between the owner and the charterer was one of affreightment only. True, the charter party contained the common clause to the effect that, though the master and officers of the ship were appointed by the owner, they were to carry out the orders of the charterer as regards employment, agency, and other arrangements, and in regard to the handling of the cargo, as though they received such instructions from the owner.

A similar clause was in the charter party which was under consideration by the Circuit Court of Appeals of the Second Circuit in the case of The Volund, 181 Fed. 643, 666, 104 C. C. A. 373, 396, in speaking of which the court said, among other things:

"Nor can we assent to the proposition, which is earnestly contended for, that under charter parties of this sort there is some joint, two-headed navigation of the vessel which will put both parties in control. The provisions (clauses 8, 10) that the captain shall be under the orders and direction of the charterers as regards employment and other arrangements merely authorize the charterer to designate the safe port, and the berth therein to which the ship shall proceed. How she shall be navigated to get there is a matter entirely within the owner's hands."

See, also, The Santona, 169 Fed. 275, 94 C. C. A. 551; Dunlop S. S. Co. v. Tweedie Trading Co., 178 Fed. 673, 102 C. C. A. 173; Luckenbach v. Insular Line, 186 Fed. 327, 108 C. C. A. 405.

[2] The charterer in the present case, having nothing whatever to do with the navigation of the Selja, upon the most obvious principles of justice cannot be held in any way responsible for the negligence of her master, who, in the matter of her navigation, was the agent of her owner, and not the agent of the charterer.

The judgment is affirmed.

SHREWSBURY et al. v. POCAHONTAS COAL & COKE CO.

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

No. 1263.

1. MINES AND MINERALS ⊂=55—DEEDS—FORGERY—SUFFICIENCY OF PROOF.
   Evidence considered, and *held* to sustain the finding of a trial court that a deed to the coal and minerals under a tract of land was not a forgery, but was executed by the owner of the land.
   [Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153–165; Dec. Dig. ⊂=55.]

2. DEEDS ⊂=116—GENERAL WARRANTY—AFTER-ACQUIRED TITLE.
   Under the law of West Virginia, a conveyance of land by deed with a general warranty, executed by the equitable owner, operates to pass to the grantee an after-acquired legal title.
   [Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330; Dec. Dig. ⊂=116.]

3. MINES AND MINERALS ⊂=49—ADVERSE POSSESSION—OCCUPATION OF SURFACE.
   Possession of the surface of land is not adverse to the title to the coal thereunder, where the estate in the coal has been severed as to title.
   [Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135; Dec. Dig. ⊂=49.]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Bluefield; Benjamin F. Keller, Judge.

Suit in equity by the Pocahontas Coal & Coke Company against G. W. Shrewsbury and others. Decree for complainant, and defendants appeal. Affirmed.

Randolph Henry, of Roanoke, Va. (J. Hayden Gadd, of Princeton, W. Va., on the brief), for appellants.

A. W. Reynolds, of Princeton, W. Va. (Col. Childers, of Pineville, W. Va., and Joseph S. Clark, on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. This suit was brought by the appellee, Pocahontas Coal & Coke Company, to quiet its title to the coal and minerals, the ownership of which is also claimed by appellants, in a certain tract of land in Wyoming county, W. Va., containing some 393 acres, and known as school section No. 163.

It appears that an extensive tract, stated to be 273,000 acres, became forfeited to the state of West Virginia for nonpayment of taxes, and that proceedings were instituted in 1880, in the circuit court of Wyoming county, by W. B. McClure, commissioner of school lands, against Jos. Maitland and others, the former owners of this tract, for the purpose of selling the same, or a large portion thereof, for the benefit of the school fund of the state, as provided by the statute laws then in force. This tract was divided and laid off in sections of varying acreage, and several hundred sections, including No. 163, were sold by the commissioner on November 1, 1881. The report of this sale, which was confirmed by decree of November 24, 1881, describes the land in question as follows:

"Tract No. 163, containing 393 acres on Barker's creek, at 10c. per acre. Wash Solesbury purchaser, with G. R. McKinney security; cash paid $9.80, note for $29.50."

By decree of July 13, 1882, it is recited that certain parties, among them "Wash Shrewsbury," had paid for the lands sold to them as above stated, and the commissioner was directed to convey the same by proper deeds to the respective purchasers. Accordingly, on August 3, 1882, a deed was executed conveying this 393 acres to "Geo. W. Shrewsbury." It is conceded that "Wash. Solesbury," "Wash. Shrewsbury," and "Geo. W. Shrewsbury" are different names of the same person; and both parties claim under deeds alleged to have been executed by him.

The appellee contends that this person, on November 29, 1881, five days after the confirmation of the sale to him, conveyed the coal and minerals in this 393 acres, by deed with covenant of general warranty, to Wm. A. French and G. W. Straley, from whom, by various mesne conveyances, the title passed to and became vested in the appellee in the latter part of 1901. Such a deed, purporting to have been acknowledged on the day of its date before M. G. Clay, clerk of the circuit court of Wyoming county, was recorded in the clerk's office of that county on July 10, 1882, and again recorded in the same office, for reasons that do not appear, on May 1, 1886. This deed recites that it is made by "George W. Solsberry," and bears at the end the signature of "George W. Soleby," as nearly as the names can be deciphered from the photographic copy submitted with the record. The wife of the grantor, who was married at the time, did not join in the conveyance; the words "and ——— his wife" in the printed blank being erased.

The appellants assert that this deed to French and Straley is a forgery, and they defend the pending suit mainly on that ground. Their own claim is based upon a conveyance to them, on December 8, 1906, of the coal and minerals in the tract of land in dispute. This conveyance, the execution of which is not questioned, was made by "Geo. W. Shrewsbury and Malinda Shrewsbury, his wife," and contains

a covenant that the grantors "will warrant generally the title to the coal and minerals hereby conveyed and that they have done no act to incumber the same." In the meantime, during the years 1893, 1898, 1902, 1904, and 1905, Shrewsbury and wife deeded to various persons certain portions of the surface of this tract, and in one instance a quantity of standing timber. These conveyances are unimportant in this case, except for the reservations therein made, which will be referred to later, and which are claimed to support the contention that the French and Straley deed is genuine.

Incidentally, it may be here mentioned that George W. Shrewsbury—to call him by that name—died shortly before this action was commenced, and that his heirs at law were afterwards substituted as defendants.

[1] As already indicated, the controlling question of fact in controversy is the genuineness of the deed of November 29, 1881, to French and Straley, upon which the rights of appellee obviously depend. Without repeating the argument in detail, it will be sufficient to state the principal facts upon which the appellants rely to sustain their charge that this deed is spurious. Among other things, they point out that neither Shrewsbury nor his wife could read or write; that in every deed shown to have been made by him, except the one in dispute, his wife joined, and that both of them always signed by mark; that he is named George W. Shrewsbury in every other conveyance to or from him, and would certainly not sign himself "Soleby," even if he could write his name at all; that all the deeds above mentioned of portions of the surface describe the grantors as residents of Raleigh county; that in the deed from French and Straley, on March 17, 1886, which conveys some 36 parcels, including the tract in question, they "warrant specially only the property hereby conveyed, taking the same as to quantity as represented by their title papers, and the titles just as they are, the parties of the first part guaranteeing nothing as to quantity or title"; that the appellants, when they received their conveyance from Shrewsbury and wife, in December, 1906, had no notice, actual or constructive, of any prior grant to French and Straley of the mineral deposits on this tract; that Shrewsbury repeatedly denied having made any such grant to them; that he remained during his lifetime in the actual, visible, and notorious possession of the entire tract, except those portions of the surface which he had sold; that neither French and Straley nor their successors in interest, including the appellee, ever attempted any mining operations on this tract, or took any steps to assert their rights of ownership therein, while Shrewsbury was living; and that this suit was not commenced until after his death. For these and other reasons it is alleged that the deed in question is a forgery.

In reviewing briefly the appellee's proofs, it will not be necessary to notice the evidence bearing upon all of the items in the foregoing summary of appellants' case, since it suffices to refer to the more significant and persuasive facts which presumably induced the conclusion of the court below.

In the first place it cannot be doubted that in 1881, and for a number of years afterwards, George W. Shrewsbury was commonly known

as "Wash Solesbury." He is so named in the report of the commissioner of the sale in November, 1881, and the fact is testified to by several witnesses. The land he purchased was assessed to "G. W. Solesbury" down to and including 1891, and it is noteworthy that the assessment to him for 1887 to 1890 was for the surface only of this 393 acres. And in his deed to Hilton in 1904 the description begins at a planted stone "at the upper end of the said George W. Solesbury old farm on which he now lives," etc. It is therefore not surprising, but rather to be expected, that if he gave a deed to French and Straley in 1881 it would be by the name of "Solesbury," and not by the name of "Shrewsbury."

That this man Solesbury, as he was then called, but who later assumed the name of Shrewsbury, acknowledged the execution of the French and Straley deed, is sworn to positively by M. G. Clay, who was then clerk of the circuit court of Wyoming county and took the acknowledgment in that capacity. Clay was well acquainted with Solesbury, or Shrewsbury, having served with him in the Civil War, and apparently could not be mistaken as to his identity. Whether the name signed to this deed was written by Solesbury, or by the witness himself, or by some other person, is not made at all certain by his testimony. But, whatever was the fact in that regard, we have his unqualified statement under oath that Solesbury appeared before him in person and acknowledged the execution of the instrument. This instrument was recorded in his office on July 10, 1882; the deed from French and Straley to Clark and others, trustees, was recorded in the same office on May 12, 1887; and the deed from them to appellee on June 27, 1902. It is not altogether easy to believe that these conveyances were made matters of public record without any knowledge of the same coming to Shrewsbury. Indeed, it would seem that some report must have reached him that he had given a deed to French and Straley, as otherwise there was no occasion for him to deny that he had made such a conveyance. Moreover, he could hardly have been unaware that from 1887 he was assessed for surface ownership only, and that the underlying minerals were assessed to other parties. With this information concerning a matter of special importance to himself, it seems rather strange that he made no effort to ascertain what had occurred, and took no action against those who, as is now contended, sought to deprive him of his property by a forged conveyance. And in this connection it may be observed that, if the alleged crime was actually committed, there was no attempt at concealment, for the deed was put upon record within a few months, and apparently the guilty parties could have been discovered without much difficulty.

The reservations in the deeds to various persons of portions of the surface of this tract are not without significance. In the deed to T. J. Shrewsbury in 1898, after describing the parcel sold by metes and bounds, it is stated that there is *"reserved in this conveyance the coal and mineral and all the branded timber which has heretofore been conveyed to other parties."* The reservation of branded timber apparently refers to the deed of 450 standing trees to one Blankenship in 1893. The deed to Meadows in 1902, conveying 50 acres, more or less,

states that the grantors *"do reserve thereout and therefrom all coal and mining rights and privileges, together with such other timber rights as has been stipulated in former conveyances."* The parcel in the Hilton deed of 1904 is described as *"containing 25 acres, more or less, the surface only, with the coal and mineral excepted, and with such exceptions as has heretofore been conveyed away."* In the deed to B. P. Shrewsbury in 1905, the land described is conveyed, *"with the following exceptions; that is, the coal, mineral and such other privileges as has heretofore been conveyed."* These deeds, which are limited in terms to surface rights, plainly import a previous conveyance of the coal and minerals in the same lands, and the language used cannot well be claimed to have any other meaning. But to whom had the mineral deposits been conveyed, if not to French and Straley, by the deed of November 29, 1881? In the absence of any attempt to show that Shrewsbury had made any other conveyance of the coal and minerals in this tract, the reservations contained in these surface grants tend strongly, in our judgment, to support the genuineness of the French and Straley deed.

The record contains the deposition of J. H. Shrewsbury, a son of Geo. W. Shrewsbury, who testified on behalf of appellants. On his cross-examination he disclosed that the deed to them of December 8, 1906, under which they claim the coal and minerals in this tract, was given without any consideration passing at the time, but under an agreement that they were to pay $2,000 therefor if they should win this suit. It is reasonable to assume that this was the actual arrangement, since no attempt was made to deny it, and the fact is not without bearing upon the good faith of the transaction. It tends to create an impression that appellants had sufficient knowledge or information concerning a prior conveyance, and the adverse claims arising therefrom, to put them upon full inquiry, and this impression is not lessened by the circumstance that neither of them was called as a witness.

We find no occasion for extended comment upon the opposing contentions to which we have thus referred. They have been set forth as above for the purpose of showing that no sufficient ground appears for disturbing the finding of the trial court that the French and Straley deed is genuine. As the case is presented in the printed record, and in the argument of counsel, we might hesitate to say that we "have not the least doubt" that George W. Shrewsbury executed and acknowledged the deed under which the appellee claims; but that conclusion appears to us to be supported by the weight of evidence and the balance of probabilities. Taking the most favorable aspect of appellants' proofs, there is clearly no such preponderance in their favor as would justify us in reversing the judgment on that ground. The case was fully argued before the learned District Judge, and again considered by him upon an elaborate petition for rehearing. The original deed was put in evidence and submitted to his personal inspection. If he was satisfied beyond a doubt that this deed is genuine, it is not for us to say, upon the record now before us, that this was reversible error. The remaining questions must therefore be examined upon the assumption that Solesbury, or Shrewsbury, the purchaser at the com-

missioner's sale of school section 163, conveyed the coal and minerals in that tract of land to French and Straley by his deed to them of November 29, 1881.

[2] At the time this deed was executed the grantor had only an equitable title to the coal and minerals conveyed. But the deed contained a covenant of general warranty, and this had the effect, under the settled law of West Virginia, of transferring to the grantees the legal title afterwards acquired. Thus in Summerfield v. White, 54 W. Va. 311, 46 S. E. 154, the Supreme Court of Appeals lays down the rule regarding the effect of a covenant of general warranty as follows:

"A conveyance without warranty by mere estoppel cuts off the assertion of any title or claim which the grantor had at the time of the conveyance, but it will not operate to pass to the grantee any title afterwards acquired by the grantor. If, however, there is a general warranty in the deed, it not only cuts off the existing title of the grantor, but precludes him from setting up any after-acquired title. It does more. Such after-acquired title inures to the benefit of the grantee and passes to him."

And the same court, in Clark v. Sayers, 55 W. Va. 527, 47 S. E. 318, after referring to a number of cases, states the proposition as follows:

"In most states the covenant of general warranty is held not only to estop the grantor and his heirs from setting up an after-acquired title, but also actually to transfer the estate subsequently acquired, as if it had passed by the deed in the first instance."

[3] It is equally well settled that the possession of the surface owner is not adverse to the title of the owner of the coal and minerals; on the contrary, it seems that such surface possession inures to the benefit of the owner of the underground minerals.

"It is a general presumption that one who has the possession of the surface of the land has possession of the subsoil also. But when, by conveyance or reservation, a separation has been made of the ownership of the surface of the land from that of the underground minerals, the owner of the former can acquire no title to the latter by his exclusive and continued enjoyment of the surface; nor does the owner of the minerals lose his right or his possession by any length of nonusage. He must be disseised to lose his right, and there can be no disseisin by an act which does not actually take the minerals out of his possession." 1 Cyc. 994, cited in Wallace v. Elm Grove Coal Co., 58 W. Va. 453, 52 S. E. 486, 6 Ann. Cas. 140.

"A conveyance of the underlying coal with the privilege of its removal from under the land of the grantor effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments. The presumption that the party having the possession of the surface has the possession of the subsoil also does not exist when these rights are severed." Armstrong v. Caldwell, 53 Pa. 284.

"Possession of the surface land does not carry with it possession of the coal under that surface, where the estate in the coal has been severed as to title." Plant v. Humphries, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558.

We have considered and hold to be clearly untenable the contention of appellants that the conveyance to French and Straley is not a deed, but only a contract, which could be enforced, if genuine, by suit for specific performance. In our judgment it requires no argument beyond an inspection of the instrument to demonstrate that it is nothing

more or less than an ordinary deed with covenant of general warranty.

It is also urged with some insistence that the deed in question was not entitled to be recorded, because Clay, as clerk of the circuit court of Wyoming county, had no authority to take an acknowledgment. In answer to this we deem it sufficient to merely express the opinion that Clay had such authority under the act of December 21, 1875, which is reproduced in section 3 [sec. 3806], chapter 73, of the Code of West Virginia. Moreover, the contention in this regard bears only upon the question of notice, and it is plain that the case does not turn upon that point.

We are satisfied, after careful examination, that no cause for reversal has been made to appear, and the decree appealed from will therefore be affirmed.

PITTSBURGH, C., C. & ST. L. RY. CO. v. GLINN.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1915.)

No. 2524.

1. COMMERCE ⟸27—DEATH OF SERVANT—EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE—SWITCHMAN.

Where decedent, a switchman, was struck and killed at night by the operation of a freight train backwards at a high rate of speed, while he was aligning switches for his switch engine to switch more cars, after a cut had been disposed of, and it was conceded that the cars handled by decedent just prior to his death carried both interstate and intrastate freight, the jury were authorized to find that he was engaged in interstate commerce at the time of his death, and therefore within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]).

[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. APPEAL AND ERROR ⟸744—ASSIGNMENTS OF ERROR—FILING—TIME.

Assignments of error must be filed at the time of settling the bill of exceptions, as required by Circuit Court of Appeals rule 10 (150 Fed. xxvii, 79 C. C. A. xxvii), or they may be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3043–3048; Dec. Dig. ⟸744.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Action by Annie B. Glinn, as administratrix of Hugh A. Morford, deceased, against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 208 Fed. 989, 126 C. C. A. 77.

Joseph S. Graydon, of Cincinnati, Ohio, for plaintiff in error.

S. T. McPherson, of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The defendant in error, as plaintiff below, recovered a verdict and judgment against the railway company on account of the wrongful death of the intestate, Morford, who was her son. He was a brakeman in a switching crew, working in and near yards of the railway company, close to Cincinnati. The action was brought in reliance upon the Employers' Liability Act, and the petition alleged that Morford was engaged in interstate commerce at the time he was killed. At the time in question, which was during a dark night, the switching crew had taken a cut of cars and distributed them in the yard, and had gone with only their engine outside the yard in order to re-enter upon another track to continue their switching work. It became necessary to use a cross-over switch to pass from the side track, upon which the engine was at the moment running, to the nearest main track, upon which the engine would then run in the opposite direction. Morford set the switches to permit such crossing over. After the engine had gone upon the main track and stood waiting for the last switch to be reset, so that the engine could return on that track, a train passed upon the other and adjacent main track. It was composed of freight cars, and was running backward, with a caboose in the lead, at 25 miles per hour. A few minutes later, Morford was found dead, evidently having been hit by this caboose or train.

For the purpose of this review, and giving due effect to the instructions to the jury and to the verdict rendered, it must be assumed that the railway company was negligent in running this freight train backward at such a speed and without proper lookout and warning, and that this negligence was a proximate cause of the injury. Railway v. Jones (C. C. A. 6) 192 Fed. 769, 113 C. C. A. 55, 47 L. R. A. (N. S.) 483; Myers v. Pittsburgh Co., 233 U. S. 184, 34 Sup. 559, 58 L. Ed. 906. There is no such lack of inferential basis as we found in Smith v. Railroad, 200 Fed. 553, 119 C. C. A. 33.

[1] Did the proof sufficiently tend to show that Morford was engaged in interstate commerce? At the moment, the switch engine was not hauling any cars, and so the true character of the employment can be determined only by a broader view. The evidence showed that the railway company, in and about these yards, was continuously and indiscriminately hauling intrastate and interstate freight, and that, in this part of the work, no distinction whatever was made between the two classes. Describing the work of this train crew, the yardmaster's clerk said that it handled both intrastate and interstate shipments, that it handled all classes and character of freight and all kinds of cars during its working hours, and that it did the work of transferring and putting into other trains everything that came in for transfer, making no difference or distinction. When it was sought to get the cards constituting the record which would show exactly what cars had been handled that night, counsel for the railroad said:

"We admit that when these cards come in, they will show freight of every character and description, intrastate and interstate—both kinds."

In answer to the statement by plaintiff's counsel that he wished "to show further that this character of interstate freight came in there and was handled by this train [crew] that night," counsel for the rail-

road company admitted that at some time during that night this particular decedent had handled both intrastate and interstate freight, and that other freight of both kinds was coming in and going out of those yards, and that all the tracks down there were used for the handling of both. Upon this stipulation of fact, the trial proceeded.

The circumstances here are not, in all respects, the same as those found controlling in the Pedersen Case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, or the Seale Case, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. They may also be distinguished, though we think not effectively, from the facts in the Zachery Case, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; because, in the latter case, it definitely appeared that the engine was about to be used, or was being prepared for use, in distinctively interstate commerce. The same difference and possible distinction exists with reference to Law v. Illinois Central (C. C. A. 6) 208 Fed. 869, 126 C. C. A. 27. However, we can draw no inference from these and other familiar decisions of the Supreme Court (including the Behrens Case, 233 U. S. 473, 477, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163), and the way in which they have interpreted the statute, save that liability is created where the service being rendered is of a general, indiscriminate character, not segregated and tied to shipments within the state (as in the Behrens Case, supra, 233 U. S. 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163) but applicable at least as well to the interstate commerce which the carrier is conducting. While it may not be easy in some cases to draw the line between the results of this view and a breadth of construction which would make the statute invalid under the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, yet cases like the present are fairly within the line of validity. They hardly go beyond fixing the burden of proof and declaring that, where the facts show the case may well have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary.

It follows that the jury in this case had a right to find, as it did, that at the time of his death Morford was employed in interstate commerce.

Morford's contributory negligence did not appear so clearly, nor, if it existed, was it of such an extreme character as to require the giving of defendant's special instructions beyond the extent to which they were embodied in the charge. The other objections to the charges, given or refused, indicate no error from which substantial prejudice should be presumed, if indeed there was error at all.

[2] The assignments of error were belated, not having been filed at the time of settling the bill of exceptions, and they might well be disregarded, under rule 10 (150 Fed. xxvii, 79 C. C. A. xxvii); but this was a new and probably unfamiliar rule at the time the bill of exceptions was settled, and we have thought proper to look into the assignments.

The judgment is affirmed, with costs.

CRUCIBLE STEEL FORGE CO. v. MOIR.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1915.)

No. 2521.

1. DEATH ⊂=58—CAUSE OF DEATH—SPECULATION.
A jury may not speculate between several causes of an accident, and find that defendant's negligence was the real cause of decedent's death, in the absence of a satisfactory foundation therefor in the testimony.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 75–78; Dec. Dig. ⊂=58.]

2. MASTER AND SERVANT ⊂=278—DEATH OF SERVANT—UNGUARDED MACHINERY.
In an action for death of a servant while operating a lathe, evidence *held* to justify a finding that the death was the result of defendant's negligence in failing to cover or guard the projecting and revolving driver, dog, nuts, and bolts attached to the machine, as required by Gen. Code Ohio, § 1027, subds. 3, 7, as amended by Act June 8, 1911 (102 Ohio Laws, p. 428).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⊂=278.]

3. TRIAL ⊂=178—DIRECTED VERDICT—VIEW OF EVIDENCE.
On request for a directed verdict, the proofs must be viewed most favorably to the party against whom the direction is asked.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⊂=178.]

4. MASTER AND SERVANT ⊂=265—DEATH OF SERVANT—PRESUMPTIONS—PERFORMANCE OF DUTY.
Where a lathe operator, while bending over his machine, was caught and killed, he would be presumed to have been in the performance of his duty, in the absence of evidence to the contrary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908, 955; Dec. Dig. ⊂=265.]

5. MASTER AND SERVANT ⊂=87½, New, vol. 16 Key-No. Series—WORKMEN'S COMPENSATION ACT—REJECTION—DEFENSES—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.
Where a master had elected not to be bound by the Workmen's Compensation Act of Ohio (Act June 15, 1911 [102 Ohio Laws, p. 529] § 21—1), contributory negligence and assumed risk are no defense.

6. MASTER AND SERVANT ⊂=121—DEATH OF SERVANT—UNGUARDED MACHINERY—STATUTES—NEGLIGENCE.
Failure of an employer to guard projecting parts of a swift turning lathe, as required by Gen. Code Ohio, § 1027, subds. 3, 7, as amended by Act June 8, 1911 (102 Ohio Laws, p. 428), constitutes negligence per se.

[Ed. Note.—For other cases see Master and Servant, Cent. Dig. §§ 228–231; Dec. Dig. ⊂=121.]

7. MASTER AND SERVANT ⊂=286—DEATH OF SERVANT—UNGUARDED MACHINERY—GUARDS—PRACTICABILITY—QUESTION FOR JURY.
In an action for death of a servant by being caught in an unguarded lathe, whether it was practicable to guard the lathe *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⊂=286.]

8. MASTER AND SERVANT ⊂⊃121—DEATH OF SERVANT—UNGUARDED MACHINERY—STATE OFFICERS—OMISSIONS.

That the state inspector of workshops and factories had not required guards to be placed on lathes of the character of that by which decedent was caught and killed was not conclusive that defendant was not required to guard the same by Gen. Code Ohio, § 1027, subds. 3, 7, as amended by Act June 8, 1911 (102 Ohio Laws, p. 428).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. ⊂⊃121.]

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

Action by Catherine Moir, as administratrix of the estate of Thomas Moir, deceased, against the Crucible Steel Forge Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. G. Guthery, of Cleveland, Ohio, for plaintiff in error.

R. B. Newcomb, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error recovered verdict and judgment for alleged negligent injuries resulting in the death of decedent. The most prominent question concerns the refusal to direct verdict for defendant. Three grounds are urged in support of this alleged error:

(a) Lack of evidence tending to show that the negligence complained of was the proximate cause of the accident. At the time of the accident decedent was operating a turning lathe in defendant's machine shop. This lathe comprised a face plate 36 inches in diameter, on the surface of which was bolted a projecting driver in the form of an angle iron; the bolts extended three or four inches from the surface of the face plate; a steel forging was held in the lathe by two centers, one of which was in the face plate; a dog was fastened to the forging by means of a projecting set screw; the turning of the face plate (which made 200 revolutions per minute) caused the driver to engage the dog and thus to revolve the forging. The cutting tool was carried by a heavy post, mounted upon a carriage fed progressively by machinery toward the face plate. Just before the accident the tool post had nearly completed its travel, and decedent was seen standing near it. There was no eyewitness to the accident. Decedent was found with his head caught between the face plate and the tool post (then but 9 inches apart); the back of the head being against the face plate and the front of the face against the tool post. The left arm was lying across the body of the lathe; the right arm hung limply outside. Deceased was kept on his feet by the catching of the head as described. He had apparently been killed by being struck upon the head by the bolts projecting from the driver on the face plate, which revolved toward the front of the machine. The negligence relied upon is the failure to cover or guard

the projecting and revolving driver and dog and the nuts and bolts attached thereto, as required by the Ohio statute.[1]

[1] It is urged that the manner of the accident can only be conjectured; in other words, that there is no tangible evidence supporting the theory that he was caught or injured by the projecting and revolving parts of the machine. The rule is well settled that a jury is not permitted to speculate between several causes of an accident, and to find defendant's negligence to be the real cause in the absence of a satisfactory foundation therefor in the testimony. This proposition is sufficiently illustrated by decisions of the Supreme Court and of this court cited in the margin.[2]

[2] We think there was substantial testimony tending to show that the death occurred through the negligence complained of. There was testimony that following the accident a canvas glove was found on the floor on the back side of the machine, directly in line with the face plate, and in line with decedent's left arm if projected that far, and was kept in defendant's possession until the trial; that decedent more often than not wore canvas gloves when at work; that the glove, while made for the right hand, had apparently been worn upon the left hand, and was "ripped clean open; it was just like a flat piece of cloth." The deceased, when found, had no glove upon either hand, and the glove found was not identified as his. No attempt, however, has been made to account for the glove on any other theory than that it belonged to and was worn by decedent at the time of the accident, and the jury might not improperly so find. It was the duty of decedent to "watch his work" and to look over "to see what his tool is doing." He sometimes brushed off the machine the iron chips thrown off by the cutting, and while the machine was operating.

[3-5] The rule is too well settled, to require more than the merest reference to authority, that on a request for directed verdict that view of the proofs most favorable to the party against whom the direction is asked must be taken.[3] We think the evidence sufficient to support a finding that decedent was drawn into the machine through the catching of his glove on the projecting and revolving parts of the driving mechanism, in spite of the suggestion that he must have been engaged in doing something for the satisfaction of his own whim or fancy. He is presumed to have been in the performance of his duty. Worthington v. Elmer, supra, 207 Fed. at page 309, 125 C. C. A. 50, and cases there cited. And negligence on decedent's part would not bar recovery in cases where, as here, the employer had not elected to take the benefit of the Ohio Workmen's Compensation Act (Act June 15, 1911 [102

[1] Code Ohio, § 1027, subds. 3 and 7, as amended by Act June 8, 1911 (102 Ohio Laws, 428).

[2] Patton v. Texas & Pacific R. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Carnegie Steel Co. v. Byers, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677; Byers v. Carnegie Steel Co., 159 Fed. 347, 86 C. C. A. 347, 16 L. R. A. (N. S.) 214; Moit v. Illinois Central R. R. Co., 153 Fed. 354, 356, 82 C. C. A. 430; Smith v. Illinois Central R. R. Co., 200 Fed. 553, 555, 119 C. C. A. 33.

[3] Worthington v. Elmer (C. C. A. 6) 207 Fed. 306, 308, 125 C. C. A. 50, and cases there cited.

Ohio Laws, p. 529] § 21—1). The testimony supporting plaintiff's theory of the cause of the accident is no more speculative than that which has been held by this court, in cases cited in the margin,[4] to justify submission to the jury.

[6] (b) It is contended that the evidence does not show defendant negligent. The statute requires owners and operators of shops and factories, by way of suitable provision to prevent injury to persons coming into contact with machinery therein: (3) To "cover, cut off, or countersink keys, bolts, set screws and all parts of wheels, shafting or other revolving machinery projecting unevenly beyond the surface of such revolving machinery"; and (7) to "guard all saws * * * and all other dangerous machinery." This statute imposes an absolute and positive duty to furnish the statutory protection, and failure to do so is negligence per se. Variety Iron & Steel Works Co. v. Poak, 106 N. E. 24, recently decided by the Supreme Court of Ohio; Sterling Paper Co. v. Hamel (C. C. A. 6), 207 Fed. 300, 302, 125 C. C. A. 44, and cases there cited.

[7] Defendant contends, however, that the specific driving mechanism in question was merely temporary in character, and that the statute is not applicable thereto. The testimony showed that in defendant's shop work of all sizes was done on the one lathe; that for work upon large forgings a large face plate, such as was in use at the time of the accident, is necessary; that for small forgings (at the time of the accident the lathe was working on small forgings) a smaller face plate was generally used, in which case the dog which engages the work was attachable directly to the face plate through a slot therein, so making unnecessary the use of separate driver and projecting bolts therethrough; that the large face plate was, however, sometimes used for small work; that for several days preceding the accident the lathe had been employed upon large forgings, requiring a large face plate and a driving device in addition to the dog. Whether it was the identical device in use at the time of the accident does not appear. The work on the small forgings had been begun on the morning of the accident, but with the face plate used for several previous days. Notwithstanding the testimony of another witness, not directed to the practice in defendant's shop, that it was not usual to employ the large face plate on a two or three days' run upon small work (the job in question would probably have lasted that long), and although decedent had sole charge of the equipment and operation of the lathe, it did not conclusively appear that the use by him of the device in question was a mere temporary makeshift on his part. It was open to the jury to find that the mechanism in question was a part of defendant's well-known means for operating the lathe, rather than so unforeseen or so out of the ordinary as to deprive decedent of the benefit of the remedial statute invoked. The mischief which the statute is intended to prevent was in fact present.

[4] Felton v. Newport, 105 Fed. 332, 44 C. C. A. 530; C., N. O. & T. P. R. R. Co. v. Jones, 192 Fed. 769, 770, 113 C. C. A. 55, 47 L. R. A. (N. S.) 483; Pittsburgh, C., C. & St. L. Ry. Co. v. Scherer, 205 Fed. 356, 358, 123 C. C. A. 484; Railway Co. v. Glinn, 219 Fed. 148, 135 C. C. A. 46, this day decided.

Defendant introduced considerable testimony to the effect that it was impracticable to safeguard driving mechanism of this nature, and competent witnesses for defendant testified that they knew of no factories using such safety devices. On the other hand, a competent witness for plaintiff testified that it would be practicable to cover the driver and its attachments, either by putting a hollow casting or stamping over the entire dog and driver, or by a fixed guard bolted to the headstock; that such safety devices were shown in certain trade journals; that, while it would be necessary to take off the guard whenever the method of attachment to the face plate was changed, there would be otherwise no interference with the operation of the machine; and that while such guards would not prevent injury if the operator deliberately put his hand or head into the open space encircled by the guard, they would protect against an accidental falling into such space, and so into contact with the driving mechanism.

[8] We think this testimony clearly raised a question of fact for the jury respecting defendant's negligence in failing to guard the driving mechanism. The fact that the state inspector of workshops and factories is not shown to have required guards upon lathes of the character in question is not conclusive upon that subject. The decisions of this court in Republic I. & S. Co. v. Yanuszka, 166 Fed. 684, 92 C. C. A. 280, and Standard Fire Exting. Co. v. Heltman, 194 Fed. 400, 114 C. C. A. 362, have more or less application.

(c) It is urged that the evidence clearly shows that the danger complained of was unnecessarily created by decedent. The charge upon this subject was as favorable to defendant as it was entitled to. Moreover, the contention invokes the defense of contributory negligence or of assumption of risk, both of which were denied defendant through its failure to come under the Workmen's Compensation Act.

We have examined all the remaining assignments, so far as discussed orally or in briefs, and are satisfied that at least no error prejudicial to defendant appears.

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

DENVER-LARAMIE REALTY CO. v. WYOMING TROUT & PRODUCE CO.†

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4055.

1. VENDOR AND PURCHASER ⟸322—BREACH OF CONTRACT—RIGHT OF ACTION.
D., the president of a trout company, conducting a fish hatchery on a site owned by a ranch company under a grant from the ranch company of the right to use and possess such site, procured an option to purchase the ranch company's property and contracted to sell it to defendant. Subsequently a contract, reciting that D. was acting for the sole use and benefit of defendant, was made between him and the ranch company for the purchase of the property, in which the ranch company agreed to keep and maintain certain state leases, paying all charges thereon, and to assign them to D. on a certain date, except that certain leases for the land on which the hatchery was situated were to be assigned at any time to D. The ranch company refused to assign the leases because defendant failed

⟸For other cases see same topic & KEY-NUMBER in all Key Numbered Digests & Indexes

† Rehearing denied March 19, 1915.

to pay the purchase price as agreed, and, because of defendant's failure to carry out the contract, the trout company was compelled to abandon the hatchery. *Held*, that whether D., in making the last-mentioned contract, acted for himself or for defendant, the failure of the ranch company to assign the leases gave rise to no cause of action by D. or his successors in interest against defendant for the value of the unexpired term of the leases.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 944–947; Dec. Dig. ⊂⊃322.]

2. TRIAL ⊂⊃91—RECEPTION OF EVIDENCE—MOTIONS TO STRIKE OUT—NECESSITY OF OBJECTIONS.

As a general rule, where a question propounded to a witness clearly discloses whether the testimony to be elicited is admissible or not, if a party neglects to object to the question, the denial of a subsequent motion to strike out the evidence is not error, unless such party for some good reason has been prevented from objecting.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242–244, 252; Dec. Dig. ⊂⊃91.]

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Action by the Wyoming Trout & Produce Company against the Denver-Laramie Realty Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

N. E. Corthell, of Laramie, Wyo., for plaintiff in error.

C. P. Arnold, of Laramie, Wyo., and Sheridan Downey, of Sacramento, Cal., for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. This is an action by the Wyoming Trout & Produce Company, hereinafter called the produce company, to recover damages for breach of contract from the Denver-Laramie Realty Company, hereinafter called the realty company. A judgment for $17,000 was recovered in the court below. The realty company complains of certain rulings of the trial court. In order to more clearly understand the position of the parties at the trial, a brief statement of some of the surrounding circumstances as they appear in the record is necessary.

[1] In November, 1909, the Wyoming Trout Company, hereinafter called the trout company, was organized as a corporation under the laws of Wyoming, for the purpose of spawning, hatching, and maturing trout in the county of Albany, Wyo., and selling the said trout and the eggs and fry thereof. For the purpose of commencing and carrying on its business, it made a contract with the Willow Creek Ranch Company, whereby the ranch company granted to the trout company the right to use and possess for 99 years a certain site owned by the ranch company for the culture of trout in return for a certain amount of the net profits of the business. The trout company, relying on the contract, erected a fish hatchery with troughs and a syphon, for the purpose of conducting water through said building. It also erected an icehouse and other buildings on the land and site mentioned, and

constructed thereupon ditches, ponds, dams, and reservoirs such as were necessary and convenient for the culture of trout and the marketing thereof.

One Sheridan Downey was the president of the trout company. On June 4, 1910, Downey, having an option to purchase the Willow Creek ranch, entered into a contract in writing with the realty company for the sale thereof. The ranch consisted of 14,150 acres, for which the realty company agreed to pay $5.15 per acre. The fish hatchery, hereinbefore mentioned, was located upon a portion of the ranch. On June 30, 1910, Downey, for the sole use and benefit of the realty company, entered into a supplemental contract with the ranch company for the purchase of the Willow Creek ranch. In said contract it was provided, among other things, as follows:

"And it is further agreed by the said ranch company that it will keep and maintain all of its present state leases on the lands hereinbefore set out until November 1, 1911, paying all charges on same until said date, when it shall assign, without further charge, each and all of same, together with all improvements thereon, to said Downey, with this exception: That the state leases on the northeast quarter of the northwest quarter, northwest quarter of northeast quarter, and southwest quarter of northeast quarter of section four (4), township thirteen (13) north, of range 73 W., shall be assigned at any time after date hereof to said Downey in his personal capacity."

July 1, 1910, Downey, in consideration of the sum of $1 and other lawful considerations, sold, assigned, and transferred to the trout company all his right, title, and interest in and to the contracts of June 4, and 30, 1910, including the right to the assignment of 120 acres of land in section 4, township 13, range 73, mentioned in the contract of June 30, 1910. January 24, 1911, the produce company was organized, with Downey as president and general manager. February, 1911, the trout company, in consideration of the sum of $17,700, sold, assigned, and transferred to the produce company all its real and personal property, accounts, rights, and contracts of whatsoever kind and nature. The present action was commenced by the produce company as the successor in interest of Downey and the trout company, to recover damages from the realty company for the alleged breach of the contracts of June 4 and June 30, 1910. At the trial of the action in the court below, the produce company claimed the right to recover damages from the realty company as the successor of Downey and the trout company for the failure of the ranch company to assign to Downey personally the state leases covering the land described in the excerpt, above quoted, from the contract of June 30, 1910. It appeared that the leases referred to were executed by the state of Wyoming in 1908, and that the produce company abandoned the fish hatchery October 10, 1911, claiming it was compelled to do so by reason of the failure of the realty company to carry out its contract to purchase the ranch property. The leases ran for five years, and therefore there was an unexpired term of about two years. The ranch company refused to assign these leases to Downey, because the realty company had failed to make payment of the purchase price for the ranch as agreed.

Testimony was admitted over objection for the purpose of showing

the value of the unexpired term of the leases, and the failure of the ranch company to assign the leases to Downey in his personal capacity, as mentioned in the contract of June 30, 1910, was submitted to the jury by the trial court as an item of damage for which the realty company was liable. Downey testified as a witness that the value of the unexpired term of the leases was $3,000. Other testimony was given upon the same subject. At the close of the testimony for the plaintiff, counsel for the realty company made the following motion:

"The defendant moves the court, at the conclusion of the evidence for the plaintiff in this case, as follows: (1) To strike out all of the evidence offered and introduced tending to show the value of the unexpired term of the state land lease on the 120 acres in section 4, lying below the Willow creek reservoir, and containing the buildings and improvements of the plaintiff company, upon the ground that the defendant never became obligated, by contract or otherwise, to do anything with reference to the assignment or transfer or a conveyance for that property to the plaintiff in this case, or its assignors."

This motion was overruled and exception taken.

At the close of all the testimony counsel for the realty company requested the court to charge the jury as follows:

"It appears from the evidence that the defendant had nothing to do with the lease of the 120 acres of state land, lying below the Willow creek reservoir, and on which the fish hatchery improvements of the plaintiff were located, and did not at any time assume any obligation to assign or convey the lease of such lands. The jury, therefore, will not allow any damages for failure to assign or convey such lease."

The request was denied and exception allowed.

The contract of June 30, 1910, contained the following recital:

"Whereas the realty company is desirous of having said Downey act for and in its behalf and for its sole use and benefit in that certain contract of even date herewith between the Willow Creek Ranch Company and James McGibbon, Sr., James McGibbon, Jr., Ralph McGibbon, and George McGibbon, and Sheridan Downey, which contract is hereto attached and made a part hereof; and whereas said Downey is desirous of acting in such capacity for the sole use and benefit of the realty company."

The paragraph quoted herein from the same contract, and which it is claimed was broken in the failure of the ranch company to assign to Downey the leases for the land described therein, contains an expression that the leases should be assigned to Downey in his personal capacity. We do not see how the failure of the ranch company to assign the leases in question to Downey can give rise to any cause of action by Downey or his successors in interest against the realty company. Downey either acted for the realty company in making the contract or he acted for himself. If he acted for the realty company, as the express language of the contract said he did, then he has no cause of action against it, and if he acted for himself he certainly has no cause of action against it. Therefore it was clearly error to submit this item of damage to the jury as a basis of recovery against the realty company.

[2] Numerous other errors are assigned as to the rulings of the trial court upon the admission and rejection of evidence, some of which cannot occur again by reason of the ruling now made. In

regard to the others, we deem it sufficient to say that counsel may not, as a general rule in the trial of a cause, when the question propounded to the witness discloses clearly whether the testimony to be elicited is admissible or not, neglect to object to the question and then at some further stage of the trial move to strike out the evidence of the witness and assign the ruling of the court thereon as error, unless for good reason he has been prevented from objecting to the question.

Judgment reversed, and a new trial ordered.

In re McGINLEY et al.

Appeal of FISHBACK et al.

(Circuit Court of Appeals, Sixth Circuit. January 15, 1915.)

No. 2726.

1. BANKRUPTCY ⊂=102—SEIZURE OF PROPERTY PENDING PROCEEDINGS—INJUNCTION.

F. and two others, promoters and officers of a corporation, having been arrested for fraudulent use of the mails, took corporate funds with which to indemnify the sureties on their bail bonds, and on this alleged act of bankruptcy involuntary proceedings were instituted, and injunctions procured restraining such parties and their wives from withdrawing any deposits in their names or the name of the corporation. The diverted funds of the corporation were returned to the receiver in bankruptcy. On October 1st, F.'s wife and his attorney applied for a modification of the injunction with respect to certificates of deposit in F.'s name, on a petition alleging that they were his individual property, that the corporation had no interest therein, and that the proceeds were needed in his defense. The petition was supported by affidavits which, if true, showed his individual ownership thereof. On a hearing before a special master the petitioning creditors in bankruptcy opposed the modification, without denying F.'s ownership or making any showing that the corporation was interested therein. *Held* that, when the matter came on for hearing before the District Judge on November 2d, the petitioning creditors had been given a sufficient opportunity to dispute F.'s claim, and assuming that it was proper to restrain the use of the certificates until some investigation could be made, the modification should then have been granted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156–162; Dec. Dig. ⊂=102.]

2. BANKRUPTCY ⊂=140—SEIZURE OF PROPERTY PENDING PROCEEDINGS.

Such certificates could not, as contended, be held so that they might be available to satisfy a judgment which might be had in a suit brought by the trustee in bankruptcy against F.

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

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Petition by Wayne McGinley and others to have the Savage Motor Car Company adjudicated a bankrupt. From an order denying a petition for the modification of an injunction, Katie I. Fishback and another appeal. Reversed and remanded, with directions.

Robert W. Fishback, with Cummings and Taylor, promoted, and became officers and managers of, the Savage Motor Car Company, a corporation which

engaged in business at Detroit. On August 10, 1914, these three officers were there arrested, upon warrants from Cincinnati, for alleged fraudulent use of the mails in the promotion of the company, and their individual appearance bonds were fixed at $7,500 each. For the purpose of getting bail they took $22,500 of the corporate funds, and delivered checks or certificates therefor to a surety company, as indemnity for giving bonds. The next day an involuntary petition in bankruptcy against the corporation was filed, alleging this diversion of corporate funds as the act of bankruptcy,[1] and after summary hearing, at which there were present these three and their respective wives and Robert M. Brownson, their attorney, the court issued an order restraining the three officers and Mr. Brownson from withdrawing any deposits in the name of the corporation or in the name of any of these individuals, and from in any way disposing of any of the $22,500 funds. At about the same time, whether by advice of their counsel or solely by order of the court does not appear, the attempt to get these bonds was abandoned, and the $22,500 turned over to the bankruptcy receiver, who had been the same day appointed. On the next day, August 12th, it being represented to the court that Katie I. Fishback, wife of Robert W., was endeavoring to cash $3,000 of certificates standing in his name, another injunction was issued, directed to the same three officers and their respective wives and Mr. Brownson, more explicitly forbidding the negotiation or use of any certificate standing in the name of any one of the three officers.

No further proceedings appear until, on September 17th, Messrs. Fishback, Cummings, and Taylor, with Mrs. Fishback, joined in a petition requesting that the injunctions be so modified as to permit them to cash their individual certificates and withdraw their individual deposits. This petition was denied September 21st, without prejudice. On October 1st it was renewed or in part renewed, by the petition of Mrs. Fishback and Mr. Brownson, which showed that on August 10th Mr. Brownson was engaged as attorney for Fishback in the criminal proceeding; that on that day Mrs. Fishback had in her possession certificates of deposit amounting to $3,000 standing in her husband's name; that he directed her to cash them and deliver the proceeds to Mr. Brownson; that payment was refused and she thereupon gave Mr. Brownson the certificates themselves; that these certificates were the individual property of Mr. Fishback, and that the corporation had no interest therein; and that they were greatly needed to be used in Mr. Fishback's defense to the criminal prosecution, as neither he nor his wife had any other means and he was in jail. It prayed for relief generally, and specially that the injunction be modified, so that Mr. Brownson might cash the $3,000 certificates. Attached were affidavits which, if true, clearly showed that before the corporation was formed Mr. Fishback had sold his former business for $5,000, had used part for payments to the corporation and for personal expenses, and that this sum of $3,000 was the remainder. Details are given, and affidavits from those who paid the $5,000 which make the showing very strong and unless contradicted it must be regarded as convincing.

The petition was referred to a special master, before whom the petitioning creditors in bankruptcy filed an answer which opposed the desired modification, because (1) Mrs. Fishback and Mr. Brownson were not purchasers of the certificates; and (2 and 3) the corporation had claims against Mr. Fishback, and the certificates ought to be impounded until they could be reached by the trustee in a suit to be brought, if there should be a bankruptcy adjudication, and if a trustee should be appointed. The master treated the petition and affidavits as sufficiently establishing the facts stated until they should be contradicted; no one offered any testimony before him tending to contradict; and he made a report concluding that, because Fishback was an officer of the corporation, the question involved could be heard on a summary proceeding, and that there was power to continue the injunction, but that to justify so doing the petitioning creditors should at least make

[1] The record does not show that any adjudication has yet been made. Counsel state that on the trial of the indictment the court directed a verdict of acquittal.

a prima facie case that the corporation was interested in the certificates, and that this they had not done. In order that they might have further opportunity to do so, he recommended that the injunctions be modified as prayed, unless the petitioning creditors gave bond "fully protecting" Mr. and Mrs. Fishback and Mr. Brownson, if it should ultimately be determined that the certificates "ought not to be turned over to the Savage Motor Car Company." It is not clear how such a bond could have hurt the creditors or helped Fishback; but to this report, dated October 15th, the creditors filed objections October 20th, and the matter came on to be heard November 2d before the District Judge. He ordered that the desired modification be denied, but that Fishback or Brownson might withdraw and use the certificates upon giving a $3,000 bond conditioned to redeliver the certificates or pay the full amount to the trustee in bankruptcy, if one should be appointed and if within three months he should commence proceedings to establish, and in due course should establish, that the funds represented by the certificates were legally or equitably the property of the corporation. Mrs. Fishback and Mr. Brownson appealed from this order, claiming that their petition should have been granted without conditions.

E. G. Wasey, of Detroit, Mich., for appellants.
F. H. Watson, of Detroit, Mich., for appellees.

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

PER CURIAM. [1] Without deciding whether summary proceedings were sufficient, or whether Mr. Brownson had acquired rights superior to Fishback's, and assuming that the court might rightfully restrain the use of the certificates until some investigation could be made, we think it clear that the maximum of opportunity, which it can be permissible to give petitioning creditors in such a case, was exceeded. Where there is no testimony tending to show that property in the possession of an officer of a bankrupt corporation really belongs to the corporation, or that it has any interest therein, and where there is nothing to challenge the officer's claim of personal ownership, except suspicion due to the general situation, any impounding of the property while petitioning creditors look for evidence at least approaches the margin line of the rightful exercise of power; but, in any event, only the briefest practicable delay can be allowed, and the exercise of diligence must be imposed upon the attacking creditors. In this case, and in response to a superficially convincing showing of personal ownership made by Fishback on October 1st, it appears that after 30 days the creditors had not made even a pro forma denial, much less taken any steps in the direction of disputing Fishback's claim. We are compelled to conclude that, whatever the rights of the parties might have been on October 1st, on November 2d it was not within the provident exercise of discretion to require further delay, or to impose conditions which were equivalent to continuing the injunctions until 3 months after a trustee should be appointed, if that time should ever come.

[2] The contention made before the master, that the certificates should be held so that they might be available to satisfy a judgment which might be had in a suit which might be brought by the trustee against Fishback, was obviously untenable, and seems to be abandoned. Appellees suggest that an issue of ownership should not be tried

out on affidavits without opportunity for cross-examination. This may be conceded; but we see no necessity for swearing witnesses until the allegations of the petition were denied, or until the petitioning creditors tendered issue and indicated that there was proof to be taken. Appellees say their reason for not doing this was that they regarded their opposition before the master as in the nature of a demurrer. Whatever its character, it was not the exercise of that diligence which the situation required.

The motion to file supplemental return is granted, but because its filing has become immaterial, and without implying approval of the practice. The order appealed from must be reversed, and the cause remanded, with instructions to modify the injunctions as prayed. Appellants will recover costs.

MONTGOMERY v. UNITED STATES. †

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4137.

1. CRIMINAL LAW ⇐400—BEST AND SECONDARY EVIDENCE—TELEGRAMS.
Primary evidence of the contents of a telegram is the original message or admissions of the sender, while secondary evidence may consist of a copy proved to be correct or an oral account of the contents of the message by one who has seen it, and knows its contents; it being necessary to account for the absence of primary evidence before secondary evidence is admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879–886, 1208–1210; Dec. Dig. ⇐400.]

2. CRIMINAL LAW ⇐400—EVIDENCE—TELEGRAMS—ORIGINAL.
Where the government sought to prove a telegram alleged to have been sent by accused as an incriminating circumstance, the message filed at the sending office would be the original, and proof of its loss or destruction was required before secondary evidence of its contents was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879–886, 1208–1210; Dec. Dig. ⇐400.]

3. CRIMINAL LAW ⇐402—EVIDENCE—COPY OF TELEGRAM—CORROBORATION.
In a prosecution for causing the transportation in interstate commerce of two women for immoral purposes, one of them testified that accused told her that he wired A. to meet them at G. The other woman testified that accused said A. would meet them at the train, and A. testified that she received a telegram like the copy of the one offered in evidence, but that it was unsigned, and that she did in fact meet the women as directed. *Held*, that the copy of the telegram found in the files of the receiving office was admissible, not by reason of its own probative quality, but in corroboration of and in connection with the testimony of the women, though the absence of the original was not accounted for.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 887, 888; Dec. Dig. ⇐402.]

4. CRIMINAL LAW ⇐1156—REVIEW—DISCRETION—GROUNDS FOR NEW TRIAL.
Misconduct of a juror and newly discovered evidence alleged as ground for new trial are not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⇐1156.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Rehearing denied March 19, 1915.

In Error to the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Roy Montgomery was convicted of having caused the transportation in interstate commerce of two women for immoral purposes, and he brings error. Affirmed.

William S. Metz, of Sheridan, Wyo. (Carl L. Sackett, of Sheridan, Wyo., and Gibson Clark, of Cheyenne, Wyo., on the brief), for plaintiff in error.

David J. Howell, Asst. U. S. Atty., of Cheyenne, Wyo. (Charles L. Rigdon, U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. Montgomery was tried, convicted and sentenced for having on February 12, 1911, caused the transportation in interstate commerce of two women from Denver, Colo., to Gillette, Wyo., for the purpose of there engaging in the practice of prostitution. At the trial the prosecution offered in evidence a paper which contained the following language:

"Denver, Colo., Feb. 12, 1911.

"To Ollie Allen, Gillette, Wyo.: Meet two girls at train forty-one tomorrow. Leaving tonight for home. Roy Montgomery."

To which offer counsel for Montgomery made the following objection:

"We object to the introduction of the paper for the reason that the same is wholly incompetent, irrelevant, and immaterial, and for the reason that it is not the original, and that it is not the best evidence and not properly identified."

The court ruled as follows:

"You can offer proof that the original is lost, and this is a true copy. The objection is overruled."

This ruling of the court is assigned as error. At the time this paper was offered, one of the women had testified that Montgomery told her in Denver that he had wired Ollie Allen to meet them at the train. The other woman had testified that Montgomery said Ollie Allen would meet them at the train. Thomas D. Harper, special agent, department of justice, Elwood Anderson, county attorney, John W. Hanson, and George Roe, had testified that on the night of May 16, 1913, they had gone to the express office, adjoining the Western Union Office at Gillette, and secured a number of packages of the files of the telegraph company and took them to a little house or cabin on the edge of the town; that they investigated these files and found therein what the witness called an original telegram, of which the paper offered in evidence was a true copy made by the witness Anderson; that after making the copy the files were returned to the place where they were obtained.

Earl C. Reed, operator for the Western Union at Gillette, at the time of the trial, which was in November, 1913, had testified that he

had made a search among the files in his office and could not find a telegram like the one offered in evidence; that the entire file of telegrams for the month of February, 1911, was gone; that, so far as the witness knew, the telegrams had been destroyed in the ordinary and regular course of business. After the paper was admitted in evidence, Montgomery testified that he never sent such a telegram, and Ollie Allen, the person to whom the telegram purported to be addressed, testified that she received a telegram like the one offered in evidence, but that it was unsigned; that she did meet the women at the train.

If the admissibility of the paper offered in evidence depended upon proof by the employés of the Western Union at Denver that Montgomery filed the telegram there for transmission, or upon proof by the same employés at Gillette that such a telegram was received at that office, then its admission in evidence was clearly erroneous, as there was no testimony from said employés that any such telegram was filed at Denver or received at Gillette.

[1] The contents of telegrams are proved either by primary or secondary evidence. Primary evidence is the original telegram itself or the admissions of the sender. Secondary evidence of a telegram may consist of a copy proved to be correct or an oral account of the contents by one who has seen it and knows its contents. Before secondary evidence, however, may be received, the absence of the primary evidence must be satisfactorily accounted for.

[2] In the practical application of this rule, for the proof of the contents of telegrams, it must first be determined which is the original, the message sent or the one received. This, as a general rule, is determined by ascertaining whether the contents of the telegram sent or that of the one received are in issue. In suits between the immediate parties to telegrams, the telegram received is often the original. In suits against the telegraph company for damages for failure to send a telegram correctly or at all, the original would be the telegram sent. Scott & Jernigan, Law of Tel. par. 341; Gray on Com. by Tel. par. 128; 1 Whart. on Ev. par. 76; Reg. v. Regan, 16 Cox's Cr. Cas. 203; Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355; U. S. v. Babcock, 3 Dillon, 571; Abernathy & Co. v. Hewlett, 2 Willson, Civ. Cas. Ct. (Tex.) App. § 805; Steamship Co. v. Otis, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221; Barons et al. v. Brown, 25 Kan. 410; Commonwealth v. Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712.

Confining ourselves to the case at bar, we think that under the rule above stated, and in view of the fact that the prosecution was endeavoring to charge Montgomery with having sent a certain telegram, the original would be the one filed at the Denver office. There was no proof whatever of the loss or destruction of this telegram so as to admit secondary evidence of its contents.

[3] We think, however, that counsel for Montgomery failed to give sufficient force to other testimony that appears in the record. The testimony of one of the women that Montgomery told her that he had wired Ollie Allen to meet them at the train at Gillette was primary evidence that Montgomery did send such a telegram. The testimony of the other women, to the effect that Montgomery said Ollie Allen would

meet them at the train, bears upon the same question. With this testimony in the record a copy of the telegram, which was found in the files of the receiving office at Gillette, was admissible, not by reason of its own probative quality, but in corroboration of and in connection with the testimony given by the woman, to the effect that Montgomery had told her that he had wired Ollie Allen just such a telegram.

The question when the paper was offered in evidence was whether there was a sufficient foundation prima facie to admit it; the court not undertaking to determine whether Montgomery in fact sent it. After the paper was admitted, it was then a question for the jury on all the testimony, including that of Montgomery and Ollie Allen, to determine whether Montgomery sent the telegram. We are clearly of the opinion that on the whole record there was no error in admitting the paper complained of. In the recent case of Johnson v. United States, 215 Fed. 679, 131 C. C. A. 613, there was no direct evidence adduced to establish the authenticity of certain telegrams. The Court of Appeals, however, decided that from evidence in the case the jury were warranted in finding that the defendant was the author of the messages.

[4] The only other errors urged in the argument are the misconduct of the juror Walker, and newly discovered evidence. These questions arose on a motion for a new trial, which was addressed to the discretion of the trial court. The ruling of a trial court on such a motion is not reviewable here.

It results that the judgment must be affirmed.

And it is so ordered.

TEXAS GUM CO. v. AUTOSALES GUM & CHOCOLATE CO.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1915.)

No. 2575.

1. STATUTES ⇐276—FEDERAL COURTS—JURISDICTION—"ANY RIGHT ACCRUING OR ACCRUED."

Judicial Code, § 299 (Act March 3, 1911, c. 231, 36 Stat. 1169 [Comp. St. 1913, § 1276]), provides that the repeal of existing laws or the amendments embraced in the act shall not affect any act done or right accruing or accrued or suit or proceeding instituted or pending on writ of error, etc., when the act took effect, but that all suits and proceedings for causes arising or acts done prior to such date may be commenced and prosecuted within the same time and with the same effect as if the repeal or amendments had not been made. *Held*, that the clause "any right accruing or accrued" referred to suits and proceedings for causes arising or acts done prior to the date of the taking effect of the act, excluding suits on causes of action which had not arisen while the former law was in force, and forbidding the conclusion that the right existed when the cause of action asserted had not accrued when the Judicial Code went into effect, but was in process of accrual, with some things remaining to be done before a right to sue accrued.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 371, 372; Dec. Dig. ⇐276.]

2. COURTS ⇐329—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Averments that the matter in dispute, when the bill was filed on June 5, 1912, exceeded, exclusive of interest and costs, the sum or value of

$2,000, did not show that a cause of action involving $2,000 had accrued to complainant; while the law prior to Judicial Code, § 24, raising the jurisdictional amount, was in force.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. ⊂=329.

Jurisdiction as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennet-Stribling Shoe Co. v. Roper, 36 C. C. A. 459; O. J. Lewis Mercantile Co. v. Klepner, 100 C. C. A. 288.]

Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Bill by the Autosales Gum & Chocolate Company against the Texas Gum Company. Decree for complainant, and defendant appeals. Reversed and remanded.

J. B. Talley, of Temple, Tex., and Charles Carroll and Joseph W. Carroll, both of New Orleans, La. (Sam Henderson, Jr., of New Orleans, La., on the brief), for appellant.

O. L. Stribling, of Waco, Tex., and A. Alexander Thomas, of New York City, for appellee.

Before PARDEE and WALKER, Circuit Judges, and SHEPPARD, District Judge.

WALKER, Circuit Judge. The bill in this case was filed on the 5th day of June, 1912. It complained of conduct of the defendant which commenced on or prior to May 15, 1911, was continued to the time of the filing of the bill, and would, as alleged, not be desisted from unless the defendant's discontinuance of it is required by injunction. The bill contained averments to the effect that the plaintiff has sustained damages as a result of the conduct complained of, and that it will continue to be damaged by the defendant's future persistence in such conduct, unless it is restrained therefrom by injunction. The following is the allegation as to the amount of damages sustained and anticipated:

"That your complainant, by reason of the wrongs committed by the defendant, as hereinabove alleged, and which the defendant is now committing in like manner, has suffered irreparable injury in its property rights, and has lost large profits in the sale of its chewing gum, by reason of the defendant's wrongful acts and unfair competition, which profit would amount to more than $2,000; that your complainant has no adequate remedy at law for redress of injuries herein alleged; and complainant further avers that the matters in dispute and damage done to it by defendant, and that will be suffered by complainant in the future, exclusive of interest and cost, exceeds the sum of $2,000."

[1] There is no room for claiming, and it is not claimed, that the averments of the bill show that the matter in controversy "exceeds, exclusive of interest and costs, the sum or value of $3,000," so that the court acquired jurisdiction of the case under the provision of section 24 of the Judicial Code. The claim is that the case is one of which the court would have had jurisdiction under the law as it was before that statute became effective, and that the suit was maintainable under the provision of section 299 of that statute that:

"The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any

suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this act, pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made."

Whatever doubts there may be as to what was intended to be embraced by the saving clause of this section, which refers to "any right accruing or accrued," it seems to us to be apparent that, in so far as the provisions of the section evidence a purpose to preserve the right to bring suits which, under the terms of other provisions of the act, could not be brought in a court of the United States, the only right saved is to have the previously existing law applied to "suits and proceedings for causes arising or acts done prior to" the date of the taking effect of the act. It is such suits and proceedings which the concluding clause of the section authorizes to be "commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made." The extent to which the right to sue, as it existed under the former law, is saved, is not left to be determined by an interpretation of the ambiguous language of the clause first above quoted from, which is qualified and explained by the succeeding clauses of the section, but is clearly defined by the explicit language of the last clause, to the effect that the former law should be applicable to "suits and proceedings for causes arising or acts done prior to" the date of the taking effect of the act. Washington Home v. American Security Co., 224 U. S. 486, 32 Sup. Ct. 554, 56 L. Ed. 854. This plain description of the kind of suits, the right to bring which was intended to be saved, excludes suits on causes of action which had not arisen while the former law was in force, and forbids the conclusion that the right exists when the cause of action asserted had not accrued at the time the Judicial Code went into effect, but was only in process of accruing, something else then remaining to happen before a right to sue was perfected. Dallyn v. Brady (D. C.) 197 Fed. 494; Cady v. Barnes (D. C.) 208 Fed. 359.

[2] The averments of the bill in the instant case fail to show that when the Judicial Code went into effect on the 1st day of January, 1912, there had already accrued to the plaintiff a right of action against the defendant under the previously existing law, which made it a prerequisite of the existence of the right of action that the matter in dispute exceed, exclusive of interest and costs, the sum or value of $2,000. Act March 3, 1875, c. 137, 18 Stat. 470, 4 Fed. St. An. 265. Averments to the effect that the matter in dispute, at the time the bill was filed on the 5th day of June, 1912, exceeded, exclusive of interest and costs, the sum or value of $2,000, by no means show that, while the former law was in force, a cause of action involving what was the jurisdictional amount under it had accrued to the plaintiff. For anything that is shown to the contrary, what the defendant did or omitted to do while the former law was in force may not have given rise to a cause of action in favor of the plaintiff which involved anything like

the amount which was required to authorize the bringing of a suit in a court of the United States.

The conclusion is that the bill fails to show that the suit is one within the jurisdiction of the court in which it was brought. It follows that the court was in error in entertaining the bill and granting relief under it.

The decree appealed from is reversed, and the cause is remanded.

SHEPPARD, District Judge. I am unable to concur in the majority opinion that the court below was without jurisdiction. In this character of cases, where the remedy sought is an injunction against the injury, the value of the right to be protected is the test of jurisdiction. It is demonstrated by the record that, if the complainant suffers any damage by the alleged unfair competition, it would be in excess of the jurisdictional amount necessary to give the court jurisdiction. Hunt v. N. Y. Cotton Exchange, 205 U. S. 336, 27 Sup. Ct. 529, 51 L. Ed. 821, 19 C. C. A. 76, note; Nashville, C. & St. L. Ry. Co. v. McConnell (C. C.) 82 Fed. 65.

I think jurisdiction should be maintained, but the cause dismissed on the merits on the authority of the following cases: Gulden v. Chance, 182 Fed. 303, 105 C. C. A. 16; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828.

YOUNG v. GORDON et al.

In re FOSTER MOTOR CAR CO.

(Circuit Court of Appeals, Fourth Circuit. December 15, 1914.)

No. 1304.

BANKRUPTCY ⊂=323—PROOF OF CLAIMS—"SECURED CREDITOR."

Where a creditor of a bankrupt held the bankrupt's note, indorsed by Y., for a part of the indebtedness, it was entitled to a dividend on the full amount of the claim, though after the proofs of claims were filed Y. paid the note, and Y. was not entitled to a dividend on the amount paid; such creditor not being a "secured creditor," within Bankr. Act July 1, 1898, c. 541, § 57h, 30 Stat. 560 (Comp. St. 1913, § 9641), providing for the payment of a dividend only on the unpaid balance of claims of secured creditors, after crediting thereon the value of the securities, in view of section 1, cl. 23, defining a "secured creditor" as a creditor having security for his debt upon the property of a bankrupt of a nature to be assignable under that act, or who owns such a debt for which some indorser, surety, or other person secondarily liable has security upon the bankrupt's assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. ⊂=323.

For other definitions, see Words and Phrases, First and Second Series, Secured Creditor.]

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 Foster Motor Car Company, bankrupt; James W. Gordon and John B. Lightfoot, receivers. An order of the referee

for the payment of a dividend was affirmed by the District Court, and C. L. Young files a petition to superintend and revise the proceedings. Affirmed.

S. S. P. Patteson, of Richmond, Va., for petitioner.

John B. Lightfoot, Jr., of Richmond, Va., for respondents.

Before PRITCHARD and WOODS, Circuit Judges, and McDOWELL, District Judge.

McDOWELL, District Judge. From May, 1911, until December, 1913, the Commonwealth Bank was lending money to the Foster Motor Car Company, to be herein called the Foster Company. On December 8, 1911, the Foster Company executed a note to the bank for $5,000, which was secured by the indorsement of C. L. Young—an officer of the Foster Company—and L. M. Foster and Nixon Ball. This note was delivered to the bank with the following letter:

"Richmond, Va., Dec. 7, 1911.

"Commonwealth Bank, Richmond, Va.—Gentlemen: We herewith hand you our note dated Dec. —, 1911, payable on demand at the Commonwealth Bank for the sum of five thousand ($5,000.00) dollars, indorsed by us, and also indorsed by C. L. Young, L. M. Foster, and Nixon Ball. This note is to be held by your bank as collateral security for any and all amounts which you may loan or advance to the Foster Motor Car Company until notified in writing by the said indorsers to the contrary.

"Yours truly, [Signed] Foster Motor Car Co., Inc.,
"Per Nixon Ball."

On August 29, 1913, the estate of the bank was put in charge of receivers, the respondents here, by order of the chancery court of the city of Richmond. On January 17, 1914, the Foster Company was adjudicated a bankrupt. The receivers of the bank filed proof of unsecured debt on February 7, 1914, for $11,689.57. This claim does not include the $5,000 note of December 8, 1911, on which Young was indorser. The receivers claimed only as unsecured creditors. Young also on the same day filed his claim as an unsecured creditor of the Foster Company for $18,371.97, and at the foot thereof was the following additional claim:

"C. L. Young is indorser on $5,000 note for Foster Motor Car Company held by receivers of the Commonwealth Bank, which he will have to pay, and when paid the Foster Motor Car Company will owe him, in addition to the above, the further sum of $5,000, with interest thereon which may have accrued as of that date. C. L. Young, Creditor."

On April 25, 1914, Young paid the note of December 8, 1911, with interest, amounting to $5,249.81, to the receivers of the bank. On May 6, 1914, the referee in bankruptcy ordered the payment of a dividend of a little over six cents on the dollar on the claims of the creditors of the Foster Company. Under this order Young was to receive a dividend on $18,371.97, and the receivers on $11,689.57. On May 14, 1914, Young filed a petition for a review of the order of the referee. The District Court affirmed the order, and the case is here on petition to revise.

The contention made on behalf of Young is that he should have the dividend on the $5,249.81 paid by him in satisfaction of the collateral

note, and that the dividend payable to the receivers should be correspondingly reduced. As laid down by the majority opinion in Merrill v. National Bank, 173 U. S. 131, 136, 19 Sup. Ct. 360, 362 (43 L. Ed. 640) the equitable rule for the distribution of an insolvent estate is as follows:

"The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

See, also, Aldrich v. Chemical Bank, 176 U. S. 618, 638, 20 Sup. Ct. 498, 44 L. Ed. 611; Sexton v. Dreyfus, 219 U. S. 339, 345, 31 Sup. Ct. 256, 55 L. Ed. 244; Hitner v. Diamond State Co. (C. C.) 176 Fed. 389, 390; Commercial Bank v. Jenks Co. (D. C.) 194 Fed. 739, 741, 742.

It is argued, however in behalf of the petitioner, that receivers are secured creditors and that section 57h of the Bankrupt Act is applicable. But the words "secured creditors" in this section must be read in view of the definition of this phrase in clause 23 of section 1 of the act:

" 'Secured creditor' shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

When the receivers proved their claim, they held the $5,000 note of the Foster Company, secured by the indorsement of Young. There is no contention that Young had security upon the property of the bankrupt. Unless, therefore, the note made by the Foster Company and indorsed by Young was a part of the estate of the Foster Company at the date of filing the petition in bankruptcy, there would seem to be no ground for the contention made for the petitioner. The moment this note was delivered to the bank, it became a liability of the Foster Company, as well as of Young. The obligation on the part of Young was to the bank, and not to the Foster Company. In no sense therefore could this collateral security to the bank be considered as an asset of the Foster Company. It follows that the receivers were not "secured creditors" within the meaning of section 57h and that this section has no application here. See In re Headley (D. C.) 97 Fed. 765, 771; In re Sweetzer (D. C.) 128 Fed. 165; Gorman v. Wright, 136 Fed. 164, 69 C. C. A. 76; Board v. Hurley, 169 Fed. 92, 97, 94 C. C. A. 362; In re Matthews (D. C.) 188 Fed. 445, 26 Am. Bankr. Rep. 19; In re Thompson (D. C.) 31 Am. Bankr. Rep. 236, 208 Fed. 207; In re Manhattan Brush Co. (D. C.) 209 Fed. 997; Collier, Bankruptcy (10th Ed.) pp. 12, 13, 724.

Nor do we find any reason elsewhere in the Bankrupt Act or in the decisions of the courts for sustaining the contention of the petitioner. The discussions of the "bankruptcy rule" in the opinions in Merrill v. Bank, supra, are based on the express or implied assumption that the creditor has collateral security on the property of the bankrupt. In the Pulsifer Case (D. C., 1880) 14 Fed. 247, 249, it is said:

"There is no doubt that it has been repeatedly held, under our bankruptcy law, that even if the holder of a note has received a sum of money from an indorser, he may nevertheless prove it in full against the estate of the maker in bankruptcy, and collect as much as he can, and any surplus he may receive over the amount actually due the holder will be held in trust for the indorser or surety."

And this statement is in full accord with the decisions, cited above, arising under the present Bankrupt Act. The ruling of the trial court must be affirmed, at the cost of the petitioner.

Affirmed.

In re POST & DAVIS CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 43.

CORPORATIONS ⊂=426—CHATTEL MORTGAGES—EXECUTION—REQUISITES—STATUTES.

Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 6, provides that a corporate mortgage, except for purchase money, must be consented to by the holders of not less than two-thirds of the corporate stock, which consent must be given at a special meeting of the stockholders called for the purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under seal of the corporation that such consent was given by the stockholders in writing, or that it was given at a vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or vice president, and by the secretary or assistant secretary, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. *Held*, that subsequent action or inaction of stockholders cannot take the place of previous action under such statute, and hence a chattel mortgage executed by a corporation without the required consent properly evidenced was invalid and could not be ratified.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. ⊂=426.]

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

This cause comes here upon appeal by the trustee in bankruptcy and petition to revise an order of the District Court, Southern District of New York, directing him to turn over to Libbie Buggeln, the respondent, the proceeds of a sale of certain chattels claimed by her under a chattel mortgage made by the corporation to Elizabeth Post, the wife of its president and by her assigned to the respondent.

J. J. Lesser, of New York City, for appellant.

A. A. Wheat, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Three objections to the chattel mortgage were urged by the trustee. First. That there was no consideration proved. Second. That the mortgage had not been kept alive as a lien by proper refiling under the statutes. Third. That it was invalid because it was not executed in compliance with section 6 of article 2

of the Laws of 1909 (Consolidated Laws, c. 59). All three objections were overruled by the Special Master and the District Court. The last objection only need be here considered.

The statute referred to reads as follows:

"Every stock corporation * * * may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase money mortgages and mortgages authorized by contracts made prior to May first, eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or vice president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business."

It is conceded that the execution of the chattel mortgage was not consented to in writing at any time by the holders of not less than two-thirds of the capital stock, nor by a vote at a special meeting called for that purpose—nor indeed at any meeting—and that no certificate was filed and recorded in the office of the county clerk. It was not a purchase money mortgage.

There is testimony from which the Special Master found that the three stockholders, who held practically all the shares, were aware of or participated in the preparation of the chattel mortgage and after it was filed did nothing to attack it. He reached the conclusion, as did the District Judge, that any irregularities as to the original execution of the mortgage were cured by the subsequent action or inaction of the stockholders; that there was a substantial consent by the directors and stockholders or a subsequent ratification by them, which would make the provisions of the statute inapplicable.

The language of the statute is most clear and specific; manifestly it was made so to accomplish some purpose. That purpose is very plainly indicated on the face of the statute; it substitutes for mere oral expressions of assent, casually given it may be, an orderly permanent record which can be referred to. The provision, in the language of the New York Court of Appeals, "involves an application to the stockholders, and, on their part, consideration, judgment, and final determination, and, on the part of the assenting stockholders, a written expression of their conclusion." Rochester Bank v. Averell, 96 N. Y. 475. The same court has been liberal in its construction of the statute as to details of compliance. Thus in Greenpoint Sugar Co. v. Whitin, 69 N. Y. 335, a written assent was held good, although it did not itself state the amount of the debt which it was given to secure; the court saying "the defendant could not have been misled. The consent * * * was ample to put him on inquiry." In Rochester Savings Bank v. Averell, supra, it was held that a mortgage dated January, 1874, and invalid when originally filed because of the absence of any written assent, was validated by the signing of such an assent in No-

vember, 1894; the mortgage being then reacknowledged. "Such assent," says the court, "makes the instrument, as of the time it was given, a valid mortgage." It has also been held that a court of equity will enforce a mortgage given by a corporation without the written assent, where the mortgage is given by the corporation pursuant to a valid agreement made by it to give the mortgage, and in consideration of which agreement and in reliance upon which, the mortgagee gave property or other valuable consideration to the corporation. Paulding v. Chrome Steel Co., 94 N. Y. 340; Hamilton Trust Co. v. Clemes, 163 N. Y. 423, 57 N. E. 614; Black v. Ellis, 197 N. Y. 402, 90 N. E. 958. Such mortgages are of the same type as the "purchase-money mortgages," which the statute itself expressly excludes from the operation of the section above quoted. The mortgage in the case at bar is not of this type; it was given to secure past indebtedness for moneys loaned from time to time during the five preceding years.

To hold that written assent of two-thirds of the stockholders may be dispensed with in this case would go much further than any decision of the New York Court of Appeals to which we have been referred or which we have found. There is no pretense that any written assent was ever signed, or that it was ever voted at any stockholders' meeting, special or general. If the statute had been so construed by the state court of last resort, we should follow its construction of the state statute; but until such a decision is cited, we are unwilling to fritter away the specific provisions of an act which manifestly were put there to accomplish a plain purpose. Respondent finds support for her contention in Black v. Ellis, 129 App. Div. 140, 113 N. Y. Supp. 558, but that cause was decided by a divided court, and we are in accord with the views as to the construction of this statute expressed by the minority. Black v. Ellis was affirmed in the Court of Appeals (197 N. Y. 402, 90 N. E. 958), but on another ground.

The order is reversed.

THATCHER v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1915.)

No. 2314.

On application for rehearing. Denied.

For former opinion, see 212 Fed. 801.

Before DENISON, Circuit Judge, and COCHRAN and SANFORD, District Judges.

PER CURIAM. Mr. Thatcher's application for a rehearing presents several criticisms of the opinion of the court with such insistence as to make proper a further memorandum with respect to some of them, although no attempt will be made to comment upon all. They are thought to be sufficiently covered hereby and by the opinion.

It is said that the opinion confused different circulars, and gave to a statement in one a meaning derived by treating as context another statement in a separate circular. The record contains four complete

circulars, A, B, C, and D. Our opinion does associate statements specifically taken from Exhibit A and Exhibit B; but, in so far as this association is inaccurate, it is immaterial, because (if for no other reason) Exhibit B alone contains every statement recited in our opinion, and in substantially the mutual relationship and with the necessary interpretative effect which we attributed thereto.

It is said that our statement of percentages was erroneous, and that the charge in the circular that there were "one hundred such cases" was only one-half wrong, instead of, as we said, three-fourths. This may not be vitally important; but further consideration demonstrates that our arithmetic was accurate. We think it clear enough that both the circular and our opinion referred to the general class of personal injury cases against private corporations. Such cases against individuals certainly would not, and those against municipal corporations would not naturally, be included; and the circular, after an enumeration which would not include cases against municipal corporations, but plainly refers only to those against private corporations, says: "From the records of a hundred such cases, we cite a few at random." The Gravelle Case is included both in the general list and in the special list. No other one of the cases specially cited was included in the general list. The Gravelle Case was hence, as inferentially appears from the opinion, not considered in the groups with which it was compared. For this reason, the opinion used the numbers 70, 10, and 80; and we see nothing to correct.

With reference to the Reiter-Hudson matter: The opinion recites the charge in the instant proceeding as "bringing suit upon notes which he knew had been paid, and as part of a scheme to defraud a former client." This recital is, in one respect, wrong. The former client was Milburn, and the charge was that this act was done "with intent to deceive the court in which the action was begun, and for the purpose and with the intent of deceiving and defrauding said George R. Hudson."

The error in the recital does not seem material. As explained in the opinion, the act necessarily operated to injure unlawfully the former client, Milburn; and if conduct by an attorney was intended to and necessarily operated to deceive the court, it is not important in just what words it is additionally characterized.

The rehearing petition, with respect to the Reiter-Hudson matter, is largely based on the theory that Milburn, a former client, had authorized the suit which was brought in Reiter's name. A review of the evidence confirms the statement of the opinion to the contrary; such authority had not been given, but had been refused. The earlier correspondence between Milburn and Thatcher doubtless contemplated that this course would be taken, and Milburn even executed, and sent to Thatcher for delivery to Reiter, an assignment of Milburn's interest in the notes; but Thatcher refused to accept this assignment, and drafted others, which Milburn refused to execute. After much correspondence and a clear failure to reach any meeting of minds, because no satisfactory plan had been reached for "protecting" Milburn and his friend, Knapp, to whom Milburn's interest had perhaps been transferred, the correspondence ended with these letters:

From Thatcher's letter of September 9, 1904: "Your letter of August 12th came during my absence from the city. I think it best that you have your own attorney draft such papers as are necessary to be signed by Mr. Knapp transferring the Hudson notes to Reiter. In fact, I think the notes are already indorsed without recourse and can be transferred by delivery. If you will consent to my proceeding in Reiter's name, will do so, and not ask for any papers at all. Would like to make some progress in this matter."

From Milburn's answer of September 12, 1904: "Answering your favor of the 9th, will say that, if a way can be devised for going to work on this matter which will absolutely hold Mr. Knapp and myself harmless, all right. We will then sign papers authorizing you to go on. If this cannot be done, the matter will have to be dropped."

Nothing occurred, after this, for more than two years, and until Thatcher entered into his contract with Reiter, accepting employment from Reiter to collect for him from Hudson all that can be recovered on these notes "now owned by the said Reiter." The fact that suit was brought by Mr. Thatcher without authority from Milburn, and in the teeth of Milburn's instructions to drop the matter, is clear.

Complaint is made of the opinion's reference to Mr. Thatcher's contract with Milburn for a contingent fee of two-thirds of the amount recovered on these notes, because, in fact, his final contract with Reiter gave him a contingent fee of only one-fourth, and because, in fact, he turned over to Reiter, without any deduction, all that he did later collect. The language of the opinion obviously refers to the contract existing at the early stage of the correspondence, and correctly states the amount of the contingent fee there provided; but if the opinion causes the impression that Mr. Thatcher's final bringing of the suit was influenced by the expectation of getting 66 per cent., instead of 25 per cent., of the recovery, and so, as the rehearing petition says, becomes a charge that he was "greedy," it is unjust to Mr. Thatcher, and the impression should be corrected.

The real purpose and effect of the discussion of the Reiter-Hudson matter in the opinion should not be misapprehended. It was not stated to be the ground for sustaining the judgment below; indeed, we suggested our opinion that for this matter alone the extreme penalty imposed would have been too severe. Grounds requiring the affirmance of the judgment had already been stated. Discussion of the Reiter-Hudson matter might have been omitted, save for the extent to which it had figured in the criticism of the District Judge found in Mr. Thatcher's briefs. For this reason, we were justified in referring to a phase of the matter which had not been formulated in the charges below, but which appeared in connection with Mr. Thatcher's defense. We have carefully reviewed what the opinion says on this subject, and are satisfied that its comments are well within bounds. That the judgment sought in that case could rightfully depend only on this theory of Milburn's fraud was obvious on the undisputed facts; that, when recovered, it did in fact so depend, appears from Judge Wanamaker's opinion. Our reference to the Boone opinion served to indicate our view of the matter, but was not intended to be the basis of our judgment.

The rehearing application has been denied.

RISON v. PARHAM.

In re RISON'S, Incorporated.

(Circuit Court of Appeals, Fourth Circuit. January 13, 1915.)

No. 1295.

1. BANKRUPTCY ⟸440—REVIEW—APPEAL OR REVISION AS PROPER REMEDY.
Where, in bankruptcy proceedings against a corporation, the referee on the trustee's petition adjudicated that a deed of trust on property of the corporation, given prior to the organization of the corporation, had been paid and that the bonds secured thereby should be delivered to the trustee, and his findings and order were affirmed by the District Court, such court's decision could be brought to the Circuit Court of Appeals for review only by appeal, and a petition to superintend and revise was not authorized.

[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.]

2. BANKRUPTCY ⟸303—LIENS—SUFFICIENCY OF EVIDENCE.
In a bankruptcy proceeding against a corporation organized to take over the business of R., evidence *held* sufficient to support a finding that a deed of trust, given by R. to his wife prior to the organization of the corporation, had been paid by the issuance of stock to the wife.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458–462; Dec. Dig. ⟸303.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Edmund Waddill, Judge.

In the matter of Rison's, Incorporated, bankrupt. An order of the referee adjudging that a deed of trust was not a lien, and that the bond secured thereby should be delivered to the trustee, was affirmed by the District Court, and S. Isabel Rison appeals. Affirmed.

S. M. Brandt, of Norfolk, Va., for appellant.

James H. Corbitt, of Suffolk, Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In November, 1910, John W. Rison, Jr., the proprietor of a drug store in the city of Suffolk, Va., executed a deed of trust on his store fixtures and furniture, including a soda fountain of considerable value, to secure a bond given by him to his wife, S. Isabel Rison, the appellant herein, for the sum of $3,855.33. This deed of trust was duly recorded shortly after its execution, and the validity of the debt represented thereby is not questioned.

Something over two years later, in January, 1913, a corporation was organized, under the name of "Rison's, Incorporated," with an authorized capital of $25,000, to take over the business which Rison had individually conducted. Two of the three directors of this corporation were Rison and his wife, the third an attorney to whom a qualifying share was issued. Rison was elected president and Mrs. Rison secre-

tary. At a meeting of the directors on the 5th of February, 1913, all of them being present, a resolution was adopted to purchase the entire stock of goods belonging to Rison, including all his store fixtures, etc., for $10,000 par value of the full-paid and nonassessable stock of the corporation, of which 64 shares, each of the par value of $100, were to be issued to Rison and 36 shares to his wife. Two days later 59 shares were issued to Mrs. Rison, who signed the certificates as secretary, and she paid $2,000 into the treasury of the company. The consideration for the other 39 shares received by her is the subject of controversy in this proceeding.

Upon a petition filed in August, 1913, Rison's, Incorporated, was adjudicated bankrupt, and the appellee, Parham, appointed trustee on the 3d of October following. The deed of trust above mentioned had never been released, and Mrs. Rison claimed that the same was still a valid lien upon the property therein described. The trustee insisted that the debt secured by this instrument had been paid the previous February by the 39 shares of stock then issued to her. Accordingly, he filed a petition alleging such payment and praying for leave to sell the property free from the lien asserted by Mrs. Rison.

After hearing before the referee in bankruptcy, at which considerable testimony was taken, an order was made by him on the 18th of November, 1913, "that the said deed of trust be and the same is hereby repudiated as a lien against the said effects," and that the bond held by Mrs. Rison be forthwith delivered by her to the trustee. In April, 1914, the findings and order of the referee were affirmed by the District Court. From this decision Mrs. Rison appealed to this court and also filed here a petition to superintend and revise. The trustee answered the petition and also filed a motion to dismiss.

[1] We are clearly of opinion, without discussing the point, that the decision below could be brought to this court for review only by appeal, and that a petition to superintend and revise is not authorized by the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9585]) in such a case as is here presented.

[2] The matter in dispute is purely one of fact, and we see no reason for doubting that the referee reached a correct conclusion. Rison himself testified that the 39 shares of stock were issued to his wife in payment of the debt secured by the deed of trust, and the bookkeeper gave evidence to the effect that this was his understanding. Moreover, the contention of the trustee finds at least negative support in the resolution of purchase adopted by the directors, Mrs. Rison being present and presumably voting in the affirmative, and in the report to the State Corporation Commission which showed that Rison's stock of goods, including the soda fountain and store fixtures, were appraised at $10,000, their inventory value being $10,245, for which 100 shares of the corporation were issued. Against this was the testimony of Mrs. Rison that her husband agreed to assign to her his 64 shares to secure her for other indebtedness, that the deed of trust was not to be released until this was done, and that he had failed to keep his agreement.

It is true that the referee states in his certificate that appellant "was estopped to assert any claim by virtue of the foregoing deed of trust," and that the same was "repudiated as a lien upon any of the funds in this bankruptcy," and her counsel argues that this is reversible error because, as he says, "not a single element essential to the application of the doctrine of estoppel is present in this case." But this criticism rests wholly upon the form of the referee's report and ignores the substance of his finding. The issue really decided by him was that as between Mrs. Rison and the creditors of the corporation the bond in question must be deemed paid and the lien of the trust deed discharged. In our judgment this conclusion was justified by the evidence, and there is no occasion for further comment.

The petition to superintend and revise will be dismissed, and the decree appealed from affirmed.

RISON v. PARHAM.

In re RISON'S, Incorporated.

(Circuit Court of Appeals, Fourth Circuit. January 13, 1915.)

No. 1284.

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 Norfolk, in Bankruptcy; Edmund Waddill, Judge.

In the matter of Rison's, Incorporated, bankrupt. An order of the referee adjudging that a deed of trust was not a lien, and that the bond secured thereby should be delivered to the trustee, was affirmed by the District Court, and S. Isabel Rison files a petition to superintend and revise. Petition dismissed.

S. M. Brandt, of Norfolk, Va. for appellant.
James H. Corbitt, of Suffolk, Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. For reasons stated in the opinion in No. 1295, Rison, Appellant, v. Parham, Trustee, Appellee, 219 Fed. 176, 134 C. C. A. 550, decided this day, the petition to superintend and revise will be dismissed.

Dismissed.

DAVIES v. BOWES.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 89.

1. COPYRIGHTS ⇐83—SUIT FOR INFRINGEMENT—EVIDENCE OF COPYRIGHT.

In a suit for infringement, the certificate of the Register of Copyrights that two copies of plaintiff's work published in a New York newspaper of June 23d were received as copyright deposits on June 24th was not sufficient evidence that they were delivered at the office of the Librarian of Congress or deposited in the mail addressed to him on June 23d, as required by Act March 3, 1891, c. 565, § 3, 26 Stat. 1106, notwithstanding Copyright Act 1909 (Act March 4, 1909, c. 320) § 55, 35 Stat. 1086 (Comp.

St. 1913, § 9576), providing that such certificate shall be prima facie ev idence of the facts stated therein.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74–76; Dec. Dig. ⟸83.]

2. COPYRIGHTS ⟸83—SUIT FOR INFRINGEMENT—EVIDENCE OF COPYRIGHT.

Under Copyright Act 1909, § 55, providing that the certificate of the Register of Copyrights therein required to be given to each copyright claimant shall be admitted in any court as prima facie evidence of the facts stated therein, a certificate stating that two copies of a publication were received "as copyright deposits" on a certain date was not prima facie evidence that they were delivered or mailed in time, but only that they were turned over to his office in attempted compliance with the copyright statute, as the Librarian of Congress, when a copy is delivered to him or comes to him by mail, is required to make no investigation as to the date of the publication.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 74–76; Dec. Dig. ⟸83.]

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

This cause comes here upon appeal from a decree dismissing a bill for infringement of United States copyright. The complainant, a writer in the employ of the Sun Printing & Publishing Company, published in the Evening Sun of June 23, 1908, a story which purported to be a "real life drama," a narrative of events occurring in the presence of the narrator in an unnamed little town in the interior of Massachusetts. The Sun Printing & Publishing Company undertakes to copyright the entire copy of each edition of the Evening Sun. Whatever copyright it obtained in this story it assigned to the plaintiff. The story was really not a narrative of facts, as it purported to be, but was in large part pure fiction, the imaginative work of the writer. It presented some dramatic incidents.

Defendant has produced a play called "Kindling," containing certain dramatic incidents, which complainant contends constitute an infringement of the copyrighted story.

The District Judge dismissed the bill for reasons which will be found in his opinion, reported 209 Fed. 53.

Edward Lauterbach, of New York City, for appellant.

G. B. Rosenheim, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The statute in force at the time, section 3 of the act of March 3, 1891, made it an essential to the securing of a valid copyright that on or before the day of publication a printed copy of the title or book, etc., shall be delivered at the office of the Librarian or deposited in the mail addressed to him. The record shows compliance with this provision of the act. The statute further provides as an essential to securing a valid copyright that not later than the day of publication two copies shall be either delivered at the office of the Librarian or deposited in the mail addressed to him. The day of publication was June 23, 1908.

To entitle the complainant to maintain this suit it must, therefore, appear that the two copies were *delivered* on that day or *mailed* on that day. The complaint alleges that the two copies were delivered or caused to be delivered to the Librarian on June 24, 1908, which

is a day later than the day of publication. The complaint thus fails to allege compliance with the statute; but, if the proofs showed compliance, the complaint could be amended to conform thereto.

[1] The only evidence introduced on this point is the certificate of the Register of Copyrights that two copies of the Evening Sun of June 23, 1908 "were received as copyright deposits on June 24, 1908." It was physically possible for these copies to have been sent to Washington by messenger on an early train June 24th, and *delivered* to the Librarian on that day. It was also physically possible for them to have been deposited in the mail in New York on June 23d, and to have reached the Librarian on June 24th. In the latter case, the statute would have been complied with; in the former case, it would not. We cannot say which course was followed, in the absence of testimony; therefore complainant has not proved this essential fact, and has not shown the granting of a valid copyright, under the statute.

[2] He is not helped by the provisions of Act 1909, § 55, that the certificate shall be prima facie evidence of the facts stated therein, because the only *fact* stated is that the two copies were received on June 24th. The statement in the certificate that they were received "as copyright deposits" indicate nothing more than they were turned over to the office in attempted compliance with the copyright statute. The receipt of them by the Librarian does not involve any determination by him as to whether or not the deposit is made in time; he is not required to make any investigation when a copy is delivered to him or comes to him by mail as to what was the date of publication. The complaint was properly dismissed.

Although we place our affirmance on this ground, we may state, without reciting at length the various incidents of the newspaper story and of the play, that we are inclined to the opinion that the play would not infringe the copyright of the story, if such copyright had been proved.

Decree affirmed, with costs.

THOMAS v. BOSTON & M. R. R.

(Circuit Court of Appeals, First Circuit. January 15, 1915.)

No. 1099.

MASTER AND SERVANT ⊂=256—INJURIES TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—INTERSTATE COMMERCE—DECLARATION—CONSTRUCTION—"ENGAGED IN INTERSTATE COMMERCE."

Plaintiff, a railroad carpenter, was injured by the fall of a timber while working on a roundhouse, which had been partially destroyed by fire and which had been previously used to house engines used by defendant in interstate commerce. The declaration alleged that on the day of the injury the roundhouse had been partially damaged by fire, in consequence whereof it became necessary for defendant, for the conduct of its interstate commerce, to tear down so much thereof as was so damaged and rebuild the same, and that the defendant was undertaking to tear down and rebuild such roundhouse, with the intent and for the purpose of

again using it in interstate commerce, and that plaintiff was then and there employed on such work. *Held*, that such allegation warranted a construction that the damage which plaintiff was repairing was a partial damage to the structure, temporarily suspending its former use, and not damage requiring the complete removal of the roundhouse to permit the construction of a new one, and as so construed stated a cause of action for injury to plaintiff while engaged in interstate commerce, under the rule that one engaged in repairing an instrumentality of interstate commerce may be engaged in such commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809–812, 815; Dec. Dig. ⊂⇒256.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.

Employés engaged in interstate commerce within Employers' Liability Act, see Baltimore & O. R. Co. v. Darr, 124 C. C. A. 571.]

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

Action by Gordon Thomas against the Boston & Maine Railroad. From a judgment sustaining a demurrer to the declaration (218 Fed. 143) plaintiff brings error. Reversed and remanded.

Louis E. Wyman, of Manchester, N. H. (David A. Taggart and Taggart, Burroughs, Wyman & McLane, all of Manchester, N. H., on the brief), for plaintiff in error.

Oliver E. Branch, of Manchester, N. H. (Branch & Branch, of Manchester, N. H., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The error assigned by the plaintiff is the sustaining of a demurrer to his declaration, in which he has described both himself and the defendant as citizens of New Hampshire, and has expressly based his suit upon the federal Employers' Liability Act.

According to his declaration, the plaintiff was in the defendant's continuous employ as a carpenter, and was injured by the falling of a timber, while engaged in work upon a roundhouse owned and operated by the defendant. The injury is charged to have been in consequence of negligence on the part of the defendant, its agents, or servants.

The question raised by the demurrer is whether or not the plaintiff's allegations sufficiently show him to have been employed in interstate commerce within the meaning of the act, at the time of his injury. The declaration sets forth that, at and before that time, the roundhouse referred to constituted a part of the appliances or equipment used by the defendant while engaging in such commerce, "for the purpose of housing and storing * * * the engines used by it in such interstate commerce."

The District Court understood the declaration as follows:

"According to the declaration, the plaintiff was engaged in tearing down a roundhouse, or that part of it, which had been rendered useless by the fire, and was injured, not by an instrumentality being actively used in interstate commerce, but by a falling timber.

"The active function of the roundhouse as an instrumentality in interstate

business has ceased to exist, and the employment, therefore, was in connection with the removal of a useless structure, to the end that a new one might be created for railroad purposes, and very likely for uses in connection with interstate commerce."

The plaintiff denies that his allegations warrant the statement that the roundhouse had ceased to exist as an instrumentality in interstate business, or the statement that his employment was in removing a useless structure to the end that it might be replaced by a new one. The allegations here in question are as follows:

"That [on the alleged day of the injury] said roundhouse was partially damaged by fire, in consequence whereof it became necessary for said defendant for the conduct of its interstate commerce to tear down so much thereof as was damaged by fire and to rebuild the same, and that said defendant * * * was undertaking to tear down and rebuild said roundhouse, with the intent and for the purpose of again using the same in such interstate commerce; that said plaintiff was then and there employed * * * on said work."

While this is not wholly consistent, we do not think it must necessarily be understood in the sense attributed to it by the District Court. We think it may fairly be taken as alleging that the damage which the plaintiff was repairing was partial damage to the structure, temporarily suspending its former regular use, instead of damage requiring its complete removal, in order to permit the construction of a wholly new structure to begin.

So construed, we think the declaration states a case within the act. One engaged in repairing an instrumentality of interstate commerce may be engaged in such commerce. Pedersen v. Delaware, etc., Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. In Law v. Illinois Central, etc., Co., 208 Fed. 869, 126 C. C. A. 27, the plaintiff employé was repairing an engine, regularly used for interstate transportation, but at the time, and for 21 days before his injury, dismantled and in the repair shop where his injury was sustained. Two days later, its former use was resumed. The Court of Appeals for the Sixth Circuit held that the suit was maintainable under the act.

The judgment of the District Court is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers his costs in this court.

WILLIAMS et al. v. HOGUE.

(Circuit Court of Appeals, Fourth Circuit. November 28, 1914.)

No. 1202.

BANKRUPTCY ⇐269—SALES OF PROPERTY—RELIEVING FROM BID—PUFFING.

It was not ground for releasing a person from a bid made at a public sale of a bankrupt's property that the only other bidder was a puffer, employed by persons who took advantage of the successful bidder's well-known desire to buy the property to run up the bidding and oblige him to pay more than the property was worth, and more than any other bona fide bidder would pay, where such other bidder made no fictitious bid,

under the belief, with good reason, that he would not be held personally liable for his bids, and no assurance of immunity from any person having the power to make good the assurance had been made; and hence an application to be released from the bid was properly denied, where it failed to show any such assurance or belief.

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

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

In the matter of Benjamin G. Williams, bankrupt; George R. Hogue, trustee. From an order confirming an order of the referee, denying an application to be released from a bid at a sale of the bankrupt's property and ordering a resale in default of compliance with such bid, the bankrupt and another appeal. Affirmed.

Neely & Lively, of Fairmont, W. Va., for appellants.

E. F. Morgan, of Fairmont, W. Va., and J. M. Ritz, of Wheeling, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Under an order of sale made in bankruptcy (In re Benjamin G. Williams), the property known as Skinner's Tavern," which had been divided into three parcels, was sold at public auction and bid off by Charles T. Herd for $75,525. A resale was made by George R. Hogue, trustee, in pursuance of an order which required "offering said property for sale both in the piece and in the bulk, and selling the same in whichever way he was able to obtain the most money therefor." The property was then first put up as a whole, and after competitive bidding by Herd and the bankrupt, Williams, commencing with Herd's repetition of his former bid of $75,525, it was knocked down to Williams, the bankrupt, at $75,550. It was then offered in parcels, and No. 1 was bid off by Herd at $14,000; No. 2 and 3 by Williams at $17,050 and $44,600; the aggregate being $75,650. Williams then insisted that he was entitled to hold his bid of $75,550, or at all events that he should have the two parcels bid off by him. The trustee, nevertheless, offered the property again as a whole, and after competition between Herd and Williams it was knocked down to Williams at $85,750. The trustee having reported the sale at $85,750, by petition, Williams set up his claim to take the property at his former bid for the whole, and insisted that in any event he should be allowed to hold his separate bids for the two parcels struck off to him. Williams further set up in his petition that he should be released from his bid of $85,750 because:

"Herd, who was the only bidder at such sale of September 18, 1912, was not a bona fide bidder, but a puffer employed by designing men, who took advantage of the well-known desire of your petitioner to buy said property, and of the contracts which your petitioner has entered into the Schmulbach Brewing Company, above mentioned, to run up the bidding at such sale, so that your petitioner would be obliged to pay more for said property than it was worth and more than any other bona fide bidder would pay."

The referee refused to consider the petition, and ordered a resale in default of compliance with the bid of $85,750, and the District Court confirmed his action.

The only point made in the argument on appeal is that there was error in holding Williams to his bid in the face of his allegation that Herd was "a puffer employed by designing men." The law thus laid down in Peck v. List, 23 W. Va. 395, 48 Am. Rep. 398, is well established:

"It will be observed that in most of the cases where there have been by-bidders, they were employed by the owners of the property about to be sold at auction; that is, were puffers in the strict sense of the word. But it is obviously unimportant whether the by-bidder is employed by the owner of the land or by some one else, having a pecuniary interest in the auction about to be made, and who stands in such a relation to it that he can make good his assurances to the by-bidder that he shall not be held responsible for his bid, if it happens to be the highest bid made. The real essence of the fraud is not that the owner is bidding for the property, but it consists in the fact that a by-bidder, pretending to be a bona fide bidder, deceives honest bidders, raises the price of the property by fictitious bids, increasing competition, while he himself has good reason to believe, and does believe, that he is secure from any risk of being held personally liable for his bids. It is immaterial from whom he derives this assurance of immunity, provided the party giving the assurance expressly or impliedly has the power either legally or practically to make good the assurance."

See Veazie v. Williams, 8 How. (49 U. S.) 134, 12 L. Ed. 1018; Rowley v. D'Arcy, 184 Mass. 550, 69 N. E. 325, 64 L. R. A. 190.

There was no allegation that Herd made fictitious bids, while he believed with good reason that he was secure from risk of being held personally liable for his bids, or that he had any assurance of immunity from any person having the power to make good the assurance. Therefore the allegation of the petition, taken as true, was not sufficient to relieve the purchaser.

Affirmed.

NEW YORK CENT. & H. R. R. CO. et al. v. GILL, Internal Revenue Collector.

(Circuit Court of Appeals, First Circuit. January 13, 1915.)

No. 1082.

INTERNAL REVENUE ⊂=9—CORPORATION—EXCISE TAX—RAILROADS—LEASE—"DOING BUSINESS."

A railroad having leased its property to another railroad corporation, which is operating the same, the lessor, continuing its corporate existence only, is not "doing business," so as to render it liable to taxation, under Corporation Special Excise Tax Act Cong. Aug. 5, 1909, c. 6, § 38 (Comp. St. 1913, §§ 6300–6307).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂=9.

For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

In Error to the District Court of the United States for the District of Massachusetts; George H. Bingham, Judge.

Action by the New York Central & Hudson River Railroad Company and others against James D. Gill, Internal Revenue Collector. Judgment for defendant, and plaintiffs bring error. Reversed and remanded, with directions.

Ralph A. Stewart, of Boston, Mass. (Edmund S. Kochersperger, of Boston, Mass., on the brief), for plaintiffs in error.

Asa P. French, U. S. Atty., of Boston, Mass. (Leo A. Rogers, Asst. U. S. Atty., of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM and DODGE, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a question of a corporation special excise tax, assessed under Act Aug. 5, 1909, 36 Stat. It was assessed against the Boston & Albany Railroad Company, which had been duly leased to the New York Central & Hudson River Railroad Company. Under those circumstances the New York Central & Hudson River Railroad Company paid the tax under protest, and claims that the tax should be refunded to it by force of the application of the decision of the Supreme Court in McCoach v. Minehill & Schuylkill Haven Railroad Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, and of other decisions of the Supreme Court of like class.

Possible distinctions between some of the cases decided in the Supreme Court and the case now under review have been suggested; but, considering the interpretation to be given to the words "doing business," as used in this statute, those distinctions are fanciful. That they are so in this connection is shown by Anderson v. Morris & Essex Railroad Co., decided by the Circuit Court of Appeals in the Second Circuit, on September 9, 1914, 216 Fed. 83, 132 C. C. A. 327. There the meaning of the words "doing business" in the sense of this statute was fully considered, and interpreted as having an entirely different meaning from the same words in other statutes framed with reference to other purposes. That case related to a lease from the Morris & Essex Railroad Company to the Delaware, Lackawanna & Western Railroad Company; and we accept the interpretation there given by the Circuit Court of Appeals for the Second Circuit, construing the words in this statute, "doing business," or "engaged in business," as having direct reference to the active business for which a railroad corporation is incorporated, as correct. The court held, at page 91, that these words had such relation in this statute that they must be given "an ordinary and natural signification," and in effect that the corporation must be an actively operating concern. Further, the court held:

> "The lessor corporation had practically gone out of business, and was disqualified from any activity respecting the operation and management of the railroad which it had been incorporated to carry on."

This was a sensible interpretation of the statute, and one in harmony with its general terms and purposes. It would be sufficient to say that, in cases of doubt, our practice is to follow the decisions of the Circuit Courts of Appeals in other circuits; and we may add that the decision in the Second Circuit, to which we have referred, seems to us in harmony with the general terms of the statute involved, even though we

find that, in the present case, we have a casus omissus, and a gap in the legislation which we are not authorized to supply.

The exercise of corporate power by the Morris & Essex Railroad Company, which was held not to amount to a resumption of the business transferred by its lease, or a doing of business in the statutory sense, consisted in an issue of bonds at the lessee's request, in accordance with provisions contained in the lease. The lessor company in the present case, besides so issuing bonds, had on certain occasions taken steps in exercise of its right of eminent domain. The steps so taken were taken at the lessee's request, in order to obtain additional land necessary for the proper operation of the leased railroad, at the lessee's sole expense and under its direction, and in accordance with provisions in the lease. Bonds were issued to pay for the land thus acquired. We find no reason for regarding these land takings as "doing business" in the statutory sense, if, as held in the above case, and as we hold, the issuance of the bonds is not to be so regarded. We make these observations more as a matter of illustration than to fix limitations, and we do not intend thereby to detract anything from the citations from the Morris & Essex Railroad Co. Case.

Inasmuch as this case is submitted on agreed facts, we have no difficulty in directing final judgment.

The judgment of the District Court is reversed, and the case is remanded to that court, with directions to enter judgment in favor of the New York Central & Hudson River Railroad Company, with interest, and the plaintiffs in error recover their costs of appeal.

MILLON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 59.

ALIENS ⊂⊃59—IMMIGRATION LAWS—CONTRACT LABOR—CIVIL OR CRIMINAL REMEDY.

Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, § 1, 36 Stat. 263 (Comp. St. 1913, § 4244), provides, in section 4 (Comp. St. 1913, § 4248), that it shall be a misdemeanor for any person to prepay transportation or assist or encourage the importation of contract labor into the United States, and in section 5 (Comp. St. 1913, § 4250) declares that a violator of section 4 shall forfeit and pay for such offense $1,000, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any alien thus promised labor or service of any kind, as debts of like amount are recovered in the courts of the United States, and it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States. *Held*, that the two sections, construed together, indicated an intention of Congress to provide a fine of $1,000 as a punishment for the misdemeanor, and that the provision for a civil remedy did not exclude a criminal prosecution; the government being authorized to proceed either by indictment to punish the misdemeanor or by civil remedy to collect the penalty as a debt.

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

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

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

I. H. Levy, of New York City, for plaintiff in error.

J. C. Knox, Asst. U. S. Atty., of New York City.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. In this case the plaintiff in error was indicted under section 4 of the act of February 20, 1907, for the importation of three contract laborers, in violation of section 2 of that act, as amended March 26, 1910. The defendant objects to the jurisdiction of the court on the ground that, while section 4 defines a crime, it prescribes no punishment and therefore the whole provision is a nullity. Sections 4 and 5 read as follows:

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.

"Sec. 5. That for every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

The separation of these two sections may be disregarded. Read together, as if they both constituted section 4, it is quite clear that the punishment for the misdemeanor is a fine of $1,000. The provision of a civil does not exclude a criminal remedy. The government may proceed either by indictment to punish the misdemeanor or by civil remedy to collect the penalty as for a debt. In either case the fine or penalty is the sum of $1,000. We regard the decision in United States v. Stevenson, 215 U. S. 190, 199, 30 Sup. Ct. 35, 37 (54 L. Ed. 153), as controlling. Mr. Justice Day says:

"Congress having declared the acts in question to constitute a misdemeanor, and having provided that an action for a penalty may be prosecuted, we think there is nothing in the terms of the statute which will cut down the right of the government to prosecute by indictment, if it shall choose to restore to that method of seeking to punish an alleged offender against the statute."

The judgment is affirmed.

DRUM v. TURNER.†

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

No. 4165.

(Syllabus by the Court.)

1. PATENTS ⟹168—CLAIMS—ACQUIESCENCE IN REJECTION—ESTOPPEL.

While one who acquiesces in the rejection of his claim on references is estopped from maintaining that an amended claim covers the combinations and devices shown in those references, or that it has the breadth of the rejected claim, he is not estopped from claiming and securing by an amended claim every improvement and combination he has invented that was not disclosed by the references on which his original claim was rejected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. ⟹168.

Amendment of application for patent, see notes to Cleveland Foundry Co. v. Detroit Vapor Stove Co., 68 C. C. A. 239; Hestonville, M. & F. Passenger Ry. Co. v. McDuffee, 109 C. C. A. 613.]

2. PATENTS ⟹168—CLAIMS—ACQUIESCENCE IN REJECTION—ESTOPPEL.

Acquiescence in the rejection of a claim for a beamless "flooring composed of concrete having metallic network inclosed therein" on the citation of the patent to Seeley, No. 467,141, for various forms of beams to support a floor and the substitution of a claim for a beamless flooring consisting of concrete having metallic network consisting of strips of wire netting inclosed therein, did not estop the patentee from maintaining that a flooring consisting of concrete having metallic network consisting of belts of small iron rods from three-eighths to one-half an inch in diameter inclosed therein disposed and operating in the same way and accomplishing the same results as the strips of wire netting of the patentee was an infringement of his patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. ⟹168.]

3. PATENTS ⟹91—ANTICIPATION—PROOF.

The burden is on him who alleges priority of discovery of an invention which has been patented to another to establish that fact. And where the claim of such priority is first made many years after a patent issued, and it is supported by oral evidence only, the proof must be beyond a reasonable doubt.

Where the evidence is principally oral, accompanied by sketches or writings, the genuineness and dates of which are dependent upon oral testimony only, the proof must be at least clear, convincing, and satisfactory.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 121–123; Dec. Dig. ⟹91.]

4. PATENTS ⟹283, 289—CONTINUING TRESPASSES—DEFENSE—LACHES.

Delay and silence during the life of a patent, unaccompanied by such acts or omissions to act by the owner as amount to inducing deceit and thereby to an equitable estoppel, will not deprive such owner of his right to recover for an infringement of his patent.

It is no defense to a suit for an injunction and an accounting on account of the continuing trespasses of an infringer that the latter has long been trespassing on the rights of the owner with impunity.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452, 467–469; Dec. Dig. ⟹283, 289.]

⟹For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 31, 1915.

5. PATENTS ⟸328—VALIDITY—INFRINGEMENT.

Claims 1, 3, and 4 of letters patent No. 698,542, issued April 29, 1902, to Norcross for a metallic-concrete flooring without supporting beams, are valid and are infringed by floorings constructed in the way described in letters patent Nos. 985,119 and 1,003,384.

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Suit by John L. Drum against Claude A. P. Turner. From decree for defendant (209 Fed. 854), plaintiff appeals. Reversed and remanded, with instructions to render decree for plaintiff.

Edward Rector, of Chicago, Ill., and Amasa C. Paul, of Minneapolis, Minn., for appellant.

Charles J. Williamson, of Washington, D. C., for appellee.

Before SANBORN, Circuit Judge, and TRIEBER and REED, District Judges.

SANBORN, Circuit Judge. This appeal questions a decree which dismissed a complaint of the infringement of letters patent No. 698,542, issued April 29, 1902, to Orlando W. Norcross, for a metallic and concrete flooring by a flooring made substantially in the manner described by the specifications of letters patent No. 985,119 and No. 1,003,384, issued to Claude A. P. Turner, February 21, 1911, and September 12, 1911, respectively. The grounds of the dismissal were that Norcross had so limited his claims by his acquiescence in the rejection of his earlier claims by the examiner on the citation of the patent to Seeley No. 467,141, issued January 12, 1892, that they were not infringed.

The purpose of the invention patented to Norcross was to make in one panel or piece, extending throughout a building however large, a monolithic flooring composed of a metallic network embedded in concrete which would sustain itself and its load upon separated posts without the use of girders, floor beams, or other horizontal supports. The principle or mode of operation of the device by which this object was attained was to imbed in a concrete flooring a metallic network consisting of strips of heavy wire netting which were laid lengthwise of the building, crosswise of the building, and diagonally over the tops of and supported by the columns, so that a strip lengthwise, a strip crosswise, and a strip laid diagonally would lie on or under each other over the top of each post in cobhouse fashion and leave only small triangular spaces in any rectangular space between four posts free from this metallic network. In his specification Norcross wrote:

"It has heretofore been thought necessary to either rest or hang the floors upon girders or floor beams. In the larger type of buildings heavy rolled iron girders are now universally employed and associated with narrower floor beams constituting in effect a separate floor section. * * * In a flooring constructed according to my invention I propose to entirely dispense with all floor beams, girders, joists, or other horizontal supports providing a construction in which a floor is directly supported upon separated posts. * * * I am aware that numerous changes may be made in practicing my invention by those who are skilled in the art without departing from the

scope thereof as expressed in the claims. I do not wish, therefore, to be limited to the constructions I have herein shown and described."

At the time Norcross wrote and filed this specification, it was true that in the larger type of buildings heavy iron girders and narrower floor beams were deemed necessary and were generally used. It is also true that a flooring constructed in accordance with his specification and claims is capable of supporting itself and its reasonable load upon separated posts in a single panel or piece throughout large buildings without girders, floor beams, or other horizontal supports, and that the principle or mode of operation of his invention and the use of the means he has described, or their equivalents, have gone into use in such buildings very generally, although they had never been used therein before. The claims of his patent which are to be considered in this case are:

"(1) The combination of separated posts or supports, and a flooring consisting of metallic network formed by strips of wire netting inclosed therein, so as to radiate from the posts or supports on which the floor rests.

"(2) A flooring resting on separated supports, and consisting of concrete with metallic network so arranged therein that the amount of metal will be greatest at the points where the greatest tensile and shearing strains are to be supported.

"(3) A flooring resting on separated posts, and consisting of metallic network formed by strips of wire netting laid from post to post to cross each other in cobhouse fashion, and concrete inclosing the metallic network.

"(4) A flooring resting on separated posts, and consisting of metallic network formed by strips of wire netting laid from post to post, and on the diagonals of the figures outlined by the posts, and concrete inclosing the metallic network."

The principle or method of operation of the construction of the floors which are alleged to infringe the patent of Norcross is disclosed in the drawings and specifications of Turner's patents Nos. 985,119 and 1,003,384. Those drawings and specifications describe much that has been found to be immaterial to the issue here, the reinforcement of vertical bars of the columns or posts, the enlargement of the capitals or heads of the posts, the construction and use of cantilever heads thereon, and the method of attaching and rendering integral the heads of the columns and the metallic-concrete flooring which the columns support, and these things are here dismissed.

What it is important to know and consider is that Turner imbeds in his concrete flooring a metallic network consisting of belts of small iron rods from three-eighths to one-half an inch in diameter laid lengthwise of the building, cross-wise of the building, and diagonally so that on the top of each post there lie one of these belts extending lengthwise, one of them extending crosswise, and one of them extending diagonally in cobhouse fashion, so that the concrete flooring is supported by these belts of rods and the floor itself by the posts alone without beams or girders, and so that these belts of rods cover practically all the space between the posts. These belts of small iron rods differ from the strips of wire netting of Norcross in that they are made of the rods from three-eighths to one-half an inch in diameter, while Norcross' strips are made of heavy wire netting three-eighths of an inch in diameter, in that the belts are wider than the strips of wire netting, and in that at the places where they lie over the posts

they are imbedded in the upper, while Norcross' strips are imbedded in the lower, part of the concrete flooring. But they support the flooring and dispense with girders and beams by the use of the same principle by means similar, if not equivalent, to the strips of Norcross disposed in the same way.

[1, 2] In his specification first presented to the Patent Office Norcross claimed:

"(1) A flooring consisting of concrete having metallic network inclosed therein so as to radiate from the posts on which the flooring rests."

His second and third claims were for metallic network inclosed in a flooring consisting of concrete, and he also made what are now claims 2, 3, and 4 of his patent. The examiner rejected the first three claims on the ground that they were met by the patent to Seeley No. 467,141, issued January 12, 1892. Norcross then amended his specification by substituting claim 1 of the patent for the three rejected claims, and replied:

"The patent of record to Seeley shows a construction in which rolled iron plates and beams are inclosed in concrete. One especial object of the applicant's invention is to dispense with the use of rolled iron of all forms employing wire netting in place thereof."

Thereupon the present claim 1 was allowed, and claims 2, 3, and 4 passed to patent in their original form. Did this action of Norcross estop him from claiming that the defendant's construction is an infringement of the claims of his patent? The rule by which this question must be answered is that a patentee who acquiesces in the rejection of his claim on a reference cited in the Patent Office and accepts a patent on an amended claim is thereby estopped from maintaining that the latter claim covers the device shown in the reference and that it has the breadth of the original claim. But one who acquiesces in the rejection of his claim because it is said to be anticipated by another patent or reference is not thereby estopped from claiming and securing by an amended claim every known and useful improvement that is not described in such reference. National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 714, 45 C. C. A. 544, 565; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 268, 93 C. C. A. 561, 570; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 851, 128 C. C. A. 53; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 373, 131 C. C. A. 504.

The patent to Seeley describes numerous arrangements of beams to support floors. In one arrangement he makes the spaces between the columns narrow and uses beams disposed at right angles to each other so that they inclose a substantially square space, places other beams diagonally across this rectangle, and secures the ends of all the beams to the respective columns surrounding this rectangle which they reach. Other arrangements of the beams which he shows were to secure a ring to each of the columns and to attach the ends of the beams forming each small rectangle to the rings of the columns they respectively reached and to substitute for the diagonal beams others in various forms, always retaining the direct beams forming the small rectangles. The patent discloses plans for multiplying the number of beams requi-

site to support a floor, but no suggestion of the construction of a floor supported upon posts without beams. The specification contains the statement that the spaces between the beams of the floor frame which consist of these various beams may be filled with tile cement, etc. With this patent to Seeley and the various claims of Norcross before us, it is plain that in order to reject the first three original claims of Norcross and to sustain, as he did, the first four claims of the patent to Norcross, the examiner must have held that a claim for "a flooring consisting of concrete having metallic network inclosed therein so as to radiate from the posts on which the flooring rests," in the way described by Norcross, was broad enough to include the network of beams which might be made of iron, devised by Seeley to support a floor, but that Norcross had invented and was entitled to a patent for the construction of a flooring consisting of concrete and of metallic network formed by strips of wire netting inclosed therein so as to radiate from and be supported by separate posts without girders or beams. Norcross, and his assignee, are estopped by his acquiescence in the rejection of the first three original claims of Norcross and the substitution of the first claim of his patent from questioning this decision. But the extent of its effect is to deprive them of a right to a monopoly of the device disclosed by the patent to Seeley and its mechanical equivalents and to grant them a monopoly of the device secured by the patent to Norcross and all its mechanical equivalents that are not the mechanical equivalents of Seeley's floor beams, and the question in this case in the last analysis is whether Turner's flooring is the mechanical equivalent of Seeley's beamed floor frame or of Norcross' concrete-metallic floor.

An inspection of the drawings and a study of the specifications of the patent to Seeley, the patent to Norcross, and the two patents to Turner leave no doubt of the true answer to this question. The purpose of Seeley's invention was to provide beams to support a floor. The purpose of the invention of Norcross and of the device of Turner was to provide a monolithic single panel floor composed of concrete wherein large wire or small rods were inclosed which would support itself and its load on separate columns without beams or horizontal supports of any kind. Seeley's invention never accomplished, and never could accomplish, the purpose of Norcross or of Turner. The invention of Norcross attained it by the use of strips of heavy wire netting inclosed in concrete extending lengthwise of the building, crosswise of the building and diagonally over the tops of supporting posts, and Turner by the use of belts of small iron rods inclosed in concrete extending in the same way over the tops of sustaining posts. The monolithic flooring of Turner in which were imbedded the belts of small iron rods in order to dispense with the use of beams and girders to support the floor was the plain mechanical equivalent of the flooring of Norcross in which were inclosed the strips of heavy wire netting for the same purpose because it appropriated the principle, the mode of operation of the latter, and attained the same result in the same way by equivalent mechanical means. The result is that the plaintiff was not estopped by the acquiescence of Norcross in the rejection of the first

three of his original claims and the substitution of the first claim of his patent therefor from enforcing his present claim against the defendant for the infringement of his patent by the latter's use of the belts of small iron rods instead of the strips of the wire netting of Norcross, and that Turner's construction of his flooring was an infringement of the patent to Norcross.

Before reaching these conclusions, the argument that the reply of Norcross to the examiner, to the effect that one especial object of his invention was to dispense with rolled iron in all forms employing wire netting in place thereof, ought to estop him and the plaintiff from claiming that the use of the small iron rods constitutes an infringement, received study and meditation. But this statement must be read and given effect in the light of the circumstances surrounding Norcross at the time he made it, in the light of the question which was then before him for consideration, and in the light of the knowledge then possessed of the use of rolled iron for the purpose for which he used his strips of wire netting. The only use of rolled iron then under consideration was its use in the form of beams to support floors and especially in the form of the beams of Seeley. It had never been used in the place of strips of wire netting to construct a monolithic floor throughout a large building in a single panel capable of supporting itself on separate posts. The abandonment of a right is generally conditioned by the intention to abandon it. It is not to be presumed, but must be clearly evidenced by the act or declaration of the party charged therewith. The circumstances surrounding Norcross when he made his declaration, the subject-matter regarding which he uttered it, his knowledge of the use of rolled iron for the purpose for which he was using his strips of wire netting, have converged to convince that he never intended to renounce, and did not by this declaration renounce, his right to enforce his claim for an infringement of his patent as plain as that presented by the construction of Turner and so remote from the device of Seeley to meet which his statement was made.

Nor have the contentions that the flooring of Turner is not the mechanical equivalent of that of Norcross, because the cross-wires in the strips of netting have an effect in keeping the long wires from slipping which is not produced by the belts of small rods, but the belts of small rods are spaced apart and tied to keep them in place in the actual construction of Turner's device, because Turner places his rods in the upper while Norcross places his wires in the lower part of the flooring where they lie over the tops of the columns, because Turner's belts of rods are wider than Norcross' strips of wire netting, because Turner has enlarged the capitals of his columns and constructed cantilever heads for them and for other reasons of like character, failed to receive consideration. Conceding that these changes which Turner claims to have made were improvements on the device patented to Norcross, they did not deprive the plaintiff of his right to a remedy for the defendant's appropriation and use by equivalent means of the principle of his invention. The answer to all of these contentions is that the basic principle or mode of operation of the defendant's construction of beamless flooring is strips or belts of large wires or small rods

imbedded in concrete and laid over the tops of columns in the way described in and secured to Norcross by his patent, whereby a monolithic floor inclosing the wires or rods in a single panel, however large the building, is made to sustain itself and its load on separate columns without girders or beams. Extract this principle or mode of operation from the devices of Turner, and they become inefficient and useless. The floors will not sustain themselves on the posts. And as long as he continues to use the principle of Norcross and the mechanical means which he described and secured, or their mechanical equivalents, he cannot escape infringement.

[3] It is next said that the prior art discloses the fact that the invention of Norcross was anticipated or the claims of his patent so limited that either his patent is void or its effect is so narrow that the defendant's device fails to infringe. Much of this argument rests on the theory that the portions of the flooring of Norcross, in which the strips of wire netting lie, may be segregated from the remainder of the flooring by imaginary vertical planes drawn through the flooring along the sides of the strips and called beams, and that the result is that his floor is not without but is full of beams. It is an ingenious contention, but it is not sound. In the construction of the patents in this case and in the application of the law to the facts it presents, words must be given the same meaning that the patentees gave them and must be used to designate the same things they used them to indicate or nothing but confusion and mystification can result. Throughout the prior art and throughout these patents, girders and beams were and are horizontal supports of iron, wood, or other material, generally separate from the flooring, upon which the flooring rests or to which it is attached so that the girders or beams may support it. Floors which, without such beams or girders under, in, or over them, sustain themselves on separate columns by reason of strips of large wire netting or belts of small rods or like material which have been made integral parts of them, are floors without beams in the nomenclature of the art, and in thought and expression these meanings must be preserved in the discussion, consideration, and determination of the issues here in hand. The theory that the floors of Norcross and Turner contain and are supported by girders or beams is fallacious and cannot be permitted to prevail.

We turn to the prior art. Payne, in 1874, in English patent No. 2,786, disclosed a device for constructing a floor without girders to support it by dividing "the floor space into angular, generally rectangular compartments providing supports at the corners of the compartments" and disposing "the plastic concrete in vaults, groins, or fan vaulting." He stated in his specification that he connected the pillars longitudinally, transversely, or diagonally by ties or strengthened the outermost ones by buttresses to resist any thrust from flaws in the concrete, and that he sometimes used light diagonal arched, braced, or other girders to divide the rectangular spaces. But the specification and drawings conclusively show that the principle of his construction was the support of the floor by disposing in a series of arches or vaults restiug on the supports concrete of sufficient thickness to sustain it-

self and then filling the arches or vaults, if desired, in order to make the lower side of the floor level. No conception of the support of a comparatively thin, level, smooth concrete floor in one panel or piece throughout a large building by strips or belts of large wire netting or small iron rods imbedded in the concrete and lying over the tops of the posts is suggested, much less taught by this patent, and it neither anticipates the patent of Norcross nor reduces the range of mechanical equivalents ascribed to it in the earlier part of this opinion.

Hyatt in his patent No. 206,112, issued July 16, 1878, shows how to strengthen slabs of concrete by inclosing flat thin rolled iron ties therein, as he says, so as to make it possible "to construct them sufficiently large to form an entire sidewalk having the side walls of the basement extension under the sidewalk for their foundation." He discloses methods of making beams or girders by inclosing iron ties of large size in cement or concrete, and writes in his specification:

"Where the spaces are great, as in mills and warehouses, the manner of constructing the beams admits of considerable variation, for they are needed in part, under these circumstances, to be fashioned as girders or short bridges in order to carry a portion of the flooring in place of the wall."

He declares that:

"It is the practice in common warehouse building to break the span by a row of columns topped by a girder, to carry the floor in conjunction with the side walls, the whole depth of such girder being seen underneath the floor, and to this extent at that line lessening the headroom of the apartment underneath, but by my method of construction the girder and floor become one, the girder not being underneath the floor, but a portion of it, and thus to a large extent lost to view in it," and that "*I*," in his figure 12, "represents the portion of the girder below the floor being only a fraction of the entire depth, the top of the floor at that part being the actual top of the girder."

These statements and a reading and consideration of the entire specification have convinced that Hyatt never conceived or so suggested that a mechanic skilled in the art could have constructed such a metallic-concrete flooring as that of Norcross, or the practicability or possibility of the use of such a floor in mills, warehouses, or other buildings without horizontal supports to sustain it. Hyatt's construction was clearly conditioned by the use of beams and girders to support the floor whenever the spaces between the walls were greater than the width of a city sidewalk.

Hallberg in his patents No. 659,965 and No. 659,966, issued October 16, 1900, describes various forms of tension rods to support tile flooring. In the form which most resembles the device of Norcross, he fastens to collars on the tops of supporting columns the ends of sagged tension rods which extend radially from each column to other columns or walls that outline a small rectangle. He incloses each of these rods in concrete or cement forming, what he calls, girders or beams, each composed of a single tension rod inclosed in concrete and extending from one column to another of the four columns or to the wall which outline the rectangle, but no farther, and he fills the triangles formed by these beams with flat arch tile. In one of his patents he shows a concrete layer spread upon the tile and writes that such a concrete

flooring is applicable to any of the constructions he describes. But none of his forms of construction suggests or describes the flooring of Norcross or his means of constructing it. None of them describes or suggests strips or belts of wire netting or small rods imbedded in concrete extending throughout the building and lying over the tops of the columns, each strip or belt extending out from each column in opposite directions, or a flooring composed of such strips or belts inclosed in a single level panel or piece of concrete extending throughout the building constituting a solid monolithic flooring capable of sustaining itself and its load upon the columns alone without beams or girders or other horizontal supports. None of them could have called to the mind of a mechanic skilled in the art the principle or mode of operation and the means invented by Norcross to accomplish the object he sought to secure.

English patent No. 452, issued to Scott in 1867; German patent No. 560,137, issued May 12, 1896, to Knoche; patent No. 634,986, issued to Matrai, October 17, 1899; English patent No. 16,187, issued to Gurtler in 1899; and a clipping from "The Doings in Expanded Metal," 1901—have also received study and meditation, but none of them comes nearer to an anticipation of the claims of the patent to Norcross or to a limitation of the range of mechanical equivalents which they secure than the patents which have already been discussed. It would therefore be useless to review them at length. Suffice it to say that a careful reading of the briefs of counsel and a study of the prior art as it is disclosed by the patents, publications, and testimony in evidence, have led to the conclusion that there is nothing in these patents or publications which anticipates the claims of the patents of Norcross or so restricts the range of mechanical equivalents which they secure to the plaintiff that the construction and the flooring of the defendant can escape from infringement.

One of the defenses which Turner pleaded and upon which his counsel insists is that before Norcross conceived the invention patented to him on April 29, 1902, on his application filed November 22, 1901, Turner had conceived, disclosed to others, and was diligently adapting and perfecting the flooring disclosed in his patent No. 1,003,384, and that "Norcross unjustly or surreptitiously obtained the said patent No. 698.542." This defense concedes, and rightly we think, although Turner has taken the opposite position in his other defenses, that Turner's construction embodies the principle and the means claimed and patented to Norcross; for if it did not the obtaining of the patent for them by Norcross could not have been done unjustly or surreptitiously, and this defense must be discussed and decided upon this concession. The patent raises the presumption that Norcross first conceived and reduced to practice this invention, and the burden was on the defendant, Turner, to prove by satisfactory evidence the averments of this defense. The burden is on him who alleges priority of conception or discovery of an invention secured by a patent to another to establish that fact. Where the claim of such priority is first made many years after a patent issued and it is supported by oral evidence only, the proof must be beyond a reasonable doubt. And where the

evidence is principally oral, accompanied by sketches or writings whose genuineness and dates are evidenced by oral testimony only, the proof must be at least clear, convincing, and satisfactory. Cantrell v. Wallick, 117 U. S. 689, 696, 6 Sup. Ct. 970, 29 L. Ed. 1017; Barbed Wire Patent, 143 U. S. 275, 285, 12 Sup. Ct. 443, 36 L. Ed. 154; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 703, 45 C. C. A. 544, 554; Keasbey & Mattison Co. v. American Magnesia & Covering Co., 143 Fed. 490, 497, 74 C. C. A. 510, 517; Emerson & Norris Co. v. Simpson Bros. Corporation, 202 Fed. 747, 750, 121 C. C. A. 113, 116.

The evidence is conflicting. Turner and Bell testified that in 1898 Turner made and exhibited to Bell a sketch in his memorandum book of four posts and of small rods extending over the tops of them on the lines of a rectangle and diagonally and a photograph of that sketch is in evidence. They also testified that in 1904 similar sketches, which have been lost, were made by Turner. Turner and Boatrite testified that in 1901 Turner made a sketch of belts of rods extending over piers of masonry in the same way, that this sketch has been lost, and Boatrite, at the time he testified, made a sketch from memory which he said illustrated that made by Turner in 1901. These witnesses also testified that these sketches were made to represent rods to be imbedded in a concrete floor for the purpose of dispensing with beams. Turner testified that he had made other sketches, but that he never had any experimental data to indicate how floors constructed according to his sketches would sustain themselves and that he never constructed such floors until 1906. Norcross and French testified that in 1899 or 1900 they constructed and tested a single panel or piece of concrete flooring 30x16 feet in area, in which were inclosed strips of wire netting, that the wire netting extended along the sides and ends of the rectangle formed by the eight outer posts and diagonally from these posts to the ninth post, which was located near the center of the rectangle, and that this flooring was supported by these nine posts alone. There was evidence tending to prove that prior to 1906 Norcross had successfully used in the construction of buildings a floor made in the way described in his patent, and there was no evidence in the case that Norcross derived his conception of his invention directly or indirectly from Turner. The record discloses the indisputable and significant fact that, although Norcross applied for his patent in 1901 and secured it in April, 1902, Turner never assailed it prior to this suit and never reduced the invention he describes, or that which he describes in his patent, to practice until 1906, nor applied for a patent for it until January 23, 1905. There is other testimony upon this issue. It has been read and considered, and the result is: (1) That the evidence that Turner first conceived this invention is not of that clear and satisfactory nature which is required by the law to overcome the counter presumption raised by the patent and Turner's silence and inactivity from 1898, when he claims to have conceived the invention, until 1905; and (2) that the record fails to convince that Turner was using reasonable diligence in adapting and perfecting the invention

when Norcross obtained the patent for it, or that Norcross obtained that patent either unjustly or surreptitiously.

[4] It is argued that because Norcross brought no suit for infringement of his patent for many years and embodied it in few buildings and sold it to the plaintiff for some $2,000, the latter is estopped by laches and by this silence and inactivity in its grantor from maintaining this suit for an infringement of the patent. But this patent was of record and was itself notice to the defendant and to all the world that the owner of it held the exclusive right to make, use, and sell the flooring which it secured, and that any one who made, sold, or used it violated that right. Neither Norcross nor the plaintiff ever withdrew that notice, neither of them ever in answer to any inquiry of the defendant, by act or deed, renounced or indicated that he would renounce his right to prosecute for such trespasses. Delay and silence within the life of a patent, unaccompanied by such acts or silence of the owner as amount to inducing deceit and thereby to an equitable estoppel, and the evidence fails to satisfy that there have been any such acts or omissions in this case, will not deprive such owner of his right to recover for an infringement of the exclusive rights secured to him by the patent. It is no defense to a suit for an injunction and an accounting on account of the continuing trespasses of an infringer that the latter has been trespassing on the rights of the owner of the patent for years with impunity. Menendez v. Holt, 128 U. S. 514, 523, 9 Sup. Ct. 143, 32 L. Ed. 526; McLean v. Fleming, 96 U. S. 245, 253, 24 L. Ed. 828; Stearns-Rogers Mfg. Co. v. Brown, 114 Fed. 939, 944, 52 C. C. A. 559, 564; Ide v. Trorlicht, Duncker & Renard Carpet Co., 115 Fed. 137, 148, 53 C. C. A. 341, 352. The plaintiff was not estopped from maintaining this suit.

[5] In view of the state of the prior art and the restriction of the breadth of the claims wrought by the acquiescence of Norcross in the rejection of his first three original claims, claim 2 of his patent is useless. It must be read and interpreted as a part of the specification which discloses the fact that the greatest shearing strains are at and near the supports, and the greatest tensions are at and near the supports and near the centers of the spans. This claim 2 therefore is for a flooring of concrete with metallic network so arranged therein that it will be greatest at and near the supports and near the centers of the spans. It is limited by Seeley's patent to the metallic network composed of strips of wire netting and the mechanical equivalents thereof that are not the mechanical equivalents of Seeley's beams. In so far as it assumes to secure anything more than is saved by claims 1, 3, and 4, it is therefore void.

The argument that claims 1, 3, and 4, or either of them, when read and construed, as they must be, as a part of the entire contract evidenced by the specification which contains them between the United States and the patentee, is so indefinite as to be void, has not proved convincing. A careful perusal of the specification sufficiently refutes it.

The review of the prior art, the long and fruitless endeavor before the disclosure of this patent to find a way to construct concrete floors

for large buildings without beams or girders, the gradual approach to the desideratum, its first conception and reduction to practice by Norcross, and its large and successful subsequent use, have satisfied that his flooring and his methed of construction were not within the reach of the mechanic skilled in the art, but were novel and useful and the product of the genius of the inventor. The chief contentions of the parties have now been noticed, none of their arguments which are contained in 522 printed pages of briefs has escaped perusal and study; but it would be useless to extend this opinion by a review of those which have not been discussed herein. The conclusion of the whole matter is that claims 1, 3, and 4 of patent No. 698,542 are valid and are infringed by the construction of a flooring in the way described in No. 985,119 and No. 1,003,384; that the decree below must be reversed; and that the case must be remanded to the court below, with instructions to render a decree in favor of the plaintiff for an accounting and an injunction.

It is so ordered.

CONTINUOUS GLASS PRESS CO. v. SCHMERTZ WIRE GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. January 8, 1915.)

No. 1896.

1. PATENTS ⟸318—INFRINGEMENT—ACCOUNTING FOR PROFITS.

On an accounting for profits of infringement of a process patent, the defendant is entitled to credit for the total cost of the product made by him, and is chargeable with the proceeds of its sale; but he must account for all the product so made, and is not entitled to credit for the cost of production of any part not accounted for.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⟸318.

Accounting by infringer of patent for profits, see notes to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8; Clark v. Johnson, 120 C. C. A. 389.]

2. PATENTS ⟸322—ACCOUNTING FOR PROFITS OF INFRINGEMENT—FINDINGS OF MASTER.

In considering exceptions to a master's report on matters of fact affecting the accuracy of his findings in respect to profits, gains, and savings made by the use of an infringing apparatus or process, the conclusions of the master, depending on the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590–595; Dec. Dig. ⟸322.]

3. PATENTS ⟸319—INFRINGEMENT—COMPUTATION OF DAMAGES.

On an accounting for damages for infringement of apparatus and process patents, where the price at which the infringing product was produced by both complainant and defendant was stipulated, but it appeared that complainant procured its product to be made by another, for which it paid a fixed price, such cost price must be taken as the basis for computing its damages.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577–586; Dec. Dig. ⟸319.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Joseph Buffington, Judge.

Suit by the Schmertz Wire Glass Company and the Mississippi Wire Glass Company against the Continuous Glass Press Company. Decree for complainants, and defendant appeals. Modified and affirmed.

For opinion below, see 216 Fed. 828.

A. B. Stoughton, of Philadelphia, Pa., for appellant.

Drury W. Cooper and Arthur J. Baldwin, both of New York City, for appellees.

Before McPHERSON, HUNT, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from the final decree entered against the defendant in two suits for infringement of patents owned by the complainant, for apparatus and process for the manufacture of wire glass. The court held the patents valid and infringed, and, upon a revision of the master's finding, ascertained profits made by the defendant from its infringement in the amount of $7,835.35, and damages to the complainants in the amount of $15,812.81, and awarded judgment thereon against the defendant for the total sum of $23,648.16, with interest thereon at the rate of 6 per centum per annum from the 21st day of October, 1913, and allowed to the complainants their costs of the actions, including the costs of the proceedings before the master.

The questions presented for review pertain only to the parts of the decree awarding profits, damages, and costs.

The Schmertz patents covered apparatus and process for the manufacture of polished wire glass, which, after litigation extending over a period of 18 years, were held to be valid. To produce polished wire glass, the defendant employed an apparatus and process which were charged, and have since been held, to infringe the patents of Schmertz. In making polished wire glass by either process, the first product is a sheet or pane of glass, into the central plane of which a sheet of wire fabric has been introduced during its manufacture. This sheet of glass is rough, and is known as unpolished wire glass. To complete the process, the rough sheet is ground and polished, and then becomes the finished product, and is known as polished wire glass. In response to questions propounded at the hearing under the order of the court for an accounting, officers of the defendant company disclosed the quantity of glass of both kinds produced by the infringing process and the disposition of a portion thereof, by statements consisting of tables of figures. These statements form the bases upon which the master made his several findings; and as they are very complicated, they will be rearranged in an effort to produce simplicity, adhering, of course, to the precise figures given.

By its first statement, the defendant showed the quantity of rough or unpolished glass produced by the infringing process and the manner of its disposition, measured by square feet, the substance of which is as follows:

Unpolished Wire Glass.

Total amount produced		80,983 feet
Amount sold	3,728 feet	
Amount used for polishing	65,871 "	
Amount on hand	1,950 "	
Amount unaccounted for	9,433 "	
	80,983 feet	80,983 feet

Thus is shown the quantity of rough or unpolished wire glass produced, and what was done with it, excepting the last item of 9,433 feet "unaccounted for."

From the 65,871 feet of rough glass "used for polishing," it appears from the defendant's tabulated statement that but 57,318 feet of polished glass were produced, the difference between the two figures being waste, for which no claim was made by complainants either as profits or damages.

The total product of polished wire glass and the disposition of it appear by another tabulated statement of the defendant, as follows:

Polished Wire Glass.

Polished wire glass made		13,940 feet
" " " "		13,507 "
" " " "		29,871 "
Polished wire glass sold	36,200 feet	
Polished wire glass on hand	8,886 "	
Total polished wire glass sold and on hand	45,086 feet	
Polished wire glass unaccounted for	12,232 "	
	57,318 feet	57,318 feet

The important figures in this statement are 57,318 feet, the total amount of polished glass *made* by the infringing process; 36,200 feet, the amount of polished glass *sold*; 8,886 feet, the amount of polished glass "on hand"; and 12,232 feet, the amount of polished glass "unaccounted for." The figures of these two tables constitute the whole evidence in the case of the quantity of unpolished and polished wire glass produced by the infringing process. They were undisputed and were accepted by both parties as proper figures upon which to base a calculation of profits.

With respect to the cost of producing wire glass, the parties stipulated, for the purposes of this accounting, that the cost to each of producing one-half inch wire glass (unpolished) was 15 cents per square foot, and the cost of grinding and polishing the same was 18.79 cents per square foot, making the cost of producing the finished product 33.79 cents per square foot.

As additional data upon the cost of production, as well as upon returns from sales, the defendant produced testimony, which was undisputed, and therefore entered into the master's calculations, that the cost of making all the glass, polished as well as unpolished, unaccounted for as well as accounted for, merchantable as well as waste, aggregating 80,983 feet, amounted to the sum of $26,085.99, and that the total receipts from the sale of 36,200 feet of polished glass, which was all the polished glass that was sold, amounted to but $25,370.62, there-

by causing the defendant a loss of $715.37. The defendant therefore claimed that, as it made no profits by the infringing process, it was not chargeable for profits.

With the deduction of a loss made by the defendant from its figures, based upon the two items of cost of total production and cash returns from sale of a part, the master did not agree, but found, under the evidence, that the defendant, both upon its own showing and upon examination of its officers as witnesses, had failed satisfactorily to account for a very considerable portion of the unpolished and polished glass which it admitted to have produced, and, upon the theory that an infringer must account for the disposition of all the product manufactured, held that, as it had credited itself in the total cost item of $26,085.99 with the cost of producing the unaccounted for portion, it was chargeable with a like amount as unaccounted for profits, as follows:

Unpolished glass "unaccounted for," 9,433 feet at 15 cents	$1,414 95
Polished wire glass "on hand," 8,886 feet at 33.79 cents	3,002 58
Polished wire glass "unaccounted for," 12,232 feet at 33.79 cents	4,133 19
Total	$8,550 72
From this the referee deducted the apparent loss shown by the defendant's statement above referred to	715 37
Net profits	$7,835 35

The master's finding of profits was approved by the District Court, and the decree of the court was attacked upon the ground that, in the ascertainment of an infringer's profits, the infringer is not chargeable with material manufactured but not sold, or in any way a source of saving or income or remaining an asset to the infringer.

Against this contention as an abstract proposition, unrelated to the facts of this case, very little need be said. The infringer in this case is chargeable only for profits actually made and not for profits which it might have made. In ascertaining profits, the element of cost must enter—not merely the cost of manufacturing the part of the product sold, but the cost of manufacturing the whole product—and when the part of the product unsold is satisfactorily accounted for by the infringer, showing that it was not converted into money or other thing from which profits might properly be calculated, then the cost of producing the whole is set off against the returns from the sale of the portion sold, and a profit or loss is deduced. This rule, however, is to be applied only when the infringer makes a disclosure of his transactions of production and disposition, with the fullness and completeness required of a trustee accounting for the property of his cestui que trust, for the generic rule for ascertaining the amount of profits recoverable in equity for the infringement of a patent is that of treating the infringer as though he were a trustee for the patentee, in respect to the profits which he realized from his infringement. Walker on Patents, § 715.

In the case under consideration, the defendant primarily is entitled to credit for the cost of making all the glass it manufactured by the infringing process. The quantity produced is fixed, and the cost of its

production is known. In order, however, to maintain its right to a credit for the cost of producing the whole, the defendant must show what it did with the whole, and, if converted into money, what it received from its sale. If it shows an amount produced in excess of the amount sold, it must make a satisfactory accounting for the amount unsold; that is, it must make a satisfactory disclosure that it has not been turned into money or other thing from which profits might be calculated. While the defendant is entitled to a full credit for the cost of all that it made when it renders a satisfactory account of the disposition of all, it cannot make and keep a credit for the cost of making all when it accounts only for a part. Craving a credit for the cost of making a given quantity of the product, the defendant must account for the disposition of that quantity. If a part was waste, the cost of making the waste should not be deducted from the cost of making the whole, for the cost of producing waste was an ingredient in the cost of producing the resultant finished product, to the benefit of a credit for which, as against the profits to be charged to it, the defendant is entitled. But to have and maintain a credit for producing waste, the defendant must show first that waste was produced, and, second, the quantity of it, otherwise the defendant must be charged with the value of the product unaccounted for, at least in the precise amount which the defendant appropriates to itself a credit for producing it. What did the master find as matters of fact?

[1] In disclosing the disposition it made of the two grades of glass produced by it, as shown by the figures previously tabulated, the defendant returned 9,433 feet of unpolished glass and 12,232 feet of polished glass "unaccounted for" and 8,886 feet of polished glass "on hand." The last two items aggregate 21,118 feet, which, together with the 36,200 feet sold, aggregate the 57,318 feet, which comprised all the polished glass made. The item of 9,433 feet is an additional item of glass "unaccounted for," making an accounting of 36,200 feet sold and 30,551 feet unsold, and denominated "unaccounted for" and "on hand." The master found that the 8,886 feet of polished glass reported on hand was not waste, nor had it been culleted, but on a given date was received in stock as finished product. After its receipt there is nothing to show what became of it, and therefore it is a portion of the product as completely unaccounted for as the glass expressly classified by that expression. This item, with the other two last mentioned, makes 30,551 feet of glass admittedly made by the infringing process, for the disposition of which the defendant gave no satisfactory explanation. The master did not hold that these three items, aggregating 30,551 feet, unsold and not converted into money, constituted profits, within the meaning given by the law to that term, but held in effect that there were 30,551 feet of glass, other than waste, made by the infringing process, for which the defendant did not account; that the defendant kept no separate books of account for the infringing business, nor did it keep the product of the infringement separate from the noninfringing products of its factory, but commingled the two together; that evidence of the extent and character of the glass produced by the infringing process and of its disposition was mainly, if not exclusively, within the knowledge and power of the

defendant, which, in face of its duty, it failed to produce. Therefore the cost of manufacturing the 30,551 feet which stand unaccounted for, and to a credit for the cost of manufacturing which the defendant is not entitled, should be subtracted from the cost of manufacturing the whole. This calculation results in the same figures found by the master, as follows:

Cost of manufacturing all glass, 80,983 feet	$26,085 99
Cost of manufacturing glass "on hand," and "unaccounted for," 30,551 feet	8,550 72
Cost of manufacturing glass accounted for	$17,535 27
Total amount received from "sales" of glass	$25,370 62
Total cost of glass accounted for	17,535 27
The amount of profit found by master	$ 7,835 35

The defendant attacks this method of calculation and maintains that it not only inflicts injustice but presents an absurdity. Briefly put, the defendant says the master and the court treated the making of the "glass sold" and the making of the "glass unsold" as two distinct operations, and that from the "glass sold" a profit was made, which profit was expended in making the "glass unsold," and the quantity of glass "unsold" was therefore "charged" as a "profit" against the defendant. From this process of calculation, the absurdity is deduced:

> "That, if the respondent is to be charged in the item of profit with the cost of the glass *unsold*, then the greater the amount of glass *unsold*, and from which the respondent received nothing whatever of value, the greater the profit which the complainant would assert the respondent made and was liable for. In other words, the greater the loss to the respondent, the greater the profit to the complainant."

We find nothing in the method of the master's calculation of profits to warrant this deduction, and we think the defendant has missed the point of the master's award.

Instead of treating the transaction as one separable into two parts, "sold" and "unsold" glass, we find the master treated the *production* of 80,983 feet of glass as one indivisible and inseparable transaction. He then treated the *disposition* of this quantity of glass as divisible and separable into two parts, not into "sold" and "unsold," but into "accounted for" and "unaccounted for." He allowed the defendant all it asked for all it "accounted for," including what was sold and what was waste, but declined to allow it what it claimed for what it had not "accounted for." The defendant did not wait to ask the master for an allowance for making the glass "unaccounted for," but appropriated or took to itself a credit of $8,550.72 for making 30,551 feet of glass, which, upon its own showing, had somewhere, somehow, and at some time disappeared. The master in effect said, "I will not allow you to keep that credit unless you satisfactorily show me what you have done with that glass;" and as this it failed to do, the master took that credit away from the defendant by charging or debiting against it a like amount, leaving for subsequent calculation only the known factors of glass accounted for, its cost, and the amount of money received from sales. In this we see neither absurdity nor error.

It has been suggested that the logic of the case might require the defendant to be charged with the selling price rather than with the cost of the unaccounted for product. As an abstract proposition, this is not without force; but in the case with which we are dealing, the complainant did not urge nor did the master find that the infringer should be so charged, and no error was assigned that raises that question.

This case is not without its hardship. It is impossible to award the complainant the precise amount of profits to which it is entitled. It is likewise impossible to formulate a decree against the defendant as to profits, without the hazard of inequity. These difficulties are due to the incomplete state of the evidence, and the incomplete state of the evidence is due to the natural difficulty of the complainant to produce evidence of profits which was almost wholly within the possession of the defendant, and the failure of the defendant to fairly and fully disclose what it did with its product. The master evidently strove to make an equitable finding upon the facts before him, in doing which he was controlled by the rule laid down in the case of Westinghouse v. Wagner, 225 U. S. 618 to 620, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, which recognized the duty of an infringer to account for the profits of his infringement, and that loss must be placed upon the wrongdoer, when, in the alternative, loss must fall either upon him or upon the innocent. Directed by this rule, the master made his findings of fact and his award.

[2] It is well settled that in considering exceptions taken to a master's report in matters of fact, affecting the accuracy of his findings in respect to profits, gains and savings made by the use of an infringing apparatus or process, the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part. Tilghman v. Proctor, 125 U. S. 136, 149, 150, 8 Sup. Ct. 894, 31 L. Ed. 664; Medsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; Donnell v. Columbian Ins. Co., 2 Sumn. 366, 371; Mason v. Crosby, 3 Woodb. & M. 258, 269; Paddock v. Commercial Ins. Co., 104 Mass. 521, 531; Richards v. Todd, 127 Mass. 167, 172; Callaghan v. Myers, 128 U. S. 666, 9 Sup. Ct. 177, 32 L. Ed. 547; Crawford v. Neal, 144 U. S. 596, 12 Sup. Ct. 759, 36 L. Ed. 552; Davis v. Schwartz, 155 U. S. 636, 15 Sup. Ct. 237, 39 L. Ed. 289; Girard Insurance Co. v. Cooper, 162 U. S. 538, 16 Sup. Ct. 879, 40 L. Ed. 1062.

In the master's finding of fact respecting profits, there appears neither clear error nor mistake, and in his ascertainment of the legal responsibility of the defendant for an accounting for profits, under the facts as disclosed by the testimony, we find no error in law. It occurs to us, however, that a less involved and more direct method of ascertaining profits, one in strict harmony with the rule upon the subject, might have been employed, resulting possibly in a different amount. But as the method followed was based upon the complainant's theory of profits, concerning which, of course, no complaint could have been made nor error assigned by it, and as the other conceivable theory was of course not urged by the defendant nor error assigned for failing to pursue the same, the case is decided upon the record as made, and,

from the record as made, we are satisfied there exists no error of which either party can complain.

[3] The next question charged as error to the court below relates to the master's finding on the matter of damages and to the modification of that finding by the court. There are several grounds suggested for error, one of which merits serious consideration.

There is no doubt that, if the defendant had not manufactured the glass in question, the complainant would have produced and sold to its own profit an equal amount, for the complainant and the defendant at that time were the only manufacturers of this product. In order to ascertain damages, two stipulations were entered into, the first of which related to the cost of production, and the second of which related to the price at which the kinds and sizes of glass were sold. The first stipulation is as follows:

"It is stipulated between the parties that, for the purpose of this accounting, the cost to the complainant of producing one-half inch wire glass is the same as that of the defendant, namely, 15 cents per square foot, and the cost of grinding and polishing is the same as that of the defendant, namely, 18.79 cents per square foot. This cost is the cost of producing stock sheets and take no account of loss resulting from cutting to size."

The figures contained in this stipulation would have been taken by the master as the basis of his calculation of cost, but for the fact that it subsequently appeared in the testimony that the plaintiff did not *produce* its own polished glass, but *purchased* the same from another corporation. The price at which it purchased polished glass was 40 cents a square foot. The master, therefore, disregarded the stipulation of 33.79 cents a square foot as the complainant's cost of producing polished glass, and made his estimate at the rate of 40 cents a square foot. He did this upon the theory that the stipulation as to the complainant could have no force in this case, because, when made, it was predicated upon an assumption of a fact which afterwards was proven did not exist, namely, that the complainant *produced* its own glass, and that the stipulation could not stand, nor should the calculation of damages be based upon its figures, in view of the subsequent and uncontradicted testimony that glass purchased by the complainant during the period in controversy really cost the complainant 40 cents. The master made his finding accordingly. Upon exception, the court modified the finding of the master in his calculation of damages, and held that the stipulation was made to fix facts, and by the facts as fixed, the master was bound.

The evidence subsequent to the stipulation established as a fact what it cost the complainant to *procure* rather than *produce* its glass, and that it did not produce but procured its glass elsewhere, and thereby fixed to a certainty, we think, the cost figure by which the master was bound to base his calculation of the complainant's damage. The master calculated damages upon the quantities of glass of both kinds admitted by the defendant to have been made and sold by it, from selling prices agreed to by another stipulation, and the cost price at which it was proven and admitted that the complainant could have procured the same.

It is therefore ordered that the decree of the court awarding damages in the amount of $15,812.81 be modified and made to conform to the damages awarded by the master in the amount of $13,564,85, and, when so modified, the decree in all other respects be affirmed, with costs.

PATTERSON v. HOHLFELD.

(Circuit Court of Appeals, Third Circuit. December 28, 1914.)

No. 1892.

PATENTS ⊂⊃328—INFRINGEMENT—SETTEE-HAMMOCK.

The Hohlfeld patent, No. 947,546, for a settee-hammock, is entitled to a narrow construction only in view of the prior art, and, as so construed, *held* not infringed.

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

Suit in equity by Herman L. Hohlfeld, individually and trading as the Hohlfeld Manufacturing Company, against James B. Patterson, individually and trading as the Patterson Manufacturing Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 216 Fed. 183.

A. B. Stoughton, of Philadelphia, Pa., for appellant.

Frederick A. Blount and Hector T. Fenton, both of Philadelphia, Pa., for appellee.

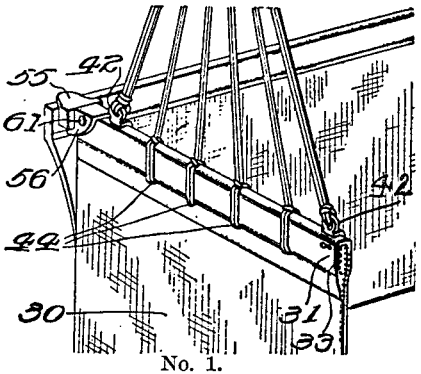
Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case Herman Hohlfeld, the plaintiff, charged James P. Patterson with infringing patent No. 947,546, granted said Hohlfeld January 25, 1910, for a settee-hammock. The court below, in an opinion reported at 216 Fed. 183, held the patent valid and infringed. From a decree in accord with such findings Patterson appealed to this court. By reference to such opinion, wherein is a full description of the devices of both parties, we avoid needless repetition. The claim here in controversy is the twenty-third, which reads as follows:

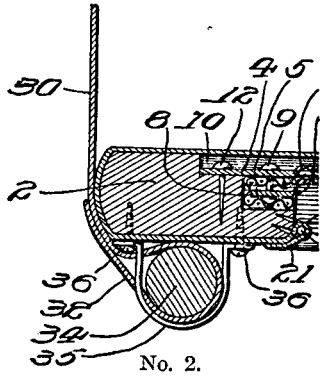
"A settee-hammock comprising a seat, a flexible end connected to each end of said seat, a flexible back connected to the rear of said seat, a spreader secured to the free edge of each of said flexible ends and to the free edge of said flexible back, means for detachably connecting the spreaders, and means connected to the end spreaders for suspending the hammock, and whereby said end spreaders are held detachably connected to said back spreader."

Briefly referring to some features of the prior art, we note that the hammock-couch made by Rowe, of Gloucester, Mass., many years before Hohlfeld's patent, was supported by flexible canvas ends and a flexible canvas back, all of which were fixedly connected respectively to the hammock seat. Rowe's flexible ends had the top spread-

ers common to the hammock art, while the back had a stiff cross-pole pocketed in its top. This cross-pole was fastened to the canvas ends by cords. Hohlfeld adopted this general form of construction and improved it by attaching the spreader of the back and the spreaders of the ends to each other by a metallic slide joint such as is used in connecting the sides and ends of an iron bedstead. The view we take of this case renders it unnecessary for us to decide whether Hohlfeld's device involved invention; but, assuming such validity for present purposes, it is clear the field for inventive exercise was so restricted that Hohlfeld's claims are also narrow. Referring to the claim element of "flexible ends," we find their character and purpose pointed out in the specification. As seen by the drawing No. 1, the flexible end *30* is provided at its upper end with a cross-pocket *31* by means of which the pocketed spreader *33* is enabled, through cords laced around it and through eyelets in the enveloping, pocketing, flexible canvas end, to transmit the load to a single central cord.



No. 1.



No. 2.

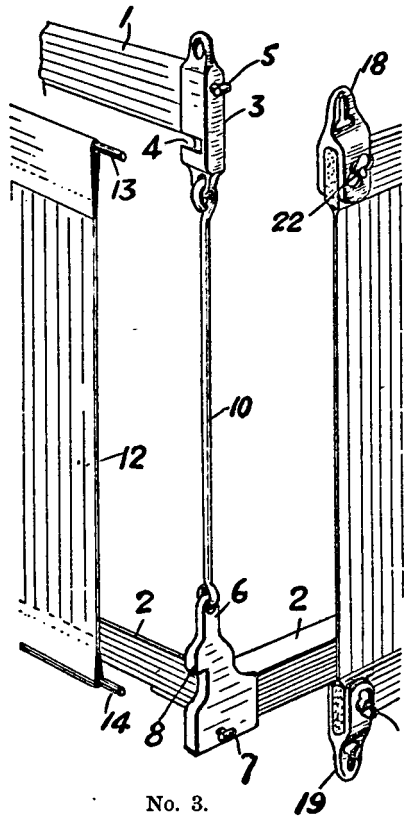
So, also, as will be seen by drawing No. 2, the flexible end *30* is provided at its lower end with a cross-pocket *32* by means of which the pocketed spreader *34* is enabled, through cleats, *35*, to carry the seat. The construction and function of these parts are thus set forth in the patent:

"The pieces of fabric forming the ends of the settee are substantially rectangular in shape and the spreaders in the edges of the ends are at right angles to the warp of the fabric, so that the pull upon the spreaders when the settee is suspended will be in a direction perpendicular to the warp to give the maximum strength and to avoid displacement of the fabric on the spreaders which would be apt to occur were the pull on the fabric oblique to the stretchers."

"Each fabric end *30* of the settee is provided at each end edge with pockets *31* and *32* respectively containing spreaders *33* and *34* respectively. The inner or lower edges of these fabric ends are secured upon the under side of the ends of the seat respectively by means of cleats *35* passing around the spreaders *34* and through the pockets, the cleats being fastened by screws *36* or other suitable means."

In the defendant's device we find a different end construction. Instead of carrying his seat on two flexible canvas ends, the defendant

swings the seat by four metal corner rods *10*, which swing from two end crosspieces *1* as shown in No. 3. Such method of swinging, corner-rod suspension was well known in cellar and spring-house swing-board equipment. To call such corner-placed, metallic supports flexible ends merely because they permit swinging is to lose sight of the functional use of the flexibility of canvas pointed out in the specification, which is to form pockets for carrying spreaders. The rods of Patterson's hammock have no such function. It is clear, therefore that the hammocks of these parties are of different types in their mode of suspension, and infringement cannot be sustained on the use by Patterson of these corner supports. The two hammocks then having no infringing equivalency in their end supports, does Patterson infringe by providing such noninfringing hammock with the detachable end curtains shown in No. 3, which neither carry the seat nor pocket either upper or lower spreader? Manifestly not. It is also equally clear that the use of a back curtain, which can be attached either to the front or back of the seat, is not the "flexible back connected to the rear of said seat" of Hohlfeld's combination claim. While the spreader of Patterson's detachable back is, when put in place, rigidly locked to the ends of the top-end-crossbars, and to the seat frame of the hammock, and thus forms a rigid back, yet it must not be overlooked that even when so attached the attachment is not to a spreader pocketed in the free edge of a flexible end, and that the detachable back curtain and the end curtains of Patterson's device have no functional connection or physical relation to each other. They are mere nonfunctional, aggregation additions, the presence or absence of which in no way affects the carrying of the hammock seat.



No. 3.

The decree below must therefore be reversed, and the cause remanded, with directions to enter a decree dismissing the bill for noninfringement.

TREIBACHER-CHEMISCHE WERKE GESELLSCHAFT MIT BESCHRANKTER HAFTUNG v. ROESSLER & HASSLACHER CHEMICAL CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 61.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PYROPHORIC ALLOY.
The Welsbach patent, No. 837,017, for a pyrophoric alloy, is a pioneer patent, and entitled to that liberal application of the doctrine of equivalents which is usually accorded to such patents; also *held* infringed.

2. PATENTS ⊂=179—CONSTRUCTION OF TERMS—"IRON."
In a claim in a pioneer patent for an alloy "containing cerium alloyed with iron," the word "iron" should be construed to mean iron or its equivalent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 255; Dec. Dig. ⊂=179.
For other definitions, see Words and Phrases, Iron.]

3. PATENTS ⊂=179—CONSTRUCTION—EQUIVALENTS.
A patentee is not confined to those equivalents to which he has expressly referred in his specification.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 255; Dec. Dig. ⊂=179.]

4. PATENTS ⊂=179—CONSTRUCTION—LIMITATION OF CLAIMS.
Where a pioneer patentee claims an alloy of one or more rare earth metals with one or more nonrare earth metals, he is not restricted to named varieties of either, unless he has himself restricted his claim by something in his specification.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 255; Dec. Dig. ⊂=179.]

5. PATENTS ⊂=179—SCOPE—EQUIVALENTS.
In a patent for an alloy described as an alloy of cerium "with certain other metals, in particular iron," the equivalency of other metals with iron is to be found, not in their chemical structure, but in their functional efficiency, when combined with cerium in a metallic alloy.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 255; Dec. Dig. ⊂=179.]

6. PATENTS ⊂=179—EQUIVALENTS.
Although some nonrare earth metals will produce with cerium a less efficient pyrophoric alloy than does iron, and although proportions must be varied with different constituents to produce better results, each of such metals, with the exception of those found in such small quantities that they are known merely in the laboratory and have not been experimented with, is a fair equivalent of iron in a patented compound.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 255; Dec. Dig. ⊂=179.]

7. WORDS AND PHRASES—"ALLOY."
An "alloy" is a compound of two or more metals.

8. WORDS AND PHRASES—"PYROPHORIC ALLOY."
A "pyrophoric alloy" is one which gives forth sparks on being rubbed with a file or otherwise abraded.

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

Suit in equity by the Treibacher-Chemische Werke Gesellschaft mit Beschränkter Haftung against the Roessler & Hasslacher Chemical Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 214 Fed. 410.

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

James Hamilton, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [7, 8] The invention relates to manufacture of metallic alloys having pyrophoric action and their application to the purposes of ignition and illumination. The alloy gives forth sparks on being rubbed with a file or otherwise abraded; hence, the term "pyrophoric." The substance is of conceded commercial utility. Being an alloy, it is a compound of two or more metals. Out of 55 or more known and classified metals, 16 are recognized as "rare earth metals." These 16 are divided into three groups—the cerium group, the terbium group, and the ytterbium group. One of the metals in the alloy of the patent must be a rare earth metal, and, by the language of his specifications, the patentee states that "for the purposes of this invention the presence of the cerium is relied on as essential." Therefore, although there may be a mixture of rare earth metals in the one element of the combination, cerium, or at least, a metal of the cerium group, must be present. The testimony shows that an alloy composed solely of rare earth metals will not produce the pyrophoric alloy desired. The patent indicates this. The presence of one or more of the nonrare earth metals is essential. The specification states that the rare earth metal, cerium, becomes pyrophoric, if alloyed with certain other metals, in particular iron. It indicates that with about 30 per cent. of iron the alloy attains its maximum of pyrophoric energy; also that the iron can be partially replaced by nickel or cobalt, but, if entirely replaced by these, the pyrophoric property is considerably diminished.

The first claim reads:

1. "A pyrophoric alloy, containing cerium alloyed with iron, substantially as and for the purposes described."

The only other claim is identical, except that the iron is stated as being 30 per cent. of the compound. As defendant's compound consists of cerium with from 11 to 15 per cent. of magnesium, the first claim only is declared upon.

[1] Judge Hough, discussing the most pertinent references in the prior art, found that the patentee "taught how certainly and knowingly to produce that [a compound usefully pyrophoric] which had been observed, indeed, but not understood." We fully concur in this finding, and in the conclusion that this Welsbach patent covers a pioneer invention, and is entitled to that liberal application of the doctrine of equivalents which is usually accorded to such patents.

In defense it is contended that defendant's product, made, it is said, according to the process set forth in a patent to Huber (No. 967,775, issued August 16, 1910), is not a "metallic alloy" at all, but a chemical

compound. What defendant does is, first, to make a metallic alloy of cerium and magnesium (in the proportions of about 85 to 15). This alloy is then subjected to the action of hydrogen in a fire clay muffle under a temperature of 500 degrees to 600 degrees C. Changes are produced by this hydrogen treatment—the pyrophoric property of the compound is improved, possibly sufficiently to give validity to the Huber patent—and there is a conflict between the experts as to whether the resultant product has become a chemical compound or still remains a metallic alloy saturated with hydrogen. We concur in Judge Hough's finding that the weight of testimony supports the latter conclusion.

[2, 3] The claim in suit mentions only iron as the nonrare earth metal; but multitudinous authorities support the proposition that, in construing a pioneer patent such as this, "iron" should be held to mean "iron or its equivalent." In the specification two other metals, nickel and cobalt, are expressly referred to as equivalents; and defendant concedes that if a metallic alloy, in which these, or even manganese, which, like the other three, belongs to a group known as the "heavy" metals, has been substituted for the iron, it would infringe. But the doctrine of equivalents does not confine a patentee to equivalents which he has expressly referred to.

[4] Numerous authorities sustain the proposition that when, as here, a pioneer patentee claims an alloy of one or more rare earth metals with one or more nonrare earth metals, he is not restricted to named varieties of either, unless he has himself restricted his claim by something in his specifications, as Welsbach did, on the rare earth side of the combination, by the statement that in his alloy cerium is an essential. Winans v. Denmead, 15 How. 330, 14 L. Ed. 717. Welsbach nowhere intimates that iron is essential; on the contrary, he states his invention is the alloy of cerium "with certain other metals, in particular iron."

[5] We are satisfied that the "equivalency" of other metals with iron is to be found, not in their chemical structure, but in their functional efficiency when combined with cerium in a metallic alloy. Cases in this circuit (Matheson v. Campbell, 78 Fed. 910, 24 C. C. A. 384; Rickards v. Du Bon [C. C.] 97 Fed. 96; Panzl v. Battle Island Paper Co., 138 Fed. 48, 70 C. C. A. 474) have indicated a qualification of this theory of broad equivalents. A patentee will not be allowed to maintain a claim for more than he has discovered and disclosed.

In the first of these cases the claim was for a dyestuff as a new product. The patentee described a special process by which the product was obtained, using therein a specified sulpho acid. He stated as his discovery, invention, and disclosure that "any sulpho acid of any radical," when treated according to the process described, would produce the dyestuff of the patent. The testimony showed that there were over 100 different substances in the group of "sulpho acids of any radical," and that only some of them—di-sulpho acids, with which alone the patentee had experimented—would, when treated according to the process, produce the dyestuff. The complainant contended that whenever a particular sulpho acid, not tried before, produced the dye-

stuff, his patent would cover it, although it did not cover sulpho acids which would not produce the result. We held that he could not thus "speculate on the equivalents of his claimed invention, and thereby oblige the public to resort to experiment in order to determine the scope of the claim of his patent."

In the second case above cited the claim was for an improvement in the art of treating tobacco leaves, which consisted in "applying an alkali to the leaves of the growing plant." Patentee had produced his result of applying a specified alkali to the leaves; but the broad construction of the claim covering *all* alkalis was held void because it would be broader than the invention, as it would cover potash, an alkali which would not accomplish the result, and the patentee had not experimented to discover what alkalis would and what would not do so.

[6] The case at bar, however, does not come within the principle laid down in these decisions. Of the 40 or more nonrare earth metals, it is not shown that there is one of them which will not, when alloyed with cerium, produce a pyrophoric compound. Some of them will produce a less efficient one than iron does. As the patent indicates, proportions must be varied with different constituents to product better results; but we are satisfied from the record that (with the exception of metals found in such small quantities that they are known merely in the laboratory and so no one has experimented in combining them with cerium) each and every nonrare earth metal is a fair equivalent of iron in the compound of this patent.

The decree is affirmed, with costs.

FORUM INV. CO. et al. v. CEMENT STAVE SILO CO. et al.

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

No. 4151.

PATENTS ⟸196—ASSIGNMENT—VALIDITY—CONSIDERATION.

An instrument under seal and duly recorded in the Patent Office, by which a patentee assigned all his rights under the patent in certain states for the expressed consideration of a sum in hand paid, receipt of which was acknowledged, and a royalty to be paid on the articles manufactured, binds the assignee who accepted the same to pay the consideration stated, and it is not void for want of consideration, nor invalid to pass title to the patent as against a subsequent licensee of the assignor, because the cash payment named therein was not in fact made.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 275–280; Dec. Dig. ⟸196.

Agreements to assign patents, see note to Paine v. Parkhurst, 126 C. C. A. 200.]

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

Suit by the Forum Investment Company, the American Cement Stave Silo Company, and J. Emil Nelson against the Cement Stave Silo Company, Sterling T. Playford, and L. H. Paul. Decree for defendants, and complainants appeal. Reversed.

John E. Stryker, of St. Paul, Minn. (W. H. Williams, of St. Paul, Minn., on the brief), for appellants.

J. R. Orwig and J. M. Parsons, both of Des Moines, Iowa (Orwig & Bair, and Parsons & Mills, all of Des Moines, Iowa, on the brief), for appellees.

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

REED, District Judge. The Forum Investment Company, the American Cement Stave Silo Company, Minnesota corporations, and J. Emil Nelson, a citizen of Minnesota, sued the Cement Stave Silo Company, an Iowa corporation, Sterling T. Playford, a citizen of Illinois, and L. H. Paul, a citizen of Iowa, for alleged infringements of letters patent No. 850,048, issued to the defendant Sterling T. Playford, April 9, 1907, for building blocks used in the construction of buildings, cement silos, tanks, culverts, and other similar structures, and for an injunction and accounting of damages. The suit was dismissed by the plaintiffs as to the defendant Paul, and upon a hearing a decree went in favor of the other defendants, dismissing the bill at plaintiffs' costs, but without determining the validity or invalidity of the patent, and the plaintiffs appeal.

The validity of the patent is not challenged, and the defendants admit that the defendant Cement Stave Silo Company has made and sold the patented article in the territory described in the bill, and that such sales, if unauthorized, would be in legal effect an infringement of the patent, but claim that it had the prior right to do so under contract with the defendant Playford. The contest, therefore, is over the ownership of the patent, or which of the parties has the prior or better right to make, sell and use the patented device. The contracts relating to the patent, and the asignment thereof, or of some interest therein, under which the respective parties claim, in the order of their dates, are:

(1) December 24, 1909, Playford assigned to J. A. Giantvalley, of St. Paul, Minn., all rights under the patent (except in the states of Michigan, Indiana, and Ohio) for a consideration of $500, receipt of which is acknowledged. Giantvalley also agreed to form a stock company to manufacture the patented article and pay to Playford a royalty of two cents for each stave manufactured and sold by him or the company which he was to organize.

(2) January 28, 1911, Playford made a written contract with the plaintiff J. Emil Nelson to sell and assign to him all his rights under the patent in certain states named, for a specified royalty of two cents a stave, to be paid by Nelson to Playford upon the number of staves or blocks made or sold under the patent by Nelson in each year.

(3) November 10, 1911, defendant Playford and one W. J. Rammer, as parties of the first part, made a contract with L. H. Paul and F. Henderson, of Des Moines, Iowa, as parties of the second part, whereby the first parties gave to the second parties the exclusive right to manufacture and sell a certain "steel angle iron frame machine," in all states west of the Mississippi river and north of Texas, for which ma-

chine (it is stated in the contract) patents are pending and controlled by the first parties and used for making the Playford cement staves. Second parties to pay first parties a royalty of $10 on every machine sold. This agreement was signed and acknowledged by the parties thereto and recorded in the United States Patent Office July 15, 1912.

(4) December 27, 1911, Giantvalley reassigned to Playford all his rights under the assignment of Playford to him of December 24, 1909, which assignment was duly acknowledged by Giantvalley and recorded in the United States Patent Office, January 2, 1912.

(5) December 29, 1911, defendant Playford and plaintiff Nelson entered into a written agreement, the pertinent parts of which are:

Grant.

Whereas, I Sterling T. Playford, * * * on April 9, 1907, did obtain letters patent of the United States, No. 850,048, for improvement in cement "staves" or blocks, * * * and am now the sole owner of said patent and of all rights under the same; and whereas, J. Emil Nelson, of Willmar, Minnesota, is desirous of acquiring an interest in the same:

Now, therefore, * * * be it known that for and in consideration of five hundred dollars to me in hand paid, the receipt of which is hereby acknowledged, and for the further consideration of a royalty of one cent per stave to be paid by Nelson as long as the production is less than 50,000 staves a year, and one-half of one per cent. in excess of such amount to be paid by said Nelson in each year, I, the said Sterling T. Playford, have sold, assigned, transferred, and by these presents do sell, assign, and transfer, unto said J. Emil Nelson all the right, title, and interest in and to said invention as secured by said letters patent in the states [naming them, including Minnesota and Iowa], the same to be held and enjoyed by the said J. Emil Nelson within and throughout said territory, but nowhere else, for the full term for which said letters patent are granted. * * *

It is also understood and agreed that said second party, his assigns or legal representatives, shall have the right to manufacture, sell, and use a certain machine invented by the party of the first part for making said cement staves, or if he should so demand, the first party agrees to furnish the said second party, his assigns or legal representatives, with machines with all improvements used by himself, at a price which shall not exceed that of the lowest quotation for making same that can be gotten.

It is also agreed that the party of the first part shall give his services, aid, and assistance in all possible ways for three months each year for three years, said service to be given when needed and demanded, at five dollars per day and necessary expenses, figured from his home. * * *

Which agreement was duly signed and acknowledged by Playford, and, together with the reassignment of Giantvalley to him, mailed by the parties to the United States Patent Office December 29, 1911, and duly recorded therein January 2, 1912.

(6) February 14, 1912, the defendant Playford and W. J. Rammer entered into an agreement with the defendant Cement Stave Silo Company, whereby they granted to said company the exclusive right to manufacture, sell, and use throughout the United States, except certain parts of Illinois, a certain machine to be known as a steel angle iron frame machine with self-cleaning mold for making the Playford patent cement staves described in letters patent No. 850,048, for which machine it is stated in the agreement they had applied for a patent under serial No. 866,928; said Playford and Rammer agreeing to proceed at once to procure the aforementioned patent to be al-

lowed as soon as possible at their own expense. They further agree that they will license and empower said Cement Stave Silo Company to manufacture, lease, use, and sell such machine so to be patented throughout the entire United States, except certain designated parts of Illinois; and also the exclusive right to manufacture, use, sell, or lease all staves or blocks to be manufactured and made under the aforesaid patent (No. 850,048) within said territory, subject, however, to all outstanding contracts made by the first parties with certain persons (naming them) and J. Emil Nelson for the manufacture, sale, lease, and use of such staves or patent rights. The Cement Stave Silo Company agrees to protect said Playford as to the contracts or assignments known and referred to as the Nelson contract, saving and protecting him in every manner and form, with the express understanding and agreement that said first parties (Playford and Rammer) are to furnish all necessary assistance within their power, but not at their expense, to defeat any litigation that may arise in relation thereto, either between themselves and said Nelson, or the said company and said Nelson. It is also agreed that said first parties will "protect said second parties in their rights under said patent in their territory, except that covered by the Nelson contract and that territory reserved herein. * * *." Which agreement was duly filed and recorded in the United States Patent Office July 15, 1912.

The corporate plaintiffs, the Forum Investment Company and the American Cement Stave Silo Company, have acquired interests in the Playford patent, No. 850,048, by assignment from J. Emil Nelson of the grant to him by Playford of December 29, 1911 (No. 5 of the contracts above mentioned). The right of the American Cement Stave Silo Company is subject or inferior to the rights of the Forum Investment Company. The corporate defendant, the Cement Stave Silo Company, has acquired whatever right it has in the Playford patent by assignment from Paul and Henderson of their agreement with Playford and Rammer of November 10, 1911, and its agreement with Playford and Rammer of February 14, 1912 (Nos. 3 and 6 of the contracts above mentioned).

The defendants admit that Playford made to Nelson the grant of December 29, 1911, but aver that the same was without consideration to Playford and was obtained from him by the fraud of Nelson. The plaintiffs deny this, and also allege that the defendant Cement Stave Silo Company acquired no rights in the Playford patent under the contract of November 10, 1911, or the contract of February 14, 1912: (1) Because the subject-matter of the contract of November 10th is an unpatented machine only for making the staves covered by the Playford patent No. 850,048, and does not cover that patent nor the cement staves covered thereby; (2) that when the contract of February 14, 1912, was made said defendant had full notice of the assignment or grant of Playford to Nelson of December 29, 1911, and it is expressly made subject to the Nelson contract.

The want of consideration to Playford for the assignment or grant of December 29, 1911, rests upon the alleged ground that the $500, mentioned in this assignment as part of the consideration thereof, was

never in fact paid by Nelson to Playford (though the receipt thereof is acknowledged by Playford in the contract). That the contract expresses a consideration is not disputed, and being in writing and under seal is presumptively valid. Nelson admits in his testimony that the $500, and the royalties to be paid by him as mentioned, were not paid by him in cash when the contract was made; but he claims that Playford was then owing him more than the amount of these two sums when the contract was made. He bases this claim upon the following grounds, viz.: That subsequent to the assignment of Playford to Giantvalley of December 4, 1909 (No. 1 of the contracts above mentioned), Giantvalley assigned to him (Nelson) an interest in that contract; that a corporation was then organized by Giantvalley under the laws of Arizona, known as the American Manufacturing Company, of which Nelson was president, for making the cement staves covered by the Playford patent; that some time in 1910 this corporation made certain cement staves or blocks according to the Playford patent No. 850,048, and that Nelson and Giantvalley, with the assistance of Playford, constructed certain silos therefrom, one of which was on the State Agricultural Farm near St. Paul, Minn., and one upon the State Fair Grounds near that city. These silos for some reason proved to be defective and practically worthless. The one on the State Fair Grounds was examined by a large number of visitors at the fair in 1910, and it was claimed by Nelson and Giantvalley that the worthless silos worked a great damage to them, in that they ruined the sale of the cement staves covered by the Playford patent, and Nelson at least claimed that Playford was liable for such damages, and responsible to him therefor. Upon the merits of such claim we express no opinion; but out of this controversy or dispute arose the contract of January 28, 1911 (No. 2 of the contracts above mentioned). That contract in terms provides:

"It is hereby agreed by and between Sterling T. Playford, party of the first part, and J. Emil Nelson, party of the second part: That for the consideration hereinafter expressed the party of the first part will sell and assign all rights under patent No. 850,048, and any and all improvements on the same, relating to the manufacture and sale of cement staves in the states [naming them, and including Minnesota, Iowa, Nebraska, Wisconsin, and others], subject to adverse rights. That as a consideration for said sale and assignment the second party agrees to pay the party of the first part a royalty of one cent per stave on the first fifty thousand staves made and sold each year, and on all staves made and sold above that number a royalty of one-half cent shall be paid. As a further consideration, the party of the second part agrees to procure a release to party of the first part from any and all rights under the said patent held by the party of the second part, the American Manufacturing Corporation, and the J. Emil Nelson Corporation. All accounts, claims, and royalties to date existing or claimed by or against either of the parties hereto or by one of the parties against the other, and any accounts or claims by the party of the first part against the party of the second part, the American Manufacturing Corporation, and the J. Emil Nelson Corporation are hereby canceled. That the party of the first part hereby agrees to assume and does assume any and all liability for royalty and rights held or claimed by W. J. Rammer, his assigns or legal representatives, against party of the second part, the American Manufacturing Corporation, and the J. Emil Nelson Corporation. That the party of the first part further agrees to give his services, aid, and assistance in all possible ways for three months each year for three years. That said services shall be given

when needed and demanded at five dollars per day and necessary expenses. That all knowledge that can be given in regard to the machinery necessary in making the staves be given freely and without pay. That all said machines shall be furnished at cost.

"Witness our hands and seals the 28th day of Jany., 1911.

"S. Playford. [Seal.]

"Witness: J. Emil Nelson. [Seal.]

"E. J. Wahl.

"J. A. Giantvalley."

After this contract was signed, further disputes and controversies arose between Nelson and Giantvalley and Playford, Paul, and Henderson, and there were meetings between them in St. Paul, Minneapolis, and Des Moines, in efforts to settle such controversies or disputes, during which time the contract of November 10, 1911, between Playford and Rammer and L. H. Paul and F. Henderson, of Des Moines, Iowa, was made (No. 3 of the contracts above mentioned).

December 27, 1911, Nelson procured from Giantvalley pursuant to the contract of January 28, 1911, a reassignment to Playford of Giantvalley's rights under the contract of Playford to him of December 24, 1909, which assignment was duly acknowledged by Giantvalley December 29, 1911, and Playford then made to the plaintiff Nelson the contract or agreement of that date (which is No. 5 of the contracts or agreements above mentioned). This contract was made apparently in full settlement of the controversy between Nelson and Playford, growing out of the alleged defects in the cement staves of which the silos at the Agricultural Farm and the State Fair Grounds near St. Paul, Minn., arose, and it is the contention of Nelson that it was made in pursuance of the contract of January 28, 1911, and the real consideration therefor was the settlement of the controversies theretofore arising between them in regard to the alleged defects in the cement staves or blocks that the American Manufacturing Company had made, and which were used in the construction of silos with the assistance and under the direction of Playford, and was in lieu of the $500 mentioned in the contract; that the royalties to be paid were only to be paid after the specified number of staves had been made and sold subsequent to the making of such contract; that the defendant the Cement Stave Silo Company under the contract of February 14, 1912, claimed the right to such royalties, whatever they may be; and that until the right to them is determined he should not be required to pay them. Be this as it may, the acceptance by Nelson of the contract of December 29th, though it is not signed by him, binds him to pay the consideration expressed in that contract, and is a sufficient consideration to support the same. The payment of the consideration is not a condition precedent to the validity of the contract, and his failure alone to pay the same does not under the terms of the contract render it void for want of consideration; and such consideration, if not paid or settled by the parties, may be recovered by Playford from Nelson. The contention, therefore, that the contract of December 29th is void for want of consideration, cannot rightly be sustained.

The contract of February 14, 1912, is no defense to the plaintiffs' action; nor does it afford the defendants any grounds for affirmative

relief against the plaintiffs, for by its express terms it is made subject to the Nelson contract, and the proofs show that Paul and Henderson had actual notice of the Nelson claim when their contract of November 10, 1911, was made. Besides, the Nelson contract of December 29th and the reassignment of the Giantvalley contract to Playford of December 27th (reconveying the full legal title to the patent to Playford) had been recorded in the United States Patent Office January 2, 1912, more than a month before the contract of February 14, 1912.

Of the alleged fraud of Nelson in procuring the contract of December 29th from Playford, it must suffice to say that we have carefully considered the testimony bearing upon this question, and reach the conclusion that it is wholly insufficient to support this defense. It need not be reviewed or further considered.

The District Court held the equities to be with the defendants, upon what ground is not stated, and dismissed the bill with prejudice, at plaintiffs' costs, and added:

"This decree will not be construed as an adjudication of either the validity or invalidity of letters patent No. 850,048, or of any claim thereof."

In dismissing the bill the court erred. Its decree is therefore reversed, and the cause remanded to the District Court, with directions to render a decree for the plaintiffs with costs, and the usual order for an accounting. It is ordered accordingly.

Reversed.

McMASTER et al. v. DAUGHERTY MFG. CO.

(Circuit Court of Appeals, Third Circuit. December 30, 1914.)

No. 1909.

1. PATENTS ⟸328 INFRINGEMENT—BARREL JACK.

The granting of a preliminary injunction restraining infringement of the Daugherty patent, No. 1,111,219, for a barrel jack, *held*, on the evidence, within the discretion of the trial court.

2. PATENTS ⟸294—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where it is shown that defendants examined the device of complainant's patent while the application for the patent was pending, and before its issuance commenced making and selling the alleged infringing device, which is in no substantial respect different from that of the patent, it is within the discretion of the court to grant a preliminary injunction, although the patent is of recent issuance and its validity has not been adjudicated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 473; Dec. Dig. ⟸294.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the Daugherty Manufacturing Company against John McMaster, James McMaster, and the Waverly Oil Works Company. Defendants appeal from an order granting a preliminary injunction. Affirmed.

Robert D. Totten, of Pittsburgh, Pa., for appellants.
James D. Heard, of Pittsburgh, Pa., for appellee.

Before HUNT, McPHERSON, and WOOLLEY, Circuit Judges.

HUNT, Circuit Judge. Appeal from a decree made after a hearing by the United States District Court for the Western District of Pennsylvania granting a preliminary injunction restraining the appellants herein, defendants below, from manufacturing and selling a device known as a "barrel jack," alleged to infringe letters patent No. 1,111,219, granted September 22, 1914, to Alexander R. Daugherty, of Kittanning, Pa. The bill was filed November 4, 1914. The injunction was granted November 9, 1914.

The allegations of the bill are those such as are usually employed in suits for infringement of letters patent.

[1] The device is one in which a barrel can be lifted and supported off the ground in a horizontal position so that the contents can be readily drawn from the barrel, and is so constructed that the barrel is slightly tilted, whereby all the contents can be readily drawn without moving the barrel. The object of the invention is to provide a simple, cheap, and more effective barrel jack with details of structure more fully set forth in the specifications but not necessary to be elaborated here. It is enough to state that the device has two cross arms which are mortised together about midway their end and secured together by plates secured to the cross arms by bolts; the arms above the connection being of such a length and arranged at such an angle that an ordinary barrel will readily fit between them. Below the connection of the cross arms is an elongated arm. This elongated arm has a short portion forward of the cross arms of the device and a longer portion in the rear of the cross arms. Extending from the end of the longer portion of the cross arms and connected thereto is a brace which is bolted to another brace and extends forwardly, being secured to the forward end of the short portion of the elongated arm. The rear longer portion of the arm is adapted to support the rear end of the barrel, and the forward portion, being shorter than the other, allows the barrel to be supported in a slightly tilted position. In operation, the jack is placed in a position with the longer portion of the arms upon the ground at the base or head of the barrel, and the barrel is tilted to the upper ends of the cross arms and thereby supported. The barrel is then raised, the lower ends of the cross arms forming the fulcrum points on the ground, until the shorter portion of the arm rests upon the ground, when the cross arms assume a forwardly inclined position past a vertical line, whereby the weight of the barrel, being past a vertical line, is supported, and the barrel, being slightly tilted forward, is so placed that its contents can be drawn without tilting it. As we read the claims of the patent of the Daugherty device and the file wrapper in evidence, the applicant did not claim the broad idea of a barrel jack, but limited his claims, so that by means of the device, comprising a fork member adapted to receive a barrel, a rearward extending arm carried by the fork member, and a forwardly extending foot carried by the fork member and adapted to engage the ground for supporting

the forked member in a forward inclined position, a barrel can be raised from the ground and kept in a tilted position so that all of the contents thereof can be readily drawn out.

Sale of the Daugherty barrel jack commenced in the early part of 1914, patent having been applied for January 7, 1914. The sales indicated acceptance by the public. The testimony heard by the District Court shows that James McMaster, one of the appellants, conceived the idea of the barrel jack introduced in evidence by appellants as the "McMaster Barrel Jack" in March, 1914, and that upon March 28, 1914, he applied for letters patent for a barrel jack, application being allowed September 10, 1914; but that final government fee for issuing the patent has not yet been paid. One of the McMaster appellants saw the Daugherty barrel jack before the device herein alleged to infringe was conceived of. A witness testified that the appellant Waverly Oil Works, selling agents for the McMaster barrel jack, asked the appellee for the exclusive right to sell the Daugherty jack, and it is shown that, after application for a patent therefor was filed, a Daugherty barrel jack was shown to one or both of the McMaster brothers, and that one of them said he thought he could build a better jack or could improve on the one shown.

There is no application or drawing or specification of any kind for letters patent introduced in evidence by appellants whereby we can ascertain with precision just how the device which appellants claim is their invention is constructed. Accompanying the record, however, is a device exhibited and treated by the appellants as a model of their barrel jack. Examination of it satisfies us that the District Court did not err in holding that, in making it, appellants employed a mechanism intended to procure a jack which would meet the public demand for the barrel jacks put on the market by the Daugherty Company. The McMaster device appears to be specially designed for raising and supporting a barrel. It has a forwardly extending arm in combination with a member adapted to embrace the barrel. The arm extends downward, and, if sunk into the ground or rested upon a depression in the floor, will effect a slightly forward inclination of the barrel upon the jack. The argument of the appellants that their jack does not raise the barrel to a tilted, but to a horizontal, position, is not persuasive; for it is too plain that opportunity to use the McMaster jack in a way to effect a forward inclination of the barrel can be easily availed of.

[2] It will not be disputed that appellants are right in arguing that ordinarily preliminary injunctions will not issue in cases of alleged infringement, unless the patent has been adjudicated and held to be valid, and the question of infringement is not in doubt. But, with every respect to this usual practice, it does not conflict with the doctrine that, under a state of facts such as is presented here, the granting or denying of a preliminary injunction is a matter within the sound judicial discretion of a court of equity, and, where the rights of the parties appear to be such that injunctive relief is necessary for the protection of the one as against the other, it will be granted, even where acceptance of a patented device may have been somewhat limited. Wilson v. Consolidated Store Co., 88 Fed. 286, 31 C. C. A. 533; Foster v. Crossin (C.

C.) 23 Fed. 400; Chester Forging Co. v. Tindel-Morris Co., 165 Fed. 899, 91 C. C. A. 577.

The fact that the device of the appellants is collapsible does not appear to be material to the present consideration of the case. Standard Typewriter Co. v. Standard F. T. S. Co., 181 Fed. 500, 104 C. C. A. 248.

Nor can appellants gain by the point that they and appellees had applications for patents pending at the same time without interference having been declared for the reason that, as indicated, the evidence shows no substantial difference in mode of operation of the two devices.

Finding no error in the action of the District Court, the order appealed from is affirmed.

STANDARD TRUCK CO. et al. v. PITTSBURGH RYS. CO. et al.

(Circuit Court of Appeals, Third Circuit. December 28, 1914.)

No. 1845.

PATENTS ⊂328—INFRINGEMENT—CAB BRAKE.

The Price patent, No. 818,639, for a brake shoe mechanism, construed, and *held* not infringed by a brake in which there is no initial or sustained contact between the brake shoe and the wheel.

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Suit by the Standard Truck Company and others against the Pittsburgh Railways Company and others. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see Standard Motor Truck Co. v. Pittsburgh Rys. Co., 211 Fed. 667.

Kay & Totten, of Pittsburgh, Pa., for appellants.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., and Jos. L. Levy, of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiffs, the grantee of, and the licensee under, patent No. 818,639, issued April 24, 1906, to W. G. Price, for a brake, charged the Brill Company, as maker, and the Pittsburgh Railways Company, as user, with infringement thereof. On final hearing that court, in an opinion reported at 211 Fed. 667, held infringement was not shown. From a decree dismissing the bill, plaintiffs took this appeal.

After careful consideration, we agree with and adopt that opinion as expressive of our view that the decree below should be affirmed. Adopting it, therefore, as the opinion of this court, we restrict ourselves to briefly stating the conclusions reached by us from a study of Price's patent.

Price's brake, as disclosed by his specification, shows, first, an initial contact of the brake shoes with the car wheel, effected by nuts and

springs; second, maintenance of such contact by means of an automatic turnbuckle; and, third, taking claim 48 as illustrative, the first recited features of nut and spring are shown in the elements, "a bolt pivotally connecting said link with said support, a nut on said bolt, a spring engaged by said nut for producing frictional contact between the link and support when the nut is lightened," and the second recited feature, an automatic turnbuckle, is shown in the element, "means for taking up the slack of the brake shoe." That there was initial, subsequent, and actual contact of shoe and wheel is shown by the specification:

"With this and further objects in view the invention consists * * * of brake shoes for said wheels and means for *normally retaining said shoes in contact with the said wheels.* * * * The nut *25* may be adjusted against the spring *24* to any desired degree for producing sufficient frictional contact between the link *22* and the bar *21 for retaining the said link in a given adjusted position.* * * * In operation the shoes are *retained in contact* with the wheels, but not with sufficient pressure for materially retarding the movement of such wheels. * * * The prime object of the invention is the *retention of the brake shoes against the wheels* by the provision of means for taking up the wear on said shoes and retaining the shoes against the wheels after the same have been applied by the application of the brake-applying means. For a more comprehensive understanding of the invention the operation of the structure disclosed should be fully understood and the functions of the springs *24* and *30* appreciated. The springs *24* and *30* produce such frictional engagement between the parts as to sustain the shoes and beams in their given positions for application thereof at least for a sufficient period for permitting even a very weak spring *50* to actuate the parts of the turnbuckle for spreading the same sufficiently for taking up and wear upon the brake shoes thus *assuring the constant application of the shoes to the wheels,* as each time said shoes are applied for stopping the rotation of the wheels the friction occasioned by the springs *24* and *30* will be sufficient to give the turnbuckle an opportunity for actuation; * * * the movement of the live lever permitting the turnbuckle to lengthen itself for automatically taking up the slack between the shoes and the wheels resulting from wear."

Turning to the defendant's device, we find a different type of structure. Instead of initially placing the shoe and wheel in contact, defendants' wheel and shoe are spaced apart. Instead of maintaining or continuing, through an automatic turnbuckle, such initial contact, the defendants' device does not use any automatic means for taking up the slack caused by the wear of the shoe.

In view of these differences, the court below rightly held there was no infringement, and its decree is therefore affirmed.

INTERNATIONAL MOLDING MACH. CO. v. TABOR MFG. CO.

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

No. 2076.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—MOLDING MACHINE.

The Tabor patent, No. 824,317, for a molding machine, discloses patentable invention, and is valid, the patented machine being new, useful, and successful; also *held* infringed.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Tabor Manufacturing Company against the International Molding Machine Company. Decree for complainant, and defendant appeals. Affirmed.

Action on patent No. 824,317, on a molding machine, granted to Harris Tabor, assignor to the appellee, June 26, 1906. Decree for appellee, finding the patent valid and infringed. Affirmed.

The machine in question is a "turn-over draw" molding machine, or a turn-over pattern lift machine, in which the pattern is placed in the "flask" or mold box used to hold the molding material, is rammed or tamped, a bottom board clamped on to hold the mold in place, the flask then turned over to the opposite side of the machine, and laid bottom side up on a receiving support, unclamped, and the pattern drawn vertically upward out of the mold. Claim 6 is sued on, as follows: "In a molding machine, the combination of a movable frame, means for elevating it, a carrier marginally hinged to said frame, and stops for holding the carrier at right angles to the direction of motion of the frame, substantially as described."

Tabor was not the first to provide a machine in which the pattern carrier is pivotally mounted to permit it to be rotated to inverted position, nor to provide for straight-line draw, nor to provide for straight-line draw by lifting the pattern out of the mold; nor was he the first to provide a marginally hinged carrier machine involving separation of the mold and pattern by straight-line draw; and while Tabor did produce a machine which is different from the machines of the prior art, the contention of the appellant is that the production of this machine did not involve invention, in view of the prior art, but was merely the result of the exercise of mechanical skill in the selection of parts of prior machines, and the rearrangement of elements old in this particular art, and involved merely the reversal of the operation of prior machines without producing a new result. The patented machine has been quite successful, 1,700 having been sold since 1905 for about $350,000. Appellant had been making a "drop-mold" machine, in which the mold was withdrawn downwardly from the pattern; but in 1912 adopted the patent construction. This is the infringement complained of.

Wm. B. Davies, of Chicago, Ill., for appellant.

Francis T. Chambers, of Philadelphia, Pa., for appellee.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). There can be little doubt of the novelty and utility of the patented machine here in question. It is unlike anything in the prior art, and it possesses utility in a marked degree, besides having had a considerable success. To put it in another way, the patented device is new, it is useful and successful, and appellant has adopted it, although the prior art was open to it, and it had previously made another kind of machine, of the marginally hinged drop-mold type. There is an improved result, because it is better to lift a light pattern from the mold than to lower a heavy mold away from the pattern, and it is better to lift the pattern straight out of the mold than to do so with a turning movement, as in the earlier trunnion machines.

The earlier machines are of three kinds. There were trunnion machines where the mold plate was supported by centrally located trunnions on which it could turn over. These are not as convenient as the

Tabor machines, because the pivoted plates necessarily limit the size of the mold. In other machines the pattern was withdrawn, not in a straight line, but in the arc of a circle. In others, the mold dropped away from the patterns. Tabor improved on all of these by producing a machine which may use any size of mold, together with the vertical lift. There are also other points of improvement in respect to maintaining the center of gravity and compensating lost motion. It is, however, enough to say that Tabor produced something new, with an improved result, and that appellant has taken it. The device is exceedingly simple, practical, and reliable. A witness testified that one of the machines had been used six years at a total expense for repairs of 35 cents. Even if there were doubt on the question of invention, appellant's action would be enough to turn the scale. While praising the prior art, it prefers to use complainant's machine.

The decree finding the patent valid and infringed is affirmed.

AMERICAN FRUIT MACHINERY CO. v. ROBINSON.

(Circuit Court of Appeals, Third Circuit. December 28, 1914.)

No. 1866.

PATENTS ⊂=328—INVENTION—VEGETABLE PARING MACHINE.

The Robinson patent, No. 942,932, for a vegetable paring machine, in view of the prior art, is void for lack of invention.

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

Suit in equity by Henry Robinson against the American Fruit Machinery Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see Robinson v. American Fruit Machinery Co., 216 Fed. 179.

E. H. Hunter, of Philadelphia, Pa., for appellant.

H. S. Mackaye, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiff, Henry Robinson, charged the American Fruit Machinery Company with infringing patent No. 942,932, granted to him December 14, 1909, for a vegetable paring machine. That court, in an opinion reported at 216 Fed. 179, held the patent valid and infringed. From a decree in accord therewith defendant appealed.

Prior to the patent in suit potato paring machines of high excellence had been patented by complainant and others. Some such machines were before this court in American Co. v. Robinson Co., 191 Fed. 723, 112 C. C. A. 313. Their construction and general mode of operation are there described. By reference to such opinion it will be seen that the part which peeled the potatoes mechanically was a revolving bottom

disk of peculiar formation, mounted on a rotating shaft rising through the bottom of a container. The peculiar form and function of the disk is not here involved, has nothing to do with the device of the patent in suit, and therefore need not be here described. The action of a paring machine generally is thus described in Robinson's specification:

"The vegetables being charged into the container and onto the rotating bottom, and the latter set in rotation, the vegetables are given a violent motion, tossing against the side walls of the container and dropping down onto the bottom, until by a constant and rapid succession of small abraising action the peel is removed."

As this rapid rotary motion was kept up, and additional potatoes were thrown continuously against the sides of the container, the potatoes rose against the sides of such vessel until they fell away from its wall, dropped down on the revolving bottom, and were again forced by its revolution against the container wall. In this state of the art, which, it will be observed, effectively and mechanically peeled potatoes and other vegetables, Robinson conceived the idea of fastening a lug or wing to the side of the container wall to force the potatoes to fall back on the revolving bottom sooner than they would otherwise do.

Stripped of the elaborate verbiage so often resorted to in patent specifications to impart inventive character to a simple device, we may say the alleged inventive act consisted in fastening a scoop-shaped lug to the side of the container to scoop or force the potatoes inward. When it is borne in mind that effective potato paring machines already existed, that this lug had no part in the mechanical peeling of the potato, that it was a mere means of speeding the work of the machine, and differed in no functional respect from inserting one's hands and pushing over the potatoes, it will be apparent that to confer on such a device the reward of a 17-year monopoly is a misapplication of the patent system.

So viewing this palpable mechanical expedient, we are of opinion the claim in question is invalid, and the case should be remanded, with instructions to dismiss the bill.

H. K. PORTER CO. v. BALDWIN LOCOMOTIVE WORKS et al.

(District Court, E. D. Pennsylvania. December 31, 1914.)

No. 751.

PATENTS ⇐328—INVENTION—METHOD OF OPERATING COMPRESSED AIR ENGINES.

The Hodges patent, No. 953,334, for a method of operating compound compressed air engines, which consists in conducting the working air on its passage from the high pressure to the low pressure cylinder through an intermediate chamber, through the walls of which it absorbs heat from the atmosphere, is void for lack of invention, in view of the prior art, and especially in view of the fact that claims made by the patentee, in a prior application for a patent, for an apparatus which operated in accordance with the same method, were rejected for want of invention by the Patent Office, which was sustained by the court on appeal.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by the H. K. Porter Company against the Baldwin Locomotive Works and the Four States Coal & Coke Company. On final hearing. Decree for defendants.

James I. Kay and Robert D. Totten, both of Pittsburgh, Pa., and Francis T. Chambers, of Philadelphia, Pa., for plaintiff.

William A. Redding and William B. Greeley, both of New York City, for defendants.

THOMPSON, District Judge. The complainant's patent, No. 953,334, for which application was filed June 11, 1909, and patent allowed March 29, 1910, is for a method of operating compound compressed air engines. The complainant relies on claims 1 and 4, which are as follows:

"1. The method of operating compressed air engines, consisting in carrying the air at high pressure through and expanding it in one cylinder and thereby reducing it below lowest atmospheric temperature, reheating the exhaust air from said cylinder when confined by extended exposure to air heating at atmospheric temperature and thereby increasing the volume thereof and its capacity to generate power, and carrying the reheated air through a low pressure cylinder."

"4. The method of operating compressed air engines, consisting in carrying the air at high pressure through and expanding it in one cylinder and thereby reducing it below lowest atmospheric temperature and reheating the exhaust air when confined by extended exposure thereof to air at atmospheric temperature and thereby increasing it to the necessary volume to generate substantially like power within another cylinder of greater cubical contents and carrying such reheated air through such low pressure cylinder."

The distinction between the two claims is that the object of the method under claim 1 is to increase generally the volume of air exhausted from the high pressure cylinder in its discharge to the low pressure cylinder, and its capacity to generate power, while the fourth claim is more specific, in that it states as the object the increasing of the compressed air in its discharge from the high pressure cylinder to the low pressure cylinder to the necessary volume to generate power within the low pressure cylinder equal to that in the high pressure cylinder.

The difficulties in compressed air engines, which the patentee attempted to overcome, are caused by the fall in temperature of the compressed air in the high pressure cylinder in expanding, thereby freezing any moisture present, forming snow and frost upon the valves, and freezing the lubricants of the engine, so as to interfere with its operation. It was found that there was a limit of low temperature which prohibited the expansion of the working air to an extent beyond that which would produce such a degree of low temperature. These difficulties prevented the obtaining of power from the working air to its full capacity for expansion. It had been well known in the art that in a compound compressed air engine the heating of the exhaust compressed air while passing from the high pressure cylinder to the low pressure cylinder would overcome the difficulties due to freezing and solidification or thickening of the lubricant, and would increase the expansive power of the exhaust air which remained under a consider-

able degree of compression while confined in passing from the one cylinder to the other.

While this was the state of the prior art, Hodges, the patentee, filed October 10, 1904, his application for a patent for an interheater for compound compressed air engines, upon which patent No. 868,560 was issued October 15, 1907. The application contained the following claims, which were rejected by the examiner:

"1. An interheater for a compound compressed air engine, which consists of a receptacle receiving air from the high pressure cylinder and delivering air to the law pressure cylinder and provided with an extended surface adapted to absorb heat from the atmosphere at normal temperature and impart heat so absorbed to the compressed air in its flow to the low pressure cylinder, substantially as described.

"2. An interheater for a compound compressed air locomotive engine, which consists of a receptacle receiving air from the high pressure cylinder and delivering air to the low pressure cylinder, the said receptacle provided with an extended heating surface and arranged to receive a flow of atmospheric air at normal temperature over said surface, substantially as described.

"3. An interheater for a compound compressed air locomotive engine, which consists of a receptacle receiving air from the high pressure cylinder and delivering air to the low pressure cylinder, together with means operative on the operation of said locomotive engine for causing a flow of atmospheric air at normal temperature over said heating surface, substantially as described.

"4. An interheater for a compound compressed air engine, which consists of a receptacle receiving air from the high pressure cylinder and delivering air to the low pressure cylinder, and provided with an extended heating surface, together with means for causing a flow of atmospheric air at normal temperature over the said surface of said receptacle, substantially as described.

"5. An interheater for a compound compressed air engine, which consists of a receptacle for the air in its passage from the high pressure cylinder to the low pressure cylinder, provided with an inlet at its lowest end and an outlet at its upper end, and having an extended surface exposed to the heating influence of atmospheric air at normal temperature, substantially as described."

A comparison of the claims of the two patents in the light of the specifications makes it apparent that the only substantial matter in which they differ is that the rejected claims of the prior patent were for an interheater for using atmospheric air at normal temperature for imparting heat to the working air, while those of the patent in suit are for a method of operating compressed air engines in which the only claim of novelty is in the method of using the heat of the atmospheric air at normal temperature in the interheater for imparting heat to the working air.

In determining the bearing of the five rejected claims of the application for the prior patent upon the patent in suit, the action of the tribunals considering the claims which resulted in their final rejection will be considered. It appears by the file wrapper that the primary examiner in charge rejected the claims in view of the Reynolds & Haupt patent No. 222,950, of December 23, 1879, for an improvement in pneumatic motors. The claim in the Reynolds' patent is for:

"The combination, with a compound engine for the use of compressed air as a motive power, of a heater, arranged between the high and low pressure cylinders of such engine, and containing heated water or other liquid, through or in direct contact with which the air passes on its way from the high

pressure to the low pressure cylinder, substantially as and for the purpose herein described."

Upon a request for reconsideration the claims were again rejected by the primary examiner upon an additional reference to Nutty patent, No. 745,373, of December 1, 1903, for utilization of compressed air. This patent shows high and low pressure air engines connected by pipes. Nutty heated the working air by means of hot water contained in reservoirs; the air being brought in contact with the hot water and maintained in its heated condition by means of a heater supported upon the engine. The examiner cited as examples of the prior use of atmospheric air for heating the British patent to Geisenburger, No. 3056 of 1871, for air and gas engines, Caloric; the patents to Palmer, No. 344,006, of June 22, 1886, and to Dickerson, No. 655,148 of July 31, 1900, both of which were for refrigeration. Upon appeal to the board of examiners in chief, the assistant examiner in charge stated, referring to the patents to Nutty, Reynolds, Geisenburger, Palmer, and Dickerson:

"The claims differ from Reynolds only in the substance used for cooling the air as it passes through the interheater on its way from one power cylinder to the other. The use of atmospheric air as a heating material is common as shown by Geisenburger, Palmer, or Dickerson, and by substituting air for the heating material used by Reynolds, a structure the same as applicant's is obtained. This combination is substantially shown by Nutty. In Nutty the pipes *p* and *q* connecting the high and low pressure cylinders are exposed to atmospheric air which will tend to bring the air in the pipes to the temperature of the atmosphere, or there will be an interchange of heat."

The examiners in chief affirmed the decision of the primary examiner upon the following grounds:

"The examiner states that the thing claimed differs from the heater shown in the Reynolds & Haupt patent 'only in the substance used for cooling the air as it passes through the interheater on its way from one power cylinder to the other,' and that 'the use of atmospheric air as a heating material is common, as is shown by Geisenburger, Palmer or Dickerson.' The examiner's conclusion is that it would require no invention to make this substitution and we agree with him."

Thereupon an appeal was taken to the Commissioner, who agreed with the conclusions of the examiners in chief for the reasons stated by them and affirmed their decision. The cause thereupon came before the Court of Appeals for the District of Columbia on an appeal from the Commissioner of Patents, and for its bearing upon the questions at issue, I cite from the opinion of Mr. Justice Robb of that court:

"A compound compressed air engine is an engine in which the compressed air is first used in a high pressure cylinder; that is, in a cylinder of relatively small diameter, and, after driving the piston connected therewith, instead of being permitted to escape is conveyed to a low pressure cylinder, that is, to a cylinder of larger diameter where it still has sufficient expansive force to drive another piston. This operation may be again repeated in a third cylinder, or the air be permitted to escape to the atmosphere. When the compressed air enters the first cylinder, it necessarily partially expands and in expanding becomes much colder, and by becoming colder its expansive power is, of course, correspondingly lessened or diminished. It is manifest, therefore, that any arrangement or device that will operate to warm or heat the air after it leaves one cylinder and before it enters the next will greatly increase its efficiency in the second cylinder. Inasmuch as such compressed

air, after being partially expanded in the first cylinder, is frequently colder than atmospheric temperature, appellant has arranged what he calls an 'interheater,' which in fact is a plurality of longitudinally extending tubes within and along which the compressed air flows from one cylinder to another, and over which a current of atmospheric air passes. The atmospheric air, being warmer than the compressed air within the tubes, imparts or gives up some of its warmth to the compressed air within, and to that extent increases the efficiency of the compressed air. It is simply a reversal of the old idea of warming atmospheric air by a plurality of tubes called radiators, through which steam or hot water passes. In one case the atmospheric air absorbs heat from the substance within the tubes, and in the other case it imparts heat to the tubes and the substance therein.

"The following references are cited by the Commissioner as the basis for the rejection of the above claim: British patent, No. 3056 of 1871, Geisenburger; No. 222,950, December 23, 1879, Reynolds & Haupt; No. 344,006, June 22, 1886, Palmer; No. 655,148, July 31, 1900, Dickerson; No. 745,373, December 1, 1903, Nutty.

"Reynolds & Haupt in their specification say 'we employ an engine of the compound type and though we may or may not heat the air before its introduction to the engine *we always heat it after its exhaust from the high pressure cylinder and before its induction to the low pressure cylinder;* and to this end our invention consists in the combination, with a compound engine for the use of compressed air for motive power, of a heater placed between its high and low pressure cylinders and containing heated water or other liquid, through or in contact with which the air passes between its eduction from the one cylinder and its induction into the other.' It will be observed that this patent, like the claim in issue, has reference to an interheater for a compound compressed air engine, the only real difference being that Hodges uses atmospheric air instead of a liquid substance to impart heat to the compressed air within the interheater. Inasmuch as it is obvious that, under certain conditions, an interheater dependent wholly upon atmospheric air for its successful operation possesses advantages over one requiring some liquid substance, Hodges will be entitled to a patent if it can be successfully demonstrated that he is the originator of the idea embodied in this difference between the two devices. On the other hand, if he is not the originator of the idea of using atmospheric air to impart heat to air within some receptacle for the purpose and with the effect of increasing its expansive force, then obviously he ought not to be given a monopoly on all such devices. We pass, therefore, to the other references to determine this question.

"The Dickerson patent, as described by him, 'consists in the combination, with a receiver for containing the liquid air, of an air motor connected therewith through suitable intermediate expansion coils or chambers, and a blower or fan which is driven by the motor and which is arranged to produce a current of air over the expansion coil, so as to impart to the latter sufficient heat to effect the expansion of the air therein and to be delivered at a reduced temperature into the room or other space which is to be cooled and ventilated. * * * The expansion coils are located in the conduit, through which air is forced by the blower, so that by the absorption of heat from the latter the air in said coils is raised in temperature and expanded. This expanded air on reaching the reservoir is still further expanded by the absorption of heat from the incoming air and exerts a sufficiently high pressure to run the motor.' Without describing this patent further, we refer to the statement in the brief of counsel for appellant in reference thereto: 'Although Dickerson here shows that one body of air may impart heat to another body flowing in a coil, and by thus imparting heat may increase the expansive power of the inclosed body of air, it teaches nothing more which is pertinent to the invention under consideration.'

"Appellant concedes he did not invent the interheater. He found that in the Reynolds & Haupt patent. His claim is for a device susceptible of using atmospheric air, instead of a liquid substance, to heat and expand air therein, and in the Dickerson patent we find such a device for such a purpose. We

think appellant concedes this in the statement taken from his brief. In Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566, it is said: 'A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.'

"The use of atmospheric air as a heating medium is also shown in the Geisenburger patent, and also in the Palmer patent. In the Geisenburger patent the carbonic acid gas in liquid form passes to the expansion cylinder through a coil or heater 'inclosed in a tank or vessel filled with water or *air*, or any body capable of having the same temperature as the circumambient air.' A careful examination of these cited patents and the drawings and specifications filed therewith convinces us that the Commissioner of Patents was right in disallowing all these claims, and we therefore affirm his decision, and direct the clerk to certify the proceedings in this court to him as the law provides."

The application for the patent in suit was filed June 11, 1909. The claims were originally rejected, the examiner citing Rix patent, No. 605,187, June 7, 1898, for air and gas pumps, in view of Worthington, No. 917,232, April 6, 1900, and Bushnell, No. 137,889, April 15, 1873, air and gas pumps, air motors; but subsequently, December 20, 1909, they were held allowable by the examiner and the patent issued March 29, 1910.

The Rix patent related to a pneumatic pump operated by a compound compressed air engine having a high pressure cylinder and a low pressure cylinder. The interheating of the air between the high pressure and low pressure cylinders was accomplished by causing the water on its way to the pump to pass over an interheating casing containing pipes leading the exhaust compressed air from the high pressure cylinder to the low pressure cylinder.

Subsequent to the favorable decision of the examiner, the application was amended by inserting a reference to the prior Hodges patent, No. 868,560.

It is contended by the defendants that the supposed invention covered by the claims for the method of the patent in suit is coextensive with the claims for the apparatus Nos. 1 to 5, which were included in the original application for the prior patent and were rejected and canceled; that the patent in suit for the method was therefore improperly granted; and that the alleged method is nothing more than the necessary mode of operation or function of the apparatus for which Hodges had previously obtained letters patent.

It is urged by the defendants that, if the examiner had been aware of the references cited in the rejection of the previous application showing that heating for expanding compressed air and atmospheric air as a means of interheating were known in the prior art, he would have rejected the claims of the second application on the ground that no invention was involved in substituting atmospheric air heating for the interheating means used in connection with compound compressed air engines as disclosed in the Rix and the Reynolds and Haupt patents, and that if the examiner had known of the decision of the Court of Appeals of the District of Columbia, sustaining the action of the Patent Office in rejecting claims 1 to 5 of the prior patent, he would have been bound by force of this superior authority to reject

the claims presented in the later application, as being of practically equal scope with those rejected in the prior application.

The defendants further refer to two patents alleged to be anticipations of complainant's method of operating a compound compressed air engine, namely, Hill, No. 244,601, July 19, 1881; and Smith, No. 596,386, December 28, 1897. Both of these patents relate to refrigerating apparatus, but it is claimed by the defendants that the apparatus disclosed include compound compressed air engines operated according to the method claimed by Hodges.

It is contended by the complainant that the Hill and Smith patents are not anticipations, because they relate to a different art, namely, that of refrigeration, while the patent in suit relates to the production of power. In both of these patents the primary object is the maintaining of an even temperature in the chill room of a refrigerating plant by a continuing circulation of air of low temperature obtained by expansion of compressed air in a compound compressed air engine.

The Hill patent discloses an arrangement which is thus defined in the specifications:

"The object of this arrangement of the apparatus is to draw out the warmest air of the chill room, and by bringing it in close contact with the expanding engines and their interheater to extract all possible heat from it and use it for doing work in driving the compressors."

In the Smith patent, the specification states:

"The invention is based upon the fact that atmospheric air, when compressed and then cooled, will, upon such air being made to perform mechanical work during its expansion, have its temperature lowered, and will consequently lower the temperature of bodies in contact with it, owing to the absorption by such expanded air of heat from bodies in its particular locality."

And again in the specification:

"During the expansion in the cylinder *M* the air does work in assisting to compress the air in cylinders *G* and *C*, and during this practically adiabatic expansion the working air becomes cooled to a temperature depending on the initial pressure and temperature, and the amount of expansion is so regulated that the air is cooled to a temperature a little lower than that of the refrigerating room, say to a temperature of 36 degrees centigrade or 238 degrees absolute. * * * The air is drawn off through the pipe *P* to the second expanding cylinder *Q*, where it is again allowed to expand till its pressure falls to about 40 pounds per square inch absolute and work in assisting to drive the compressors *C* and *G*, the expansion being regulated by means of any approved expansion valve and the temperature of the air falling to 238 degrees absolute. The expanded air then exhausts from the cylinder *Q* through pipe *R* at a lower temperature than that of the cooling chamber, namely, 238 degrees absolute, into the surface condenser *S*. By the circulation of air by blowers U^3 U^4 through and from the tubes in the surface condenser the temperature of the air is again raised during its passage from the pipe *R* through the condenser to the pipe *T* to the temperature 252 degrees absolute. The air, having completed the cycle, is reduced to its initial pressure and temperature and is consequently ready to go through the same process again. It must be distinctly understood that the pressures and temperatures given above are subject to alteration according to circumstances, the efficiency of the plant becoming greater as the range of temperature is reduced."

It is apparent that both the Hill patent and the Smith patent disclose a compound compressed air engine, the use of an air interheater between the cylinders, increasing the volume of the exhaust air from the high pressure cylinder and its capacity to generate power, and the carrying of the reheated air into the low pressure cylinder of the compound engine.

Notwithstanding the fact that the primary object of the Smith and Hill patents is to cool the air in the chill room by means of the expansion of the compressed air, while the object of the patent in suit is to produce power by the transfer of the heat of the surrounding air to the compressed air, I fail to see any essential and fundamental difference between the interheating methods employed by Hill and Smith and that employed by Hodges. In either case the temperature of the compressed air after expansion is raised and that of the surrounding air lowered, but in effect it is a mere exchange between the heat in the surrounding air and the air confined within the pipes of the interheater. Moreover, in the Smith and Hill patents there is the stated object of obtaining additional work from the compressed air by raising its temperature. While the amount of power produced in the Smith and Hill apparatus would perhaps be negligible as an effective sole means of producing power, yet this is a difference merely of degree and not of principle.

The contention of the complainant that, in the patents for refrigerating apparatus, its invention is not anticipated because they are applicable to another art than that of producing power, is not sustained upon an examination of those patents because the production of power is an essential object in the Smith and Hill patents as a function employed in the apparatus in accomplishing the effect of refrigeration. The complainant relies upon the well-established principle that a patent for an apparatus in which a new method is employed does not preclude the patentee from later obtaining a method patent for the process. The claims in the prior patent, however, were rejected because the method was not new, that is, because air as a means of interheating was not new, and that is what is shown by the prior patents cited by the defendants. The use of air as a means of interheating is the essence of the method of the patent in suit and is the function or mode of operation of his prior patent.

While the patentee has no doubt overcome many difficulties in the practical working of compound compressed air engines, what he did is tersely described by Judge Robb in his opinion cited above as—

"simply a reversal of the old idea of warming atmospheric air by a plurality of tubes, called radiators, through which steam or hot water passes. In one case the atmospheric air absorbs heat from the substance within the tubes, and in the other case it imparts heat to the tubes and the substance therein."

Everything claimed as novelty disclosed by claims 1 and 4 of the patent in suit is covered by claims 1 to 5, inclusive, in the application under the earlier patent. While the action of the Patent Office in granting a patent is prima facie evidence of its validity, it is apparent from the record in this case that the examiner did not have under consideration prior patents which show anticipation, nor did he have

the rejection of the prior claims before him. As the prior claims were rejected because the use of air as a means of heating was not new, the prima facie effect of the issuing of the patent in suit loses its force. If the Hill and Smith patents and the references cited by Judge Robb in sustaining the rejection of claims 1 to 5 of the earlier patent had been before the examiner in considering the patent in suit, no doubt the result would not have been the issue of the present letters patent.

It is concluded that no patentable invention is disclosed in the method of operating compound compressed air engines by the use of atmospheric air as an interheating means in view of the prior art; that the method described in claims 1 and 4 is nothing more than the necessary mode of operation of the apparatus for which the patentee, Hodges, had previously obtained letters patent No. 868,560; that these claims are coextensive with the claims 1 to 5 for the apparatus which were rejected upon the application for the prior patent on the apparatus; and that the patent in suit for the method of operation was improperly granted, and is invalid.

A decree may be entered dismissing the bill.

FARMERS' HANDY WAGON CO. v. BEAVER SILO & BOX MFG. CO.

(District Court, E. D. Wisconsin. October 16, 1914.)

PATENTS ⇐328—VALIDITY—IMPROVEMENT IN SILOS.

The McClure patent, No. 814,067, for an improvement in silos, which relates to a door frame for a continuous silo opening, *held* void, on the ground that the construction shown discloses no inventive difference from, but is substantially identical with, the structure of the Crosby patent, No. 792,969, which was pending in the Patent Office at the same time on an earlier application, and was first issued.

In Equity. Suit by the Farmers' Handy Wagon Company against the Beaver Silo & Box Manufacturing Company. On final hearing. Decree for defendant.

Wallace R. Lane and George Mankle, both of Chicago, Ill., for complainant.

John E. Stryker, of St. Paul, Minn. (George B. Swan, of Beaver Dam, Wis., on the brief), for defendant.

GEIGER, District Judge. The suit is brought to restrain unfair competition, and infringement of letters patent No. 814,067, granted March 6, 1906, to McClure, for an "improvement in silos." If the patent is valid, it has been infringed by defendant.

The court recently (Ryder et al. v. Beaver Silo Mfg. Co., 219 Fed. 242), considered and sustained the Harder patent, No. 627,732, granted June 27, 1899. The present suit—the complainant herein being not only owner of the McClure, but also licensee under the Harder, patents—discloses considerable development in silo construction in the seven years intervening the date of the two patents. In the Harder suit, much stress was laid upon the impetus given by that invention

to "factory" silo building—its solution of the problem of economical and easy construction of silos which successfully withstand the strains of wind and weather to which such structures are subject—all in support of the claim that the patentee had, in his discovery of the re-inforced continuous door opening, exercised the inventive faculty. The patent was sustained, as was also the contention that its claims should receive a liberal interpretation.

The present complainant urges, in support of the McClure patent, many of the considerations pressed in the Harder suit; and while the latter patent was accorded a liberal interpretation in successive tests in litigation (Ryder v. Schlicter [C. C.] 121 Fed. 198; Id., 126 Fed. 487, 61 C. C. A. 469; Ryder v. Townsend [C. C.] 188 Fed. 792; Ryder v. Lacey [D. C.] 200 Fed. 966), there is nevertheless good ground for the conviction that the inventor had not entered a large field.

The claims of the McClure patent are:

1. A frame for silo openings, comprising in combination a pair of upright bars of L-section, each bar being arranged with one of its members flush with the face of the adjacent silo staves; a plurality of transverse bars spanning the silo opening and rigidly secured to said upright bars, the ends of said transverse bars projecting beyond said upright bars, together with hoops encircling the silo and overlying the ends of said bars to hold them in contact with the silo staves, substantially as described.

2. The combination, with the staves of a silo, of a metallic door frame therefor relative to which frame the staves are erected, said frame comprising a pair of continuous angle irons, one flange of each of which abuts the end staves of the silo, the remaining flange of which projects over the opening in the silo, to form seats or guides for the doors, and braces extending between the angle irons and superposed upon the outer faces thereof, the ends of the braces overlying the end staves of the silo and separate means for securing the braces to the outer faces of the angle irons and to the end staves.

3. In a silo provided with a continuous opening, the combination of a door frame comprising a pair of vertical angle irons lining the walls of the opening from end to end, one flange of each of the angle irons abutting the wall and the remaining flange overlapping the opening to form seats for the doors, braces connecting the angle irons, and braces applied to the outer faces of the angle irons and overlapping that portion of the silo adjacent the frame, and separate means for securing the braces to the angle irons and to the silo respectively.

The invention is stated to be "an improvement in silos," and relates more particularly to an independent rigid door frame construction for the vertical opening of the silo, and its objects, "to produce for silo doors a frame that can be quickly and readily assembled without the aid of skilled labor, that will serve as a gauge or guide for setting up the silo, and will form a secure support for the silo doors and provide a support for the silo hoops."

Upon the trial the case narrowed down to a consideration of the patent in suit in the light of patents to Crosby and to Haag, copending in the Patent Office prior to the date of the former's issue. The dates of application and issue respectively are:

Patentee.	Application.	Issue.
McClure 814,067	April 27, 1904.	March 6, 1906.
Crosby 792,969	April 13, 1904.	June 20, 1905.
Haag 802,391	February 8, 1904.	October 24, 1905.

It is conceded that, in view of the dates, the Crosby and Haag inventions—if such they be—were not in the prior art to be claimed as anticipatory of McClure; but, under the answer here the status of McClure as the first and original inventor is challenged, and thereunder it is urged that the McClure invention is substantially identical (within the rules for testing identity) with the Crosby invention, and this necessitates some consideration, as well, of the Haag invention.

Now, without setting forth the claims of the Crosby patent, it will suffice to say that each of these structures is an iron frame for the "continuous opening" of a silo. While complainant urges that McClure's particular improvement consists of an "independent rigid door frame," the feature of "independence" is certainly not novel. Indeed, that feature was, in substance, claimed in behalf of Harder—that is to say, in support of the latter's claim of novelty and invention. It was strongly urged that his structure was a great step in the art of silo building, because it provided an integral opening having continuity from top to bottom of the silo, with the requisite strength to resist the strains peculiar to a circular silo. It initiated, and made possible, so it was claimed, the present era of the "factory silo."

Assuming that McClure made advances over the Harder and other silo structures disclosed in patents issued in the interim, which are to be accredited as inventions, the facts here show that copending with his application was that of Crosby, whose structure differs in two particulars only: (1) The former uses for his uprights, which constitute the sides of the door frames, L-shaped or ordinary angle bars, the latter a Z-bar. (2) The cross-bars of the former extend beyond the upright angle bars to the adjacent silo stave, to which they are fastened by bolt or screw—this being claimed as an element in the combination structure; whereas, Crosby extends his cross-bars to his upright Z-bars, to whose inwardly projecting flange they are fastened by rabbeting and bolting. It may be noted that the feature of extending the cross-bars to the adjacent staves is found in the copending Haag patent; and while it may not be permissible to make a comparison of the McClure with the combined Crosby and Haag structures, the question is whether the structural differences are such as disclose radically different inventive acts, or merely the carrying out of the same purpose through a selection of different mechanical expedients. Certainly the use of an L instead of a Z bar involves no more than choice between well-known means, and to my mind makes a difference which, structurally and functionally, is not substantial; and if the case rested upon that alone, it would be one of substantial identity.

Does the second feature above noted—the extension and fastening of the cross-bars beyond the uprights and to the adjacent stave—save the McClure structure from the charge of identity with Crosby? In other words, must the fact that that feature appears in the Haag patent, and is absent from the Crosby claim, preclude identification of the latter with McClure, wherein it is also found? I am inclined to test the situation in this way: If Crosby and McClure are alike in all respects excepting this one particular, and if the former were in the prior art, would the latter infringe, or would the former be anticipatory? I

should answer that McClure added an element which did not make a new combination; that, for the purpose of securing rigidity, the choice between the methods of fastening was one to be made by a capable structural iron mechanic, and not an inventive genius.

The fact that the copending status of the patents forbids their consideration as anticipatory or prior art patents does not, upon an issue of substantial identity, forbid using some of the tests of infringement or anticipation; nor does it forbid considering which of the elements of the claims of the several copending patents are or are not elements of a true combination.

"It is not necessary," said Judge Lacombe, in discussing the basis upon which structures shown in copending patents are to be compared, "to go into details of mechanism. The substantial invention of each patent is the invention set forth in the claims when such claims are construed in the light of the specifications." Electric Co. v. Transit Co., 198 Fed. 94, 117 C. C. A. 280.

In the case before us, while it is not possible to take the claims or structure of one, and conclude, upon comparison, that the claims or structure of the other are exact copies, still the invention disclosed in each is that of an "independent" silo door frame—differing from one another in the two particulars only. The one patentee can well assert that the end sought to be attained, required, in his judgment, the use of an L-bar; the other, the use of a Z-bar. The former believed greater rigidity best attained by the extension and fastening of the cross-bars to the adjacent stave; the other, by using a T-flange cross-bar fastened by bolting and rabbeting to the upright. Neither can claim to have discovered that which introduces into his combination an element substantially different from the others.

It is my judgment that, upon a fair application of the rule above noted, the Crosby and McClure structures are substantially identical, and that the defendant must prevail upon its defense.

A decree dismissing the complaint may be entered.

LUTEN v. BEARCE et al.

(District Court, D. Maine. December 22, 1914.)

No. 680.

1. PATENTS ⇐202—SUIT FOR INFRINGEMENT—ESTOPPEL TO MAINTAIN—IMPLIED LICENSE.

A corporation of which complainant was president entered into a contract with defendants by which they were authorized to use as contractors in the construction of a bridge certain inventions covered by patents owned by complainant, for which they were to pay as a license fee ten per cent. of the contract price of the bridge. The corporation was also to furnish steel work for the bridge, and a controversy arose over that part of the contract. By agreement the time for payment of the license fee was extended until the bridge should be completed and its stability demonstrated. Complainant was fully cognizant of the terms of the contract and conducted some of the negotiations therefor. *Held*, that he was bound by the contract, and could not ignore it and maintain

a suit for infringement of the patents before the time for payment of the license fee as extended had expired.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–289; Dec. Dig. ⟸202.]

2. PATENTS ⟸209—IMPLIED LICENSE—ESTOPPEL.

No particular form of words is necessary to constitute a license to use a patented invention, and a license may be implied on principles based on the doctrine of acquiescence or estoppel.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 300, 303; Dec. Dig. ⟸209.]

In Equity. Suit by Daniel B. Luten against George B. Bearce and John D. Clifford. On final hearing. Decree for defendants.

Jones, Addington, Ames & Seibold, of Chicago, Ill., for complainant.

McGillicuddy & Morey, of Lewiston, Me., for defendants.

HALE, District Judge. This suit in equity is brought to obtain an injunction against the defendants by reason of their infringement of certain letters patent. The bill alleges the infringement of several patents relating to the art of bridge construction, arch construction, masonry, and concrete structures. It contains the usual allegations that the complainant is the owner of the several enumerated patents, and that they are of great commercial value. It then proceeds to set forth that against the will of the complainant, in violation of his rights, and in infringement of his letters patent, the defendants submitted a bid for the erection of a certain bridge at Dover and Foxcroft, in the state of Maine, by plans and specifications embodying the patented inventions of the complainant, and, after being awarded the contract, proceeded to erect the bridge, and that the same is in process of construction in accordance with the improvements described in the letters patent. Among other things the complainant further alleges that he fears that, unless the defendants are restrained by a writ of injunction, they will complete the erection of the bridge, and will cause irreparable injury to the complainant. The complainant prays, among other things that the defendants may be decreed to account for profits and damages, and that they may be restrained both temporarily and permanently by an injunction of the court from using or selling the improvements described in the letters patent; that there may be a decree that the patents are valid, and that the complainant is the lawful owner of the same; that the construction, use, or sale by the defendants of structures embodying the invention may be decreed to be an infringement of the patents; and that the court may cause the damages to be assessed, and may increase the actual damages to three times the amount of such assessment, by reason of the circumstances of the aggravated infringement by the defendants.

The answer denies that the complainant is the owner of the patents, that there has been any infringement, and that there is any necessity for an injunction; also that the defendants will receive profits from any use of the invention. By way of defense it sets forth that defendants entered into a contract with the National Bridge Com-

pany, a corporation having its place of business at Indianapolis, Ind.; that the complainant is the president of the Bridge Company; that this company gave permission to the defendants to erect a bridge according to certain plans furnished by it; that such plans included and incorporated the several patents set forth in the bill; that by the terms of the contract the Bridge Company agreed with the defendants to protect them against the claims of infringement of any patent granted or applied for, or of any device used in the structure, and to furnish certain "shopwork" in the steel construction to be delivered at Foxcroft, Me. The answer further discloses a conflict between the Bridge Company and the defendants with relation to the matter of "shopwork," and in relation to the payments to be made. It sets up that the National Bridge Company modified the terms of the contract by several changes, and finally by a provision that the final payment should be deferred until the defendants were satisfied that the bridge and its walls would stand up, and that by its modification of the contract, the final payment of $920 by the defendants to the Bridge Company was not due at the time this equity suit was brought. The answer enters upon the contention between the defendants and the Bridge Company as to the terms of the payments and other matters which it is not necessary to consider here. The defendants further and finally allege in their answer that the complainant was president of the company, knew of the contract with the Bridge Company, and approved it; that he was actually present and knew the different elements of the contract, and the whole conduct of business with the Bridge Company; and that the defendants have fully performed all they were required to do under the contract. The answer substantially sets up that by acquiescence in the use of the patents under the contract referred to, the complainant has given a license to the defendants to use the inventions under the contract referred to; and that the bill presents no equity.

[1] The case shows that a contract was entered into between the defendants as contractors and the town of Foxcroft covering the erection of a bridge over the Piscataquis river between Dover and Foxcroft, and that it included a set of specifications furnished by the National Bridge Company, agreeing to furnish the plans and steel, and a license to use certain patents owned or controlled by the Bridge Company under specified conditions. The evidence makes it clear that the bridge was to be erected under plans and specifications covered by letters patent owned or controlled by the Bridge Company; that the company was not to bid on the work, but was to furnish a license to the defendants, the contractors, to erect this bridge for 10 per cent. of the contract price. The contractors were to acquire no license under the patents owned or controlled by the Bridge Company through any act of the company, or its agents, until the specified amount of the license fee had been paid to the Bridge Company. It appears that, should any conditions prevent the prosecution of the work to completion in the time named, or should its prosecution be delayed by the owner of the patents, or by other causes beyond the control of the contractors, then an extension of time should be allowed

equivalent to the delay. It appears, too, that payments were to be made to the contractors according to monthly estimates on work done and materials delivered at the bridge site, which estimates should become due the following month, except that 10 per cent. was to be reserved by the owner until the bridge was completed, when the balance remaining unpaid on the bridge should become due and payable. As the work of construction proceeded, a controversy arose between the parties relating to "shopwork" on the steel furnished. It is unnecessary to discuss what this controversy was; for the issues in this patent case do not enable the court to settle the contentions between the parties. In the conduct of business between the owners of the patents and the contractors, some of the letters of the Bridge Company were signed by their president, Daniel B. Luten, the complainant in this case; others were signed by W. M. Denman, who alleged himself to be the representative of the company, and who was acting as agent for the Bridge Company, and for the complainant, as the evidence clearly shows. Extensions of time of payment under the contract were made from time to time; finally Mr. Denman, acting for the Bridge Company and for the complainant, instructed the defendants, the contractors, to send him a check in final payment "when you are satisfied that the bridge is going to stand up." The testimony further shows that the bridge was not accepted, and that up to December 18, 1911, it was not settled whether the bridge would stand up or not. This suit was brought on November 13, 1911. The testimony induces me to find that the complainant was cognizant of the conduct of business between the defendants and the Bridge Company, and of the negotiations entered into by Denman with the defendants. With the full knowledge of the complainant, then, the Bridge Company was furnishing patents under which the defendants, the contractors, were building a bridge. The conduct of all negotiations between the parties was under the contract and specifications to which reference has been made. The time of final payment of the license fee was extended by agreement of the parties. Whatever the controversy was between the parties, it arose under the contract. It was clearly within the contemplation of this contract that the defendants should build the bridge under the patents enumerated in the bill. It would be grossly inequitable to permit the Bridge Company to ignore its contract with the defendants, and treat them as infringers, when both parties were acting under it, and the controversy between them related to their contract rights. If either party regarded the contract as broken, recourse could be had to the courts to enforce it, or to recover for its violation. The testimony makes it clear that Luten, the complainant, as president of the Bridge Company, was himself conducting many of the negotiations between the defendants and the Bridge Company. He is charged with knowledge that the contractors were proceeding, and were to proceed, under the contract until they should be satisfied that the bridge was going to stand up, and that until then they were not to make the final payments. He brought this suit before that time had elapsed. It appears by a letter from Mr. Denman that he, representing the Bridge Company and this complain-

ant, indicated to the defendants his intention to claim recourse to the federal courts, and that, if the defendants refused to pay in accordance with what he thought to be the rights of the Bridge Company, "Mr. Luten would enter suit for perpetual injunction, royalty, and damages," etc. The case shows that this suit was brought substantially in pursuance of the indication in Mr. Denman's letter. On a careful examination of the whole testimony, I am constrained to come to the conclusion that the relief prayed for in the bill cannot be decreed on the facts disclosed in the testimony.

[2] The allegations in the bill relating to the infringement of the patents are not sustained. The whole testimony leads me to conclude that the defendants had an implied license to the use of the patents in the way they were using them under the contract, and that they acquired such license by the knowledge and acquiescence of the complainant. No form of words is necessary to constitute a license or permission to use patents. The federal courts have repeatedly applied the law relating to an implied license, on principles based upon the doctrine of acquiescence or estoppel. Walker on Patents (4th Ed., 1904) § 312; Hartell v. Tilghman, 99 U. S. 547, 25 L. Ed. 357; Keyes v. Eureka Mining Co., 158 U. S. 153, 15 Sup. Ct. 772, 39 L. Ed. 929; Seibert Cylinder Oil Cup Co. v. Detroit Lubricator Co. (C. C.) 34 Fed. 216; Blanchard v. Sprague, 1 Cliff. 288, 298, Fed. Cas. No. 1,516; Am. Graphophone Co. v. Victor Talking Machine Co., 188 Fed. 428, 429, 110 C. C. A. 308; Chadeloid Chemical Co. v. Johnson, 203 Fed. 993, 994, 122 C. C. A. 293.

In the case at bar, there is no denial of the validity of complainant's patents, nor of his right to the monopoly which they give him. The conduct of the parties, as shown by the evidence, discloses the intention of all concerned in the transaction that the patents should be used by the defendants until the bridge was fully constructed. The time of final payment of the amount due by the defendants had clearly been extended until the bridge had been fully constructed, and the terms of the contract had been carried out. The complainant had clearly acquiesced in the acts of the Bridge Company in extending the time of final payment. There is no more reason for allowing him to ignore the terms of the contract, and the rights acquired under it, than there is for allowing the Bridge Company itself to ignore those conditions. The evidence in the case shows that the complainant has waived his rights to invoke the provision of the contract negativing the acquirement of a license by any act of the company or its agents until the full amount had been paid to the Bridge Company. It is evident that all parties understood that the defendants should have the use of the patents until the bridge should be built. After a careful consideration of all the testimony, I find that, at the time this bill was brought, the complainant had no right to treat the defendants as infringers of the patents in suit.

The bill is dismissed, with costs to the defendants.

RYDER et al. v. BEAVER SILO & BOX MFG. CO.

(District Court, E. D. Wisconsin. August 14, 1914.)

1. PATENTS ⊂=129—SUIT FOR INFRINGEMENT—EVIDENCE OF VALIDITY—RECOGNITION IN PRIOR LITIGATION.

Recognition of the validity of a patent by the defendants in a number of suits for its infringement during 14 years of litigation is a sufficient reinforcement of its presumptive validity to justify a court in declining to treat the question as an open one, in view of prior patents.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. ⊂=129.]

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SILO.

The Harder patent, No. 627,732, claim 4, for a silo having a continuous opening from top to bottom, braces between the edges of the walls forming the opening, door sections for closing the opening, and reinforcing strips for the door sections, covers a combination not shown to have been anticipated by prior publication, nor by prior use, discloses invention, and is entitled to a broad and liberal construction; as so construed, *held* infringed.

In Equity. Suit by Edgar S. Ryder and others against the Beaver Silo & Box Manufacturing Company. On final hearing. Decree for complainants.

Samuel Owen Edmonds, of New York City, and Parkinson & Lane, of Chicago, Ill., for complainants.

John E. Stryker, of St. Paul, Minn., for defendant.

GEIGER, District Judge. Complainants filed their bill charging defendant with infringement of letters patent No. 627,732, granted to Harder, June 27, 1899, covering an improvement in silos. The fourth claim of the patent reads:

"In a silo having a continuous opening from top to bottom, braces between the edges of the walls forming the opening, door sections for closing the opening, and reinforcing strips for the door sections, substantially as described."

The defenses are invalidity and noninfringement—the former being based upon the claim of noninvention, anticipation by prior patents, and prior use; whereas, the defense of noninfringement upon the limitation, generally, of the patent structure to the precise form and language of the claim.

[1] The patent has been before the courts in Ryder v. Schlicter (C. C.) 121 Fed. 98; Id., 126 Fed. 487, 61 C. C. A. 469 (C. C. A. 3d Cir.); Ryder v. Townsend (C. C.) 188 Fed. 792; Ryder v. Lacey (D. C.) 200 Fed. 966; and while these cases dealt with the interpretation of claim 4 here involved, its validity seems to have been either conceded or *not disputed*. Its validity, in view of the prior art patents, is not here seriously challenged; and after 14 years of litigation whose result assumed validity, after exhaustive recognition and acknowledgment by licenses and the trade, the court can now well dispose of this phase of the case by according to the patent's presumptive validity the additional support of such recognition, and declining to treat as open the question of validity in view of prior patents, or the question of utility.

[2] The elements of the claim in contest are:
(1) A continuous opening from top to bottom.
(2) Braces between the edges of the walls forming the opening.
(3) Door sections for closing the opening.
(4) Reinforcing strips for the door sections.

Respecting validity, the principal contention here has been that the patented structure was fully disclosed in and anticipated by publications in 1894 and 1897, in Hoard's Dairyman, and in silos constructed by Harlan and Trescott at Churchville, Md., and Livonia, N. Y., respectively, in the summer of 1898.

The silo disclosed in Hoard's Dairyman, July 6, 1894, is structurally unlike that of the patent, and, indeed, unlike the ordinary modern silo, in that it is not a stave silo, but built upon the plan of a round, frame house—a frame of uprights is erected, and then to inclose it sheathing is applied—and the idea of staves or hoops, the barrel or tank form of structure, is not suggested. The latter, of course, presents the necessity, in order to meet the stresses and strains peculiar to that type, of having a special form of opening. The only elements of the claim in contest which can be said to read upon the structure are the "continuous opening" and braces; the latter consisting, according to the descriptive article published, of iron rods, while the published diagram or drawing refers to them as gas pipe placed across the openings at 2½-foot spaces. No suggestion of their function is possible, except that they prevent a spreading of the doorway's sides. The idea that rods were to be inclosed in gas pipe, the former to prevent spreading, and the latter, by abutting the sides, collapsing, has no warrant either in the drawing or the accompanying descriptive article. In my judgment, the structure, upon critical examination, discloses an opening whose tendency to spread is met by cross bolts or rods, and nothing more is found or intended. Such opening was to be closed by allowing boards to rest against its inner sides after the ordinary fashion of closing a grain or coal bin. The elements of the claim in contest here are not present, for the sufficient reason that the structure is so fundamentally different as neither to suggest nor require their presence.

The structure disclosed in Hoard's Dairyman, March 26, 1897, is eliminated, as not containing the "continuous opening." It suggests nothing more than the cylindrical stave structure, in which, after its erection, the door openings are cut out. No continuous opening with braces, reinforced from top to bottom, to be closed by various door "sections," is embodied.

Coming to the question of prior invention or prior use as found in the Harlan structure, the facts are these: Harder's application for a patent was filed February 4, 1899. He was engaged in the manufacture of silo machinery at Cobleskill, N. Y., and the building of silos. He commenced the exploitation of his patent structure some time prior to 1900. He died shortly after, and hence his testimony upon the direct question whether he first conceived the invention, and, if so, when, is not available on this issue. The two questions presented in this connection are whether the Harlan structure em-

bodies the Harder conception and combination, and whether, if it does, Harlan did not get his idea, or some considerable assistance, from Harder. It appears that in the summer of 1898 Harlan, who was a farmer at Churchville, Md., built a stave silo. The important differences between it and the modern silo—of complainant's type—are, first, that a considerable portion thereof was built underground, having masonry walls; secondly, that while it had a "continuous opening" above the ground level, which was closed with sectional doors, the feature of reinforcing the opening, if present at all, was supplied, not by "reinforcing" means, but arose incidentally in using the edge staves—which were smaller, 4-inch, instead of 6, turned radial to the silo—as the door wall. The patent structure calls for a separate reinforcement as an element, and while the Harlan idea of turning the stave, as indicated, may have been hit upon as a means of forming the walls of the opening, the fact that they were initially weaker than the rest of the staves, and, after being turned to 90°, were to be notched, perforated, and mortised to receive the door-securing strips, the hoops, and tenon, as shown in the proofs, quite conclusively precludes the presence of a "reinforcing" function to be performed, as in a combination like the patent structure. At all events, the marked difference in the two structures, the one being partly above and partly below the ground level, while the patent structure is all above ground, and therefore has a "continuous opening" for the *whole* silo, and the further fact that the "reinforcing" idea is not present in the former—these two aspects of the Harlan structure of themselves make it impossible to say beyond reasonable doubt that it anticipated the structure of the patent.

But if this were not so, if it be conceded that the Harlan silo structurally anticipated the Harder, the question is suggested, upon the proofs, whether Harlan did not get his idea, or some assistance, from Harder. When an alleged prior user and a patentee are shown to have sustained some relation to each other respecting the subject-matter of invention, the charge that the latter borrowed from the former may readily advance to the larger inquiry whether either borrowed from the other. Now, as above stated, Harder was a manufacturer of silo machinery, a builder of silos. As such, it is fair to presume he knew the art, and was interested in its development and progress. Harlan probably knew this, for on May 17, 1898, he wrote Harder for prices on hoops and lugs, presumably for use on the silo then contemplated. A reply was sent by Harder May 23, 1898. On May 27, 1898, Harlan wrote to the Williams Manufacturing Company, a manufacturer of tanks and water supply goods, asking for quotations upon the same and other articles, to which he received reply dated May 30th. As a matter of fact, he bought from the latter, and not from Harder, having ordered the goods July 11, and received and paid for them August 31, 1898. By reference to account books, and vouchers evidencing payments for labor and materials, he establishes the building of the silo, and its completion at about September 15th of that year. But Harder and Harlan met at some time prior to this date. Upon this subject, the latter, against complainant's objection,

testified that in the month of July or the early part of August (1898) he received a letter (not produced or found) from Harder, saying that the latter was going to Baltimore and would like to see Harlan "about silos"; that Harlan replied, saying he would be glad to see him "to talk silos, but did not expect to change his (my) plans, as I had already made considerable progress toward building his (my) silo." Thereupon the two met and "had a long talk about silos and silo construction."

At the time of this meeting, Harlan says he thinks all of his material for building was on hand and "probably part of the foundation built"; that his plans had been fully made for four or five months, and included "a new and original idea for using a continuous succession of doors, built of straight material, instead of the usual curved doors, which so far as I knew was the only kind that had been used up to that time." He testified further:

"Q. State whether or not, directly or indirectly, you received any information or suggestion from Mr. Harder which was embodied in the silo as you built it. A. I certainly did not. All the information which was communicated was communicated by me to Mr. Harder, for I explained to him my new idea of a continuous succession of doors, and he seemed much interested in it."

The testimony, assuming its competency, is obviously not only general, but apparently given upon the assumption that Harder's invention relates to the continuous opening or successive doors. But, although the proofs fail to show Harlan's structure to anticipate Harder's, the testimony above referred to clearly assumed such anticipation, and was aimed to show communication by Harlan to Harder. Corroboration was suggested in the witness' statement that one Lee was present during the "whole interview," his presence being prompted by Harlan because he (Lee) "was much interested in silos at that time, he having built or about to build several," wherefore, said Harlan, "I invited him to meet Mr. Harder with me, thinking Mr. Harder might interest him in his silo." Lee, however, was unable to fix the time of the interview other than in the year 1898, referring to the occasion as one when Harder wanted to sell him a silo. "I contemplated building one, and talked over the question." Lee afterward built a stone silo, completing it September 1, 1898. Although present at the whole interview, he answered, when asked whether he knew that Harlan "had designed a new form of silo": "I am not sure. It has been 14 years ago." Then, in response to suggestive questions, he answered that Harlan "stated that his silo was to contain continuous doors"; but, when asked whether Harder said anything about the form of silos manufactured by him (Harder), he answered, "No, he did not."

It may not be permissible to assume that Harder, who filed his application for a patent in February, 1899, had his invention fully in mind in the summer or spring of 1898, when this interview took place. This much is true: The witnesses have not disclosed all that transpired between Harder and Harlan. The insistence by Harlan and Lee that Harder, who came expressly to interest them in silos, did not in the slightest degree seek to promote his own interests, nor

to accomplish the object of his visit, that he said nothing about the kind of silo *he* was building, that he should play the part of a pupil eager to learn, is contrary to all reasonable probabilities; and this alone, if the structures were conceded to be duplicates, may well suggest a doubt respecting anticipation which can be said to rest in reason, and not upon conjecture or suspicion. I do not mean that the inference of disclosure by Harder to Harlan is thereby justified. But Harder's testimony is not now obtainable, and Harlan's version of the interview was offered by the defense as proof, not only of prior use, but Harder's knowledge thereof, and, if it is competent at all, cannot be accepted if it is inherently infirm, or unless supported by other corroborating facts and circumstances presumably within his power to produce. The defense of prior use by Harlan has not been established to the requisite degree of certainty.

The Livonia silos, alleged to anticipate, are no longer in existence. The testimony tends to establish their erection in 1898. Of course, witnesses, unaided by the presence of the physical structure, can at best give only such aid, after 15 years, as recollection of generalities can give. And herein is found the infirmity of the proof in this branch of the defense. Drawings and models are exhibited to witnesses, who almost inevitably testify to a recollection of the alleged anticipating structure, which conforms with the drawings or model. If the model or drawing produced be one originally made and used as a guide to construction of the alleged anticipating structure, its probative force may be great. But when, as here, after many years, it is prepared under the stress of an adverse interest seeking to sustain an issue of identity, the presence and certainty of the patent drawings and structure are very apt to prove potent aids, sensibly or insensibly, in the preparation of the model or drawing of the alleged anticipating structure which is no longer existent; and likewise recollections, otherwise utterly infirm, are not only stimulated, but naturally assume some creative power, through whose exercise resemblances are found and greatly exaggerated, while radical differences, which in fact existed, are either minimized or totally eliminated. If the conception, by Harder, of the idea of a continuous opening in the silo, were the only question, then the testimony respecting the Harlan and Livonia silos might have the requisite probative force. But complainants can concede that that idea may not have been original with him, and still prevail in the contention that the combination structure of the patent is the first wherein the element of the continuous opening in combination with the other elements disclosed novelty, and, for the first time in the silo art, great practical utility. Upon such latter issue, involving the combination of the various elements, the proof, in my judgment, fails.

The remaining question—infringement—must be answered in favor of the complainants, unless defendant's contention for a limited interpretation of the claim in controversy be upheld. In other words, it is conceded that, if the claim be interpreted as urged by complainants, defendant's structure infringes. An examination of the cases, supra, involving this patent, shows that they all presented this precise

question. In Ryder v. Schlicter (C. C.) 121 Fed. 98, defendant's contention for a narrow construction was sustained, but upon appeal (126 Fed. 487, 61 C. C. A. 469) the ruling was reversed, and it was held that a broad and liberal interpretation must be given to the claim. The other cases gave it a like interpretation. The question was sharply litigated and exhaustively discussed, and their conclusions upholding the broad interpretation of the claim are here adopted.

A decree for the complainants may be entered.

IOWA WASHING MACH. CO. v. SAECKER.

(District Court, W. D. Wisconsin. January 12, 1915.)

No. 17-E.

PATENTS ⇐328—INFRINGEMENT—WASHING MACHINE.

The Victor patent, No. 863,120, for a washing machine, construed an infringement, *held* not established by the evidence.

In Equity. Suit by the Iowa Washing Machine Company against E. C. Saecker. On final hearing. Decree for defendant.

Wallace R. Lane, of Chicago, Ill., for complainant.

Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for defendant.

SANBORN, District Judge. Complainant moved for a temporary injunction on patent No. 863,120, for a washing machine, issued August 13, 1907, to A. F. Victor, now owned by complainant, and after the motion was heard it was agreed by the parties that such hearing might be treated as a final one, and the affidavits as depositions. The patent was sustained by the Circuit Court of Appeals of this circuit in Horton Mfg. Co. v. White Lily Mfg. Co., 213 Fed. 471, 130 C. C. A. 117. An examination of that report shows that the most important advance made by the patentee was relieving the tub cover of weight, by putting driving mechanism and heavy operating parts on the side, leaving only the light connections for operating the stirrer or "dolly" on the cover. Judge Kohlsaat says:

"If the appellee's patent was the first to provide a lever-operated gear for a washtub, which reduced the weight of the lid to a negligible quantity, he made such an addition to that art as amounted to invention. * * * In view of the absence in the prior art and use of any device showing a washtub having a cover free from the weight of the impelling machinery and the so-called line of cleavage at the point where the power is applied to the drive shaft, which carries the stirrer shaft, and in view of the other novel features of the claims, we hold the patent to be valid."

The "other novel features" referred to are undoubtedly the combination of the stirrer shaft with the slow-acting lever, the rapid-acting flywheel, and the line of cleavage. If we assemble all these elements, they may be thus stated:

1. A stirrer shaft.
2. A cover without the weight of the driving machinery.

---

3. A slowly moving lever.
4. A rapidly moving flywheel.
5. A line of cleavage or separation where the power of the lever is applied to the flywheel, so that the latter may continue its motion after the separation is made by raising the cover.

Defendant's machine has all the above elements (in a somewhat different degree from the Victor machine) except the first and second. As to the first element, it is claimed that defendant's dolly is a combined suction and clothes-moving device, by which there is no stirring back and forth, but where the clothes are continuously moved around in the same direction. It is, however, a stirrer shaft, so it seems this element may, by the rule of liberal construction applied by the Circuit Court of Appeals to the question of novelty, be held an equivalent.

The second element, however, of a cover without the load of the driving machinery, presents a different question. This is the gist of the patented device, but defendant does not employ it. All of its mechanism, except the flywheel and the lever, is on the cover. It is not very heavy, but all the iron parts are light. This important and essential feature of the patent is substantially wanting.

There are also other differences which lead me to think that infringement is at least doubtful. For the Victor segmental gear on the lever defendant has a gear driving wheel, with an entirely different function. I do not, however, go so far as to say that defendant's theory is correct, that the segmental rack and pinion are so connected with the line of cleavage as to make it necessary to read the rack into claims 2 and 4. I stop short of that by simply saying that the two constructions differ.

Another point of distinction is that if a belt is applied to defendant's flywheel the lever can be taken off, but on the Victor washer the lever would still be necessary in order to operate the stirrer and make the "line of cleavage" of any importance at all. Then the stirrer shaft of the Victor patent is driven by a rocking movement, and defendant's by a rotary drive for translating the continuous rotary motion of the shaft into an up and down motion, and a step by step rotation, of the stirrer shaft. In one form the motion is "transmitted," and in the other "translated."

On the whole, I think it quite doubtful whether infringement is shown. Decree for defendant, with costs.

ENGLISH et al. v. BROWN et al.

(District Court, D. New Jersey. November 30, 1914.)

1. JUDGMENT ⊂=715—CONCLUSIVENESS OF ADJUDICATION—PROBATE PROCEEDINGS.

The decree of a probate court, adjudging an estate insolvent after an examination of the administratrix, who was also the widow of the decedent, made on petition for a discovery by a judgment creditor, and also approving her final account, *held* not a bar to a subsequent suit by the

creditor against the widow to set aside alleged fraudulent conveyances of property to her by her late husband.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1244–1246; Dec. Dig. ⟸715.]

2 FRAUDULENT CONVEYANCES ⟸74—CONSIDERATION—"VOLUNTARY CONVEYANCE."

To render a conveyance "voluntary" and void as to creditors, there must have been a total want of any substantial consideration. A mere inadequacy of consideration does not bring it within the definition of a voluntary conveyance, nor in such case can it be avoided, unless made with a fraudulent intent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186–190; Dec. Dig. ⟸74.

For other definitions, see Words and Phrases, First and Second Series, Voluntary Conveyance.]

3. HUSBAND AND WIFE ⟸47—CONVEYANCE OF PROPERTY BY HUSBAND TO WIFE—VALIDITY—CONSIDERATION.

Under the law of New Jersey, while a direct transfer of property by a husband to his wife in repayment of advances made to him by her out of her separate estate is not good at law, it is enforceable in equity as against the claim of a subsequent judgment creditor.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 232–241; Dec. Dig. ⟸47.]

4. FRAUDULENT CONVEYANCES ⟸300—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE OF FRAUD—FAILURE TO KEEP ACCOUNTS.

The fact that a husband and wife kept no strict account of transactions between themselves respecting money of the wife advanced to or collected by the husband and used in his business is not an evidence of fraud, to invalidate a transfer of property to the wife in repayment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896–903; Dec. Dig. ⟸300.]

5 FRAUDULENT CONVEYANCES ⟸299—TRANSFERS OF PROPERTY BY HUSBAND TO WIFE—VALIDITY.

Transfers of corporate stock by a husband to his wife *held*, on the evidence, to have been made in good faith in repayment for money from her separate estate advanced by the wife and used by her husband, and valid as against a creditor of the husband, where the latter was at the time solvent and retained a substantial amount of the same stock in his own name; but a subsequent transfer of all his remaining stock to his wife, after he was in failing circumstances and a large judgment had been obtained against him, although based on an adequate consideration, *held* fraudulent and voidable as against the judgment creditor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 876–890; Dec. Dig. ⟸299.]

6. FRAUDULENT CONVEYANCES ⟸155—TRANSFERS OF PROPERTY BY HUSBAND TO WIFE—VALIDITY.

While a husband, although in failing circumstances, may transfer property to his wife for an adequate consideration, in order to be valid, the transfer must also have been executed and received in good faith and for an honest purpose; and if the wife had or was chargeable with knowledge of an intent on the part of the husband to hinder, delay, or defraud creditors, and the transfer had that effect, it will be set aside as fraudulent in equity at their instance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 493; Dec. Dig. ⟸155.]

In Equity. Creditors' suit by Paul A. English, Arthur English, and Otto B. English against Ella Wyman Brown and the United States Gypsum Company. Decree for complainants.

Andrew Foulds, Jr., of Passaic, N. J., and H. C. Brome, of Omaha, Neb., for plaintiffs.

Jesse Watson, H. Francis Dyruff, and Selden Bacon, all of New York City, for defendants.

HUNT, Circuit Judge. The plaintiffs, Paul A. English, Arthur English, and Otto B. English, who for convenience will be called the English brothers, brought this suit in December, 1912, as judgment creditors of Charles B. Brown, deceased, against Ella Wyman Brown and the United States Gypsum Company. Thereafter Ella Wyman Brown, as administratrix with the will annexed of Charles B. Brown, deceased, was added as a defendant. The purpose of the suit is to set aside transfers of certain stock in the United States Gypsum Company, made by the decedent, Charles B. Brown, to his wife, Ella Wyman Brown, defendant herein.

Plaintiffs set up two claims—one under a judgment for $21,534.27, against the administratrix, entered in New Jersey on May 6, 1912, based on a judgment for $16,298.74 rendered in the courts of New York against the decedent, Brown, on January 13, 1906, in an action begun in New York in June, 1905, and which action in turn was based upon a breach of contract made in January, 1902, between the testator and the English brothers; the second under a judgment for $5,412.91, entered against the administratrix in New Jersey on July 5, 1912. This last-mentioned action was in tort, arising out of an alleged malicious issue of attachment by Charles B. Brown against the plaintiffs herein in a counter action in contract instituted by Brown in New York in 1906.

It appears that about July, 1901, Charles B. Brown, the husband of the defendant, Ella Wyman Brown, aided in promoting the organization of the United States Gypsum Company. The plaintiffs then owned certain properties in Kansas, Michigan, and New York which Brown wished to include in the new corporation, and an agreement was entered into between Brown and the plaintiffs, whereby Brown agreed to give to the plaintiffs out of the promotion stock $31,250 of the preferred and $18,750 of the common stock. In due time, the United States Gypsum Company was incorporated under the laws of the state of New Jersey in 1902, and plaintiffs conveyed to the corporation. Stock was issued to Brown, but because of a refusal on the part of Brown to deliver a certain number of shares of stock to the plaintiffs, as it was contended he was obliged to do under the agreement, action was instituted by the plaintiffs against Brown in the Supreme Court of New York on June 13, 1905. This is the action just heretofore referred to as being the one which resulted in a judgment in favor of the plaintiffs against Brown for the stock in the corporation or its value, $16,298.74. After judgment was entered upon the case in New York, Brown brought the counter suit referred to against the plaintiffs on a contract for $52,000.

In the case just mentioned an attachment was issued at Brown's instance, and the judgment already referred to, which the English brothers had theretofore obtained against Brown, was levied upon. Brown prevailed in the trial court, but the appellate court set aside the judgment and ordered a new trial. Brown v. English, 131 App. Div. 909, 115 N. Y. Supp. 1113; Brown v. English, 137 App. Div. 900, 122 N. Y. Supp. 1123. In April, 1910, an order was served on the attorneys for Brown in the attachment suit, requiring Brown to give additional security on the attachment by May 30, 1910, under penalty of the dismissal of his action. Brown failed to give the security, and the action was dismissed on June 27, 1910, and judgment entered in favor of the plaintiffs herein, defendants therein. Thereafter the English brothers brought action in New Jersey for malicious prosecution, based upon the issuance of the attachment in the action just referred to, and also sued upon the New York judgment on contract as stated. Brown appeared in these two actions, that against him for malicious prosecution, and that against him for recovery under the original judgment which had been theretofore obtained in New York in 1906, but died during their pendency.

His will left all of his property to his widow, Ella Wyman Brown, defendant in this suit. Thereafter, on February 6, 1911, letters of administration with the will annexed were issued to Ella Wyman Brown, and in due course the administratrix was substituted as defendant in place of Charles B. Brown. In due course the actions heretofore referred to proceeded against her, so that judgment was rendered against her by default; the judgment in the contract action being rendered on May 6, 1912, for $21,534.27, and that in the tort action being rendered on July 5, 1912, for $5,412.91. Executions upon these judgments were returned unsatisfied on November 12, 1912, and thereafter the present suit was brought.

The complaint in the present suit, after the allegations concerning the judgments, alleges that Brown fraudulently and without consideration, and with intent to defraud his creditors and these plaintiffs, and to embarrass them in enforcing their claims against him, and to conceal his property, transferred his stock in the Gypsum Company to Ella Wyman Brown, defendant, and that she now holds and claims such stock; that at the time of the transfer she knew of the existence of the debt of her husband to the plaintiffs, and of his purpose of avoiding using the stock to pay the indebtedness; that she paid no consideration for the transfer, but accepted the stock to prevent the application of the proceeds thereof to the payment of the judgments; that the par value of the preferred stock issued to Brown was $33,000 and of the common stock $33,000; that Brown under the agreement was entitled to receive an additional amount of preferred and common stock of the corporation; that a large quantity was issued by the Gypsum Company to one H. J. McCormick, as trustee for Brown, and was held by McCormick as such trustee at the time of the death of McCormick, which occurred October 17, 1911; that thereafter Ella Wyman Brown, defendant, obtained the stock from the representatives of McCormick, and that her purpose

was to prevent the application of the stock or dividends toward the payment of the indebtedness existing in favor of the plaintiffs against Brown; that the defendant Ella Wyman Brown asserts that the estate of her husband is insolvent, and that the stock belongs to her; but plaintiffs allege that in equity the stock, property, and assets are subject to the lien of their judgments and executions thereunder.

Defendant Ella Wyman Brown by answer admits that shortly after the Gypsum Company was organized her husband received from the corporation 330 shares of preferred stock and 330 shares of common stock, but she denies any knowledge of any agreement to transfer stock to the plaintiffs. She admits the proceedings had in the New York courts, and alleges that about February 20, 1903, her husband sold and transferred to her for valuable consideration 200 shares of preferred stock and 100 shares of the common stock of the Gypsum Company. She denies fraud in connection with the transfer to her of any shares of stock by her husband, and says that about August 3, 1909, her husband transferred to her the balance of the stock which had been originally issued to him, consisting of 130 shares of preferred and 230 shares of common stock of the corporation, and that such transfer was for a consideration of full value; that she paid partly in cash by advances at various times, and that part payment was made in moneys which he had collected for her, but never paid over or accounted for. She further sets forth that her husband, under an agreement between himself and H. J. McCormick, was entitled to receive an additional amount of stock, and that on May 15, 1905, for a good and valuable consideration, the right to this stock was transferred to her, and that thereafter, on February 6, 1912, in an accounting with the estate of McCormick, she received the stock, for which she says she paid full consideration to her husband in the form of advancements and moneys for which he had not accounted; but she says that when the right to this stock was sold to her by her husband on May 15, 1905, it was worth $6,088, although when turned over to her on February 6, 1912, it was worth $12,099. She then sets up that her husband's estate was insolvent, and had been so decreed by the orphans' court of Morris county, N. J.; that she had a right to do anything she pleased with the stock, as it was her own property.

With considerable detail, she alleges that she had property of her own in 1878, when she married Brown, and frequently made advances to him, and that the transfer of the shares to her was in consideration of such advances and loans made by her covering the years from her marriage in 1878 up to 1909. She pleads that about October 3, 1912, as administratrix, she filed in the orphans' court in New Jersey an inventory or final accounting, and that the English brothers obtained an order for examination and discovery of the defendant as administratrix, and that hearing was had on the 17th of October, 1912; that the hearing was closed by stipulation, and that thereafter by order of the orphans' court the estate of Charles B. Brown was duly declared insolvent; that because of the proceedings had in the orphans' court, and because of the decree that the estate was in-

solvent, a bar exists against relief being accorded to the plaintiffs in this action. Laches are also relied upon by the defendant, because plaintiffs herein knew of the various transfers of stock, beginning with that of February 20, 1903, yet until the bringing of the present suit they never notified defendant of any claim in regard to the same, and because of laches on the part of these plaintiffs she has lost valuable evidence and papers. Defendant also sets up that any cause of action which the plaintiffs have did not accrue within six years before the filing of the complaint.

Trial was had and evidence submitted.

[1] Defendants urge that the claims of the plaintiffs have already been adjudicated against them. The ground taken by the defendants is that the orphans' court in New Jersey entered a decree declaring that the estate of Charles B. Brown, deceased, was insolvent. The proceedings had in the orphans' court were such as are usually connected with the administration of an estate. Mrs. Brown was appointed as administratrix, notice to creditors was published, and notice of the settlement of the account was given. On October 9, 1912, the English brothers filed a petition in the orphans' court, setting up that Charles B. Brown, at the time of his death, owned 330 shares of preferred and 330 shares of common stock in the Gypsum Company; that the certificates for that stock had come into the hands of the administratrix, and that she had converted the shares to her own use; and that she had other shares indorsed to her as administratrix, which she had misapplied. The petition prayed for a discovery, and order granting discovery was made.

Thereafter, in due course, examination of Mrs. Brown was had, but by consent of counsel the proceedings were discontinued, and on January 3, 1913, formal order of discontinuance was made. Prior to that date, Mrs. Brown had presented her final account as administratrix, in which she did not charge herself, as administratrix, with any of the Gypsum stock involved in this litigation or its proceeds as assets, and she asked that the estate be decreed insolvent, and, as has already been said, decree declaring the estate to be insolvent was entered.

I cannot believe that the decision of the orphans' court, approving the account of the administratrix and adjudging the estate to be insolvent, constitute a bar to the trial of the issues presented in this suit. The examination had at the instance of the English brothers in the orphans' court was a proceeding in discovery only, not a final determination that Mrs. Brown did not hold property belonging to the estate for which she was accountable; nor should it be held that the orphans' court attempted to determine that the transfer by the deceased of the shares of stock in controversy operated to the prejudice of the creditors of the deceased.

It will simplify to examine each of the three transactions involved separately. First, there is the matter of the 200 shares of preferred and 100 of the common stock which were transferred by the husband to his wife on February 20, 1903; second, on May 15, 1905, the transfer of the interest of the decedent in certain other shares,

which we can call the McCormick shares, consisting of 152 shares of common and 137 shares of preferred; and, third, the transfer of August 3, 1909, when the decedent transferred to his wife 130 shares of preferred and 230 shares of common stock.

Let it be understood, too, that examination into each of the transactions here involved has been made under an earnest belief that, where transfers of property by a husband to his wife are assailed by his creditors, great care must be exercised by the courts in their investigations. In the confidential relationship of marriage, the opportunity to remove property from the reach of creditors by transfer from the husband to the wife is so easily availed of, and when used circumstances of wrong intent so hard to be ascertained, that it is in the interest of justice to those who have honestly dealt with the husband that unusual effort be made to reach the truth and to avoid being misled by arguments which may have fallacious or specious foundations.

Now, as to the first transfer: While the evidence is not as satisfactory as it might be concerning the character of the transfer of 1903, whether it was a security given by Mr. Brown to his wife, or was an out and out transfer as a payment, the weight of evidence points to its having been an unreserved transfer or sale.

There is no allegation by the plaintiffs that Brown was insolvent at the time of the transfer to his wife in 1903, nor is there any substantial evidence tending to show that at the time of such transfer Brown did not have assets out of which payment on a money judgment could have been compelled. It is admitted, too, that the plaintiffs knew of this transfer as early as 1904 or 1905, and that they had free access to the corporate books in 1903, when the transfer was actually made. Furthermore, subsequently, when plaintiffs instituted suit upon the contract in the courts of New York, they relied upon a right to recover the stock or a money judgment for its value. The judgment in New York and notice of entry thereof were served upon Brown on February 3, 1906. In this judgment there was a provision that Brown might at his option, within 30 days after entry of judgment and notice thereof, deliver $31,250 of Gypsum preferred and $18,750 of Gypsum common stock, and pay the costs, and that in such case the judgment should be satisfied, but otherwise should stand as a money judgment for the $16,298.74 claimed as value in the pleadings. As Brown did not deliver the stock within 30 days, the judgment became an absolute money judgment on March 5, 1906.

It is not to be disputed that at the time of the marriage of Mr. and Mrs. Brown, in 1878, she had about $25,000 of her own, and had an annuity of over $400. In 1897, she owned in her own name property in Omaha of the approximate value of $50,000. Mrs. Brown testified, on the petition for discovery heard in the orphans' court in 1912, that she had loaned Mr. Brown money at different times, and that the stock was made over to her for value received; that she did not keep full memoranda of transactions between herself and her husband; but that he turned over part of the stock to her at the time

of the organization of the Gypsum Company to pay her. In her examination, this occurred:

"Q. Do you mean that a part of the stock that was originally issued to him (Brown) at the time of the organization was issued to you? A. I do. Q. Well, what part? A. I cannot tell you to-day. Q. Or how much? A. I should say half of it; I cannot tell positive. With your husband you do not keep so strict a reckoning as you do with a lawyer. Q. Did you keep any record of that transaction? A. Yes; there was a record of it. Q. What kind of a record was made of it? A. I don't know as I can tell; just a memoranda. * * * Q. In what form do you remember it was transferred to you? A. The stock was made out to me, as I remember it, at the time he received it. Q. It was put in your name? A. It should have been."

Again, while testifying concerning loans to her husband, she was asked if she kept any account with him:

"Q. Yes; any record? A. Yes; as much as it is necessary to have with a good husband. Q. How much of a record have you? A. I cannot tell. Q. Were any books or memoranda made? A. No; I never kept any books with what I loaned my husband. I merely demanded that he should give me something for it, as he invested in things I did not believe in. Q. When you loaned him money, did you lend it by way of checks? A. Many times. Q. Did you lend him any considerable sums in any other way, except by checks? A. Sometimes he acted as my agent, and took my money, and it never went through my hand at all. He took it and used it. I have a little property, and, of course, he was perfectly honest, and I trusted him. Q. Have you got the checks for the money that you yourself loaned him? A. I have got a number of checks; yes. * * * Q. Now, you say that a part of this Gypsum stock was issued in your name by the company. A. I do, as I recollect it; that I have had a part of it. I furnished the $10,000 that was put up to promote that business. Q. Now, did you have any written agreement with your husband with regards to the putting up of this money or issuance of this stock? A. I had an understanding that I was to be fully paid and more than paid back."

She further said that her husband delivered the stock to her at their home in New Jersey; that she had received the dividends from the stock; that she had paid out large sums of money for Mr. Brown's benefit during the Gypsum promotion scheme; that her husband had frequently obtained money from her, not only from rentals from the property she owned in Omaha, but from collections upon mortgages which belonged to her; that she had trusted him with everything; that he had used her funds without saying anything to her, but that he always told her he would make good whatever sums he used.

From time to time throughout their married lives, there were repayments by Mr. Brown to her of sums clearly due to her from him, and in 1903, when the transfer of stock was made, his debt to her was not less than the then value of the stock transferred. The purpose of the 1903 transfer was to repay for all advances made by his wife to him up to that time. A circumstance strongly confirmatory of this fair inference from the evidence is that, when the 1903 transfer was made, Brown did not make over all of the stock he then had, but kept 130 shares of preferred and 230 shares of common stock, besides having an interest in the McCormick shares, which made enough to cover any claim that the English brothers could then have asserted against him. It may have been knowledge of the fact that Brown was financially able to meet any claims which they might have against

him which prevented any action by the English brothers at that time; but, whatever may have led to their inaction, it is fair to say that in 1903 failure on Brown's part to transfer a greater number of shares than he did make over to his wife overcomes the argument that at that time he had in mind a scheme to defraud plaintiffs in this suit, or to hinder them in the collection of their claims.

[2] Surely, under such a state of facts, the contention that the transfer from the husband to his wife was voluntary is not sound. A voluntary conveyance is one where there is a total want of any substantial consideration; mere inadequacy of consideration is not enough to bring a conveyance within the definition of voluntary conveyances. If there is a total want of any substantial consideration, creditors of the grantor may avoid such a conveyance; but if the consideration is substantial, yet inadequate merely, the conveyance will not be void as to creditors unless it has been made with a fraudulent intent. 3 Washburn on Real Property, 2272.

[3] We may assume that a contract directly between a husband and wife would not be held valid at law in New Jersey; but it seems very clear that equity will recognize a transfer made directly from the husband to his wife, when founded on a valuable consideration. That a husband may make a contract with his wife which will be upheld in equity was ruled in Executor of Farmer, Deceased, v. Farmer et al., 39 N. J. Eq. 211, cited by the plaintiffs.

Woodruff v. Clark et al., 42 N. J. Law, 198, decided in 1880, was an action at law, where plaintiff claimed property by virtue of a chattel mortgage executed to her by her husband to secure an alleged loan, but where the chattel mortgaged property remained in the possession of the husband and was seized by subsequent execution against him in favor of the defendants. Chief Justice Beasley prefaced his discussion of the case by stating that the plaintiff was obliged to prove the chattel mortgage given to her by her husband, and that, as she had never had the chattels in her possession, she had no standing on the legal merits of the case, unless she could establish the validity in law of the conditional sale. But he added:

"That this transfer was enforceable in equity, and that the title of the plaintiff would have been protected in that forum against the claims of her husband's creditors, no one will deny; the only question being whether such transfer can be recognized and effectuated by a court of law."

In Garwood v. Garwood, 56 N. J. Eq. 265, 38 Atl. 954, decided in 1897, it was held that a husband can enter into an enforceable contract to repay his wife money loaned to him by her, and that such a contract is good in equity as against the claim of a subsequent judgment creditor of the husband, who has levied his execution, contesting the validity of the mortgage solely upon the ground that it was made directly by the husband to his wife without the intervention of a trustee.

Turner v. Davenport, 63 N. J. Eq. 288, 49 Atl. 463, decided in 1901, cited by the plaintiffs to sustain the proposition that a legal contract cannot be made between husband and wife in the state of New Jersey, may support the well-settled common-law rule that the wages and

earnings of the wife became or could become by reduction to possession the absolute property of the husband; but the case is positive authority to sustain the general rule that, under the married women's acts of the state of New Jersey, the rule of the common law has been superseded by statute, and that a wife may maintain a suit in equity even against her husband to enforce a contract for the performance of service to a copartnership of which her husband was a member.

Such, too, is the general rule recognized by the Supreme Court of the United States, in Wallingsford v. Allen, 10 Pet. 583, 9 L. Ed. 542. It was there said:

"Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution before it will confirm them. But it does sustain them when a clear and satisfactory case is made out that the property is to be applied to the separate use of the wife; where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or of their family, or which has been appropriated by him to his uses; where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use. Either case equity will sustain, though no trustee has been interposed to hold for the wife's use. In More v. Freeman, Bunb. 205, it was determined that articles of agreement between husband and wife are binding in equity, without the intervention of a trustee. Other cases may be cited to the same purpose. In regard to grants from the husband to the wife, an examination of the cases in the books will show, when they have not been sustained in equity, it has been on account of some feature in them impeaching their fairness and certainty, as that they were not in the nature of a provision for the wife, or when they interfered with the rights of a creditor, or when the property given or granted had not been distinctly separated from the mass of the husband's property. In Slanning v. Style, 3 P. Wms. 334, Lord Talbot assumed the doctrine that femes covert could have a separate interest by their husband's agreement. In the case of Lady Arundel v. Phipps, 10 Ves. 146, 149, Lord Eldon held that a husband and wife after marriage could contract, for a bona fide and valuable consideration, for a transfer of property from him to her. In Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57 [11 Am. Dec. 396], it is said husband and wife may contract, for a bona fide and valuable consideration, for a transfer of property from him to her. In Walter v. Hodge, 2 Swanst. 97, it is said husband may convey to the wife a chattel. In the case of gift from the husband to the wife, it is held valid, when the husband, by some distinct act, divests himself of his property. As, for instance, in the case of Lucas v. Lucas, 1 Atk. 270, the Lord Chancellor held that the transfer of £1,000 South Sea annuities by the husband, in the name of the wife, was so decisive an act as amounted to an agreement by the husband that the property should become hers. It is not necessary to review here the cases of gifts to the wife by the husband, which have been sustained in equity. They are alluded to, to show how far equity has gone in maintaining transfers of property by the husband to the wife, without the intervention of a trustee, and when there was no valuable consideration money from the wife to the husband."

Metzker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, has a bearing upon the present case. There suit in equity was brought by an assignee in bankruptcy to set aside a conveyance of real estate made shortly before the bankruptcy by the bankrupt to his wife through the intervention of a third party. The evidence showed that the husband, throughout a period of years after marriage, had come into the possession of moneys belonging to the wife, and that the husband was

insolvent when he made the conveyance of certain lands to his wife, but that the wife did not know of his insolvency. It was shown that the land was conveyed in good faith and without purpose to defraud creditors. The Supreme Court sustained the transfer, and approved of the decision of Atlantic National Bank v. Tavener, 130 Mass. 407, wherein the Supreme Court of Massachusetts held that a loan by a wife to her husband of money which was her separate property, upon his promise to repay it, created an equity in her favor which a court of equity would enforce; it not appearing that repayment of the loan was made with the purpose of hindering, delaying, or defrauding creditors. Such a conveyance was regarded not as a voluntary one, and was sustained against the creditors of the husband. Magniac v. Thompson, 7 Pet. 348, 8 L. Ed. 709; Garner v. Second National Bank of Providence, 151 U. S. 420, 14 Sup. Ct. 390, 38 L. Ed. 218.

Another case of importance is Bean v. Patterson, 122 U. S. 496, 7 Sup. Ct. 1298, 30 L. Ed. 1126. There William Miller deeded land to a trustee for the benefit of his wife at a time when he was insolvent. When an attack was made upon the transaction, and a court of equity was asked to set aside the deed as fraudulent and void, the Supreme Court said:

"If, therefore, there had been no other consideration for the deed than a desire to secure for his wife provision against the necessities of the future, it could not be sustained. It must find its support in the fact, alleged in the recital, that the amount secured was a sum realized from the sale of her individual property, and used by him. It is not material whether the recital be accurate in stating that the sum received from the sale of her property was used in payment of the real estate covered by the deed; it is sufficient if Miller was indebted to his wife in the amount mentioned. That the property in Pennsylvania, deeds of which are mentioned above, was used for his benefit, and to pay or secure his debts, is sufficiently established. The amount realized therefrom, as we read the evidence, was greater than the sum named in the trust deed as due to her. That deed for her security stands, therefore, upon full consideration. Had it been given to a third party for a like debt, it would not be open to question that it would have been unassailable. The result is not changed because the wife is the person to whom the debt is due and not another. While transactions by way of purchase or security between husband and wife should be carefully scrutinized, when they are shown to have been upon full consideration from one to the other, or, when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection should be afforded to them as to like transactions between third parties."

Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179, decided in 1876, relied upon by plaintiffs, involved the construction of a statute (section 727, R. S. District of Columbia) which made the right of a married woman to property belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, as absolute as if she were unmarried. The court held that under the statute the earnings of the wife during coverture could not be part of her separate estate, but belonged to her husband, and that she could have such earnings only by the gift of her husband, and such gift was not protected against his creditors. But the court laid emphasis upon the failure of Mrs. Seitz to aver that she had paid for the lots involved out of her separate property, or to aver or prove that she had any separate property, and had paid for the lots with her own sep-

arate property. The whole case turned for decision upon the point that under the statute referred to the earnings of the wife did not belong to her, because they were not part of a separate estate, and the possession of money by the wife raised no presumption that it was her separate estate. In certain language, however, the opinion of Justice Strong implies that purchases of either real or personal property made by the wife of an insolvent debtor during coverture, while justly to be regarded with suspicion, are yet to be upheld where it clearly appears that the consideration has been paid out of her separate estate.

Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955, decided in 1890, is much closer to the instant case than is Seitz v. Mitchell, and it is worthy of passing notice that Seitz v. Mitchell is not cited in Schreyer v. Scott, but the earlier cases of Smith et al. v. Vodges, 92 U. S. 183, 23 L. Ed. 481, decided in 1875, one year before Seitz v. Mitchell, and Sexton v. Wheaton, 8 Wheat. 229, 5 L. Ed. 603, decided in 1823, are.

The question presented in Schreyer v. Scott was whether certain transfers of property made by Schreyer to his wife were fraudulent and void as against a creditor of the husband. Upon the facts, the Supreme Court found that according to the testimony of Schreyer the deeds were not made as a voluntary transfer, but rather to pass the legal title to his wife of property of which she was prior thereto the equitable owner, but in which she had at least an equitable interest. Mrs. Schreyer in that case, like Mrs. Brown in this, had considerable money at the time of her marriage. She had purchased property with her own money, and rentals from property so purchased were treated as hers. The balance of money which she had when she married was passed over to her husband from time to time for improvements on the property and to use in his business. Without entering into detail, the Supreme Court rested its decision upon a finding that the testimony clearly disclosed that Mrs. Schreyer at the time of her marriage was possessed of separate property which was the foundation and largely the source of subsequent accumulation, so that the conveyances by Schreyer to his wife were not purely voluntary, but meritorious and upon good consideration.

[4] The facts in the Schreyer Case are also like those in the present, in that there was considerable objection to the testimony of Schreyer, because what he said was confused and uncertain, without definiteness as to amounts and dates, and because moneys received for rent after the conveyances were deposited by Schreyer in his own name and were managed and handled by him as his own, and no accounts were kept between husband and wife of their separate moneys, but all were mingled in one fund in his hands. Meeting this argument, which is really the substance of the argument of counsel for the English brothers with respect to the transactions under investigation, the Supreme Court said:

"But does all this indicate fraud? If his testimony is worthless and to be rejected, then there is practically no testimony interpreting those transactions, and the court never presumes fraud. The very confusion and carelessness in the dealings between husband and wife make against rather than in favor of the claim of fraud. There is no evidence that he was in debt at the time of these conveyances, at least beyond a trifling amount, which was subsequently paid; and if the parties had intended fraud and wrong,

unquestionably their accounts would have been kept carefully and accurately, and books would now be presented showing such accounts. Husband and wife evidently saw no necessity of dealing with each other at arm's length; the title to the property was placed in her name, when there was no legal or equitable reason why it should not be done; and the rents and other cash receipts were not unnaturally kept in one account and handled as one fund. The lack of substantial indebtedness and the record of the transfer being established, the carelessnesss of their dealings tends to prove honesty, rather than to establish fraud."

[5] We may therefore dispose of the first transaction, or the 1903 transfer, by saying that in the light of the decisions of the New Jersey courts, which are not out of harmony with the decisions of the Supreme Court of the United States, the transfer to Mrs. Brown by her husband was valid, and was made for ample consideration by way of advances made to him by her from her separate estate, and with the intent on his part to repay her, and without intent or purpose on his or her part to hinder or delay these plaintiffs or any one else in the collection of any claims that they might have against him at the time of the transfer. The stock, therefore, was lawfully made over to Mrs. Brown, and plaintiffs have failed to establish any right or claim to it, or to any proceeds which ever passed into the hands of Mrs. Brown by reason of any sales of it, or any part of it.

II. We now pass to the 1905 transaction. This, too, under the evidence, must be regarded as a bona fide transfer or sale, and not as a pledge. This transfer arose out of the agreement made on August 31, 1901, between H. J. McCormick, P. S. Jones, and the deceased, Charles B. Brown. Jones and McCormick were to aid in the promotion and consolidation of the Gypsum corporation. Brown was to advance them $2,500 as required from time to time, and they (Jones and McCormick) were to pay Brown a sum equal to 30 per cent. of all the net profits in stock and cash that they might receive, first deducting and repaying to Brown the $2,500 advanced by him (Brown). Plaintiffs say that if any transfer was made by the deceased (Brown) to his wife, prior to his death, it was while they were creditors of the deceased, and was without consideration, and with the intent of preventing plaintiffs from getting hold of the stock. The instrument by which Mr. Brown assigned any right accruing to him to receive stock which was to be issued to McCormick and Jones was in writing and bears upon its face a notation, in the handwriting of McCormick, now deceased, showing that he received it May 16, 1905, the day after its date. Plaintiffs again have failed to prove insolvency of Brown at the time of this assignment to his wife, while, on the other hand, the accountants who testified in this Court demonstrated that in May, 1905, Brown had over $30,000 in bank, and still had of his original shares 130 preferred and 230 common, and owned valuable real estate in Omaha. The fact is that this accruing right to Brown to receive stock under the arrangement with McCormick and Jones seems to have been somewhat outside of his original arrangement with the English brothers.

It appears that between 1903, when Brown transferred to his wife the stock referred to in the previous part of this opinion, and May 15, 1905, the date of the execution of the assignment of the stock to

come from McCormick and Jones to Brown, Brown kept on using as his own and putting to his individual credit in banks large sums of money collected on account of the rentals of the separate property of his wife, defendant in this suit. Furthermore, he received annuity moneys due to her, so that altogether, when he turned over the McCormick stock to her, the aggregate moneys for which he became accountable to his wife amounted to at least $3,965.77. This amount excludes items of $2,724.72 and $400, which the defendant claims ought to be included as a receipt by Mr. Brown of moneys belonging to Mrs. Brown; but, as Mrs. Brown's recollection as to these items was so vague that she could give no aid in explanation of the matters they should be excluded.

Furthermore, there is nothing to show that at the time of this 1905 transfer the English brothers had made any claim against Brown. Without entering upon a precise application of what legal rule should be applied with respect to the burden of proof, it is enough to say that Mrs. Brown has shown that there was valuable consideration, that there was good faith, and that her husband was solvent when this transfer was made. The fact that the transfer was made but a few weeks prior to the institution of the suit by the English brothers against Brown in the Supreme Court of the state of New York has had most attentive consideration on my part, and the whole surrounding circumstances connected with this 1905 transfer have been weighed with special care, yet the conclusion is irresistible that, when the transfer was made, Brown was solvent and paid a fair consideration, and that he and his wife acted in good faith in the matter.

III. Let us now move to the transaction of August 3, 1909. Here we find a changed situation. The plaintiffs had brought their suit against Mr. Brown on June 13, 1905, and had obtained a judgment in 1906, so that Brown knew of the established right of the English brothers to the stock or money under the original agreement made with them, and Mrs. Brown, of course, knew of the institution and determination of this suit, although she was not a party to it. It is a most reasonable construction of her whole testimony that she and her husband had the greatest confidence in each other, and, as they had had mutual dealings in Gypsum stock, it would be against the ordinary rules of human nature to assume for a moment that she did not know of the existence of the suit by the English brothers against her husband and judgment in their favor. So, too, for like reasons did she know of the attachment issued in the action by her husband against the English brothers. It may be assumed that between May 15, 1905, and August 3, 1909, her advances to her husband and his collections for her account aggregated $20,963.18, so that when, in 1909, Mr. Brown transferred to her all the stock he then had in the corporation, 130 shares of preferred and 230 shares of common stock, their value was inadequate to cover his debt to her. But, even so, it is plain that at least much of the money advanced by her was received by Brown when he was in failing circumstances, and when Mrs. Brown knew he was so situated, and the shares were turned over to Mrs. Brown when he was without means wherewith to meet the claims of the English brothers under the original agreement between himself and them, and when he and his wife both

knew that the English brothers were diligently pressing their rights and that the transfer of the stock would necessarily operate to hinder and delay the collection of the New York judgment held by the English brothers, and which was without just right attached by Brown.

I should say that under such circumstances, the transaction ought not to be sustained, for the manifest purpose of the turning over on his part was to make it impossible for his judgment creditors to recover that to which they were justly entitled, and to which they had been entitled ever since the organization of the Gypsum Company, and I think it must be found that the wife for the purpose of aiding him as well as to obtain a preference took the shares with full knowledge of the circumstances and of the judgment, and of the proceedings on the part of her husband to defeat the payment of the same, and that his and her acts were done with a purpose of hindering and defeating his creditors, the English brothers.

The position taken by the defendant is that the transfer of 1909 was a pledge, whereas the transfers of 1903 and 1905 were full acquittances. While such a distinction should not change the result, I cannot distinguish the last transfer from the two previous ones. I should say that the transfer of 1909 was of the same character as the preceding ones, and is not to be treated as a pledge. If one was a transfer by way of sale, all were. No note was given by the husband to the wife, and no essential differences surround the several forms of transfer. This view is justified by the vagueness of the testimony of Mrs. Brown concerning the matter of a loan and deposit as collateral, as well as by her failure to set forth in her account as administratrix the ownership by her husband of any shares which were delivered or transferred to her in 1909. If the shares were merely pledged, his estate would have had a sufficient interest in them to require the administratrix to describe and include them, and the creditors would have a right to know the fact concerning such ownership and when and how it ceased. Granting that a voting trust agreement existed in 1909, and that the stock was held in the form of voting trust certificates, and that for this reason the transfer from Mr. Brown to Mrs. Brown would not appear upon the books of the corporation, yet notwithstanding this, and the fact that the legal title to the shares may have been in the voting trustees, if the transaction was merely a pledge, there must have been an equity in Brown as the real owner of the shares, which ought to have been disclosed and referred to by the administratrix and Mrs. Brown.

I have not failed to read the note incorporated in the audited and stated account of Mrs. Brown as administratrix, filed in the orphans' court in New Jersey on December 6, 1912, wherein she states that she does not set forth the individual claim of herself against the estate for moneys loaned to Mr. Brown during his life, and which he promised to repay, because the expense of enlarging the account with such items, which ran into thousands of dollars, would be a burden to the accountant, in view of the fact that there was no likelihood of the estate being able to pay such further claims of the accountant, in view of the insolvency of the estate. But omission on the part of Mrs. Brown to set forth her individual claims ought not to excuse her from including any

equitable ownership which the decedent, her husband, had in property under a pledge, whether or not the pledge was made to her in her individual capacity. It is to be observed too, that in her answer Mrs. Brown expressly says that Mr. Brown did—

"agree to and did sell, assign, transfer, and set over to this defendant the 130 shares of preferred stock and 230 shares of common stock of the United States Gypsum Company, * * * and this defendant thereupon accepted said stock in acquittance of said advances so made as aforesaid, and in payment of the indebtedness then due this defendant from the said Charles B. Brown, and in payment of the further sum at that time advanced by this defendant to the said Charles B. Brown, and that said sums so due this defendant, and so advanced by this defendant to the said Charles B. Brown, at and prior to the said 3d day of August, 1909 (but subsequent to May 15, 1905), were greatly in excess of the value of the stock so transferred and sold to this defendant at or about said time as aforesaid."

[6] It may be conceded that a creditor of an insolvent debtor may be preferred (Green v. McCrane, 55 N. J. Eq. 436, 37 Atl. 318; Lehrenkrauss v. Bonnell, 99 N. Y. 240, 92 N. E. 637); and that this rule may prevail, even though the wife is the preferred creditor (Jewell v. Knight, 123 U. S. 426, 8 Sup. Ct. 193, 31 L. Ed. 190); and that a transfer may under certain circumstances be made for a valuable consideration by a husband to his wife when the husband is in failing circumstances. But, while such a conveyance may be made for a valuable consideration, it nevertheless must have been executed and received in good faith and for an honest purpose. That is to say, good faith, as well as a valuable consideration, is necessary to support a conveyance from husband to wife as against creditors standing in the position of the plaintiffs in the present suit. The general doctrine goes way back to Twyne's Case (1601), 3 Coke, 80; it is stated by Lord Mansfield in Cadogan v. Kennett (1776) 2 Cowper's Reports, 432.

There Lord Mansfield, discussing the statute of 13 Elizabeth, which relates to frauds against creditors, cited the case of a person where, with knowledge of a decree of a Court of Chancery and sequestration of the house and building, gave a full price for them, it was held the purchase being with the manifest view to defeat the creditor, was fraudulent, and therefore, notwithstanding a valuable consideration, void. He continued, saying:

"So, if a man knows of a judgment and execution, and, with a view to defeat it, purchases the debtor's goods it is void, because the purpose is iniquitous. It is assisting one man to cheat another, which the law will never allow. There are many things which are considered as circumstances of fraud. The statute says not a word about possession. But the law says, if after a sale of goods, the vendee continue in possession, and appear as the visible owner it is evidence of fraud, because goods pass by delivery. But it is not so in the case of a lease, for that does not pass by delivery."

Cadogan v. Kennett, supra, was expressly cited with approval by the Supreme Court of the United States in Clements v. Moore, 6 Wall. 299, 18 L. Ed. 786. There the court said:

"A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge." Wadsworth v. Williams, 100 Mass. 126; Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233.

An interesting case of where a purchaser of property transferred by a debtor to defraud his creditors paid full value, and yet the sale was set aside as against the creditor, is found in Green v. Tantum, 19 N. J. Eq. 105. The court there recognized that, if the vendor intended fraud and the vendee was innocent and paid the consideration for the transfer in good faith without knowledge of such intent, the title could not be injured by the vendor's fraudulent intent. But it appeared that the vendee knew of the pendency of a suit against the vendor, and of a verdict which had been rendered in such suit against the vendor, and because of many circumstances not necessary here to be recited was put upon inquiry, and so charged with notice, and that a court of equity would deprive him of the character of a bona fide purchaser without notice. The chancellor in his opinion said that it was easy to believe that the answer was literally true, and that the vendee in the case had no knowledge of any intent of his vendor to defraud the complainant by the transfer; but he held that, if the circumstances were such as must and ought to have aroused in the vendee's mind, in spite of the fact that the fraudulent intent was not announced and an honest purpose pretended, a conviction that the object was to delay the complainant, the answer should not protect him.

The transfer was from one brother to another, but for full consideration, and the suit was by a creditor to have the transfers declared void as against her. In the discussion of the facts, it is expressly stated that there was no direct proof that the vendee brother knew of any intent on the part of the vendor brother by the assignment to defraud the particular creditor by taking the transfer, and there was no part of the proof which directly or by implication connected the vendee brother with the design of the vendor brother to defraud his creditor. I quote from the opinion of Chancellor Zabriskie:

"The facts before Dr. Tantum at the time of this transaction were such that they must have suggested to him that the object of his brother was to do just what he has since done—to transfer all his property in New Jersey to some purchaser, for value actually paid over, before they were attached or seized in any way, so as to be beyond the reach of the complainant. This, although no knowledge in its strict or literal sense, so as to make his denial of knowledge of that intent perjury, yet is such notice of circumstances of suspicion that should have put him upon inquiry as will deprive him, in a court of equity, of the character of a bona fide purchaser without notice. A person is to be charged with notice when he is acquainted with circumstances sufficient to convince a court or jury of the truth of the fact."

This case was affirmed in 21 N. J. Eq. (6 C. E. Green) 364.

In the light of the foregoing views, the judgment for $5,412.91 in the action for malicious prosecution, because of the attachment which had been obtained by Mr. Brown against the English brothers, loses real importance in the case, for the reason that the judgment was entered after the death of Mr. Brown, and against the administratrix, who appears not to have any property belonging to the estate of her husband, except that involved in the matters heretofore passed upon, and which is not of a quantity or value in excess of the demands to which Mrs. Brown must respond under the judgment for $21,534.27.

Having now disposed of the material features of the case, it remains

to exercise a proper jurisdiction. In Clements v. Moore, 6 Wall. 299, 18 L. Ed. 786, after referring to the flexibility and tolerant jurisdiction to be exercised in equity, Justice Swayne said:

"The cardinal principle is * * * that the property of a debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud."

Applying to the best of my judgment the underlying rule, I conclude that the making over and receipt of the stock in 1909 after notice was given by the institution of the original action in the Supreme Court of New York, wherein the English brothers were plaintiffs and Mr. Brown was defendant, have been prejudicial to the rights of the English brothers, creditors of Mr. Brown. If Mrs. Brown now holds the shares of stock in the Gypsum Company which were transferred to her by her husband on August 3, 1909, preferred and common, she will be regarded as a trustee, whose duty it is to transfer such shares to the English brothers, together with all the dividends which she has collected upon such shares from and after August 3, 1909, and up to the time of the delivery, together with interest on the dividends so collected from the date of the receipts of the dividends, and against the amounts of the dividends collected, she should be credited with any sums of money that the books in evidence show she advanced to Mr. Brown or that Mr. Brown collected for her account and failed to pay over, from the date of the transfer of the McCormick shares on May 15, 1905, up to the date of the institution of the action by the English brothers against her husband, which was June 13, 1905. If, however, Mrs. Brown has sold the shares of stock turned over to her on August 3, 1909, by her husband (and it would seem she has), then she must account for and pay to the plaintiffs all moneys received on account of the sales of said shares of stock as such sales have been made for Mrs. Brown's account from time to time, together with all dividends received on the shares so sold up to the time of the sale or sales thereof, with interest on any and all dividends collected by her from the time of the receipt of such shares or any thereof until the rendition of this decree, together with interest at the current rate of interest in New Jersey upon any moneys received from the sales of stock from the date of the respective sales up to the time of the rendition of this decree; and against the amounts so due, she should be credited with any sums of money that the books in evidence show she advanced to Mr. Brown or which he collected for her account, but failed to turn over to her, from the date of the transfer of the McCormick shares on May 15, 1905, up to the date of the institution of the action in New York by the English brothers against her husband, June 13, 1905.

Before final decree in the premises may be entered, the court will hear further testimony with respect to the situation and disposition of the stock transferred in 1909, and then make an accounting along the lines just laid down.

BUCYRUS CO. v. McARTHUR.

(District Court, M. D. Tennessee, Nashville Division. September 11, 1914. Opinions as to Attachment and Jurisdiction, October 30, 1914.)

No. 24.

1. COURTS ⟸346—PROCEDURE—ATTACHMENT—STATUTORY PROVISIONS.

Rev. St. § 915 (Comp. St. 1913, § 1539), providing that in common-law causes in the Circuit and District Courts plaintiff shall be entitled to similar remedies by attachment or other process against the property of defendant provided by the laws of the state, merely authorizes the issuance of ancillary attachments for the purpose of impounding the property of defendants, of whose person the court may otherwise acquire jurisdiction, and the federal courts are not authorized to issue foreign attachments as the original process for commencing a suit against defendants not amenable to personal service of process.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 918; Dec. Dig. ⟸346.]

2. ATTACHMENT ⟸12—ACTIONS IN WHICH AUTHORIZED—SUITS IN EQUITY.

Attachment is a purely statutory remedy, entirely unknown to the immemorial practice or usage of courts of equity, and is essentially a legal remedy, which in the absence of statutory authority is not available in equity.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 38, 39; Dec. Dig. ⟸12.

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

3. COURTS ⟸346—PROCEDURE—ATTACHMENTS—SUITS IN EQUITY.

In the absence of any provision in the rules of the District Court for writs of attachment in suits in equity, such remedy is not available, as there is no statutory authority therefor under Rev. St. § 915 (Comp. St. 1913, § 1539), providing that "in common-law causes" in the Circuit and District Courts plaintiff shall be entitled to similar remedies by attachment as provided by the laws of the state, and section 914, providing that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the Circuit and District Courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding in the state courts, nor has the Supreme Court provided for such remedy under the authority given it by section 917 to prescribe the forms of writs and other process, etc.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 918; Dec. Dig. ⟸346.]

4. ATTACHMENT ⟸113—PLEADINGS—ALLEGATIONS AS TO GROUNDS OF ATTACHMENT.

In a suit in the United States court for one of the districts of Tennessee, a bill alleging that defendant was threatening, preparing, and attempting to remove certain property from the jurisdiction of the court did not state a ground of attachment, within Shannon's Code Tenn. § 5211, authorizing an attachment where defendant is about to remove, or has removed, himself or property from the state, etc.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 307–311; Dec. Dig. ⟸113.]

As to Jurisdiction.

5. COURTS ⟸328—UNITED STATES COURTS—JURISDICTION—AMOUNT INVOLVED—JOINDER OF CAUSES.

The enforcement of liens on a steam shovel, for the purchase price thereof and work thereon, was a matter of purely equitable cognizance,

while causes of action for goods sold and on an account stated, entirely disconnected from the claims relating to the steam shovel, were of purely legal cognizance; and neither equity rule 26 (198 Fed. xxv, 115 C. C. A. xxv), authorizing the joinder in one bill of as many causes of action cognizable in equity as plaintiff may have against defendant, nor rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that, if in a suit in equity a matter ordinarily determinable at law arises, such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court, authorized the joinder of such causes of action in one suit, for the purpose of bringing the amount involved within the jurisdiction of the United States District Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⟸328.]

6. COURTS ⟸328—UNITED STATES COURTS—JURISDICTION—AMOUNT INVOLVED—ENFORCEMENT OF LIEN.

In a suit to enforce liens against a steam shovel, the amount involved was the amount claimed, and not the value of the shovel.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⟸328.]

7. COURTS ⟸280—WANT OF JURISDICTION—WAIVER OF OBJECTIONS.

Under Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), providing that, if in any suit commenced in a District Court it shall appear to the satisfaction of the court at any time that it does not really and substantially involve a controversy properly within its jurisdiction, the court shall proceed no further therein, but shall dismiss the suit, there being an entire want of equitable jurisdiction over causes of action for goods sold and on an account stated, sought to be joined with causes of action for the enforcement of liens on a steam shovel, the court should so hold of its own motion, though the question was not raised by the pleadings or suggested by counsel, and, where without such causes of action the amount involved was less than the jurisdictional amount, should dismiss the suit; the case not being one in which the defense of a plain and adequate remedy at law might be waived by defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⟸280.]

8. COURTS ⟸268 — UNITED STATES COURTS — JURISDICTION — DISTRICT IN WHICH SUIT SHOULD BE BROUGHT.

There is no provision of law under which a defendant, residing in the Eastern district of Tennessee, can be summoned to appear in the Middle district, and defend against transitory legal causes of action by a resident of another state, even though such causes of action could be joined with causes of action for the enforcement of liens on property within the Middle district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ⟸268.]

In Equity. Suit by the Bucyrus Company against M. T. McArthur. On application for writ of attachment. Application denied, and suit dismissed.

Smith & Berry and W. L. Talley, all of Nashville, Tenn., for plaintiff.

SANFORD, District Judge. This is an original bill on the equity side of the court. It alleges that the plaintiff is a citizen and resident of Wisconsin and the defendant a citizen of Tennessee, residing in

the Eastern District. The bill seeks to enforce: (1) A claim for $1,750.00 and interest, due as part of the purchase price of a steam shovel sold by the plaintiff to the defendant and secured by retention of title, which is now located within this district; (2) a claim for $703.06 for work and labor done by plaintiff on said shovel after such sale, and secured by statutory lien; (3) an account of $687.50 and interest for goods sold by plaintiff to defendant under a contract of conditional sale retaining title—the location of such goods not being stated; (4) the further sum of $329.49 due by account stated; making a total claim of $3,470.05.

The bill alleges that this court has jurisdiction by reason of the diversity of citizenship and amount involved and the fact that "this suit is brought to foreclose a mortgage" and "is of a local nature." The bill prays for a writ of subpœna directed to the defendant in the Eastern District of Tennessee; for "writs of attachment pursuant to the practice in the State"; and for writ of injunction pendente lite.

The plaintiff has applied for a fiat for the issuance of a writ of attachment, as prayed in the bill.

[1] I assume, for present purposes, without determination, that so much of the bill as relates to the retention of title to the steam shovel and the enforcement of a lien thereon is a suit "of a local nature" within the meaning of section 54 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. 1913, § 1036]), so that a subpœna to answer may be served on the defendant by the marshal of the Eastern District; and that the plaintiff is hence not applying for the issuance of an attachment as the leading process for the purpose of compelling the defendant's appearance, but merely seeks an ancillary attachment to be issued in connection with the subpœna for the purpose of impounding the steam shovel. It is well settled that the federal courts, under the provisions of the laws of the United States governing the issuance of process are not authorized to issue foreign attachments as the original process commencing suits against defendants not amenable to personal service of process. Toland v. Sprague, 12 Pet. 300, 329, 9 L. Ed. 1093; Saddler v. Hudson, 2 Curt. 6, 21 Fed. Cas. 135; Dormitzer v. Illinois Bridge Co. (C. C.) 6 Fed. 217, 218. And see Courtney v. Pradt (6th Circ.) 160 Fed. 560, 562, 87 C. C. A. 463, citing Chicago Railway v. Sturm, 174 U. S. 710, 715, 19 Sup. Ct. 797, 43 L. Ed. 1144. And section 915 of the Revised Statutes (derived from the Act of June 1, 1872, c. 255, § 6, 17 Stat. 197), adopting in common law causes in the federal courts the laws of the several states in relation to attachments and other process against the property of defendants, merely authorizes the issuance of ancillary attachments for the purpose of impounding the property of defendants of whose person the court may otherwise acquire jurisdiction. Chittenden v. Darden, 2 Woods, 437, 5 Fed. Cas. 642; Nazro v. Cragin, 3 Dill. 474, 17 Fed. Cas. 1259, 1260; North v. McDonald, 1 Biss. 57, 18 Fed. Cas. 332, 333; Anderson v. Shaffer (C. C.) 10 Fed. 266, 267; Boston Elec. Co. v. Elec. Lighting Co. (C. C.) 23 Fed. 838, 839; and, by implication, Ex parte Railway Co., 103 U. S. 794, 796, 26 L. Ed. 461, and Treadwell v. Seymour (C. C.) 41 Fed. 579, 581. The contrary opinion in

Guillou v. Fontain, 32 Leg. Int. 362, 11 Fed. Cas. 108, is contrary to the great weight of authority, and does not, in my opinion, rightly interpret the provisions of the statute. Such ancillary attachment, when otherwise authorized, may, however, it seems, be issued in connection with the personal process when the defendant is amenable thereto. Toland v. Sprague, supra, 12 Pet. at page 329, 9 L. Ed. 1093; North v. McDonald, supra, 18 Fed. Cas. at page 333.

[2, 3] Such ancillary attachment of the defendant's property is, however, a purely statutory remedy, in derogation of the common law. 1 Shinn on Attachment, § 8 (g), p. 10; 4 Cyc. 396, and cases cited in note 3; 3 Am. & Eng. Enc. Law (2d Ed.) 184. It is entirely unknown to the immemorial practice and usage of Courts of Equity, either in England or in the United States, and is essentially a legal remedy, which, in the absence of statutory authority, is not available in equity. Drake on Attachments (3d Ed.) § 4, a, p. 4; Shinn on Attachments, supra, § 7, p. 9; 1 Bouv. Law Dict. (15th Ed.) 202; 3 Am. & Eng. Enc. Law (2d Ed.) 184, 193; Lackland v. Garesche, 56 Mo. 267, 270; McPherson v. Snowden, 19 Md. 197; People's Bank v. Shryock, 48 Md. 427, 30 Am. Rep. 476, 478. And see Courtney v. Pradt (6th Circ.) supra, 160 Fed. at page 562, 87 C. C. A. 463; Shiel v. Patrick (2d Circ.) 59 Fed. 992, 993, 8 C. C. A. 440; Black's Law Dict. (2d Ed.) 101.

There is, however, no statutory authority for the issuance of such an attachment in an equity cause in a Federal Court. Section 915 of the Revised Statutes, adopting in the Federal Courts the laws of the several states in relation to attachments against the property of defendants, is specifically limited to "common-law causes"; and section 914 of the Revised Statutes, providing that the practice and procedure in Federal Courts shall conform to those of the State Courts, specifically excludes "equity causes." Neither has the Supreme Court of the United States, in promulgating the Rules of Equity Practice in the District Courts, under the authority vested in it by section 917 of the Revised Statutes, provided for such ancillary writs of attachment. Nor is provision made therefor by any rule of this court; although it may well be that this could be done in accordance with the 79th Rule of Equity Practice (198 Fed. xli, 115 C. C. A. xli), and under the various statutory provisions cited in Steam Stone-Cutter Co. v. Sears (C. C.) 9 Fed. 8, and Steam Stone-Cutter Co. v. Jones (C. C.) 13 Fed. 567.

[4] The bill furthermore states no ground of attachment under the Tennessee statutes. The sole allegation upon which the prayer for attachment is predicated is, apparently, the averment that the defendant is "threatening, preparing and attempting to remove the said steam shovel from out of the jurisdiction of this court." This is, however, not equivalent to an averment that the defendant is "about to remove or has removed (his) property from the state," or to any other ground of attachment set forth in the Tennessee statutes. Code of Tenn. § 3455 (Shan. 5211).

I furthermore have great doubt whether on the face of the bill, this court has jurisdiction. Even assuming that the first two claims are, under the allegations of the bill, of an equitable nature, involving a claim to or lien upon property within this district, and that the

defendant could hence be brought before the court either under section 57 of the Judicial Code, if not under section 54, there is no similar averment as to the third and fourth claims, which, so far as appears from the averments of the bill, are merely transitory rights of action to enforce purely legal claims. As to these, there appears to be no process by which the defendant can be brought before the court in this district. Furthermore, it may be doubted whether the joinder of separate legal and equitable causes of action, each of which is insufficient in amount to create Federal jurisdiction, will avail for jurisdictional purposes. And on the whole it may well be that the court should dismiss the bill upon its own initiative for want of jurisdiction, under the provisions of section 37 of the Judicial Code. This question is, however, now reserved; and the plaintiff will be allowed twenty days in which to file a brief thereon, before action is taken by the court.

An order will be entered in accordance with this opinion.

Opinion as to Jurisdiction.

[5] In my opinion on the application for a writ of attachment I expressed great doubt as to whether or not the bill should not be dismissed by the court of its own initiative for want of jurisdiction, under section 37 of the Judicial Code. Act March 3, 1911, c. 231, 36 Stat. 1098 (Comp. St. 1913, § 1019). This question was, however, reserved, and the plaintiff allowed twenty days in which to file a brief thereon. This brief has been filed and carefully considered.

Section 37 of the Judicial Code provides that if in any suit commenced in a district court it shall appear to the satisfaction of the court at any time after it has been brought that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, the court shall proceed no further therein, but shall dismiss the suit, with such order as to costs as shall be just. The jurisdiction of this court must depend upon the diversity of citizenship of the parties and the amount in controversy, if jurisdiction can be maintained. The plaintiff is alleged to be a corporation of the State of Wisconsin and the defendant a citizen and resident of the Eastern District of Tennessee. The necessary diversity of citizenship therefore exists. The plaintiff sues upon four claims, aggregating $3,407.05. The first is for $1,750.00 and interest, alleged to be due as part of the purchase price of a steam shovel located within this district, on which the plaintiff claims a lien. The second is for $703.06 for work and labor subsequently done upon said shovel for which the plaintiff likewise claims a lien on the shovel. These two claims aggregate $2,453.06 and interest. These claims may be properly joined, and, in view of the fact that a lien is sought to be enforced upon the steam shovel, properly present matters of equitable cognizance. They are, however, of themselves insufficient in amount to give the court jurisdiction.

The third claim is for an account of $687.50 and interest, for goods sold under conditional sale. These goods are not, however, alleged to be in existence or their location shown. There is no allegation in the bill which gives any color of claim to a lien upon the steam shovel, and from the face of the bill this claim must be held to be a mere money

demand against the defendant. This is likewise true of the fourth claim for $329.49 alleged to be due by account stated. These last two claims aggregate $916.99. They are, however, under the allegations of the bill purely of legal cognizance, being merely claims to recover money due. They are furthermore entirely disconnected from the claims relating to the steam shovel, and are not in any way auxiliary thereto or dependent thereon.

[6] The jurisdictional amount involved under the lien claims on the steam shovel is furthermore merely the amount claimed and not the value of the shovel. New England Mortgage Co. v. Gay, 145 U. S. 123, 130, 12 Sup. Ct. 815, 36 L. Ed. 646; Simk. Fed. Eq. Pract. (2d Ed.) 180. Obviously, therefore, this court has no jurisdiction under these two claims of an equitable nature, which aggregate only $2,453.05, exclusive of interest, unless in arriving at the jurisdictional amount there can be added one or both of the disconnected legal demands which have been joined in the bill. This is not a case presenting the joinder of different equitable claims in one bill, where the test of the jurisdictional amount is the aggregate of the claims. 1 Street's Fed. Eq. Pract. § 367, p. 213, and cases cited; and Lilienthal v. McCormick (9th Circ.) 117 Fed. 89, 95, 54 C. C. A. 475, in which the plaintiff claimed a lien on the same property, both for the advances and damages, each of these claims, however, being of an equitable nature, involving the enforcement of a lien. Nor is the question affected by equity rule 26 (198 Fed. xxv, 115 C. C. A. xxv), which merely authorizes the plaintiff to join in one bill as many causes of action "cognizable in equity" as he may have against the defendant. Nor does equity rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), when read in connection with equity rule 26, authorize the joinder in a bill in equity of disconnected matters cognizable only at law, this rule obviously relating only to auxiliary matters of legal cognizance which may arise in the determination of an equity cause.

The question then comes to this: whether a plaintiff, having a claim of equitable cognizance of less than $3,000.00, may successfully invoke the jurisdiction of the Federal Court by joining in a bill of equity seeking to enforce such equitable claims a separate and distinct legal cause of action, entirely disconnected from the equitable claim, sufficient in amount to make an aggregate of more than $3,000.00. I am clearly of opinion that this cannot be done. While the equity and law sides of the Federal Courts are merely different sides of the same court, it is entirely clear that separate claims which are distinctly of equitable and legal cognizance cannot be litigated in the same suit, but must be maintained in separate suits. Hurt v. Hollingsworth, 100 U. S. 100, 102, 25 L. Ed. 569. The present bill hence presents, under color of one bill in equity, two separate and distinct suits, one a suit in equity to enforce a lien upon a steam shovel for the amount of the first two claims, and second, a suit at law to recover for the amount of the second and third claims. These matters are entirely disconnected, and if the case remained in court so much of the bill as relates to the third and fourth claims would clearly have to be transferred to the law side of the court as a separate suit, leaving in the equity suit only the first

and second claims. In neither of these two suits, however, would the requisite jurisdictional amount be involved.

I think it clear, therefore, that as neither of the two separate suits into which this bill must be divided involves the requisite jurisdictional amount, the bill must now be dismissed for want of jurisdiction.

[7] The bill does not, in my opinion, present a question analogous to In re Metropolitan Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, or other cases, in which it is held that where the matter presented is one of general equitable jurisdiction the defense of a plain and adequate remedy at law may be waived by the defendant. Rowe v. Hill (6th Circ.) 215 Fed. 518, 522, 132 C. C. A. 30. Here as to the third and fourth claims there is an entire want of equitable jurisdiction; and the matters involved thereunder being solely cognizable at law, the court should so hold of its own motion, though the question is not raised by the pleadings or suggested by counsel. Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934; Allen v. Pullman, 139 U. S. 658, 662, 11 Sup. Ct. 682, 35 L. Ed. 303; and cases cited.

The conclusion reached is furthermore supported by Bureau of National Literature v. Sells (D. C.) 211 Fed. 379, 383, in which, while recognizing the general rule that where the plaintiff has established the right to equitable relief the court will grant all other relief essential to complete adjustment of the subject-matter among the parties, though involving matters of law, it was held that the court's jurisdiction must nevertheless be complete by reference to the equitable relief sought; that the auxiliary legal relief asked for could not be relied on to aid in conferring that jurisdiction, and that hence the jurisdictional amount in controversy was to be determined solely by reference to the character of the equitable relief sought in the bill. This conclusion applies all the more strongly where the matters of legal cognizance presented by the bill are not incidental to the equitable relief prayed but are entirely separate and disconnected therefrom.

Since, therefore, it now distinctly appears that this bill, in substance, under the color of one suit in equity, really embraces two separate and distinct suits, one of equitable cognizance and one purely of legal cognizance, neither of which involves a sufficient jurisdictional amount to bring it within the jurisdiction of the court, I am of opinion that it should now be dismissed by the court on its own initiative.

[8] I may add, as an illustration of the complexity which would be introduced if a bill of this character could be maintained, that while the equitable portion of the bill relating to liens claimed on the steam shovel may well be one of such "a local nature" that a subpœna could be directed to the marshal of the Eastern District of Tennessee, where the defendant resides, under section 54 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102 [Comp. St. 1913, § 1036]), or that at least the defendant could be brought before the court by substituted service of process, under section 57 of the Judicial Code (Comp. St. 1913, § 1039), the legal claims set forth in the bill appear to be of a purely transitory character. And since the defendant does not reside within this district and does not appear to be within the district, there is no provision of law by which he could be summoned to appear

and make defense to so much of the bill as relates to these transitory causes of action. The marshal of this district in which the suit is brought would, of course, be powerless to serve a subpœna upon the defendant outside of this district; while, to this extent, the action being of a transitory character, there would be no authority, statutory or otherwise, for the service of a writ of subpœna by the marshal of the Eastern district or for substituted service in that district. This, however, is stated merely by way of illustration of the anomalous situation that would result if a bill of this character, involving a combination of equitable causes of action local in their nature with legal causes of action transitory in their nature, could be maintained, although neither involved the amount requisite to give the court jurisdiction.

An order will be entered in accordance with this opinion.

RAICH v. TRUAX et al.

(District Court, D. Arizona. January 7, 1915.)

No. E-9.

1. CONSTITUTIONAL LAW ⊜275—"EQUAL PROTECTION OF THE LAW"—DISCRIMINATION AGAINST ALIENS.

The act of Arizona adopted November 3, 1914, by a vote of the people, section 1 of which provides that any company, corporation, partnership, or individual employing more than five workers at any one time, regardless of the kind or class of work, shall employ not less than 80 per cent. qualified electors or native-born citizens of the United States or some subdivision thereof, denies the "equal protection of the laws" to persons within the jurisdiction of the state, in violation of Const. U. S. Amend. 14, as aliens as well as citizens are entitled to the benefits of that amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 830, 835, 839, 843-846; Dec. Dig. ⊜275.

For other definitions, see Words and Phrases, First and Second Series. Equal Protection of the Law.]

2. MASTER AND SERVANT ⊜11—REGULATIONS—EMPLOYMENT OF ALIENS.

Such statute is evidently not intended to be a regulation within the police powers of the state, and is not a valid exercise of police regulation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊜11.]

3. EQUITY ⊜97—PARTIES—SUING ON BEHALF OF ALL PARTIES INTERESTED.

A suit by an alien to restrain the enforcement of a state law requiring employers to employ not less than 80 per cent. qualified electors or native-born citizens, in which he alleged that his employer was willing and anxious to retain him in his employ, but that the Attorney General and county attorney threatened to prosecute the employer, was not an action in which plaintiff could sue on behalf of all others similarly situated, under equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), providing that, when the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 257; Dec. Dig. ⊜97.]

---

4. COURTS ⊂=326—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Under the provision of Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1913, § 991), giving the District Court jurisdiction of all suits authorized by law to be brought by any person to redress the deprivation under color of any state law of any right, privilege, or immunity secured by the Constitution of the United States, or any right secured by any law of the United States providing for equal rights of persons within the jurisdiction of the United States, the District Court had jurisdiction of an alien's suit to enjoin the enforcement of a state law requiring employers to employ at least 80 per cent. of qualified electors or native-born citizens, without regard to the amount in controversy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 888; Dec. Dig. ⊂=326.]

5. INJUNCTION ⊂=85—UNCONSTITUTIONAL STATUTE—INADEQUACY OF REMEDY AT LAW.

Equity will enjoin the enforcement of an unconstitutional statute requiring employers to employ at least 80 per cent. qualified electors or native-born citizens, on behalf of an alien thereby discriminated against, as he has no other remedy, either by an action at law for damages, or in criminal proceedings which might be instituted against his employer, for the enforcement thereof, as he would not be a party to such a proceeding and could not be heard therein.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⊂=85.]

6. COURTS ⊂=508—LEGAL PROCEEDINGS—CRIMINAL PROSECUTIONS.

While, as a general rule, a court of equity will not restrain the prosecution of criminal cases, where the United States District Court acquired jurisdiction of a suit to enjoin the enforcement of an unconstitutional state law, requiring employers to employ citizens in preference to aliens, before any criminal proceedings were instituted for the enforcement thereof, it would maintain its jurisdiction to the exclusion of criminal proceedings in the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. ⊂=508.]

7. COURTS ⊂=494—UNITED STATES COURTS—JURISDICTION—DECLINING JURISDICTION.

Where an alien elected to sue in the United States District Court to enjoin the enforcement of a state law requiring employers to employ citizens in preference to aliens on the ground that it violated the federal Constitution, it was the duty of that court to hear and determine the issues involved, and it could not refuse to do so in order that the determination of such questions should be left to the state courts, which had not passed upon the questions involved, and in which no proceeding or action involving such questions was pending when such suit was brought.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1355–1371; Dec. Dig. ⊂=494.]

In Equity. Suit by Mike Raich against William Truax, Sr., and others. On application for a temporary injunction pendente lite. Motion to dismiss bill denied, and application for injunction granted.

John H. Campbell, of Tucson, Ariz., and J. S. Williams and Edward J. Flanigan, both of Bisbee, Ariz., for complainant.

Wiley E. Jones, Atty. Gen. of Arizona, Leslie C. Hardy, Asst. Atty. Gen. of Arizona, and William B. Cleary, of Bisbee, Ariz., for respondents.

Before MORROW, Circuit Judge, and VAN FLEET and SAWTELLE, District Judges.

SAWTELLE, District Judge. This is an application for a temporary injunction pendente lite to restrain the Attorney General of the state of Arizona and the county attorney of Cochise county, Ariz., from enforcing a law enacted by vote of the people of that state, under an initiative petition, on November 3, 1914, upon the ground that the law is in violation of the Constitution of the United States, and the hearing thereof is had under section 266 of the Judicial Code.

[1] The act in question is entitled:

"An act to protect the citizens of the United States in their employment against noncitizens of the United States, in Arizona, and to provide penalties and punishment for the violation thereof."

And section 1 thereof provides:

"Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the state of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty per cent. qualified electors or native-born citizens of the United States or some sub-division thereof."

By section 2, violations of the act on the part of employers are made misdemeanors and punishable by fine of not less than $100 and imprisonment for not less than 30 days; and by section 3, any misrepresentation or false statement by an employé as to his or her nativity or citizenship is made punishable by a fine of not less than $100 and imprisonment for not less than 30 days. The employment of more than 20 per cent. of persons who are not qualified electors, or native-born citizens of the United States, or of some subdivision thereof, by an employer of labor who employs at any one time more than five persons, is not made an offense on the part of the alien so employed, and no penalty attaches to him in consequence of his employment.

The complainant alleges that he is a native and subject of the empire of Austria; that he is employed by the defendant Truax in a restaurant kept by the defendant Truax at Bisbee, Ariz.; that the defendant has in his employ more than five persons; that the said defendant is willing and anxious to retain the complainant in his employ, but that the Attorney General of the state of Arizona and the county attorney of said Cochise county threaten to prosecuté the said defendant under the act aforesaid; that if the defendant Truax shall be compelled by prosecution under said act to discharge the complainant from his employ, he, the complainant, will suffer irreparable injury on account of his discharge; and that the act in question is violative of the rights of the complainant under the Constitution of the United States, in that it denies to him the equal protection of the laws which is guaranteed under the fourteenth amendment to all persons submitting themselves to the jurisdiction and laws of the United States, whether citizens or aliens.

On behalf of the state of Arizona, it is avowed by the Attorney General that the law in question will be enforced against all persons

within its borders and that it is a valid exercise of the police powers of the state.

We think that the act in question denies to the complainant the equal protection of the laws, and is therefore in violation of the fourteenth amendment to the Constitution of the United States, and is void. In the case of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, the Supreme Court of the United States said:

"The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to *any person within its jurisdiction* the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. * * * The fourteenth amendment was undoubtedly intended not only that there shoud be no arbitrary deprivation of life and liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; * * * and the rights of the complainant are not less, because they are aliens and subjects of the emperor of China."

The Constitution of California, adopted in 1879, contained a provision prohibiting any corporation from employing directly or indirectly any Chinese or Mongolians in any capacity, and the validity of this provision was attacked in the case of In re Tiburcio Parrott (C. C.) 1 Fed. 481, and the court there held:

"That the provision was in violation both of the Constitution and laws of the United States and the treaty between the United States and the empire of China."

And it added that:

"In our country, hostile and discriminating legislation by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the Constitution."

In the same case the opinion of Mr. Justice Swayne of the United States Supreme Court was quoted with approval that:

"Labor is property, and, as such, merits protection. The right to make it available is next in importance to the right of life and liberty. It lies, to a large extent, at the foundation of most other forms of property."

In the case of In re Ah Chong (C. C.) 2 Fed. 733, the constitutionality of a law enacted by the state of California prohibiting aliens who were incapable of becoming qualified electors from fishing in the waters of the state was called in question, and the law was declared to be in violation of the fourteenth amendment of the Constitution and void.

In the case of Fraser v. McConway & Torley Co., 82 Fed. 257, the United States Circuit Court for the District of Pennsylvania, in con-

struing an act of the assembly of the state of Pennsylvania, approved the 15th day of June, 1897 (P. L. 166), which provides:

"That all persons, firms, associations or corporations employing one or more foreign born unnaturalized male persons over twenty-one years of age within this commonwealth, shall be and are hereby taxed at the rate of three cents per day for each day each of such foreign born unnaturalized male persons may be employed, which tax shall be paid into the respective county treasuries; one-half of which tax to be distributed among the respective school districts of each county, in proportion to the number of schools in said districts; the other half of said tax shall be used by the proper county authorities for defraying the general expenses of the county government. * * * That all persons, firms, associations and corporations shall have the right to deduct the amount of the tax provided for in this act from the wages of any and all employés, for the use of the proper county and school district as aforesaid"

—said:

"The court is here called upon to consider whether these provisions of this act of assembly are in conflict with the Constitution or laws of the United States. The fourteenth amendment to the Constitution of the United States declares: 'Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' * * * Congress has enforced the above-quoted provisions of the fourteenth amendment by legislation embodied in sections 1977 and 1979 of the Revised Statutes (Comp. St. 1913, §§ 3925, 3932). The former of these sections enacts: 'All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' It will be perceived that this statute, following in this regard the constitutional provisions themselves, embraces within its protection, not citizens merely, but all 'persons' within the jurisdiction of the United States. The question of the extent of the application of these constitutional provisions with respect to persons was before the Supreme Court in Yick Wo v. Hopkins, 118 U. S. 356, 359, 6 Sup. Ct. 1064 [30 L. Ed. 220], and it was there decided that the guaranties of protection contained in the fourteenth amendment to the Constitution embraced subjects of the emperor of China residing in the state of California. * * * There can be no doubt that the fourteenth amendment embraces the case of the present plaintiff, who, although a British subject, is, and since about April 27, 1893, has been, a resident of the state of Pennsylvania, and whose right to reside within the United States is secured to him by treaty between the United States, and Great Britain. * * * The tax is of an unusual character, and is directed against and confined to a particular class of persons. Evidently the act is intended to hinder the employment of foreign-born unnaturalized male persons over 21 years of age. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations obstacles to which others, under like circumstances, are not subjected. It imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. Now, the equal protection of the laws declared by the fourteenth amendment to the Constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances."

In conclusion the court says:

"I am of opinion that the act of assembly of the state of Pennsylvania of June 15, 1897, here in question, is in conflict with the Constitution and laws

of the United States. and cannot be sustained. The demurrer to the bill of complaint is therefore overruled."

Legislative enactments in several of the different states, limiting or restricting the rights of aliens therein have been tested in the state Supreme Courts and held to be violative of the fourteenth amendment to the Constitution of the United States and void.

In the case of State v. Montgomery, 97 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386, decided May 28, 1900, by the Supreme Judicial Court of Maine, the constitutionality of section 2, c. 298, of the Laws of 1889, as amended by chapters 282 and 306 of the Laws of 1893, was attacked. This statute relates to hawkers and peddlers; section 1 thereof prohibiting the peddling of certain named classes of goods and chattels until the peddler shall have procured a license to do so, and said section 2 providing that:

"The secretary of state shall grant a license" for peddling "to any citizen of the United States who files in his office a certificate signed by the mayor of a city, or by the majority of the selectmen of a town, stating to the best of their knowledge and belief that the applicant therein named is of good moral character; but such license shall be granted to no other person."

Under said section 2, it follows that a citizen could obtain a hawker's or peddler's license, but an alien could not. The court, in an opinion reflecting exhaustive research on the question of constitutionality of enactments of this ilk, and after citing numerous decisions in support of the court's opinion that legislation of this category is obnoxious to the fourteenth amendment to the Constitution of the United States, says:

"In the light of these interpretations of the fourteenth amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be is a denial of the 'equal protection of the laws.' It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation, and to acquire and enjoy property on equal terms with the citizen. * * * Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society, but against a class solely as aliens. Such a discrimination is forbidden."

In the case of Templar v. Michigan State Board of Examiners of Barbers, 131 Mich. 254, 90 N. W. 1058, 100 Am. St. Rep. 610, the Supreme Court of the state of Michigan held that Act No. 212, Pub. Acts 1899, par. 5, was repugnant to the fourteenth amendment to the Constitution of the United States as denying equal protection of the law in so far as it discriminates on account of citizenship. Said act provided for the examination and licensing of barbers. After designating various points upon which the applicant for the license is to be examined, etc., the act further provides that:

"No person so examined shall receive such certificate who at the time of such examination is an alien."

In that case the Attorney General contended that under the police power the Legislature was vested with the right of regulating the professions, trades, and callings, and that said paragraph 5 of said act, even if it should result in excluding aliens from privileges enjoyed by citizens, was still within the purview of the legitimate exercise of the police power. The court, in dealing with this contention, quoted the rule:

"When legislation applies to particular bodies or associations, imposing upon them additional liabilities and restrictions, under the police power of the state, which are not purely arbitrary, the law does not violate the equal protection clause of section 1 of the fourteenth amendment to the federal Constitution, if all persons brought under its influence are treated alike, under the same conditions and circumstances. But," said the court, "the difficulty with this enactment [meaning said Act No. 212] is that all persons brought under the influence of this legislation are not treated alike, under the same conditions and circumstances. Before the enactment of this statute the plaintiff had the undoubted right to ply his trade in Michigan. In the exercise of the police power the Legislature had the undoubted right to require, as a prerequisite to his plying his trade, that he submit to an examination. But had it the right to require citizenship? If it had the right to couple that with other requirements, it would have the same right to make that the only requirement. In other words, it would have the right to exclude alien labor wholly. * * * But in the present case the relator's business is in no way injurious to the morals, the health, or even the convenience of the community, provided only he has the requisite knowledge upon the subjects prescribed by the Legislature to practice his calling without endangering the health of his patrons. To hold that he is not entitled to practice this calling, because not a full citizen of the United States, is to deny to him rights which we think are preserved by the fourteenth amendment."

In Ex parte Case, 20 Idaho, 128, 116 Pac. 1037, it was held by the Supreme Court of the state of Idaho that section 1458 of the Revised Codes of Idaho is repugnant to the Constitution and laws of the United States and void. Said section 1458 provides:

"It shall hereafter be unlawful for any county government, or municipal or private corporation organized under the laws of the state or organized under the laws of another state or territory or in a foreign county and doing business in this state, to give employment in any way to any alien who has failed, neglected or refused, prior to the time such employment is given, to become naturalized or to declare his intention to become a citizen of the United States."

In that case the complaint charged that petitioner, the superintendent of a private corporation, "knowingly gave employment to four aliens, regardless of the character of the work upon which they were employed." After citing the cases of Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, supra, Fraser v. McConway (C. C.) 82 Fed. 257, supra, and In re Tiburcio Parrott (C. C.) 1 Fed. 481, in support of the doctrine that:

"All persons within the territorial jurisdiction of the United States are within the protection of the fourteenth amendment of the Constitution, without regard to differences of race, color, or nationality"

—the court said:

"A state Legislature, by legislative enactment or otherwise, has no authority to deprive a person of the right to labor at any legitimate business or to deny any person within the jurisdiction of the United States the equal

protection of the laws, or to prohibit a corporation that has a right to do business in the state to employ any person, whether alien or native, in the prosecution of any legitimate business."

In Ex parte Kuback, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226, the unconstitutionality of the so-called "eight-hour" ordinance, which had been adopted by the city of Los Angeles, Cal., was determined by the Supreme Court of California. Section 3 of said ordinance provided that:

"It shall be unlawful for any contractor by himself or through another, when having labor performed under any contract with the city, to employ Chinese labor thereon."

In referring to this ordinance, the court used this language:

"It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts."

In the case of City of Chicago v. Hulbert et al., 205 Ill. 346, 68 N. E. 786, the question of constitutionality was raised against Hurd's Rev. St. 1901, p. 141, c. 6, par. 10, which provides that:

"It shall be unlawful for any * * * officer * * * acting for * * * any * * * city * * * or any contractor, or subcontractor, under any or either of said municipalities, to employ any person or persons, other than native-born or naturalized citizens, or those who have in good faith declared their intentions to become citizens of the United States, when such employés are to be paid, in whole or in part, directly or indirectly, out of any funds raised by taxation."

The Supreme Court of Illinois in that case, holding said chapter 6, par. 10, unconstitutional, speaking through Justice Ricks, said:

"A similar law was enacted by ordinance in the city of Chicago, and we have repeatedly held that such law is invalid, as it is in contravention of the Constitution and the right of individuals to contract. The statute in question is void upon the same grounds, and neither the city nor the contractor was under any obligation to observe it."

So, also, in the case of People v. Warren, 13 Misc. Rep. 615, 34 N. Y. Supp. 942, Laws 1870, c. 385, par. 2, as amended by Laws 1894, c. 622, which made it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as laborer on said works, was held to be void on the grounds, among others, that it was violative of the treaty between the United States and the king of Italy, which provides that Italians resident in the United States shall enjoy the same rights and privileges as are secured to our own citizens, and that it was abrogative of rights, privileges, and immunities guaranteed by the fourteenth amendment to the Constitution of the United States.

[2] The discrimination against aliens wrought by the said act cannot be upheld as valid on the ground that it is a valid exercise of police regulation. Judge Cooley, in his work on Constitutional Limitations (5th Ed. p. 745), in comprehensive yet succinct language, covers the entire domain of this particular contention. He says:

"The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This right cannot be taken away. It is not competent, therefore, to forbid any person, or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize the distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class by leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be, regulated. And some employments, in which integrity is of vital importance, it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable."

The case of People of the State of New York v. Crane, 150 N. Y. Supp. 933, decided by the Supreme Court, Appellate Division, of the state of New York, in December, 1914, not yet officially reported, involved the validity of that portion of section 14 of the Labor Law of said state (Consol. Laws, c. 31) which is as follows:

"In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public work, preference shall be given to citizens of the state of New York"

—a violation of which act is made a misdemeanor. In that case the court said:

"The appellant, Clarence A. Crane, was convicted of a misdemeanor for violation of the statute, in that he employed aliens as laborers in the performance of a contract executed by the president of the borough of Manhattan for the construction of a catch-basin in connection with the public sewer system. * * * The particular provision of the act above quoted which has been discussed at bar is that which forbids the employment by persons engaged in the performance of work, under contracts with the state or a municipality, of any except citizens of the United States, and it is that feature of the act to which we shall direct our attention, and we shall commence our discussion by conceding, as is strongly urged upon us by the respondents, that the invalidity of an act of the Legislature is not to be lightly declared, and that, in order to find such an act invalid upon constitutional grounds, some definite provision must be found in the fundamental and paramount law with which the questioned enactment is at variance. The specific constitutional provision which is claimed to have been violated by the act in question is that portion of the fourteenth amendment of the Constitution of the United States which reads as follows: 'No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' It is settled law that the amendment is not confined to the protection of citizens, but that its provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, or color, or of nationality, and the promise of equal protection of the laws is equivalent to a pledge of the protection of equal laws. Yick Wo v. Hopkins, 118 U. S. 369 [6 Sup. Ct. 1064, 30 L. Ed. 220]. The rights thus secured to resident aliens, as well as to citizens, have been repeatedly held to extend to the right to contract, to pursue lawful callings, and to follow ordinary avocations, that no impediments should be interposed to the pursuits of any one, except such as

are applied to the same pursuits by others under like circumstances. Barbier v. Connolly, 113 U. S. 27 [5 Sup. Ct. 357, 28 L. Ed. 923]. It was said by the same court in Missouri v. Lewis (101 U. S. 22 [25 L. Ed. 989]) that: 'No person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' And again in Hayes v. Missouri, 120 U. S. 68 [7 Sup. Ct. 350, 30 L. Ed. 578]: 'The fourteenth amendment * * * requires that all persons' subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the limitations imposed.' Hence it may be said to be as firmly established as is any principle of constitutional law that one of the purposes and effects of the fourteenth amendment of the federal Constitution was to forbid discrimination by any state between citizens and resident aliens, based solely upon the fact of alienage and nonalienage, so far as concerns the right to enjoy life, liberty, and the pursuit of happiness and the equal protection of the laws. Among the rights guaranteed to every individual is that of freely contracting to render service and perform labor. 'The provisions of the state and of the federal Constitutions protect every citizen in the right to pursue any lawful employment in a lawful manner. He enjoys the uttermost freedom to pursue his chosen pursuit, and any arbitrary distinction against, or deprivation of, that freedom by the Legislature is an invasion of the constitutional guaranty.' People v. Williams, 189 N. Y. 131 [81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. Rep. 854, 12 Ann. Cas. 798]. That the statutory provision now under consideration is frankly and baldly discriminatory requires no argument to establish. It forbids the employment of aliens upon all public works within the state, for no other reason than that they are aliens. On its face it appears to be directly in conflict with the fourteenth amendment. * * * It is sought to sustain the act as an exercise by the state of the police power—that well-recognized but not easily defined power under which the state may and often does restrict the liberty of the individual for the safety and protection of the community. It is not easy, nor is it necessary, to attempt to precisely define the scope and limitations of the police power, but it may be said generally to authorize such enactments as are deemed necessary for the protection of society and to guard its morals, safety, health, and good order; but it is well recognized that, in order to justify an act as an exercise of the police power, there must appear to be some obvious and real connection between the terms of the enactment and some of the purposes for the attainment of which the police power may be exercised. Consequently an act which invades personal rights or private property cannot be justified under the police power, unless there be some discernible relation between it and some legitimate object of police regulation. Whether or not any statute can be upheld as a valid exercise of the police power is also a proper subject for judicial inquiry. It was said in Colon v. Lisk, 153 N. Y. 188 [47 N. E. 302, 60 Am. St. Rep. 609]: 'The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts.' Lawton v. Steele, 152 U. S. 133, 137 [14 Sup. Ct. 499, 38 L. Ed. 385]. * * * It seems to be quite clear that the provision of the Labor Law now under consideration cannot be upheld on this ground. * * * We have heard and considered various arguments dealing with the sociological aspects of the case, and others dealing with somewhat far-fetched suppositions as to the dire results that might be expected from the employment of aliens in constructing the subways in case this country should ever, unhappily, be engaged in war with some foreign country. Such arguments, in our opinion, afford no assistance in the solution of what is purely a legal question. Our conclusion, therefore, is that the provisions of section 14 of the Labor Law, quoted earlier in this opinion, are violative of the fourteenth amendment of the Constitution of the United States, and therefore void. Our attention has been called to the text of numerous treaties between the United States and

foreign countries which, as it is claimed, expressly forbid discriminating legislation of this character. In view of the conclusion we have reached upon the constitutional question, it is unnecessary to discuss any question arising under these treaties. * * * It seems to be conceded by all of the respondents that it would be incompetent for the Legislature to impose upon private persons or corporations, not engaged in performing public work, such restrictions as are attempted to be imposed upon the city of New York as an arm of the state."

In this case the judgment of conviction against the defendant Crane was reversed, and the defendant discharged.

In the case at bar the law in question is evidently not intended to be, and is not, a regulation within the police powers of the state. If, under the guise of enacting a police regulation, the state can prohibit an employer from hiring more than 20 per cent. of alien laborers, it can prohibit the employment of 5 per cent., and if it can prohibit the employment of more than 5 per cent. aliens it can prohibit the employment of any aliens at all, and thus, under the guise of enacting a police regulation, nullify the fourteenth amendment to the Constitution of the United States as interpreted by the Supreme Court of the United States.

[3] The bill is filed by the complainant in his own behalf and on behalf of all others similarly situated, under equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), providing that:

"When the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

But, manifestly, this rule does not apply to the case at bar, and therefore, under the facts stated in the bill, complainant cannot invoke this rule to sue as representing a class. As was recently said by the Supreme Court of the United States in the case of McCabe v. A., T. & S. F. Ry. Co., 235 U. S. 151, 35 Sup. Ct. 69, 59 L. Ed. ——:

"The complainant cannot succeed because some one else may be hurt. Nor does it make any difference that other persons, who may be injured, are of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

See, also, Scott v. Donald, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648, and Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128.

[4] Under section 24 of the Judicial Code, and the rule laid down by Judge Morrow in the case of Simpson et al. v. Geary et al. (D. C.) 204 Fed. 507, we hold an allegation of the amount in controversy is not necessary to give this court jurisdiction in this case.

[5] We think the position taken by respondents that the institution of a criminal proceeding against the respondent Truax in the state courts will afford ample means of determining judicially the rights of the complainant in the case at bar is untenable. The complainant is not a party to any such criminal proceeding, nor can he be made a party thereto; nor can he be heard therein, nor can he be in any legal sense secure, or require that his legal rights be determined therein. If he cannot secure his legal rights in a court of equity, he cannot secure them at all; for he is powerless to secure them in any legal proceedings that have been or can be instituted under this law, and he cannot secure

them in any action at law for damages. It cannot be successfully contended that he has no legal rights. It is axiomatic that every man within the territorial jurisdiction is entitled to his day in court. This complainant can have no day in court, save in a court of equity.

[6] The general doctrine that a court of equity will not restrain the prosecution of criminal cases is well settled, but it is subject to the exception 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, that:

"When such an indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed."

"It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its powers to enforce such law by indictment or other criminal proceedings." Davis v. Los Angeles, 189 U. S. 207–218, 23 Sup. Ct. 498, 500 (47 L. Ed. 778).

The Circuit Court of Appeals of the Ninth Circuit has also held that a court of equity has jurisdiction of a suit to enjoin the enforcement of a statute which affects property rights, although its violation is punishable as a criminal offense. Little v. Tanner, 208 Fed. 605–609.

In the case at bar the court acquired jurisdiction before any criminal proceedings were instituted against the defendant Truax, and should under the rule in Ex parte Young, supra, maintain its jurisdiction to the exclusion of all criminal proceedings instituted against Truax in the state courts.

[7] Counsel for respondents have urged with some emphasis that this cause should not be heard before this tribunal, but that the interpretation and determination of the questions involved should be left to the state courts. In this connection it is pertinent to observe that this case involves the construction of a law enacted by vote of the people of the state of Arizona, and that at the time of the filing of the bill herein the Supreme Court of the state had not passed upon or construed the law, nor was there pending in any court of said state any proceeding or action involving the validity of the same. In Burges v. Seligman, 107 U. S. 20–33, 2 Sup. Ct. 10, 21 (27 L. Ed. 359), the Supreme Court said:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state Constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their

own judgment, as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

It cannot be gainsaid that this complainant had the right of election of a forum in which to have his rights adjudicated. Having elected to bring his cause before this tribunal, it is the duty of this court to hear the application and determine the issues involved. The rule to be followed by the federal courts in cases of this character is clearly laid down by the Supreme Court of the United States in the case of Cohens v. Virginia, 19 U. S. (6 Wheat.) 264–403 (5 L. Ed. 257):

"It is most true that this court will not take jurisdiction, if it should not; but it is equally true that it must take jurisdiction, if it should. The judiciary cannot, as the Legislature may, avoid a measure, because it approaches the confines of the Constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty."

For these reasons, the motion to dismiss this bill is denied, and the application for an interlocutory injunction is granted.

CERRI v. AKRON-PEOPLE'S TELEPHONE CO. et al.

(District Court, N. D. Ohio, E. D. November 30, 1914.)

No. 8805.

1. COURTS ⊜316—JURISDICTION OF FEDERAL COURTS—COLLUSIVE PARTIES.

Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), which provides that if it shall appear that any suit commenced in a District Court does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable in that court, such case shall be dismissed, applies to all cases, whether of contract or tort, and it is the duty of the court to act in such case on its own motion to prevent imposition or fraud on its jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 862; Dec. Dig. ⊜316.]

2. COURTS ⊜316—JURISDICTION OF FEDERAL COURTS—COLLUSIVE PARTIES.

A decedent left no estate, except a cause of action for his wrongful death, which under the state statute inured to the benefit of his widow and children. Both he and his widow were natives of the United States and citizens of Ohio. At the request of the widow's attorneys, plaintiff, who was an alien and a consular representative of the kingdom of Italy, was appointed administrator, and brought an action against citizens of Ohio for his decedent's death in a federal court. He had no acquaintance

with decedent, or his family, and no interest in the estate, and the sole reason for his appointment was so that he might sue in that court. *Held*, that the suit was collusive, and under Judicial Code, § 37, should be dismissed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 862; Dec. Dig. ⊂=316.]

At Law. Action by Nicola Cerri, administrator of the estate of William McCracken, deceased, against the Akron-People's Telephone Company and the Village of Cuyahoga Falls. Hearing on question of jurisdiction. Action dismissed.

H. F. Payer and R. A. Baskin, both of Cleveland, Ohio, for plaintiff.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio, and Stuart & Stuart, of Akron, Ohio, for defendant Akron-People's Telephone Company.

D. F. Felmly and J. C. Frank, both of Akron, Ohio, for defendant Village of Cuyahoga Falls.

CLARKE, District Judge. This is an action for wrongful death. After the case was stated to the jury, but before any evidence was introduced, the court noted that by the answer of the village of Cuyahoga Falls the jurisdiction of the court was challenged by allegations on the part of that defendant that William McCracken, the plaintiff's decedent, was at the time of his death a citizen and resident of the state of Ohio, that his widow and heirs at law were all of them, at the time of the commencement of the action, citizens of the state of Ohio and all resided in the village of Cuyahoga Falls, Summit county, Ohio; that the plaintiff is an alien and a citizen of the kingdom of Italy; that the widow of William McCracken declined the administration of his estate and requested the appointment of the plaintiff, an alien; that said plaintiff sought such appointment as adminstrator "for the colorable, collusive, and fraudulent purpose" of seeking thereby to confer jurisdiction upon this court, and for no other purpose; and that said alien plaintiff has in fact no interest in the controversy, nor in said estate, save to collusively and fraudulently lend his name and aid to a colorable attempt to give jurisdiction in this action to this court.

The court, calling the attention of counsel to the question of jurisdiction thus raised at the threshold of the trial, asked for argument of it, and after discussion adjourned court for its consideration. On the further coming in of court the jury was excused, and the court announced that, following the practice indicated in Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725, Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, and Toledo Traction Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28, and under authority of section 37 of the Judicial Code, an issue would be formulated by the court, that evidence would be taken, and the question thus raised as to the jurisdiction of the court decided before further progress

of the trial. Thereupon the court stated to counsel that it would proceed to enter upon the hearing of the question following, viz.:

"Does this suit really and substantially involve a controversy properly within the jurisdiction of this court, or has the plaintiff, Nicola Cerri, as administrator of the estate of William McCracken, been improperly or collusively made plaintiff herein for the purpose of creating a case within its jurisdiction?"

By leave of court the Akron-People's Telephone Company amended its answer, so as to include substantially the allegations which have been quoted from the answer of the village of Cuyahoga Falls, and in addition alleged that for several years past the plaintiff, Nicola Cerri, has not devoted himself to the practice of his profession of physician, nor to any regularly recognized business or profession, other than that directly connected with his duties as consular agent of the kingdom of Italy; that he was never at any time a resident of the state of Ohio within the contemplation of the provisions of the Ohio statutes requiring that an administrator of the estate of any deceased citizen must be a resident of that state; that the appointment of Cerri was made through the solicitation of the widow and next of kin of said William McCracken, and their counsel, for the collusive and fraudulent purpose of invoking the jurisdiction of this court for the maintenance of this action, and for the purpose of preventing a trial of the cause of action herein sought to be enforced in Summit county, Ohio, in which each of the defendants was domiciled at all of the times involved in this litigation.

It is claimed in said amended answer as the effect of these allegations that the jurisdiction of this court has been fraudulently and collusively invoked, and that it is against public policy to allow the enforcement of such a cause of action by the consular representative of a foreign country. Section 37 of the Judicial Code reads as follows:

"If in any suit commenced in a District Court, or removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The case of Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725, was decided in 1886 and construes section 5 of the act of March 3, 1875 (18 Stat. 472, c. 137). This section was repealed by the Judicial Code in 1911, but was re-enacted word for word, substituting only the word "District" for "Circuit," thus giving jurisdiction to the District Court, instead of to the Circuit Court.

In Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690, it is said, when the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit, and its failure or refusal to do what under

the law applicable to the facts proved it ought to do is an error which this court upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception (as was said upon full consideration in Mansfield, Coldwater, etc., R. R. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462)—

"which requires this court, of his own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act."

In Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725, referred to above, the court says:

"Beyond this, no doubt, if from any source the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

Without reference to the facts of each particular case, the principles upon and the spirit in which the statute precisely similar in terms to section 37 of the Judicial Code should be applied in practice by the courts are clearly and emphatically expressed by the Supreme Court as follows, viz.:

Williams v. Nottawa, 104 U. S. 209, 211 (26 L. Ed. 719):

"It cannot for a moment be doubted that this was done 'for the purpose of creating a case' for Kline and Connor cognizable in the courts of the United States. That being so, it was the duty of the Circuit Court to dismiss the suit as to these bonds, and proceed no further; for as to them the controversy was clearly between citizens of the same state, Kline and Connor being the real plaintiffs. The transfer to Williams was colorable only, and never intended to change the ownership. This both Williams and Kline and Connor knew. * * * But, whatever may have been the practice in this particular under the act of 1789, there can be no doubt what it should be under that of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction, for as was very properly said by Mr. Justice Miller, speaking for the court, in Barney v. Baltimore, 6 Wall. 280 [18 L. Ed. 825] such transfers for such purposes are frauds upon the court, and nothing more. * * * In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the Circuit Courts to exercise their power under it in proper cases."

Detroit v. Dean, 106 U. S. 541, 1 Sup. Ct. 563, 27 L. Ed. 300:

This "was an attempt to get into the federal court upon a pretense that justice was impossible in the state courts, owing to the excited condition of the public mind. * * * The refusal to take legal proceedings in the local courts was a mere contrivance, a pretense, the result of a collusive arrangement to create for one of the directors a fictitious ground for federal jurisdiction. The case comes, therefore, within the purview, if not the letter, of the provisions of section 5 of Act March 3, 1875, c. 137, defining the jurisdiction of the Circuit Courts of the United States."

Farmington v. Pillsbury, 114 U. S. 138, 144, 5 Sup. Ct. 807, 810 (29 L. Ed. 114):

"The old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown on the face of the record to be taken by plea in abatement before pleading to the merits, was changed (by the act of 1875), and the courts were given full authority to protect themselves against the *false pretenses* of apparent parties. This is a salutary provision, which ought not to be neglected. It was intended to promote the ends of justice, and is equivalent to an express enactment of Congress that the Circuit Courts shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act."

Little v. Giles, 118 U. S. 596, 602, 7 Sup. Ct. 32, 36 (30 L. Ed. 269):

"We are satisfied that by the act of 1875 Congress intended to introduce a rule that shall put a stop to *all collusive shifts and contrivances* for giving such jurisdiction. The language of the fifth section of that act is as follows: [After quoting the language the court continues:] Here the words 'really' and 'substantially,' and the expression 'improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable,' are very suggestive, and show that, by giving the Circuit Courts authority to dismiss or remand the cause at once, if these things are made to appear, it was the intent of Congress to prevent and *put an end to all collusive arrangements made to give jurisdiction*, where the parties really interested are citizens of the same state. Of course, where the interest of the nominal party is real, the fact that others are interested who are not necessary parties, and are not made parties, will not affect the jurisdiction of the Circuit Court; *but when it is simulated and collusive, and created for the very purpose of giving jurisdiction*, the courts should not hesitate to apply the wholesome provisions of the law."

Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444:

In this case the stockholders of a Virginia corporation, which owned land, organized themselves into a corporation under the laws of Pennsylvania, and the Virginia corporation then conveyed the lands to the Pennsylvania corporation, and the latter company brought action against citizens of Virginia to recover possession of the lands. After an elaborate discussion of the cases which we have cited and of others putting an interpretation upon the act of 1875, the court concludes as follows (160 U. S. 342, 16 Sup. Ct. 313, 40 L. Ed. 444):

"The case before us is one that Congress intended to exclude from the cognizance of a court of the United States. The Pennsylvania corporation neither paid nor assumed to pay anything for the property in dispute, and was invested with the technical legal title for the purpose only of bringing a suit in the federal court. * * * If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the Circuit Court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, *would become of no practical value, and the dockets of the Circuit Courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance.*"

Lake County Commissioners v. Dudley, 173 U. S. 243, 254, 19 Sup. Ct. 398, 402 (43 L. Ed. 684):

"But he [Dudley, the defendant] did not buy the coupons at all. He is not the owner of any of them. He is put forward as owner for the purpose of making a case cognizable by the federal court as to all the causes of action embraced in it. * * * *The transfer was collusive and simulated for the purpose of committing a fraud upon the jurisdiction of the Circuit Court in respect at least of part of the causes of action that make the case before the court.* For the reasons stated the trial court, when the evidence was concluded, should on its own motion have dismissed the suit."

Proceeding to the trial of the question which we have stated, and upon the authority of the decisions quoted, the court heard the testimony of the plaintiff, Nicola Cerri, and of Mrs. Pearl McCracken, widow of William McCracken, deceased.

The testimony of Cerri disclosed that he had been consular agent for the Italian government, resident at Cleveland, Ohio, since 1900; that since 1907 or 1908 he had devoted his entire time to his consular duties; that he did not know William McCracken in his lifetime, and had not met his widow until the day of the hearing; that he did not know whether either McCracken or his wife were of Italian origin or not; that he secured his appointment as administrator at the request of counsel engaged in the trial of the case, for the purpose of accommodating them, without any definite purpose of commencing suit in the United States court, as he said, but with knowledge that it would be possible for him to commence suit in the United States court, making his alienage the basis of its jurisdiction. He said that he did not know who was on his bond, that being arranged by the lawyers, and that *his only interest in the case was the statutory fee which he expected to receive.*

Mrs. McCracken testified that her husband was born in Massachusetts, and that she was born in Ohio; that they had lived in the village of Cuyahoga Falls, Summit county, Ohio, for about nine years before his death, and that neither of them was of Italian origin; that she did not know Mr. Cerri at the time he was appointed administrator; that he was selected, so that the suit on trial might be brought in the federal court; and that her husband left no estate, except the claim sued on in this case. She was asked: "Was there any other purpose?" and she replied, "I don't know as there was."

Upon this state of facts can it be said, having regard to realities rather than to mere form, that this suit involves a controversy "really and substantially" within the jurisdiction of this court?

Since the Judiciary Act of 1789 it has been the policy of the federal law, slightly varied by the act of March 3, 1875, not to extend to Circuit or District Courts jurisdiction over any suit to recover "the contents of any promissory note or other chose in action" in favor of an assignee, unless a suit thereon might have been prosecuted in such court if no assignment had been made. A very broad scope has been given by the courts to the expression "other choses in action." Mexican National R. R. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

[1] While section 37 of the Judicial Code does not mention in specific terms claims sounding in tort, its obvious purpose and policy is not to permit the jurisdiction of the federal courts in any case to be the

subject of collusive arrangement between persons who for any reason may prefer a trial of the case in the federal rather than in the state courts, which are open to all litigants.

[2] In this case the deceased left no estate to be administered except a right of action for wrongful death, and this right of action is given by Ohio law "for the exclusive benefit of the wife and children of the deceased." While such right of action must be prosecuted in the name of a personal representative of the deceased, yet the amount recovered shall be apportioned among the beneficiaries, unless adjusted between themselves by the court making the appointment, in such manner as shall be fair and equitable. General Code Ohio, § 10772. And the order in which interested persons are entitled to administer an estate is minutely prescribed. G. C. Ohio, § 10617.

Thus the beneficial interest in the claim for wrongful death involved in this case is vested wholly in the widow and children of the deceased, and the evidence shows that they all resided at the time of McCracken's death, and since that time, in the village of Cuyahoga Falls, Summit county, Ohio. One of the defendants is that village, and the other is a local telephone company, with its principal office in the village.

All of the beneficiaries of the estate of the deceased and both of the defendants being thus residents of Summit county, Ohio, no reason existed for an appeal to that jurisdiction of the federal courts which is based on diversity of citizenship, and which was created for the express purpose of protecting the alien or nonresident from the injustice which might result from local prejudice against him on the part of courts or jurors. Gordon v. Longest, 16 Pet. 103, 10 L. Ed. 900; Whelan v. New York, L. E. & W. R. Co. (C. C.) 35 Fed. 858, 1 L. R. A. 65. If McCracken had survived his injuries, he could not have sued the defendants in this court to recover for any injuries received in this same accident in which he was killed.

In this state of facts and of the law, this alien consular agent, residing in Cleveland, Cuyahoga county, Ohio, at the request of lawyers resident in the same city, appears as a party to the controversy, and his appointment as administrator is procured to be made by them. They arrange the giving of his bond, and assure him that the appointment shall not cause him any trouble or responsibility; and he, knowing that he may be paid the statutory fees upon the amount of money which may be recovered by settlement or trial of this action, accepts the so-called, but wholly nominal, trust.

Thus, while an administrator is a necessary party to the prosecution of this claim, this administrator was plainly a party only in name and form—not in any real or substantial sense. He had no interest in the beneficiaries; he was not even acquainted with any of them; he confesses that he was acting against his inclination in order to accommodate the lawyers engaged in the case; and the widow says that he was selected for the sole purpose of making it possible to sue the defendants in the case in this federal court rather than in the local courts, provided by the state of Ohio for all the real parties to this suit, and in which they would all have stood upon a perfect equality

It would be difficult to find a more perfect illustration of a mere "naked trust" than that which Cerri was undertaking to administer—a trust which required no action on the part of the trustee beyond turning over money to the cestui que trust. Black's Law Dict. title "Trust," p. 1176.

Under the circumstances thus detailed, it seems to be too clear for discussion that there was no real and substantial controversy between Cerri and the defendants in this case, and that it is the duty of the court to defeat this attempt on the part of the plaintiff to use his position as an alien to trifle with and defeat the jurisdiction of our state courts, to impose upon the federal court the trial of cases which it is not created to try, to delay the trial of cases properly pending here, and to call from their own courts into this distant court the defendants, who, as certainly as the beneficiaries of this estate, have rights which should be considered and protected by this court from unjust imposition.

Looking through forms to the substance of this transaction, it seems to this court as palpably a collusive attempt to in form vest in this alien plaintiff the right of action, which is really and substantially vested in the widow and her children, "for the purpose of creating a case" cognizable in this court, as was the transfer of the land in Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, or as was the refusal on the part of the two resident directors to take legal proceedings in the local courts in Detroit v. Dean, 106 U. S. 541, 1 Sup. Ct. 560, 27 L. Ed. 300, and that it is therefore the clear duty of the court "to proceed no further herein," and to dismiss this suit, as required by section 37 of the Judicial Code.

If there should be any doubt as to the validity of the conclusion arrived at in the foregoing discussion, certainly there can be no doubt that the evidence introduced on the trial of the issue formulated by the court brings this case within the alternative provision of section 37 of the Judicial Code, viz., that the plaintiff, Cerri, was improperly or collusively made a plaintiff herein for the purpose of creating a case cognizable in this court. The widow testifies that her only purpose in selecting this alien Italian consular agent as administrator of her husband's estate was that his alienage might be used as the basis of invoking the jurisdiction of this court, and he himself testifies that he had no interest in the estate or in the beneficiaries beyond the lending of his name and privilege as an alien to create a case which might be prosecuted in this court. Discussion cannot make clearer than this statement of the facts makes it that the appointment of the plaintiff was arranged and procured for the purpose of imposing upon the jurisdiction of this court, and that under section 37 of the Judicial Code it is the imperative duty of the court to proceed no further herein, but to dismiss the case.

In consideration of this case, I have not overlooked or been unmindful of the effect which a due subordination of authority on the part of this court should give to the two cases of Cincinnati, H. & D. R. R. Co. v. Thiebaud, 114 Fed. 918, 52 C. C. A. 538, and Toledo Traction Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28, both decided by

the Circuit Court of Appeals of this circuit. An examination of these decisions, however, and of the earlier decisions on the authority of which they proceed, shows that in each of them the question considered and decided by the court was, assuming a regular appointment of an administrator, or of a guardian, is the citizenship of the representative or that of the beneficiaries to be looked to in determining the diversity of citizenship necessary to the jurisdiction of United States courts based on that ground?

Not in one of these cases was the claim made or considered by the court that before the appointment of the representative counsel had deliberately selected and procured an alien to be appointed for the express purpose of defeating the jurisdiction of state courts, and of invoking the jurisdiction of the federal court. Not in one of them was the act of 1875 referred to, thus showing that the claim that the case was collusively created in form to be cognizable in a federal court was not made or considered in any of them. In the Thiebaud Case the administrator was appointed in the appropriate county in Indiana where the fatal accident involved in the case occurred, and in the Cameron Case the guardian was appointed in Michigan, where the ward resided, and neither opinion discusses any such question as we have in this case. For these reasons it seems clear enough that such decisions do not make against the conclusion we are reaching in this case.

The only decision to which my attention has been attracted in which approximately the question we are considering here was presented is Goff's Adm'r v. Norfolk & W. R. Co. (C. C.) 36 Fed. 299, decided in 1888 by Circuit Judge Paul. In that case the statute of 1875 was not considered by the court, and the decision is so obviously one of first impression that I cannot accept it as authoritative, having regard to the principles announced by the Supreme Court in Lake County Commissioners v. Dudley, 173 U. S. 243, 19 Sup. Ct. 398, 43 L. Ed. 684, Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, Southern Realty Investment Co. v. Walker, 211 U. S. 603, 29 Sup. Ct. 211, 53 L. Ed. 346, and Miller & Lux v. East Side Canal & Irrigation Co., 211 U. S. 293, 29 Sup. Ct. 111, 53 L. Ed. 189, all of which were decided long subsequent to the decision of the Goff Case.

I cannot forbear saying, however, in this connection, that there is a wide-spread conviction among members of the bar, in which this court shares, that these cases referred to deserve a re-examination on principle, because of the extent to which they are being taken advantage of for the purpose of thwarting the jurisdiction of state courts, and because of the opportunity which they furnish for burdening the dockets of federal courts with cases, of which the case under consideration is an extreme example, in which the real and substantial dispute involved is between citizens of one state.

This case, it may be added, presents further, also, a question of public policy. The plaintiff is a consular agent for the kingdom of Italy, resident in Cleveland, and as such he enjoys very definite and important privileges and immunities while residing in the United States.

Const. U. S. art. 3, § 2, and section 256 of the Judicial Code provide that suits against consuls and vice consuls shall be prosecuted only in federal courts; and as to his other privileges, see Enc. Law & Procedure, vol. 2, p. 269.

If a becoming sense of propriety does not serve to prevent such an agent of a foreign government from using his alienage for the purpose of meddling in controversies between citizens of this country in which he has no legitimate interest, and from injecting himself into differences between citizens of the government to which he is accredited for the purpose of determining the courts in which such controversies shall be tried, it would seem, wholly independent of the provisions of the Judicial Code, that the courts, upon principles of that public policy which forbids conduct of a tendency so mischievous as to be injurious to the interests of the state, even apart from their legality, should interpose to prevent such conduct from either defeating the jurisdiction of state courts or from burdening federal courts with cases the trial of which must delay the trial of other cases properly pending therein.

It results from the authorities cited, and the discussion in this opinion, that this court is without jurisdiction to try this case, because it does not involve a real and substantial dispute between the alien plaintiff and the defendants, and also because the appointment of Cerri, the plaintiff, an alien, was improperly and collusively obtained, for the purpose of creating a case cognizable in this court, and that therefore the case must be dismissed, at the costs of the plaintiff.

In re DISNEY et al.

(District Court, D. Maryland. January 6, 1915.)

1. BANKRUPTCY ⟸68—PERSONS SUBJECT TO BANKRUPTCY—PERSONS CHIEFLY ENGAGED IN FARMING.

Whether a debtor was chiefly engaged in farming, and therefore exempt from involuntary bankruptcy adjudication, is to be determined as of the time when he committed the act of bankruptcy charged against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⟸68.]

2. BANKRUPTCY ⟸68—BUSINESS OCCUPATION.

A man who regularly follows two occupations is not at the time of the commission of an act of bankruptcy chiefly engaged in one of them merely because at that time he is giving his principal attention to it rather than to his other pursuit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⟸68.]

3. BANKRUPTCY ⟸68—ADJUDICATION—OCCUPATION—FARMING.

Evidence *held* to require a finding that a bankrupt firm, operating a canning factory and canning produce partially raised on their farm, was not chiefly engaged in farming, nor were the members of the firm, except one, so chiefly engaged, and hence the firm and the partners, with such exception, were subject to bankruptcy adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⟸68.]

In Bankruptcy. Involuntary bankruptcy proceedings against John W. Disney, Jr., and others, trading as J. W. Disney & Sons, and John W. Disney, Jr., and others, individually. Adjudication granted against the firm and the individual partners, with the exception of Arthur A. Downs.

William Stanley, John M. Requardt, and Ogle Marbury, all of Baltimore, Md., for petitioning creditors.

Ridgely P. Melvin and James M. Munroe, both of Annapolis, Md., for J. W. Disney & Sons, John W. Disney, Jr., and James F. Disney.

L. Vernon Miller and George Weems Williams, both of Baltimore, Md., for Arthur A. Downs.

ROSE, District Judge. John W. and James F. Disney are brothers. They have always lived together upon a farm in Anne Arundel county. During all their adult life they have been engaged in farming. For many years they have carried on their agricultural operations as partners under the firm name of J. W. Disney & Sons. Each of them as individuals owned some of the land cultivated by the partnership, while the rest belonged to the firm. They estimate that the gross annual value of the crops sold by them varied from $13,000 to $20,000. These figures, in view of the tillable acreage employed, seem large, and probably are liberal; but as they were principally engaged in the production of fruits and vegetables, the value of their output and the cost of raising and marketing it were both high. In winter time, for the purpose of affording employment for their farm hands, they cut and dealt in cordwood. It was a small business. They estimate that it brought in not more than about $500 a year. In 1908 they decided to go into canning. They erected a canning factory on their place, and equipped it at a cost of some $8,000. In the years from 1909 to 1913, both inclusive, they annually put up and sold somewhere between $20,000 and $30,000 of canned goods. A considerable portion of the fruits and vegetables canned by them were raised on their places, but from a half to two-thirds were purchased from other people.

From a financial standpoint their canning venture was not successful. They lost money by it. In 1912, and in some preceding years, they purchased their cans from one of the petitioning creditors. They have not yet paid for them. In the fall of 1913 they sought a renewal of the notes they had given for these cans. At that time the creditor advised them not to re-engage in the canning business. Perhaps the Disneys supposed that this advice was in part inspired by the fact that they had purchased their 1913 cans elsewhere. At all events they appear to have decided not to follow it.

In July, 1914, they made arrangements with the Southern Can Company, from whom in the preceding year they had obtained their cans, to supply their requirements for the packing season of 1914. Early in August, in accordance with their direction it shipped them a car load of cans. About the same time they purchased solder and coal. The war in Europe had then broken out. Crop prospects on their places and in their neighborhood were poor. Their financial difficulties were

fast coming to a head. They changed their minds, and determined not to do any canning that year. They asked the Southern Can Company to take back its cans. It did so. In a similar fashion they disposed of their coal and their solder.

Arthur A. Downs is a neighbor and friend of theirs. He has also been farming all his life. In July, 1912, he and the Disneys entered into an agreement by which he was to be a partner in the canning business carried on by them. The style of the firm was to remain unchanged. They were to contribute the canning house and other buildings, and he was to put in $2,000. He was to have one-third of the profits and to bear one-third of the losses. At the end of the season he had the option of withdrawing his $2,000, if he wished. He was introduced to many persons having dealings with the firm as one of its partners. He never put in $2,000 of his own money; but, together with the Disneys, he either signed or indorsed notes to the extent of $9,500, most of the proceeds of which went into the canning business, although some of it may have been expended on the Disney farms. There were no profits in 1912, and he received none. There were losses; but, except in so far as the notes upon which he became liable helped to defray them, they have not been paid by him, if they have been paid at all. Neither he nor anybody else ever gave any notice to the creditors of the firm or other persons dealing with it that he had retired from it. As late as the summer of 1914 he on some occasions at least acted in such a way as would naturally lead persons who knew he had once been a partner to suppose he still was. When examined as a witness in this case, he seemed to be very uncertain in his own mind whether he was or was not a partner, and whether, if there had been any profits in 1914, he would or would not have been entitled to share in them. Many of the debts, contracted when he was a partner, are still unpaid. The partnership of which he was once a member is, therefore, still subject to adjudication in bankruptcy. Bankr. Act July 1, 1898, c. 541, § 5a, 30 Stat. 547 (Comp. St. 1913, § 9589).

During August, 1914, Downs and the Disneys, together with some of their relatives, gave two judgment notes to the Farmers' National Bank of Annapolis, one for $8,000, and one for $1,500. On the 6th of that month the bank caused a confessed judgment to be entered on the larger note, and on the 19th on the smaller, for a sum aggregating, with attorney's fees and costs, $9,709.50. At various other dates during the same month it and the Annapolis Banking & Trust Company obtained like judgments upon similar notes against the Disneys, but not against Downs, for the aggregate sum of $2,158.60. Almost all of the property of the debtors was in the form of real estate, upon which these judgments at once became liens. On the 30th of October, 1914, Downs made a general assignment for the benefit of his creditors, and on the 11th of November the Disneys did the like.

On the 5th of December the John Boyle Company, which had sold them cans in 1912, the Simpson & Doeller Company, from which they had purchased labels in 1913, the Patuxent Bank of Laurel, and the

Citizens' National Bank of the same place, which had lent them money, as the banks understood, for their canning operations, filed a petition to have them adjudicated involuntary bankrupts. They owe the petitioning creditors some $11,500. The indebtedness of the firm due to other persons than the judgment creditors already mentioned, or to those uniting in the petition, amounts to some $7,000 or $8,000 more, so that the partnership owes in all about $30,000. Practically all of this indebtedness was contracted in the course of the canning business. It is not likely that as farmers they either would have sought or could have secured so extensive a line of credit. They resist adjudication on the ground that they are principally engaged in farming.

The substantial contest is, of course, not between them and the petitioning creditors, but between the latter and those who were fortunate enough to obtain judgments. All or nearly all the money or money's worth that came from either set went into the canning business. If they are not adjudged bankrupts, the holders of judgments will get somewhere between 75 and 100 cents on the dollar, and the other creditors nothing. It does not appear that the debtors have even any sentimental interest in choosing among their creditors, for none of their relatives or associates are among those who have obtained judgments.

It may be safely assumed that Congress had no wish to facilitate preferences among a farmer's banking or mercantile creditors. There were in its judgment, however, reasons which in the overwhelming majority of cases made it inexpedient that farmers be subject to the possibility of involuntary bankruptcy, although, of course, there would be instances in which the denial to creditors of the right to institute bankruptcy proceedings against a farmer would work grave injustice to them and be of no benefit to him. Weighing one consideration against another, Congress made up its mind that the maximum of practically obtainable good with the minimum of preventable evil would be done by exempting from liability to involuntary bankruptcy all those who were more farmers than they were anything or all things else. It gave statutory embodiment to this conviction by declaring that "a person engaged chiefly in farming or the tillage of the soil" may not be made an involuntary bankrupt. Bankr. Act, § 4a.

[1] The fact that a particular farmer will not suffer if he be adjudicated, and many of his creditors will if he be not, is therefore no reason for construing the exemption narrowly. Nor does the probability or reverse of such an outcome give even in a close case much help in determining whether a debtor was or was not chiefly engaged in farming. It is settled, at least in this circuit, that whether a debtor was or was not chiefly engaged in farming is to be determined as of the time at which he committed the act of bankruptcy charged against him. Counts v. Columbus Buggy Co., 210 Fed. 748, 127 C. C. A. 298; Flickinger v. First Nat. Bank of Vandalia, 145 Fed. 162, 76 C. C. A. 132.

For the defendants, it is contended that they had definitely retired from the canning business some months before they made the assignments here complained of. The evidence does not justify the conten-

tion that they had gone out of it, or that they thought they had, at any time before they made up their minds to execute those assignments which put an end to their farming and to their wood-cutting, as well as to their canning. As late as July or early August they expected to operate their cannery in the season of 1914. When circumstances prevented their doing so, it does not appear that they supposed they would not resume again in 1915. They were on the stand, and I am convinced that in August they did not think their cessation of canning was anything other than temporary. Hard pressed as they were for money, they made no attempt to dispose of their valuable canning machinery. Indeed, it is obvious that such an idea never occurred to them. When and immediately before they made their assignments, they were still engaged in canning in the same sense as they had been at any time at which their cannery was not actually in operation.

[2] Defendants say that, even conceding so much for the sake of argument, yet it nevertheless does not make any difference what they did from 1909 to 1913, or what they prepared to do in 1914, or what they hoped to do in 1915. It is a fact that the canning season of 1913 closed in October of that year, and that they then shut down their cannery. They shortly after shipped its product to Baltimore. Most of it was sold, and the rest was put into a public warehouse and pledged as collateral for a loan which they negotiated. Thereafter their actual connection with the canning business was confined to occasional attempts through their broker to sell the pledged goods at a profit, to making preparations for the resumption of canning in 1914, and to securing further indulgence from those to whom they were indebted for money or merchandise which they had used in it. They point out that, no matter how liberal an allowance may be made for the time and effort expended in any of these ways, or in all of them together, farming was the larger part of all of their activities and pursuits during the 12 months immediately preceding the making of their assignments. They rely upon Counts v. Columbus Buggy Co., supra, as conclusively determining that they are not subject to adjudication.

In that case the debtor had three occupations. He was a large farmer. The capital he had invested in that pursuit amounted to $40,000. The annual product of his farms at the prices then prevailing must have exceeded $20,000. For some 18 months preceding the filing of the petition in bankruptcy he had been a partner in a buggy business, which was conducted by his son, in the management of which he took no part, and from which he received no profits. Moreover, for some years he had given over January and February to the buying and selling of mules in partnership with one Cowan. He contributed no capital to this mule business. As between himself and his partner, he assumed none of its liabilities. He gave his services and received one-half of the profits therefor, which latter averaged $1,125 per annum. Upon this state of facts there was no doubt that for the four years, considered as a whole, his chief occupation had been farming, as it had been during each and every period of 12 consecutive months. The only time in which it could have been claimed that his principal pursuit was anything else was the 2 months of each year in which he

dealt in mules. Whether such claim could have been justified by the facts, or would have been material in law if it had been, the court had no occasion to consider; for, as it pointed out, the acts of bankruptcy alleged took place in the months of November and December. Concurring with the view of the Circuit Court of Appeals for the Sixth Circuit, as expressed in the Flickinger Case, supra, it held that whether a debtor belongs to an exempt class depends upon his status at the time of the commission of the act of bankruptcy charged against him. It was not material to inquire whether a man, who for a series of years regularly follows two occupations, has one status throughout the entire period, or has a periodically changing one, as from time to time his chief engagement is in one pursuit or in the other.

It is easy to conceive of a case in which a debtor regularly spent Monday, Tuesday, and Wednesday of each week in an exempt occupation, and Thursday, Friday, and Saturday in one which was not exempt. It would scarcely be contended that his liability to be adjudicated a bankrupt depended solely upon whether the act of bankruptcy charged against him was committed during the first half of some week or during the second. Like principles must control wherever a man has for a series of years regularly followed two occupations, one of which was his chief pursuit during one part of the year, and the other during the remainder. To determine whether he was chiefly engaged in farming, all his pursuits and activities for the entire 12 months would have to be considered. Of course it does not matter how long he has followed both such occupations. So soon as he definitely abandons one of them, it can no longer be claimed as one of his pursuits, much less the chief. Moreover, without abandoning either, the relative importance of one and the other may change, either suddenly or by almost imperceptible degrees. If such alteration appears from all the facts and circumstances to be permanent in its nature, and not merely such a fluctuation as naturally occurs in all business activities, his status may be altered by it. But whether he is subject to adjudication or not does not depend merely upon which of two occupations in which he was permanently engaged was his principal one on the day, or for the week or the month, or perhaps even for the year, in which the act of bankruptcy was committed. His status on that day, it is true, is decisive; but what was his then status is by no means determined by the particular things he did thereon. A man's domicile may change overnight, but he does not acquire a new one every time he sleeps away from home, and absence from the latter for years may not alter it. The analogy is, of course, not perfect, and if pressed too far may be misleading; but it serves to illustrate the distinctions which should be kept in mind in passing upon the class of cases now under consideration.

[3] The question for determination is, therefore: What was the occupation in which the debtors were chiefly engaged during the period from 1909 to the commission of what are charged as acts of bankruptcy? The affairs and occupations of men are of infinite complexity. It is not possible to lay down any precise rule which will in every case enable a court to say with certainty in what occupation a man has

been chiefly engaged. It is not permissible to segregate certain facts or circumstances, and say that their existence or nonexistence settles the question. In answering it, all "his activities and pursuits must be considered as a whole." American Agricultural Chemical Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373.

The relative amounts of time which a man devotes to various lines of endeavor in which he is interested is doubtless one circumstance to be taken into account. In the case at bar there is no question that the defendants spent more time in their farming than in their canning. That circumstance is, however, not necessarily decisive. Many men may use or waste the larger part of their working hours in looking after some enterprise which is of relatively little pecuniary importance to them or others. From the standpoint of the bankruptcy law, it would not be accurate to say that they were chiefly engaged in the prosecution of such a fad. The amount of the financial returns the debtor expects from his various enterprises is one factor to be considered in determining which is the pursuit in which he is chiefly engaged. In a leading case it was said:

"The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood, or as the means of acquiring wealth, great or small." In re Mackey (D. C.) 110 Fed. 355.

The exceeding complexity of the problem is illustrated by the fact that the word "relies," in the excellent definition just quoted, itself needs some construction. The defendants now before this court never made any net profits in the canning business. While they were engaged in it, they lived by their farming. Nevertheless they went into it in the not unreasonable expectation that it would prove their principal source of livelihood. Upon no other theory is it possible to explain the fact that they were willing to incur the obligations necessary to prosecute that business upon the scale upon which they undertook to carry it on. Practically all of their relatively large indebtedness was contracted in canning. That might be immaterial, had they definitely withdrawn from the canning business before they committed the act of bankruptcy charged against them. Flickinger v. First Nat. Bank of Vandalia, supra; In re Leland (D. C.) 185 Fed. 830; In re Folkstad (D. C.) 199 Fed. 363. It has already been found as a fact that they had not done so.

When a debtor follows two pursuits, the relative amounts of his indebtedness contracted in one and the other may be taken into account as an aid in determining in which he was chiefly engaged. Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514; In re Mackey, supra; Bank of Dearborn v. Matney (D. C.) 132 Fed. 75; Tiffany v. La Plume Condensed Milk Co. (D. C.) 141 Fed. 444; In re Burgin (D. C.) 173 Fed. 726. By that test the defendants were canners, rather than farmers.

It is easy to point out that no one fact or set of facts is necessarily controlling. It is impossible to give any definite mathematical weight to any one of them, even in comparison with the others. In cases as close as this undoubtedly is, all that can be done is to keep all the circumstances in mind and decide according to the impression resulting.

No process of reasoning, no analysis of the evidence, will necessarily demonstrate that the determination arrived at is sound.

So far as the partnership and the Disneys are concerned, I have, after much hesitation, concluded that they were not chiefly engaged in farming. The extent of their operations as canners, as tested both by the annual output of their canning business and by the volume of the indebtedness incurred in it, seems to show that they made it their chief occupation and concern. Downs allowed himself to become nearly as deeply involved financially in the canning enterprise as did the others. That result, however, appears to have been chiefly due to the influence the Disneys had over him and to the confidence he had in them. From the evidence it does not seem that he ever personally gave much time or thought to canning. I do not think he was chiefly engaged in it. He is therefore as an individual not liable to adjudication. The firm had three members. One of them was chiefly engaged in farming and could not be made a bankrupt against his will. The principal business of the other two and of the partnership as such was not farming. They have committed an act of bankruptcy and are subject to adjudication.

A partnership and some of its members may be against their consent adjudicated bankrupts, although others of the partners belong to the exempt classes. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; Counts v. Columbus Buggy Co., supra. The recent criticism of the former case by the Circuit Court of Appeals for the Second Circuit (In re Samuels, 215 Fed. 845, 132 C. C. A. 187) has little application to the precise point here involved.

A decree may be prepared in accordance with the views herein expressed.

PUBLIC SERVICE RY. CO. et al. v. HEROLD.

(District Court, D. New Jersey. January 14, 1915.)

No. 481.

1. INTERNAL REVENUE ⟸9—CORPORATION EXCISE TAX—CORPORATIONS LIABLE.

Where a street railway company leased its railway to another company, which assumed all incumbrances, debts, assessments, etc., and distributed the rental reserved by the lease among the stockholders of the lessor, and the lessor did no business, except to maintain its corporate existence and collect the rental, the lessor was not maintaining or operating a railroad, and was not taxable under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), providing that every corporation organized for profit and having a capital stock represented by shares and engaged in business shall be subject to a special excise tax with respect to carrying on or doing business by it.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.]

2. INTERNAL REVENUE ⟸22—RECOVERY OF TAX—INDIVIDUAL LIABILITY OF COLLECTOR.

Where, though a street railway company had leased its railway to another company, which distributed the rental among the lessor's stockholders and was doing no business, so as to be subject to the excise tax imposed by Act Aug. 5, 1909, § 38, it was, as shown by its charter, an existing organization, with a right to operate a railroad, and appear-

ing to have officials for the transaction of corporate business, the collector of internal revenue, in collecting the assessment made against it by his superior, the Commissioner of Internal Revenue, was neither usurping authority nor acting so far outside the limits of his jurisdiction as to be personally liable to return the taxes, as revenue officials are often called on, not merely to ascertain facts in a ministerial capacity, but to deduce from facts a conclusion of a legal nature, and when their decision has been made honestly, within the general scope of the subject-matter over which they have authority to act, they are not personally liable for an error, especially as the company dealt with him in his capacity as collector, and through him applied to the Commissioner for a refund.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 47–61; Dec. Dig. ⊂⊃22.]

3. INTERNAL REVENUE ⊂⊃38—RECOVERY OF TAXES—STATUTORY PROVISIONS.
Under Rev. St. § 3220 (Comp. St. 1913, § 5944), authorizing the Commissioner of Internal Revenue to refund taxes erroneously assessed or collected, section 3226, providing that no suit for the recovery of any internal tax erroneously assessed or collected shall be maintained until an appeal shall have been duly made to the Commissioner and a decision of the Commissioner had therein, section 3227, providing that no suit or proceeding for the recovery of any such tax shall be maintained, unless brought within two years after the cause of action accrues, and section 3228, providing that all claims for the refunding of any such tax must be presented to the Commissioner within two years after the cause of action accrues, where suit to recover corporate excise taxes illegally collected was not brought within two years after the tax was paid, there could be no recovery, as the statutory remedy is exclusive, and the conditions therein prescribed must be complied with, and the cause of action accrues when the tax is paid.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⊂⊃38.]

4. INTERNAL REVENUE ⊂⊃38—RECOVERY OF TAXES—STATUTORY PROVISIONS.
Under Rev. St. §§ 3220, 3226–3228 (Comp. St. §§ 5944, 5949–5951), where claims for the refund of corporate excise taxes illegally collected were presented to the Commissioner of Internal Revenue, and rejected by him, more than two years after the taxes were paid, a suit could not be maintained to recover the taxes, as the Commissioner's adverse decision did not operate to extend the time within which suit could be brought.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⊂⊃38.]

At Law. Action by the Public Service Railway Company and another against Herman C. H. Herold, removed to this court by certiorari. Judgment for defendant.

Frank Bergen and Edward Ambler Armstrong, both of Newark, N. J., for plaintiffs.

J. Warren Davis, U. S. Atty., of Trenton, N. J., and Walter H. Bacon, Asst. U. S. Atty., of Bridgeton, N. J., for defendant.

HUNT, Circuit Judge. This action was originally brought in the Supreme Court of New Jersey, county of Essex, and was removed to this court on a writ of certiorari. Counsel and witnesses were heard on November 5, 1914, and briefs were submitted later.

The suit is for the recovery, with interest, of two sums of $542.20 each, assessed by the Commissioner of Internal Revenue, claiming to act under the act of Congress, hereinafter cited, approved August 5, 1909, as special excise taxes for the years ended December 31, 1909, and December 31, 1910, respectively, and paid by the Public Service

Railway Company on June 29, 1910, and June 28, 1911, respectively, to the defendant, who was then the collector of internal revenue of the United States for the Fifth district of New Jersey.

The complaint alleges that the Rapid Transit Street Railway Company leased all of its property and franchises, except its franchise to be a corporation, to the Newark Passenger Railway Company on June 1, 1893, for a term of 999 years from that date, and that the former company has not carried on any business whatsoever since that time, except to receive the rental under the lease and to distribute it among its stockholders; that, by virtue of mesne assignments and transfers, all of the leasehold property was transferred to, and became vested in, the Public Service Railway Company; that the Rapid Transit Street Railway Company was not doing business within the meaning of the act of Congress aforesaid, and hence was not liable for said taxes; and that the Public Service Railway Company, which, under the terms of its lease was required to pay all taxes against said Rapid Transit Street Railway Company or the leasehold estate, was wrongfully, illegally, and improperly compelled by the defendant to pay the said sums, which it did under protest. The plaintiffs made claim in writing to the Commissioner of Internal Revenue for a refund of the amounts so paid on the ground that they were illegally, improperly, and wrongfully assessed and collected, which claim was refused by the Commissioner on December 1, 1913. The plaintiffs claim that an action thereby, on that date, accrued to them.

In his answer, the defendant objects, because the complaint discloses no cause of action—that it fails to show compliance by plaintiffs with section 3226, 3227, and 3228, R. S. U. S. He admits the making of the lease of the Rapid Transit Street Railway Company to the Newark Passenger Railway Company, but denies that the former company has not done or carried on any business except the receipt of the rental under the lease and the distribution thereof among its stockholders. He admits also the assignment and transfer of the leasehold property to the Public Service Railway Company. He admits the assessment and collection of the taxes, but denies that they were wrongfully or illegally assessed or collected, and avers that, at the time of payment of said sums, they were due and owing by plaintiffs for taxes under the aforesaid act of Congress. Defendant pleads also the statute of limitations, alleging that no claims for refund of these taxes were filed with the Commissioner of Internal Revenue until November 28, 1913, more than two years after they were paid, and pleads that section 3228, R. S. U. S., provides that all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued, that these claims were not so presented, and that they were, therefore, lawfully rejected by said Commissioner of Internal Revenue on December 1, 1913.

In their reply, the plaintiffs deny that these taxes were lawful taxes. and aver that claims for refund were filed before the expiration of two years after causes of action accrued. Section 38 of the act of Congress approved August 5, 1909, entitled "An act to provide revenue,

equalize duties and encourage the industries of the United States and for other purposes," provides in part:

"That every corporation, * * * organized for profit and having a capital stock represented by shares, * * * and engaged in business in any state or territory of the United States, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations * * * subject to the tax hereby imposed."

From the evidence, it appears that the Rapid Transit Street Railway Company was operated during the years 1909 and 1910 by the Public Service Railway Company as a part of its system of street railways in New Jersey, and that the rental for each of those years, under the provisions of the lease, was paid by the Public Service Railway Company to the Fidelity Trust Company, of New Jersey, as trustee, and by the latter company distributed among the stockholders of the Rapid Transit Street Railway Company. The lease from Rapid Transit Street Railway Company to Newark Passenger Railway Company, afterwards assigned to Public Service Railway Company covered the railroads and property of the Rapid Transit Street Railway Company; the rental after 1893 being semiannual payments of $29,610 each, to be paid to a trustee. The lessee assumed all incumbrances upon the property of the lessor, interest accruing on the bonds of the lessor theretofore issued or thereafter issued, and the principal of the bonds as they matured, and all assessments, taxes, and special taxes assessed upon the real estate, franchise, stock, or earnings of the leasing Company. Provision was made also for funding bonds already issued, and issuing new bonds of the lessor corporation equal in amount to the bonds retired, and reissuing certificates of the lessor company. At the termination of the lease, the lessee was to deliver to the Rapid Transit Street Railway Company, or its successors, all property received by it or pay the value. The lessee company agreed to keep in good repair the railroad and its equipment, the lessor company having the right at times to make examination of the property and to notify the lessee company if the property is not put in good repair within 30 days from the notice by the lessee. The lessee company agreed to pay to the treasurer of the lessor company the sum of $100 annually for the "maintenance of the corporate existance of the lessee company." Operation of the road was required by the provisions of the lease in a manner to preserve the rights and franchises of the lessor company. Forfeiture clauses were incorporated in the provisions of the lease. Neither the stockholders nor the directors of the Rapid Transit Street Railway Company had met since 1903. The Public Service Railway Company paid the trustee's fee. Under the lease referred to, all of the property connected with the lessor company was turned over in due course to the Public Service Company, and the only business done by the original lessor company has been the maintenance of its corporate existence and the annual collection of the rental called for by the lease. The rental is distributed among the stock-

holders of the Rapid Transit Street Railway Company through the Fidelity Trust Company, as were also certain sums paid as interest on the Rapid Transit Street Railway Company's first mortgage bonds. During the years 1909 and 1910, no extensions or reconstruction of any railway lines were carried on by the Rapid Transit Street Railway Company or the Public Service Railway Company under the lease already referred to. Nor did the Public Service Railway Company, during those years, do any act of any kind with respect to the property leased, except to operate the property so leased and to maintain the same under the lease.

[1] It is in effect conceded by the defendant that, upon the facts as stated, the decision in McCoach v. Minehill Railway Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, leads to a ruling that the Rapid Transit Street Railway Company was not engaged at all in the business of maintaining or operating a railroad, which was the real object of its incorporation. It had turned its business over. No suggestion is advanced that the lease heretofore referred to was not one authorized by the laws of the state of New Jersey. Nor can we trace the existence of any possible agency in the lessee as for the lessor. The effect of the lease was to make the Public Service Company the public agent for the operation of the railroad while the lease existed, and it is the Public Service Railway Company which is doing business under the provisions of the lease and may be taxable. That lessor and lessee may entirely escape from taxation on income as a consequence of this ruling is also explained by the decision of the Supreme Court in the case cited, wherein the court said that, as to rentals for the use and possession of property and franchises employed by the lessee company in a business taxable under the corporation act, there should be a deduction by the lessee of the amount of rentals paid for such use and possession, irrespective of the question of whether or not the lessor corporation is within the reach of the taxing scheme.

We therefore have an instance of the collection of money as internal revenue taxes by an official of the government, claiming to act under the provisions of acts of Congress, but in reality and in good faith mistaking the applicability of the law, in that he has collected sums as taxes from a corporation not subject to the tax assessed.

[2] The corporation, to reserve possible rights, made its return under a protest, and now seeks to get back the money paid, assuming the position that it may sue the defendant personally for money had and received, upon the ground that the defendant's actions were outside of the scope of the corporation tax law. Reasoning along this line, learned counsel for the plaintiffs say that the defendant has done acts not by way of official misconduct, whereby the rights of the plaintiff corporation have merely been impaired, but that he has extorted money in the name of taxation, and therefore is to be treated as having divested himself of his official character, and to be dealt with as an individual, liable for the consequences of his individual acts, without protection under the corporation tax law; that, in fact, he stands just as if he had never held office.

The evidence shows that the assessment for the years 1909 and 1910 was paid by the Public Service Railway Company to "Herman C. H. Herold, Collector," and that the defendant gave a collector's receipt for the payment. The vouchers which accompanied the checks, as prepared by the Public Service Railway Company, were in favor of the defendant, collector of United States internal revenue, and all notices with respect to penalties which might be imposed if taxes were not paid were sent by the defendant as collector of internal revenue. Indeed, it seems plain that, at the time of the transactions with relation to the taxes assessed, the Public Service Railway Company, lessee, dealt with the defendant in his capacity as collector of internal revenue. Moreover, the plaintiffs, after alleging the official capacity of the defendant, state that the "Commissioner of Internal Revenue of the United States, claiming to act under and by virtue of the provisions of an act of Congress approved August 5, 1909, assessed a special excise tax, * * * and that the defendant wrongfully, illegally, and improperly compelled the plaintiff Public Service Railway Company to pay the sum assessed"; that plaintiffs made claim for a refund through the "defendant as aforesaid to the Commissioner of Internal Revenue" by applications in writing, to which plaintiffs refer, which claim was refused by the Commissioner on December 1, 1913.

The statutes directly pertinent are as follows:

"All laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section." From section 38 of the act of August 5, 1909.

Sections 3220, 3226, 3227, and 3228, R. S. U. S.:

"Sec. 3220. The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. * * *"

"Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: Provided, that if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued. * * *

"Sec. 3228. All claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued. * * *"

The duty of the Commissioner of Internal Revenue (who is not a party to the present suit) is to make assessments upon the returns made of corporations subject to the payment of the special excise tax provided for by the act of August 5, 1909, and it is the duty of the collectors of internal revenue, in their respective districts, to make the collections assessed as aforesaid.

Now, when the revenue officials looked into the particular matter of the status of these plaintiffs, they found two corporations organized under the laws of the state of New Jersey—one, the Public Service Railway Company; the other, Rapid Transit Street Railway Company. The charter of each showed that it was a living, existing, corporate organization, with right to operate a railroad (whether as lessee or otherwise), and to do those things which under the laws of the state of New Jersey a public service corporation may lawfully do in the premises, including a right to issue bonds and to exercise the power of eminent domain. Each appeared to have officials for the transaction of corporate business, and each appeared to be a corporation organized for profit and having a capital stock represented by shares. Starting with this general information, surely the revenue officials were justified in assuming that each corporation was doing acts enough to subject it to the special tax, unless upon further investigation it should be ascertained that it was not carrying on or doing business. Necessarily determination of this further point involved ascertainment of certain additional conditions and facts and then drawing a conclusion therefrom whether, largely as a matter of law, the corporation investigated was carrying on or doing business as contemplated by the provisions of the excise tax statute. And what may we reasonably say the revenue officials found in such further investigation as to Rapid Transit Company? That it had assigned its right to operate a railroad under its original charter, but that it had expressly reserved its corporate existence, and that it was maintaining the same in apparent accord with law; that it was in the enjoyment of a considerable income paid to it semiannually by the Public Service Railway Company, apparent assignee of the rights originally leased to a predecessor lessee, and that the income so received by it from the Public Service Company, lessee, was distributed to the lessor's stockholders as they appeared upon its corporate books. Finding these several things with respect to corporate affairs, the internal revenue officials, acting in a quasi judicial sense, concluded that the Rapid Transit Street Railway Company, as well as Public Service Company, was subject to tax and that its claim of exemption was not well founded.

Can it be that, under such a state of facts, the collector of internal revenue of the local district, whose duty was to collect the assessment made by his superior, the Commissioner, is to be looked upon as having gone so far outside of the scope of his official duty as a revenue officer as that, in demanding payment and receiving it, he must be held to have acted wholly without warrant of law, and is, therefore, individually liable? I should say no, because, being clothed with a general authority within his district to collect internal revenue

taxes assessed by the Commissioner, he was neither usurping authority nor acting so far outside of the limits of his jurisdiction as to be removed from that protection which should be extended to officers acting in good faith under color of their offices. This would seem to be just, when we remember that the duties placed upon revenue officials often call, not merely for the ascertainment of facts, wherein the official acts in what is called a ministerial capacity, but for the deduction from facts of a conclusion of a legal nature upon which liability is or is not in the first instance to be declared. Just what nice distinctions must sometimes be made by the revenue authorities, and how hard it is for them to apply the law, is well exemplified by the Minehill Case, supra, where even under judicial test the question of what constitutes doing business was so close that the learned justices of the highest court found themselves in disagreement as to what proper conclusion followed the undisputed facts. It goes without saying that internal revenue officers, like all others called upon to administer laws, whether in one or another branch of government, not infrequently err in their conclusions, and as a result make illegal assessments and collections; but even so, where the decision of such an official has been made honestly, and his action is within the general scope of the subject-matter over which he has authority to act, ordinarily the official is not personally liable for his error. The case is not one where the official has collected taxes under a statute null and void, because unconstitutional, as was the case 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. Nor have we any facts showing abuse of power to the irreparable loss of a party, as in Philadelphia Co. v. Stimson, Secretary of War, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570. Nor was there any invasion of rights such as appeared in United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171.

[3, 4] As the sequel to the views just expressed is that this suit is to be regarded as maintainable against the defendant as a collector of internal revenue and not otherwise, the single remaining question is whether plaintiffs, having been unlawfully assessed and having paid the tax under objection, can recover back in this suit. The answer lies in this: The remedy to recover back an internal revenue tax after paid is exclusively as specified in the statute. The Supreme Court has held in Snyder v. Marks, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901, that no other remedy can be substituted for that given by statute, for the system prescribed by the United States in regard to internal revenue taxes and their collection by measures not judicial, with appeals to specified tribunals, and suits to recover back moneys illegally exacted, "was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues." United States v. Shipley, 197 Fed. 265, 116 C. C. A. 627. The conditions, then, which we meet here, include statutes fixing a time when the plaintiffs could have presented their claims for refund and begun their action, and at the end of which their right of action ceased. Arnson

v. Murphy, Collector, 109 U. S. 238, 3 Sup. Ct. 184, 27 L. Ed. 920. Plaintiffs did not present their claims to the Commissioner of Internal Revenue until November 28, 1913, and on December 1, 1913, that official refused to allow them. They filed this suit in the Supreme Court of New Jersey on December 18, 1913, and thereafter it was filed in this court January 7, 1914. But it was on June 29, 1910, that they paid the assessment for the year 1909, and on June 28, 1911, that they paid the tax for 1910. Under these facts the causes of action accrued when plaintiffs paid the taxes. From the dates of such respective payments plaintiffs had two years as the periods in which they could have filed their claims for refund with the Commissioner, and they were limited to such period. But they let more than two years go by, so that, when the Commissioner decided adversely to them, his decision did not operate to extend the time within which they could begin suits for the refunds. Merck v. Treat, Collector, 174 Fed. 388, 98 C. C. A. 606; Hastings v. Herold (C. C.) 184 Fed. 759; Schwarzchild & Sulzberger v. Rucker, Collector (C. C.) 143 Fed. 656; U. S. v. Shipley, 197 Fed. 265, 116 C. C. A. 627.

Defendant is entitled to judgment.

BAXTER v. BEVIL PHILLIPS & CO. et al.

(District Court, S. D. Alabama. December 12, 1914.)

No. 11.

1. APPEAL AND ERROR ⊜78—FINAL AND INTERLOCUTORY DECREES.

Where the court determined the ownership of the proceeds of a fire policy in the hands of the stakeholder, and directed him to pay out of the fund the costs of the case, and the balance to the successful claimant, such decree was final and appealable, but not so as to a subsequent decree against the stakeholder, intended merely to carry the former one into execution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464–477, 480, 481; Dec. Dig. ⊜78.]

2. APPEAL AND ERROR ⊜76—"FINAL DECREE."

A "final decree" is one which settles all matters in litigation between the parties and within the pleadings, so that an affirmance will end the suit, and leave nothing for the trial court to do, but to execute the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426–428, 430, 431, 435–443; Dec. Dig. ⊜76.

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

3. TIME ⊜5—TO APPEAL—MONTHS.

Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 (Comp. St. 1913, § 1647), provides that no appeal or writ of error, by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals, shall be taken or sued out, except within six months after the entry of the order, judgment, or decree sought to be reviewed. *Held* that, since a writ of error is not sued out or brought until it is actually filed with the clerk of the court rendering the judgment or decree sought to be reviewed, and the time begins to run on the day when the judgment or de-

cree is filed and entered, an appeal on December 12, 1914, from a decree entered June 12, 1914, was too late.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 5–8; Dec. Dig. ⇐5.]

In Equity. Suit by H. E. Baxter, as trustee of J. A Harvey, bankrupt, against Bevil Phillips & Co. and others. On petition to allow an appeal and to issue a writ of error. Dismissed.

For former opinion, see 212 Fed. 340.

H. H. McClelland, of Mobile, Ala., for complainant.

R. P. Roach, of Mobile, Ala., for defendants.

TOULMIN, District Judge. In the case of Long v. Maxwell, reported in 59 Fed. 948, 8 C. C. A. 410, the court (Chief Justice Fuller writing the opinion) decided that a decree of July 20, 1891, was a final decree, terminating the litigation between the parties, and leaving nothing to be done, except to carry it into execution. The reservation for further directions simply related to such execution, and could not be availed of as rendering the decree less final, or leaving open points expressly decided when it was entertained. If the decree was erroneous, the proper mode of correction was by rehearing or appeal. The decree of July 20th granted the relief prayed, and directed specific performance, with costs.

On September 7, 1891, a motion was made for further time to the defendant to comply with the decree, and for an order of reference. The court said, in substance, that so far as the motion referred to the ascertainment of what, if any, amount of money was due, was a matter disposed of by the conclusion reached. After the lapse of more than a year from the time defendant's motion was made, the complainant moved for a decretal order to execute the decree, and that order, after hearing, was entered November 15, 1892. The order by its terms, was merely one in execution of the former decree, treating that as final. If an appeal had been taken from the decree of July 20, 1891, it could not have been sustained, as more than six months had expired from that date. Hill v. Chicago & E. R. Co., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331.

The case of Long v. Maxwell, supra, is analogous to the case here under consideration, and in my opinion the decision cited is in point and applicable to it. The decree in this case of January 31, 1914, terminated the litigation between the parties to it. Said litigation arose by the complainant, as trustee of the bankrupt estate of one Harvey, claiming a sum of money due and payable by a fire insurance company under a policy of fire insurance on certain property belonging to the bankrupt, effected some time prior to the proceeding in bankruptcy, and which policy had been assigned by the bankrupt to Bevil Phillips & Co. as a pledge and security for money loaned to said Harvey at the time said loan and pledge were made. The property consisted of a storehouse and stock of goods. Subsequently the property was destroyed by fire. About 30 days thereafter Harvey went into bankruptcy. Bevil Phillips & Co., creditors of the bankrupt, made proof of the loss

of the property by fire, and claimed payment of the money due under the policy. Before the money was paid by the insurance company to Bevil Phillips & Co., complainant, Baxter, as trustee in bankruptcy of said Harvey, demanded of the insurance company payment of the money due on the policy to him as trustee aforesaid. In this condition of affairs the insurance company declined to pay the money to either claimant until the question as to who was entitled to the money was judicially determined. It was then agreed by all the parties that the amount due should be placed by said insurance company in the possession of R. T. Ervin, as stakeholder, to be held by him as such until the respective parties could, by a proper proceeding, bring the matter at issue between them before this court, and have the same determined by the court. The money was turned over to said R. T. Ervin accordingly.

[1] Under this agreement said Baxter, as trustee aforesaid, filed the bill in this cause against said Bevil Phillips & Co. and said R. T. Ervin. The cause came on to be heard, and was submitted for decree on the evidence and the law, which was fully argued by the respective counsel in the case. After due consideration of the same, the court rendered a decree in favor of Bevil Phillips & Co., dated January 31, 1914, which was duly entered on the records of the court. I consider said decree a final decree, terminating the litigation between the parties as to who owned the money, and leaving nothing to be done, except to carry said decree into execution.

The court in the decree ordered the defendant R. T. Ervin to pay out of the fund the cost in the case, and the balance thereof to pay over to Bevil Phillips & Co., or to their attorney. Some months thereafter the attorney of Bevil Phillips & Co., through counsel, informally notified the court that R. T. Ervin had not paid over the money to them, but asked no action by the court at that time. Subsequently he gave to the court similar information, but asked for no rule or order to said Ervin to show cause why he had not complied with the decree and order, but thereafter filed a motion for a decree for the specific amount due and for execution, which I considered a decretal order to execute the former decree.

[2] A final decree is one which settles all matters in litigation between the parties and involved by the pleadings, so that an affirmance by the appellate court will end the suit, and leave nothing for the lower court to do, but the execution of the decree of January 31, 1914, which has been done by the lower court's decree of June 12, 1914. Dainese v. Kendall, 119 U. S. 53, 54, 7 Sup. Ct. 65, 30 L. Ed. 305. Under this rule, the decree appealed from, being the last decree rendered in the case, was not final. The first decree, that of January 31, 1914, which settled all matters in litigation between the parties and involved by the pleadings, was final. If this decree was erroneous, the proper mode of correction was by rehearing or appeal.

[3] Now let us consider whether an appeal may be taken on December 12, 1914, from a decree entered on June 12, 1914, to be reviewed in the Circuit Court of Appeals, under the provisions of Act March 3, 1891, § 11 (Comp. Stat. 1913, § 1647). The provision is that:

"No appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this

act shall be taken or sued out, except within six months after the entry, of the order, judgment, or decree sought to be reviewed."

The statute does not say within six months after the day or date of the *entry* of the order, judgment, or decree on the records of the court. In re McCall, 145 Fed. 898–901, 76 C. C. A. 430; Clark v. Doerr, 143 Fed. 960, 75 C. C. A. 146; Collier on Bankruptcy (9th Ed.) 541. The writ of error is not sued out or brought until the writ is actually filed with the clerk of the court which rendered the judgment or decree sought to be reviewed. It is the filing of the writ that removes the record from the inferior court to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. Kentucky Coal, Timber, Oil & Land Co. v. Howes, 153 Fed. 163, 82 C. C. A. 337.

The United States Supreme Court has held that the day the judgment is filed and entered is the day on which the plaintiff in error had a right to his writ, and on that day the limitation for writs of error, as provided by the statute, began to run within which his right existed. Polleys v. Black River Imp. Co., 113 U. S. 81, 83, 5 Sup. Ct. 369, 28 L. Ed. 938. The United States Supreme Court has held that:

"A writ of error is not brought in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly."

The act provides that no appeal or writ of error shall be taken or sued out, except within six months after the entry of the order, judgment, or decree sought to be reviewed. Act March 3, 1891, § 11, 26 Stat. 826, 829; Old Nick Williams Co. v. U. S., 215 U. S. 543, 544, 30 Sup. Ct. 222, 54 L. Ed. 318, citing Conboy v. First Nat. Bank, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128, to the effect that the time within which an appeal may be taken under the Bankruptcy Act runs from the entry of the original judgment or decree.

The court denies the petition of the complainant to allow an appeal to be taken in this cause to the United States Circuit Court of Appeals for the Fifth Circuit, and to issue a writ of error therein, because the court is of opinion that the original decree herein was a final decree in the cause, and further that the time limit within which an appeal or writ of error could have been taken or issued from either of the decrees entered in this cause had expired; the decrees having been entered on January 31, 1914, and June 12, 1914, respectively, and the petition for the appeal having been presented December 12, 1914.

Petition is dismissed.

DANA v. MORGAN et al.

(District Court, S. D. New York. December 8, 1914.)

1. CORPORATIONS ⟸211—STOCKHOLDER'S BILL—VACATION OF CONTRACT—FRAUD.

A stockholder's bill to set aside a contract between the corporation and M., alleging that the contract was made in bad faith, contemplated a dissipation of defendant corporation's assets and waste of its capital, and that the controlling reason for making the contract was that certain of the officers and shareholders of defendant company and M. were interested in certain mining companies, and particularly in the C. Company, and that the contract was but a scheme to pay M. for running such C. Company or other mining companies at the expense of defendant company, alleged sufficient facts to show that the contract was fraudulent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 814–818, 820, 821, 823, 824; Dec. Dig. ⟸211.]

2. CORPORATIONS ⟸206—STOCKHOLDER'S BILL—RIGHT TO SUE—ACTION BY CORPORATION—EFFORT TO OBTAIN—EQUITY RULE.

Where a stockholder sues on behalf of the corporation to set aside an alleged fraudulent contract made by it, equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv) does not require that he shall necessarily have first made a formal request of the corporation to sue, where the circumstances show that such request would have been futile; it being within the court's power to determine in every instance on the facts alleged whether such request would have been unavailing.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 791–796; Dec. Dig. ⟸206.]

3. CORPORATIONS ⟸426—ILLEGAL ACTS—RATIFICATION—FRAUD.

Stockholders of a corporation, except by their unanimous act, may not ratify a corporate contract which is fraudulent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. ⟸426.]

4. JUDGMENT ⟸713—CONCLUSIVENESS—ISSUES.

A cause of action, once tried, includes all issues that might have been tried, and the judgment is res judicata thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. ⟸713.]

5. JUDGMENT ⟸701 — CONCLUSIVENESS — RES JUDICATA — STOCKHOLDER'S SUIT.

Where a stockholder sued on behalf of a corporation to set aside a corporate contract, on the ground that it merely granted a gratuity and was ultra vires, etc., another stockholder could have intervened and attacked the same contract on the ground of fraud; but he, though having knowledge of the suit, having refused to do so, the judgment therein was res judicata, and a bar to his subsequent suit to set aside the contract for fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. ⟸701.]

In Equity. Suit by Charles A. Dana, as executor, etc., against Edwin D. Morgan and the Corralitos Company. On defendants' motion to determine the validity of certain defenses waived by defendants' answer, which are as follows:

(1) The amended complaint does not comply with equity rule No. 27 (198 Fed. xxv, 115 C. C. A. xxv).

(2) The matters set forth in the bill of complaint herein are res judicatæ by reason of the entry of judgment in a certain suit in the Supreme Court of the state of New York referred to in the pleadings.

(3) That the contract sought to be set aside by the bill of complaint herein has been ratified by the stockholders of the defendant company, and is therefore not open to the attack made by the said bill of complaint.

(4) That the said bill should be dismissed by reason of the laches of the complainant.

Sustained and dismissed.

Herbert Parsons, of New York City, for plaintiff.
Ernest E. Baldwin, of New York City, for defendant Corralitos Co.
William W. Cook, of New York City, for defendant Morgan.
Charles F. Brown, of New York City, for other defendants.

HOUGH, District Judge. [1] It will not be necessary to digest or summarize the pleadings herein further than the following: The bill declares that both the original and the amended contract with Mr. Morgan "was made in bad faith," and contemplated "a dissipation of the profits and assets * * * and the waste of the capital" of the Corralitos Company.

I am inclined to think that an allegation of bad faith is an allegation of fact; but, even if it be not anything more than a conclusion, it is to be noted that the bill states as a reason, and a controlling reason, for the making of the contract complained of, that certain of the officers and shareholders of the Corralitos Company were, together with Morgan, interested in certain mining companies, and particularly in the Candelaria Mining Company, and that the contract sought to be set aside is really no more than a scheme or device to pay Mr. Morgan for running the mining company or companies at the expense of the Corralitos Company.

In a proceeding where the complaint is to be construed most favorably to the pleader, I think this statement regarding the Candelaria Company, plus the allegation of bad faith, constitutes a sufficient allegation of facts tending to show fraud; so that it may fairly be said that in this bill the Morgan contract is asserted to be fraudulent upon grounds sufficiently stated.

The defenses will be considered in what seems the most convenient order.

1. For reasons appearing in the record, I have declined to consider in advance of trial the defense of laches, except as it may hereinafter be alluded to under the head of res judicata.

[2] 2. Equity rule 27 requires a complainant such as Mr. Dana to set forth with particularity his efforts to obtain action on the part of the corporation, "or the reasons for not making such effort." In one sense Mr. Dana has made no efforts to procure action on the part of the Corralitos Company; that is to say, he has never asked that company or its officers to bring this particular suit. But he has shown at great length his reasons for not making such request.

Rule 27 does not require the making of a formal request in every case. The very proviso that a complainant may show his reasons for not "making such effort" impliedly authorizes suit without request under some circumstances. In my judgment it is within the power of the court to decide in every instance upon the facts shown

as to whether or not a request to bring suit would have been an idle ceremony.

In my judgment it is abundantly shown here that request would have been useless. Indeed, it is a part of the legal position assumed by the Corralitos Company that under the doctrine of res judicata, if they had brought suit it would necessarily have been defeated. This defense is therefore overruled.

[3] 3. The doctrine in respect of ratification is, I think, sufficiently stated in opinions referred to by all counsel, viz.: United States Steel Corporation v. Hodge, 64 N. J. Eq. 807, 54 Atl. 1, 60 L. R. A. 742; Russell v. Patterson Co., 232 Pa. 113, 81 Atl. 136, 36 L. R. A. (N. S.) 199; Pollitz v. Wabash Railroad Co., 207 N. Y. 113, 100 N E. 721. The substance of that doctrine is that even stockholders cannot ratify a fraud. This must be so, for otherwise a majority of shareholders could work any kind of rascally scheme upon a dissenting minority. As I have stated it to be my finding that this bill charges fraud, I am of opinion that the defense of ratification fails.

It necessarily follows, since the shareholders have ratified the Morgan contracts as far as they are capable of ratification, that Mr. Dana can never succeed in this action without proving the fraud he has alleged. No other ground of recovery is left open to him but fraud, incapable of condonation even by the largest majority of shareholders, short of universal concurrence. Unanimous concurrence would, of course, render fraud impossible.

4. The defense of res judicata is in my opinion well founded and properly pleaded. The Warner suit was in form just what this suit is; i. e., an action brought by a shareholder for the benefit of himself and all other shareholders, and instituted because the corporation itself would not act.

The relief demanded by Mr. Warner is exactly that sought by Mr. Dana; there is no plea or suggestion of collusion on the part of Mr. Warner; the present plaintiff knew all about Mr. Warner's proceedings, and deliberately refused to take part therein. The only difference between the two suits is this: Warner endeavored to reach result by showing that the contracts complained of were mere gratuities and ultra vires, while Dana wishes to arrive at the same result by pleading fraud.

Is the doctrine of res judicata avoided by varying the grounds for asking the same relief? This question is, I think, settled by authority and for reasons amply shown in the cases cited by defendant.

[4] It is undoubted law that a cause of action, once tried, includes all issues that might have been tried. Landon v. Bulkley, 95 Fed. 344, 37 C. C. A. 96; referring to Fayerweather v. Ritch, 91 Fed. 721, 34 C. C. A. 61, where the subject is extensively discussed.

[5] Mr. Warner and Mr. Dana had the same cause of action, viz., each of them had the same right, and each thought himself affected by some wrongful act or omission on the part of the defendants. Veeder v. Baker, 83 N. Y. 156; Pomeroy on Remedies, etc., § 452. Indeed, strictly speaking, no stockholder (in suits of this nature) has

an independent cause of action residing in him; he is doing no more than seeking to enforce a corporate right.

Can it be supposed that if the Corralitos Company had itself brought suit on the showing that Mr. Warner made, it could thereafter have brought another suit on the grounds now stated by Mr. Dana? I think not, and the decision in Rice v. King, 7 Johns. (N. Y.) 20, might be cited as early and well-reasoned authority for such holding, however different the facts and the method of procedure.

This is the test: If the corporation whose right is asserted by the shareholder could not bring a second suit, a second shareholder can bring no such suit (of course, in the absence of collusion). This has been specifically decided in Willoughby v. Chicago, etc., Railways Co., 50 N. J. Eq. 656, 25 Atl. 277, Hearst v. Putnam Mining Co., 28 Utah, 184, 77 Pac. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698, and Goodbody v. Delaney, 80 N. J. Eq. 417, 83 Atl. 988, where the New York cases in the higher courts are sufficiently cited.

Nor was Mr. Dana handicapped or prevented from asserting the rights of the Corralitos Company in his own way by the New York practice cases; i. e., Manning v. Mercantile Trust Co., 37 Misc. Rep. 215, 75 N. Y. Supp. 168, and Weed v. First National Bank, 117 App. Div. 340, 101 N. Y. Supp. 1045. The way was open to him. It was within the discretion of the court to let both Warner and Dana present their views, and it cannot be doubted that the court would have given that right, had it been asked. Therefore in my judgment this present plaintiff is entirely within the rule of being bound by the result of a suit wherein not only what he now wants (as revealed by the prayer of the bill) was passed upon, but he had an opportunity of asking for what he wanted (and still wants) in his own way.

A final decree will be entered dismissing the bill, with costs, on the ground of res judicata.

NOTE.—This disposition of the matter renders unnecessary any discussion of the Warner judgment as establishing laches. I have preferred to put decision on a broader ground. It may also be noted here that I feel myself responsible for the discussion of Wabash Railway Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379. I did not, until corrected by counsel, recognize the distinction between shareholders' and bondholders' actions.

BEALL v. BANK OF BOWDEN.

(District Court, N. D. Georgia. January 8, 1915.)

BANKRUPTCY ⇐166 — PREFERENCES — ACTION BY TRUSTEE — "REASONABLE CAUSE TO BELIEVE."

The words "reasonable cause to believe" that a bankrupt intended to prefer a creditor, as used in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, authorizing the trustee to recover a payment as a preference in case the creditor had reasonable cause to believe that the payment would effect a preference,

etc., means not merely that the creditor had cause to suspect that the debtor was insolvent, but that he must have had knowledge of facts sufficient to induce a well-grounded belief of such fact, and that the payment would effect a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.

For other definitions, see Words and Phrases, First and Second Series, Reasonable Cause.]

In Equity. Bill by James Beall, trustee in bankruptcy of one Waller, against the Bank of Bowden, to recover a preference. Bill dismissed.

Moore & Pomeroy, of Atlanta, Ga., and Roop & Fielder, of Carrollton, Ga., for plaintiff.

Boykin & Boykin and S. Holderness, all of Carrollton, Ga., for defendant.

NEWMAN, District Judge. I have gone over the record in this case and the briefs of counsel twice, and after a pretty thorough examination of the matter I am satisfied that the trustee is not entitled to recover in this case. The case of Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971, while the case arose under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), was construing what is meant by having "reasonable cause to believe" a person insolvent. The language of Mr. Justice Bradley, in the opinion delivered by him for the court, which has been several times quoted as authority, may well be quoted again, as follows:

"Some confusion exists in the case as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read, 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of the facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases, if mere grounds of suspicion of their solvency were sufficient for the purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an

engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided. Hence the act very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

In the subsequent case of Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640, Mr. Justice Miller, delivering the opinion of the court, in the course of his opinion said this:

"The whole matter turns upon the question whether Krieger, who acted almost alone for the bank, had reasonable ground to believe that Melter was insolvent at the time the mortgages were made. The District Judge, who decided that he had such reasonable ground, does not seem to have given due weight to the principles of the case of Grant v. National Bank, decided by this court, and reported in 97 U. S. 80 [24 L. Ed. 971], a case which was fully considered, and which has since been followed by us as a leading one on the subject. That case establishes the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it, yet such relief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by law. In the case before us the testimony of Krieger himself, as the one who best knows the strength of the suspicion, if any, on which he acted, and what evidence was before him, must chiefly control. We have examined his deposition very carefully. We think it bears the impress of candor, and it negatives the idea that he had reasonable ground to believe Melter insolvent, or that he actually did believe it. The evidence, outside of this, as to the various estimates of the value of Melter's property and the amount of his debts, while it shows that Melter was probably insolvent, does not show that this was known to Melter himself, or to Krieger, or that the latter had reasonable grounds to believe him so."

In the case of In re Eggert, 102 Fed. 735, 43 C. C. A. 1, decided by the Circuit Court of Appeals for the Seventh Circuit, in the opinion of Circuit Judge Jenkins it is held that these decisions under the Bankruptcy Act of 1867, and a number of other decisions referred to in that case, are applicable under the present bankruptcy law. In the opinion Judge Jenkins says, referring to the term "insolvency" as used in the two acts:

"In this respect the act is widely different from the Bankruptcy Act of 1867. There the term 'insolvency' was construed to mean an inability to meet one's obligations as they matured in the ordinary course of business. The term 'insolvency' in the present act is equivalent to the term 'bankruptcy' in the former act."

And after these expressions the judge proceeds:

"While, therefore, rulings under the former act are applicable in a certain sense, because of this difference in meaning of the term 'insolvency,' they do apply so far as they determine the principles of law by which it is to be ascertained whether a creditor receiving a preference had reasonable cause to believe that the debtor had not at the time property sufficient, at a fair valuation, to pay all his debts."

Of course the provision of the Bankruptcy Act since the amendment of 1910 is different somewhat from what it was in the original act. The language now is:

"Shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value."

The case of Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960, decided by the Circuit Court of Appeals of this circuit is an interesting and an important case on this subject. In the course of the opinion Circuit Judge Shelby says this:

"Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion. And circumstances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no 'reasonable cause' on which to found a belief of intended preference."

This, of course, was under the Bankrupt Act before the amendment in 1910.

The case of Kimmerle v. Farr, 189 Fed. 295, 111 C. C. A. 27, decided by the Circuit Court of Appeals of the Sixth Circuit, is along the same line, as I understand it, of the cases heretofore cited, and the opinion contains an interesting discussion of the question here involved.

Applying the rule which is now clearly the correct one in cases like this, it must be determined whether the bank in this case had "reasonable cause to believe" that the effect of the payment received by them would be to give them a preference. Of course, this would carry with it necessarily the belief that Waller, the bankrupt, was insolvent. I do not see, after the examination I have given the evidence in this case, that what was known to the bank would work more than a suspicion, at the most, that Waller might be unable to pay his debts, and consequently that it was getting a preference. The bankrupt had obtained $9,500 of insurance, and he had some real estate, and it seems, as I gather it from the evidence, to have been the general opinion that his insurance and his other property would be sufficient to pay his debts.

Of course, the burden was on the trustee to show (in the language of the Bankruptcy Act) that the bank had, at the time the payment was made, "reasonable cause to believe" that the payment to it "would effect a preference." This the trustee has failed to show, in my opinion, and consequently he cannot recover.

There must be a decree dismissing the bill.

ARMSTRONG et al. v. WALTERS.

(District Court, E. D. Pennsylvania. January 23, 1915.)

No. 2670.

1. COURTS ⟸328—UNITED STATES COURTS—AMOUNT IN CONTROVERSY—DETERMINATION OF AMOUNT.
   In actions in the federal courts, where no collusion or fictitious claim appears, the amount claimed determines the jurisdiction, though there is a defense apparent on the face of the pleadings, as the validity of such defense cannot be determined in advance.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⟸328.]

2. COURTS ⟸328—UNITED STATES COURTS—AMOUNT IN CONTROVERSY—DETERMINATION OF AMOUNT.
   Where on the face of the proceedings it is clear in an action in the federal courts that judgment could not be rendered for an amount which would save the jurisdiction, the suit may be dismissed.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⟸328.]

3. COURTS ⟸328—UNITED STATES COURTS—AMOUNT IN CONTROVERSY—DETERMINATION OF AMOUNT.
   Where there is room for different theories of damage or the proper measure of damages, plaintiff is not required in his pleadings to limit himself to any one theory; but, if he does so limit himself, the amount of his damages is to be determined by this measure.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⟸328.]

4. COURTS ⟸328—UNITED STATES COURTS—AMOUNT IN CONTROVERSY—DETERMINATION OF AMOUNT.
   Where, in a buyer's action for damages from the seller's breach of contract, the statement of claim, though it alleged a failure to deliver shipments to be made in August, and that the difference between the market price and the contract price at that time was $550, further alleged negotiations between the parties looking to shipments thereafter, and an extension of time for shipment until December, at which time purchases were made in the open market at prices such that plaintiffs suffered a loss of $647.11, it did not appear to a legal certainty that plaintiffs' damages were limited to $550, so as to require the adoption of this amount in computing the amount in controversy, as which measure of damages would be adopted was a matter which the evidence alone would disclose.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890–896; Dec. Dig. ⟸328.]

At Law. Action by Obadiah E. Armstrong and another, copartners trading as Armstrong & Demarest, against James M. H. Walters, trading as J. M. H. Walters. On motion to dismiss for want of jurisdiction because of the value of the matter in dispute. Motion disallowed.

Ward W. Pierson, of Philadelphia, Pa., for plaintiffs.
Johnson & Gilkyson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The question involved in this case has been razeed to one of pleading. The plaintiffs have declared upon a contract, its breach, and resultant damages. We are con-

cerned only with the averment of damages. The contract was to deliver brewers' grains at stipulated prices and in stipulated quantities in successive monthly shipments. There was a partial failure to deliver the first month's shipments and a total failure for the remaining months. Out of this general statement of the case of the plaintiffs spring suggestions of different theories of their rights, the presentation of their case, and the measure of damages. These are too obvious to require enumeration. The statement avers that plaintiffs in turn entered into contracts to sell, in order to fill which they bought in the "open market" grains to supply the place of the grains which defendant had contracted to deliver. This entailed a loss of $362.36 upon the July shipments. There is a further averment that at the time of the failure to deliver the August shipments the difference between the market price for deliveries "f. o. b. Lafayette, N. J." (the place of delivery called for by the contract), and the contract price, was $550 on the contract quantity, entailing a further loss of profit upon the plaintiffs to that amount. The statement of claim adds averments, somewhat indefinite in terms, but to the effect that there were negotiations between the parties looking to shipments after the time of performance and the extension of the August shipments until December. At this time purchases were made in the open market at prices such that the plaintiffs suffered a loss on the August shipments of $647.11. A further loss of $975 is averred to have been incurred because of default in the September shipments. The above items of damages, together with others which are not involved, raise the value of the matters in controversy to the narrow margin of $94.47 above the jurisdictional amount.

A plea to the jurisdiction has been interposed. The ground on which the jurisdiction of the court is challenged is disclosed by the fact that the difference between the market price of the grains at the time and place of delivery and the contract price was $550 on the August shipments, and the damage claimed is a loss on this shipment amounting to $647.11. The principle is invoked that, where the damages claimed are such that a legal certainty exists that they cannot be recovered, they are to be thrown out of the computation in determining the jurisdictional amount. The principle may be accepted. Its application is alone involved. The damages formally laid in the statement of claim show jurisdiction. The argument against jurisdiction proceeds upon the proposition that the proper measure of damages is the difference between the market price at the time and place of delivery of the grains contracted to be sold and the contract price, and that the statement of claim on its face discloses what this difference is, and, if the damages are so measured, the claim falls short of the required amount.

[1] The correct rule is this: The amount claimed (no collusion or fictitious claim appearing) determines the jurisdiction, for this shows the value of the matter in dispute or in controversy. The fact that there is a defense to the action, even although this may be apparent on the face of the pleadings, does not diminish the amount which is claimed, nor determine the amount in dispute. Schunk v.

Moline, 147 U. S. 505, 13 Sup. Ct. 416, 37 L. Ed. 255. To determine the validity of such defense in advance is to decide the very matter in controversy by anticipating a defense which may not be interposed.

[2] The cases cited by the defendant are authority for the doctrine that where, on the face of the proceedings, it is clear that judgment could not be rendered for an amount which would save the jurisdiction, the suit may be dismissed. In such case, however, this must appear as a legal certainty. Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Put-in-Bay v. Ryan, 181 U. S. 431, 21 Sup. Ct. 709, 45 L. Ed. 927.

[3, 4] This brings us to the application of these principles to the facts in this case. The case is one for damages for breach of a contract of sale. The general or what may be called the normal measure of damages is the difference between the market price at the time and place of delivery and the contract price. It often happens, however, that this measure cannot practically be applied. Damages must in consequence be found by the jury according to such fair measure as the evidence shall disclose. This leaves room for different theories of damage, or rather of what the proper measure is. The plaintiff is not required in his pleadings to limit himself to any one theory. If, however, he does so limit himself, the amount of his damages are determined by this measure.

The argument of the defendant is that in this case the pleader had selected and applied his own measure of damages, and that thereby a legal certainty exists that he cannot recover more than such predetermined sum, which is less than the jurisdictional amount. It is true that the plaintiff has averred the market price at the time and place of delivery, and the contract price, and the amount of the difference between them, and in this sense the amount of the consequent damages. He has, however, averred more than this—the extension by him of the time of the delivery and the loss or expense to him of supplying himself at a later date with that which the defendant had agreed to furnish. As of which date the damages are to be assessed as the date of the real breach of the contract the evidence will alone disclose. The amount of the damage does not now appear to be a legal certainty to be limited to $550. It may reach $647.11. If the latter, the court has jurisdiction. If the claim of the latter raises a justiciable question, the court has jurisdiction. The test applied is in effect the demurrer test. The rule invoked is in its essence merely the application of practical common sense in the administrative policy of the law. Whenever want of jurisdiction appears, the court can go no further with the case. If it appears to a legal certainty at the outset of the case, why proceed to trial? Answering the question which this test requires, it is clear that the court cannot now find the plaintiffs cannot make good by proofs their claim of damages.

The plea to the jurisdiction is not sustained. Treated as a motion to dismiss for want of jurisdiction, it is disallowed.

LAMBERT PHARMACAL CO. v. KALISH PHARMACY.

(Circuit Court, S. D. New York. May 10, 1911.)

1. TRADE-MARKS AND TRADE-NAMES ⊂⊃59—NAMES SUBJECT TO APPROPRIATION—DESCRIPTIVE WORDS.

A registered trade-mark "Listerine," as applied to an antiseptic preparation, was entitled to protection against infringement, though prior to its adoption a surgeon, named Lister, inaugurated a method of surgical dressing without, however, employing any distinct antiseptic substance, the efficacy of which method was much debated, resulting in the words "lister," "listerian," and "listerism," becoming familiar, and though the owner of such trade-mark did not acquire from such surgeon the right to use the name "listerine," it appearing that knowledge of such surgeon's achievement was practically confined to the medical profession and those closely allied thereto, and that the use of his name would not convey to the public generally any significance.

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

2. TRADE-MARKS AND TRADE-NAMES ⊂⊃8—NAMES SUBJECT TO APPROPRIATION—FANCIFUL NAMES.

A fanciful name for an article of merchandise may constitute a valid trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 12; Dec. Dig. ⊂⊃8.]

3. TRADE-MARKS AND TRADE-NAMES ⊂⊃7—NAMES SUBJECT TO APPROPRIATION—NAMES OF PEOPLE.

The name of a person who has achieved fame and distinction may be adopted as a trade-mark, provided it is not descriptive of the quality or character of the article or a geographical name, and it is not necessary that the adopted trade-mark should be the name of the merchant who puts the commodity on the market.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 11; Dec. Dig. ⊂⊃7.]

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃59—INFRINGEMENTS—IMITATION OF NAMES.

Where complainant for 17 years had been manufacturing and selling an antiseptic preparation used for cleansing the teeth, throat and mouth, under the registered trade-mark "Listerine," defendant infringed such trade-mark by selling a similar substance under the trade-name "Listerseptine," as the similarity in the names was liable to mislead unwary customers, and from the similarity an intention to deceive would be presumed.

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

In Equity. Suit by the Lambert Pharmacal Company against the Kalish Pharmacy. On final hearing. Decree for complainant.

Cummings & Burleigh and Redding, Greeley & Austin, of New York City (George P. Burleigh and William A. Redding, of New York City, of counsel), for complainant.

Charles A. Kalish and Baird, Cox & Scherr, all of New York City, for defendant.

HAZEL, District Judge. [1] The bill alleges unfair competition in trade and infringement of complainant's registered trade-mark "Lis-

terine" by defendant's use of the word "Listerseptine," in the sale of its commodity. The complainant's predecessor, Jordan W. Lambert, in the year 1881, began the manufacture of an antiseptic compound, and, to differentiate it from other compounds having similar properties, he adopted the arbitrary name of "Listerine" and printed such name on labels pasted on bottles containing his vendable article. Prior to such designation the name "Lister," or its derivative, "Listerine," had never been applied to an antiseptic preparation. It is shown that Sir Joseph Lister, an eminent English surgeon, had as early as the year 1865 inaugurated a method of surgical dressing which may be said to consist of immersing the instruments in a solution of carbolic acid and using a like solution for spraying or dressing the wounds. The efficacy of this method of dressing wounds was much debated at the time, but finally it received the approval of the medical profession, and, meanwhile, the words "Lister," "Listerian," and "Listerism" became familiar in England and the United States; but the so-called "Listerian" treatment of wounds preparatory to performing an operation was not universally recognized and adopted by the medical profession until the year 1880.

Lord Lister did not originate the product or formula to which Mr. Lambert applied the trade mark or name "Listerine." Complainant's product has no relation whatever to the antiseptic treatment of wounds made known to the medical profession by Lord Lister, whose method of applying antiseptics to achieve the desired surgical result was new and novel, but without the employment, however, of any distinctive antiseptic substance. The word "Listerine" upon its origination was registered in the United States Patent Office by complainant's predecessor, as a trade-mark for a secret medical formula, since which time it has been prominently advertised and printed upon labels of bottles containing the preparation. Although the record does not show that Lord Lister conferred on the complainant or its predecessor the right to use the name "Listerine" in connection with the manufacture and sale of its antiseptic formula, I am nevertheless of the opinion that complainant is entitled to protection in the use of its secret formula and in the adaptation of the name "Listerine" by which its article became known to the public. No one has the right to use the said trademark or to imitate it so as to enable palming off an antiseptic preparation, the product of another, in the pretense that it was the antiseptic preparation of the complainant.

[2, 3] The trade-name "Listerine" has become familiarly known to the public as belonging to the complainant and as denoting a preparation of prophylactic or antiseptic characteristics, of peculiar color and taste, generally used for cleansing the teeth and as a throat or mouth wash. The fame achieved by Lord Lister in his antiseptic treatment in surgical operations is not sufficient to warrant this court in holding that the word "Listerine" is merely descriptive or of qualifying import. The authorities uniformly hold that the selection of a fanciful name for an article of merchandise may constitute a valid trade-mark. There is no objection to adopting as a trade-mark the name of a person who has achieved fame and distinction for the purpose of attracting the at-

tention of the public to an article provided such name is not descriptive of the quality or the character of the article, or a geographical name. Hesseltine Trade-Marks and Unfair Trade, p. 15; 28 Am. & Eng. Ency. of Law (2d Ed.) 361. The name "Lister" can scarcely be said to convey to the public generally any significance of the achievements of its owner; such knowledge is practically confined to the medical profession and those closely allied thereto. It is not necessary that the adopted trade-mark should be the name of the merchant who puts the commodity on the market. Hopkins on Trade-Marks, p. 139, § 63.

[4] The defendant has applied to its antiseptic, which is also commonly used for cleansing the teeth, throat, and mouth, the trade-name "Listerseptine," and sells its article contained in bottles having thereon a label, the said trade-name printed upon it. The trade-name was chosen by the defendant in October, 1907, about 17 years after complainant's origination of the the trade-mark "Listerine." The similarity of the names in appearance and sound, when considered with the similarity of the articles to which the trade-names are applied, is clearly apparent, and the probabilities of the defendant's designation misleading the unwary customer in my opinion is so clear that it amounts to an infringement of the complainant's trade-mark. In view of the close resemblance of the respective trade marks or names and their application to similar antiseptic preparations, a fraudulent intent to deceive need not be affirmatively shown by the complaint, but such intent will be presumed therefrom.

The charge of unfair competition was not pressed by complainant at the hearing. Complainant may have a decree for infringement of its trade-mark by defendant, but without costs.

LAMBERT PHARMACAL CO. v. BOLTON CHEMICAL CORPORATION.

(District Court, S. D. New York. January 11, 1915.)

1. TRADE-MARKS AND TRADE-NAMES ⊂=93 — ACTIONS FOR INFRINGEMENT — BURDEN OF PROOF.

While, in a suit for infringement of plaintiff's trade-name "Listerine," the burden was on plaintiff to show that confusion would result, this burden was met by showing that defendant adopted the arbitrary name "Listogen" for a compound similar to that of plaintiff, as in selecting an arbitrary name defendant should have selected a name about which there would be no question, and, having selected one bearing some resemblance to plaintiff's trade-name, any possible doubt of the likelihood of damage should be resolved in plaintiff's favor.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. ⊂=93.]

2. TRADE-MARKS AND TRADE-NAMES ⊂=59 — INFRINGEMENT — DESCRIPTIVE WORDS—"LISTERISM"—"LISTERIAN"—"LISTERIZE."

The word "Listogen" was not descriptive by suggestion so as to be properly applied to a compound similar to that which plaintiff had been manufacturing and selling under the trade-name "Listerine," as "gen" would suggest that the compound had a principle of "list" in it, that it generated "list," or was its essential or active principle, and as the words "Listerism" "Listerian," and "Listerize" do not refer to a chemical com-

pound, but to a method of dressing wounds, the suggested meaning was senseless.

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

3. TRADE-MARKS AND TRADE-NAMES ⊂⊃85—INFRINGEMENTS—NAMES ENTITLED TO PROTECTION.

Where a chemical compound had been sold under the trade-name "Listerine" for 34 years and had become an article of very common use in many countries of which millions of bottles had been sold, an injunction against an infringement would not be denied, even though such name when first used was deceptive as indicating that a surgeon named Lister had something to do with the formula or had given it the sanction of his name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⊂⊃85.]

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃3—INFRINGEMENTS—NAMES ENTITLED TO PROTECTION.

The name "Listerine" had not become descriptive or generic, so that the owner's right to the name had been lost, where it had always been associated with the article manufactured by such owner, and had not followed the goods elsewhere.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. ⊂⊃3.]

In Equity. Suit by the Lambert Pharmacal Company against the Bolton Chemical Corporation. Decree for plaintiff.

John H. Drabelle, of St. Louis, Mo. (William A. Redding, of New York City, of counsel), for plaintiff.

LEARNED HAND, District Judge. [1] The defendant's compound is obviously appropriate for substitution for the plaintiff's; its uses are precisely the same, and it is made up for the same class of consumption. In choosing an arbitrary trade-name, there was no reason whatever why they should have selected one which bore so much resemblance to the plaintiff's; and in such cases any possible doubt of the likelihood of damage should be resolved in favor of the plaintiff. Of course, the burden of proof always rests upon the moving party, but having shown the adoption of a similar trade name, arbitrary in character, I cannot see why speculation as to the chance that it will cause confusion should be at the expense of the man first in the field. He has the right to insist that others in making up their arbitrary names should so certainly keep away from his customers as to raise no question. In the case at bar there is at least ample doubt that this will be true. "Listogen," if the accent be on the first syllable, is like enough to "Listerine" to serve as an apt means of substitution among those who have not already enough familiarity with the plaintiff's article as to be safe from any such efforts. There is always a fringe of possible customers, next year's for instance, with whom such opportunities are not to be disregarded, people who have heard vaguely the old name or seen it in advertisements and who fail to carry it with accuracy in their memory. Among these confusion is eminently possible, and that possibility, if not a remote speculation, is quite enough. To show how near the defendant's name is, we need only

change one letter, "g" to "r"; "Listoren" would be so close an imitation as would not allow argument in its defense. Now the "g" does make a difference; being a consonant it sounds more distinctly, but I cannot say that it is enough, and no reasonable explanation, no explanation whatever, is suggested why the name need be used.

[2] In saying this I do not forget that the defendant claims the use of the English words "Listerism," "Listerian" and "Listerize," all of which had some currency in English before 1881. But the defendant does not use these words; at best "Listogen" is a coined word with a penumbra of suggestion. The result of a decree will not be to prevent them from using any word in the English language, including all which are derived from the name of Lord Lister. Besides, what does "Listogen" suggest, if mere suggestion be enough to justify such a use of a coined word? "Gen" suggests that the compound has a principle of "List" in it, that it generates "List," or is its essential or active principle. Now there is no such thing as "List," nor as "Lister" nor "Listerism." The words which have gone into use mean the methods first introduced by Lord Lister, a way of treating wounds to prevent suppuration. There is no sense in a word which suggests that it contains the active principle of "Listerism" or that it can generate "Listerism." If Lord Lister had discovered a substance which went by his name and which could be created by a chemical compound, and if the defendant had invented such a compound, there would be some color for the contention that they had made up a word which was descriptive at least by suggestion, but "Listogen" means, and is capable of meaning, nothing whatever. There is indeed one meaning which it conceivably can carry and that is that it contains the essential principle of "Listerine"; that it generates the active element of the plaintiff's product, but that implication the defendant will scarcely wish to make.

[3] Finally, the defendant takes the position that "Listerine" is a deceptive name itself, and suggests that the compound was derived from Lord Lister, an error that has crept even into the Century Dictionary. I think that there was some basis for this contention when the name originated. I am sure I should have thought it was named after Lord Lister, as it was, and I should have vaguely supposed that he had something to do with the formula, or had at least given it the sanction of his name. Yet I am not disposed at the end of 34 years to say that it carries any longer any such implication. The record shows that the sales for now many years have been of many millions of bottles, and that it has become an article of very common use in many countries. We should rather assume that the name has become identified with the thing and has long since lost its connotation of Lord Lister's association. We need not go back for so long to find in the origin of the word a suggestion not altogether truthful, but long since cured by time. Of course, no court will protect a man in the perpetration of a deception; but, where the trade-name has ceased to be deceptive, it is pharisaical to visit the sins of one generation upon the next in the aid of those who now seek to trade upon the efforts of the present. I

shall not therefore decide how far the suggestion of "Listerine" is so deceptive as to have forbid any protection in 1881.

[4] This question does, however, bring up the further question whether the name "Listerine" itself has become descriptive or generic. This is answered by Jacobs v. Beecham, 221 U. S. 263, 31 Sup. Ct. 555, 55 L. Ed. 729, a case weaker than this, because the plaintiff, not having disclosed his formula, could not show, as here, that it was different from the defendant's. That case holds that, where the name has always been associated with the plaintiff's manufacture and has not followed the goods elsewhere, it can never become generic in the sense that the right to the name disappears.

A discussion of the many cases in which similarities have, or have not, been thought infringements, serves no end; applications of the accepted principle no doubt vary, but no two cases are alike. One must trust one's own sense of the likelihood of confusion and the absence of any justification for the defendant's choice of name.

The usual decree will pass with a reference, if the plaintiff wishes.

UNITED STATES v. INTERNATIONAL MERCANTILE MARINE.

(District Court, S. D. New York. January 2, 1915.)

ALIENS ⊂⊃54½, New, vol. 12 Key-No. Series—SEAMEN—HEAD TAX—"BONA FIDE SEAMEN."

Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (Comp. St. 1913, § 4242), imposes a tax of $4 for every alien entering the United States, and Immigration Rule 1, subd. 3, declares that the head tax shall not be levied in respect to aliens who are bona fide seamen and who land in the United States pursuant to their calling. *Held* that, where alien seamen signed a ship's articles for a voyage from Southampton to New York, and all but two signed on the New York's articles for the return voyage, and it was stipulated that the two who did not return were at that time, and for a long time prior thereto had been, and still were, seamen working in the pursuit of their calling, they were "bona fide seamen," and their entry did not subject the steamship company to liability for the head tax because of their entry.

Action by the United States of America against International Mercantile Marine. Verdict for defendant.

H. Snowden Marshall, U. S. Atty., and John E. Walker, Asst. U. S. Atty., both of New York City.

Burlingham, Montgomery & Beecher, of New York City (Norman B. Beecher and Ray Rood Allen, both of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. This action is brought to recover a head tax of $4 per man, alleged to be due on 13 alien seamen who arrived at New York on August 10, 1913, on the defendant's steamer New York. These seamen were signed on the ship's articles at Southampton for the voyage to New York to take the place of seamen who had deserted or become incapacitated on the voyage over. Eleven

of the 13 signed on the New York's articles for the return voyage. It does not appear what became of the remaining 2 sailors. The government concedes that the seamen were all bona fide seamen in the ordinary pursuit of their calling. The seamen were all landed and signed off the articles.

The statute under which the action arises is the act of February 20, 1907, as amended by the acts of March 26, 1910, and March 4, 1913, and reads thus:

"That there shall be levied, collected, and paid a tax of four dollars for every alien entering the United States."

The Supreme Court held in the case of Taylor v. United States, 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130, where sailors signed articles for New York and return and deserted, that a section of the Immigration Act, similar to the one under consideration—

"does not apply to sailors carried to an American port with a bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert, and get in, but there is no evidence that they were doing so in fact."

Following this case, the Circuit Court of Appeals for this circuit held in the case of United States v. International Mercantile Marine, 171 Fed. 841, 96 C. C. A. 420, that a head tax was not due upon a sailor who signed articles for the round trip and deserted on reaching New York.

In the case of U. S. v. Atlantic Transport Co., 188 Fed. 42, 110 C. C. A. 420, a demurrer was overruled to a complaint in an action to recover a head tax on horsemen who were held to be pro hac vice sailors. They signed for the voyage to the United States, but not for the return voyage. Upon arrival they were duly discharged by the captain, and entered the United States with his knowledge and consent, and did not return to the ship. Under these circumstances, the Circuit Court of Appeals said:

"There being no question here of any desertion, but a conceded intention of all parties that on arrival he should leave the ship permanently and enter the United States, the case is not within the exception declared by the Supreme Court."

It is to be noticed that this case related to a class of men who could pursue their calling of caring for horses as well on land as upon sea. There was, therefore, at most but a slight presumption that they would continue their seafaring life, which the court might well feel was rebutted by the bare allegation that they had entered the United States. Even this presumption, Judge Ward, who dissented in the case, thought dispensed with evidence that these seamen continued in their calling.

The Immigration Department has promulgated a rule which, at least so far as public policy is concerned, is entitled to the greatest weight as a construction of the act. Rule 1, subdivision 3, provides that:

"The head tax shall not be levied in respect to the following classes of aliens: * * *

"(J) Bona fide seamen who land in the United States pursuant to their calling."

While I cannot think that the mere presumption that a sailor would be likely immediately to continue his occupation as such is sufficient to meet the requirements of the rule laid down in Taylor v. United States, supra, if the steamship company lands a seaman, and neither has a contract to take him back, actually takes him back, nor can account for him at all, the stipulation in this case that all the sailors, including the 2 who did not return to the ship, "were at that time, and for a long time prior thereto had been, and still are seamen working in the pursuit of said calling," seems to me sufficient to bring the facts within the rule of that case.

The question always is whether the sailor has entered the country in any real sense, or has merely used it as a point from which to embark on the next available ship. The courts have proceeded so far as to hold that a sailor who signs shipping articles for a round trip in which he temporarily enters a port of the United States does not "enter" within the meaning of the act. But after all such shipping articles are nothing but evidence of intention to continue in his seafaring life, which can be equally furnished in other ways, one of which is a continuance by the sailor of his calling subsequent to landing. I think the return of the 11 sailors to England by the same ship on which they came brings them within the rule laid down by the Supreme Court in Taylor v. United States, supra, and the stipulation that the other 2 "still are seamen working in the pursuit of said calling" brings them within the same rule. Were it not for this stipulation, which I did not have in mind at the trial, I should be inclined to hold that a head tax was due upon these 2 seamen, because I do not think that the presumption that a sailor continues in his calling is sufficient to relieve the master, who has landed and discharged him, from proving the fact of such continuance.

The decision in the case of United States v. Atlantic Transport Co., supra, does not apply to the facts in the case at bar, for the reason, which I have already stated, that there was no evidence before the court in that case that the seamen on entering port continued in their calling.

Both sides having moved for the direction of a verdict, I am, for the foregoing reasons, of the opinion that a general verdict should be directed for the defendant.

STATE OF WEST VIRGINIA ex rel. BLUE, State Com'r of Prohibition, v. ADAMS EXPRESS CO. et al.

(District Court, S. D. West Virginia. October 19, 1914.)

No. 620.

INTOXICATING LIQUORS ⟸146—WRONGFUL SALE—INTERSTATE COMMERCE—SHIPPING INTO DRY TERRITORY—ADVERTISING THROUGH MAILS—PERSONAL USE.

That a licensed wholesale liquor dealer residing in Ohio mailed advertising matter into dry territory in West Virginia, soliciting a West Virginia citizen to purchase liquor for his individual use, and shipped liquor to the buyer in West Virginia, did not constitute a violation of Yost Law W. Va. (Laws 1913, c. 13) §§ 3, 8, nor Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 (Comp. St. 1913, § 8738), or Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. 1913, § 8739), regulating the transportation of liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. ⟸146.]

In Equity. Suit by the State of West Virginia, on relation of Fred O. Blue, State Commissioner of Prohibition, against the Adams Express Company and others. On motion to dismiss. Granted.

Fred O. Blue, of Philippi, W. Va., for plaintiff.

Price, Smith, Spilman & Clay, of Charleston, W. Va., for defendants.

KELLER, District Judge. This suit was brought in the circuit court of Kanawha county, W. Va., and thence removed to this court upon the petition of Adams Express Company, one of the defendants, and is before me upon bill and answer, and a motion by said defendant to dissolve an ex parte temporary injunction awarded by the circuit court of Kanawha county before the filing of the petition for removal, and to dismiss the bill.

The petition for removal is based on the first clause of section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [Comp. St. 1913, § 1010]), viz., that the suit is one arising under the Constitution or laws of the United States. This is conceded to be true by the plaintiff state, and the bill and answer read together set forth the following facts:

Edward Beigel, one of the defendants (not served), is a wholesale dealer in Cincinnati, Ohio, handling the products of Pabst Brewing Company, of Milwaukee, Wis. Prior to the 1st of July, 1914, he had been in the habit of mailing letters to inhabitants of West Virginia, advertising these goods as for sale by him and inclosing price lists thereof. Since the said 1st day of July, 1914, he has continued the same practice and I take it to be admitted for the purposes of this case that he sent such letters and circular to one R. H. Clendennin, who thereupon ordered by letter for his own personal use one-fourth barrel of beer, amounting to eight gallons, and inclosed his check for the purchase price thereof to said Edward Beigel, at Cincinnati, Ohio.

Thereupon said Beigel delivered said one-fourth barrel of beer to the defendant Adams Express Company, at Cincinnati, Ohio, consigned to R. H. Clendennin, at Charleston, W. Va., and upon its arrival at Charleston this suit was brought, asking for an injunction (preliminary awarded), and praying that defendant Adams Express Company be adjudged to be a common nuisance.

The order of injunction prepared at the instance of plaintiff will illustrate the legal position contended for by the plaintiff, and a portion of it is here reproduced:

"The defendant the Adams Express Company, its agents, employés and representatives, be enjoined and restrained from delivering to the defendant R. H. Clendennin the consignment of liquors mentioned in said bill, viz., one-fourth barrel of draught beer, and that the said defendant the Adams Express Company, its agents and employés and representatives, be further enjoined from delivering to defendants, or to any other person, any shipment of liquors manufactured by the Pabst Brewing Company and handled by said defendant Beigel, or any of his agents, representatives, or employés, at any place where said defendant company operates in the state of West Virginia, within the jurisdiction of the court, unless the consignee of any such liquors can show to the satisfaction of the defendant express company, its agents, representatives, and employés, that he, without solicitation from said Beigel, or any of his agents, representatives, or employés, ordered the consignment of liquors for his own personal lawful use without having received from the said Beigel, or any of his agents, representatives, or employés, advertisements or letters soliciting orders for liquors, or price lists or order blanks advertising or soliciting from the consignee orders for liquors."

The state contends that the effect of its own legislation (sections 3 and 8, Yost Law) and the federal legislation contained in the Wilson Act and the Webb-Kenyon Act is to render it unlawful for a wholesale liquor dealer, residing in Ohio and having there both state and federal licenses for the conduct of his business, to use the United States mails to inform citizens of West Virginia of his business and the terms upon which it is conducted. At the same time in argument it was admitted that the West Virginia citizen intending liquor for his own use, had a perfect right to order it from a licensed dealer, and unquestionably would have a right to inquire by mail or otherwise of the dealer as to his prices, in which case, of course, the dealer would have a right to afford the information desired; but it is argued that when the dealer opens such correspondence by letter or circular advertising his business he thereby violates sections 3 and 8 of the Yost Law, and further vitiates the subsequent (and otherwise lawful) order of the person receiving such letter or circular.

To this view I cannot assent. I cannot conceive that such use of the United States mails as is alleged in the bill can or does violate any section of the Yost Act, or that the court of last resort of the state will so construe said act. However, if it should so construe said act, I have no doubt but that the highest federal court would hold the law in that respect to be unconstitutional. However, that is a matter not directly arising here, as I do not construe the Yost Act as attempting to forbid the use of the United States mails to nonresident wholesalers of liquor in advertising their lawful business.

Hence there is nothing in either the Wilson Act or the Webb-Kenyon Act which authorized the state to interfere with the shipment and delivery of liquors ordered by a citizen of West Virginia for his own personal use from a licensed wholesale dealer without the state, and it follows that the preliminary injunction awarded by the circuit court of Kanawha county should be dissolved and the bill dismissed. I wish it understood that this ruling is made strictly upon the case before me, and has no reference to what might be the duties or obligations of the transportation company in the case of a consignment of liquor intended by the consignee to be resold or used in violation of the laws of West Virginia.

JAMES CLARK DISTILLING CO. OF CUMBERLAND, MD., v. WESTERN MARYLAND RY. CO.

(District Court, D. Maryland. December 18, 1914. On Reargument, January 23, 1915.)

1. JUDGMENT ⊂=668—FOREIGN STATE—DECREE—CONCLUSIVENESS.
Where, in a suit to compel a railroad company to transport liquor from Maryland into West Virginia, contrary to a decree which West Virginia had obtained against the railroad company in one of its own courts, the latter state voluntarily appeared and became a party, it alone could complain of any disobedience of the decree, and would be bound by whatever proceedings were properly taken in the suit.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1181–1183, 1188; Dec. Dig. ⊂=668.]

2. INTOXICATING LIQUORS ⊂=147—WRONGFUL SALE—STATUTES—CONSTRUCTION.
Act W. Va. July 1, 1914, § 3, regulating the sale of liquors, provides that, in case of a sale in which a shipment or delivery of liquors is made by a common or other carrier, the sale shall be deemed to have been made in the county wherein the delivery is made by the carrier to the consignee his agent, or employer. *Held*, that such provision could not be construed as making illegal anything not otherwise prohibited, and did not forbid the sale of liquors in Maryland to be transported to West Virginia, nor could it validly change a completed sale in Maryland to one made in West Virginia.
[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 162; Dec. Dig. ⊂=147.]

3. INTOXICATING LIQUORS ⊂=132—TRANSPORTATION—INTERSTATE COMMERCE.
Liquor brought into West Virginia from Maryland for the exclusive use of the consignee is not intended by any one interested therein to be received, possessed, or used in violation of any law of West Virginia.
[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 141; Dec. Dig. ⊂=132.]

4. INTOXICATING LIQUORS ⊂=146—SALES—SOLICITATION.
Mailing of letters in Maryland, where liquor may be properly sold, soliciting orders therefor in dry counties in West Virginia, is not prohibited by Act W. Va. July 1, 1914, regulating the sale of liquor in that state.
[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 159, 160, 163; Dec. Dig. ⊂=146.]

5. COURTS ⊂=366—FEDERAL COURTS—STATE STATUTES—CONSTRUCTION.
While federal courts are bound to accept the construction placed on state statutes by the courts of the state, they are not required to accept

the construction of a state court of first instance, construing a state statute on an ex parte application for an injunction.

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

6. INTOXICATING LIQUORS ⊂⊃6—REGULATION—PURCHASE AND MANUFACTURE.
A state may constitutionally prohibit its citizens from buying or making intoxicating liquors within the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. ⊂⊃6.]

7. INTOXICATING LIQUORS ⊂⊃138 — COMMON CARRIER — TRANSPORTATION OF LIQUORS.
A common carrier may be compelled to receive intoxicating liquor for transportation from Maryland into West Virginia, provided the liquor is intended solely for the personal use of the consignee, though orders for the liquor have been solicited by letters mailed at points without the state; but the carrier may not legally accept for shipment, or deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the laws of the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. ⊂⊃138.]

8. INTOXICATING LIQUORS ⊂⊃138—TRANSPORTATION—DUTY OF CARRIER.
Where intoxicating liquors are offered to a carrier for transportation from Maryland into West Virginia, for the alleged personal use of the consignee, the carrier is not bound at his peril to make sure that the liquors are not intended to be used contrary to the laws of such state, but is only required to act in good faith in a bona fide effort to prevent its instrumentalities being used to aid a violation of the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. ⊂⊃138.]

In Equity. Suit by the James Clark Distilling Company of Cumberland, Md., against the Western Maryland Railway Company. Decree for complainant.

J. Philip Roman and Walter C. Capper, both of Cumberland, Md., and Lawrence Maxwell, of Cincinnati, Ohio, for plaintiffs.

Benjamin A. Richmond, of Cumberland, Md., for defendant.

John Philip Hill, of Baltimore, Md., for American Express Co.

Fred O. Blue, Commissioner of Prohibition, of Charleston, W. Va., for the state of West Virginia.

ROSE, District Judge. Both the plaintiff and the defendant are Maryland corporations. The interposition of this court is invoked for the protection of rights said to be given by the Constitution and laws of the United States. The defendant operates a railroad between Cumberland, Md., and various stations in the counties of Mineral, Grant and Tucker, W. Va., among them being the town of Parsons. On July 1, 1914, there went into effect an act of the Legislature of the latter state commonly known as the "Yost Law." It prohibits, except for medicinal, pharmaceutical, scientific, mechanical, or sacramental purposes, the manufacture, sale, or offer for sale of intoxicants and the soliciting or receiving of orders for them. It contains many provisions intended to make evasion difficult and dangerous. Penalties are imposed on those who by themselves or in association

with others maintain any clubhouse or other place in which liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage, or for distribution or division among the members of any club or association. Section 8 provides in part that:

"If any person shall advertise or give notice by signs, bill board, newspapers, periodicals or otherwise * * * of the sale or keeping for sale of liquors, or shall circulate or distribute any price-lists, circulars or order blanks advertising liquors, or publish any newspaper, magazine, periodical or other written or printed papers, in which such advertisements or notices are given, or shall permit any such notices, or any advertisement of liquors (including bill boards) to be posted upon his premises, or premises under his control, or shall permit the same to so remain upon such premises, shall be guilty of a misdemeanor."

Another section requires common carriers to keep books in which shall be entered the name of every person to whom liquors are shipped and the amount and kind thereof, together with the date of delivery and by and to whom delivered. Every consignee must in person sign his name to such record.

Within a few weeks after the act went into effect the state thought it had reason to believe that systematic attempts to evade its provisions were being made by various residents of the counties named. It accordingly, as authorized by law, sought the aid of its circuit court having jurisdiction in them. It filed a bill against the company, which is the defendant in this cause. It alleged various facts which strongly tended to show that the defendant was delivering great quantities of liquor to many different persons in the town of Thomas and its neighborhood, and that a number of these shipments were of such quantities as to make it highly improbable that they could have been intended solely for the personal use of the consignees. It charged that much of this liquor had been shipped to boarding bosses and other persons, to be, in violation of law, by them distributed to their boarders or associates. It said that the defendant was accepting shipments and making deliveries of liquors without exercising due care to ascertain that they were not intended to be used in violation of its laws. In accordance with the prayer of this bill an ex parte injunction was issued, which, among other things, enjoined the defendant from accepting for transportation or delivery to any one in the three counties in question any liquors, unless it had first ascertained—

"by acting in good faith, with due diligence and caution, that such liquors were ordered by the consignees for their lawful personal use without solicitation on the part of the consignors, and that such liquors were offered by the consignors for acceptance and delivery thereof by the said defendant to the consignees for their lawful personal use without intention by any person interested therein to be received, possessed, sold or in any manner used in violation of any law of the said state."

It was further enjoined from delivering to any person in the counties named any liquors procured by the consignee, by him and those associated with him—

"to be received or kept for the purpose of use or gift as a beverage or for distribution or division among himself and those associating with him, at any place which is kept or maintained by himself or by associating with

others, or which he by himself or by association with others in any manner aids, assists or abets in keeping or maintaining."

The decree, moreover, prohibited delivery to any person—

"unless the consignee signs the defendant's liquor record in his own proper person and not in the name of some fictitious person, or otherwise, and then only when the consignee has ordered the same for his personal lawful use with no intention that the liquor so delivered is to be received, possessed, sold or in any manner used in said state of West Virginia in violation of any law thereof."

So soon as this injunction was served upon the defendant, it determined to refuse, and thereafter did refuse, to receive any shipments of liquor for transportation to any station in those counties. It says that if it attempted, before accepting such shipments or before making such deliveries, to obtain the information required by the order of the West Virginia court, it would be compelled to employ an army of detectives and investigators, which would cost it far more than the gross freight it would receive for the transportation of the merchandise in question.

The plaintiff is a liquor dealer in Cumberland. It has a large and profitable trade in the portion of West Virginia included within those counties. It is also one of the concerns which the state of West Virginia in its bill of complaint in its own court specially mentioned as shipping liquors in large quantities to the town of Thomas and its neighborhood. Both before and after the going into effect of the Yost Act it has through the mails systematically distributed price lists and solicited orders from residents of that part of the state. With its price lists and soliciting circulars it sent out order blanks to be filled up and signed by prospective purchasers. In these blanks there is a clause stating that the liquor is intended for the personal use of the individual giving the order.

In August, 1914, one Floyd Rosier, a resident of the town of Parsons, by one of these order blanks directed the shipment to him by the plaintiff of four quarts of alcohol and sent a post office money order for $4 in payment therefor. The plaintiff packed the goods for shipment and tendered them to the defendant for transportation. In accordance with the determination at which, as before stated, it had arrived, the defendant refused to receive or transport the package and announced that it would refuse to accept any intoxicants for delivery in the territory in which the injunction was operative. The plaintiff thereupon instituted these proceedings. It seeks a mandatory injunction to compel the defendant to transport all liquors ordered, without plaintiff's solicitation, by Rosier and other customers for their own personal use. At its request, and with the consent of all parties, the state of West Virginia has been made a party to the suit.

Only two questions in this case interest the defendant. It fears that it may be commanded to do something for the doing of which the state court will punish it, and it objects to spending a large sum of money to keep other people from evading the liquor laws of West Virginia.

[1] The voluntary appearance of the state disposes of the former. It was the plaintiff in its own courts. It alone can complain of any disobedience of the decree there passed. It has come into this proceeding and will be bound by whatever is properly done herein.

The expenses to which the defendant may lawfully be put in connection with the shipment and delivery of intoxicants in West Virginia depends upon the degree of care which it may be required to exercise to prevent others using its facilities to break the laws of the state. The controversy between the plaintiff and the state is more far-reaching and will be first passed upon.

At the hearing the counsel for the state argued, first, that any shipment into West Virginia by a seller to a buyer of intoxicants was prohibited; second, that, even if that was not so, any such shipment was forbidden if the seller had by mail or otherwise solicited the order for it.

[2] The first contention was based upon the construction which the state put upon a clause of section 3 of the act, which reads:

"In case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employé."

The sale of intoxicants in West Virginia is prohibited. Liquor which a resident of West Virginia orders from out of the state is usually delivered to him by a common carrier. If he has bought it, the state says that the law declares that the sale has taken place in the county in which he lives.

Such an interpretation of the statute cannot be accepted. The provision quoted does not make illegal anything not otherwise forbidden. All that it does or was intended to do was to make certain the county in which those who had offended against its other provisions should be prosecuted. The state could not forbid the sale of liquors in Maryland, nor could it say that what by the general law was a completed sale in Maryland should be held to have been made in West Virginia. American Express Co. v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417.

If it had wished to keep citizens of West Virginia from obtaining liquor even for their own personal use from outside the state, and had the constitutional right to do so, it might have made it an offense for any one to order them or to receive or have them. There is nothing in the act, however, to indicate that the state had any objection to any one obtaining liquor for his own personal use provided he can do so otherwise than by, within the state, buying or making it.

[3] It follows that liquor brought into West Virginia for the exclusive personal use of the consignee is not intended by any one interested therein to be received, possessed, or used in violation of any law of that state.

[4] Does the fact that such order has been solicited through the mails by a nonresident dealer in liquors make the transaction which would otherwise have been lawful illegal? One may solicit in writing, as well as by word of mouth. Such a solicitation is made at the place

at which in pursuance of the intent of the person making it the written communication is delivered to the person solicited. United States v. Thayer, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673.

That the letter is mailed in another state from that at which it is to be delivered does not necessarily prevent the latter state from punishing the sender if it can catch him. In re Palliser, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514.

It may be that the right to inflict punishment in such cases may be exercised only when the letter is sent in furtherance of something which the common moral sense of mankind regards as criminal, and does not exist when the thing, aided by the letter, would be in itself indifferent had it not been made criminal by local legislation. Adams v. People, 1 N. Y. 175.

Into these niceties it is unnecessary to go. Judge Keller has held that the Yost Act, reasonably construed, does not attempt to prohibit the solicitation of liquor orders by means of communications mailed from without the state. West Virginia v. Adams Express Co. et al., 219 Fed. 331.

It seems only fair to presume that if the Legislature had wished to deal with that phase of the problem it would have used language which would have made its purpose plain. I therefore agree that the West Virginia law has not attempted to prohibit such method of soliciting. Whether it has a constitutional right to do so if it chooses need not be here decided, and I intimate no opinion as to it.

[5] The federal courts are, of course, bound by the construction which those of the state put upon its own statutes. I do not understand, however, that such rule requires national tribunals to accept the issue by a state court of first instance of an injunction upon an ex parte application as an authoritative construction of the applicable state legislation.

The defendant in this case makes no objection to the requirement that it shall keep certain kinds of delivery books. It is consequently unnecessary to inquire whether the somewhat narrow construction put upon the Webb-Kenyon Act by a number of state courts of last resort, in such cases as Adams Express Co. v. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342, Palmer v. Southern Express Co., 129 Tenn. 116, 165 S. W. 236, Van Winkle v. State (Del.) 91 Atl. 385, or that in effect given to it by Judge Bean in United States v. Oregon Washington Rail Navigation Co. (D. C.) 210 Fed. 378, is the sounder interpretation of the intentions of the Congress which passed it. It would be even more beside the mark to pass upon the soundness of plaintiff's contention that a state cannot validly prohibit the possession by an individual of intoxicants for his own personal use. A number of courts of high rank have so held. State v. Gilman, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847; Commonwealth v. Campbell, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172, 19 Ann. Cas. 159; Eidge v. City of Bessemer, 164 Ala. 599, 51 South. 246, 26 L. R. A. (N. S.) 394.

[6] On the other hand, it is clearly settled that he may be constitutionally prohibited from either buying or making it within the state.

As every state in the Union has the like right, and as it is at least possible that Congress may validly prohibit its importation from abroad, the right, if it exists, may be lawfully made almost impossible of exercise.

[7] In this case nothing need be decided other than that the defendant as a common carrier is bound to receive for shipment, and to transport and deliver in West Virginia, such liquors as are intended solely for the personal use of the consignee, even though the orders for them had been solicited by letters mailed at points outside the state. It has no right to accept for shipment, or to deliver in West Virginia, liquors which are intended by any person interested therein to be used in any way forbidden by the law of that state.

[8] It is not bound at its peril to make sure that no liquor transported by it is intended to be used contrary to the state law. It need not create or maintain any special staff of investigators or detectives to aid it in determining such questions. It must, however, act in good faith. Its agents and employés who handle such shipments for it must keep their eyes open, and must exercise common sense to prevent it and its instrumentalities being used as aids in violation of the law.

A decree may be drawn in accordance with the conclusions herein stated.

On Reargument.

A decree as indicated in the foregoing opinion was entered on December 24, 1914. On the 13th of January, 1915, the Circuit Court of Appeals for the Fourth Circuit handed down its opinion in State of West Virginia v. Adams Express Company, 219 Fed. 794, 135 C. C. A. 464. Under the views therein expressed, the plaintiff in this case was not entitled to the relief granted it. Judge Rose of his own motion directed a reargument, which was had on the 23d of January, 1915, as a result of which the plaintiff's bill was dismissed, and in open court an appeal was prayed to the Supreme Court of the United States.

JAMES CLARK DISTILLING CO. OF CUMBERLAND, MD., v. AMERICAN EXPRESS CO.

(District Court, D. Maryland. December 18, 1914. On Reargument, January 23, 1915.)

In Equity. Suit by the James Clark Distilling Company of Cumberland, Md., against the American Express Company, to restrain defendant from refusing to transport intoxicating liquor from Maryland into West Virginia. Decree for complainant.

ROSE, District Judge. For the reasons stated in the opinion filed in the case of James Clark Distilling Company of Cumberland, Md., a Corporation, v. Western Maryland Railway Company, a Corporation, 219 Fed. 333, the plaintiff may present draft of decree for an injunction to the effect therein indicated.

On Reargument.

Plaintiff's bill dismissed.

In re MOARK-NEMO CONSOL. MINING CO.

(District Court, W. D. Missouri, S. W. D. January 14, 1915.)

No. 285.

1. EXECUTION ⟸37—MORTGAGED CHATTELS—EQUITY OF REDEMPTION—LEVY.
Under the Missouri law a chattel mortgagor's equity of redemption in personal property may not be levied on and sold under execution after condition broken and the mortgagee has assumed possession.
[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 51, 95–97, 101, 103; Dec. Dig. ⟸37.]

2. BANKRUPTCY ⟸59—"ACT OF BANKRUPTCY"—FAILURE TO DISCHARGE VOID LEVY.
Where a chattel mortgagor's equity of redemption in the mortgaged property after condition broken and possession taken by the mortgagee was not subject to execution levy, his failure to vacate the levy within five days prior to sale did not diminish his estate or constitute a final disposition of any of his property, so as to give the execution creditor a preference, and hence did not constitute an "act of bankruptcy."
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. ⟸59.
For other definitions, see Words and Phrases, First and Second Series, Act of Bankruptcy.]

In Bankruptcy. In the matter of bankruptcy proceedings of the Moark-Nemo Consolidated Mining Company. Involuntary petition dismissed.

Haywood Scott, of Joplin, Mo., for petitioning creditors.
A. W. Thurman, of Joplin, Mo., for bankrupt.

VAN VALKENBURGH, District Judge. The sole question presented is whether the failure of the bankrupt to vacate a judgment levy upon certain property within five days prior to sale thereof under excution constituted an act of bankruptcy under section 3a of the act of July 1, 1898 (30 Stat. 546, c. 541 [Comp. St. 1913, § 9587]), which reads as follows:

"Acts of bankruptcy by a person shall consist of his having: * * * (3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

[1] The record shows that the alleged bankrupt was in default under the terms of a chattel deed of trust covering the entire property upon which the levy was made, and that the trustee, under said chattel deed of trust, had taken possession of the property prior to levy and had advertised the same for sale. The following concession is made by counsel for petitioning creditors in his brief:

"Although, in most of the states, the rule is that the mortgagor's equity of redemption in personal property may be sold under execution at any time before the equity is foreclosed, yet the rule in Missouri seems to be to the contrary. While there are no late cases on the subject, the earlier cases are to the effect that the mortgagor's equity of redemption, after condition broken and possession is in the mortgagee, is not the subject of sale under execution.

We find no cases to the contrary, in Missouri. It would seem, therefore, that the levy of the constable in this case was invalid."

This is undoubtedly the law in this state. Counsel contends that it was nevertheless the duty of the bankrupt to vacate or discharge the invalid levy.

[2] It seems to me, in passing, that counsel herein fails to distinguish between an invalidity which inheres in the proceedings through which judgment is procured or levy made upon property of the bankrupt otherwise subject to execution and sale, and a levy which is void and of no effect because made upon property immune from such levy. The act embraces all forms of legal procedure, the effect of which is to enable the creditor to secure a preference by fastening a lien upon the property of the bankrupt, whereby, through sale or other disposition, it may be transferred and withdrawn from the possession and control of the debtor, and from the ordinary reach of creditors for the payment of what is due to them. Loveland on Bankruptcy, vol. 1, p. 326. Some proceedings, such as attachment, fasten upon the property at the outset; and after judgment and sale the initial seizure may be consummated into a preferential transfer. An ordinary judgment does not operate thus. It can ripen into a preference only through an execution levy and sale of property which may thereby be withdrawn from the bankrupt's estate and devoted to the exclusive enjoyment of the judgment creditor. As was said by Judge McPherson in Re Moyer (D. C.) 93 Fed. 188, 189:

"The dominant fact seems to be the actual result that has been attained by the creditor. If, through legal proceedings, he has succeeded in obtaining a preference—that is (referring to section 60 for a description of preferred creditors), if the debtor is insolvent, and has either 'procured or suffered a judgment to be entered against himself, * * * and the effect of the enforcement of such judgment * * * will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class'—if this is the actual result of legal proceedings taken against an insolvent debtor, the clause in question requires the debtor to vacate or discharge such preference within a specified time, and if he fails so to do, declares that he has committed an act of bankruptcy."

Of course, the preference must be obtained out of property of the bankrupt which is thereby withdrawn from the estate subject to the claims of other creditors of the same class. Mr. Collier (9th Ed., p. 802) says:

"Estate Must be Diminished.—A fictitious transaction not affecting the estate of the debtor or the rights of creditors cannot be deemed a transfer, although assuming the form of one."

If A. were to secure a judgment against B. (an alleged bankrupt), and levy upon what is undeniably the property of C., could it be said that the duty would devolve upon B. to vacate this proceeding within five days of a sale which could in no wise affect or diminish his estate? Here, under the law in this state, this property had already been withdrawn from the control of the bankrupt by a mortgage creditor. It was not subject to levy under this execution, and a sale thereunder could have no effect of diminishing the bankrupt's estate, and thereby result in disadvantage to other creditors of the same class.

In Citizens' Banking Co. v. Ravenna National Bank, 234 U. S. 360–368, 34 Sup. Ct. 806, 809 (58 L. Ed. 1352), the Supreme Court, speaking through Mr. Justice Van Devanter, says:

"When one speaks of a sale or final disposition of property, he means by final disposition an act having substantially the effect of a sale—a transfer of ownership and control from one to another—and especially is this true when he is referring to a sale or final disposition in the enforcement of a lien."

The act says:

"Sale or final disposition of any property affected by such preference."

But it is conceded that this property was not, and could not be, affected by this so-called preference. None of the decisions brought to my attention conflict with the conclusion I have reached. It follows that the petitioning creditors have failed to establish the act of bankruptcy charged, and the petition must be dismissed.

It is so ordered.

UNITED STATES v. CHICAGO & N. W. RY. CO.

(District Court, W. D. Michigan, N. D. October 30, 1914.)

1. MASTER AND SERVANT ⟸13—RAILROADS—HOURS OF SERVICE LAW—REGULATION—"ON DUTY."

Where a railroad operator was always subject to call whenever his services were required, both during meal hours and at other times, he was "on duty," so that the periods allowed him by the railroad company for meals and other purposes did not interrupt the continuity of his service, within the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, § 8677]).

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

For other definitions, see Words and Phrases, Second Series, On Duty.]

2. MASTER AND SERVANT ⟸13—RAILROADS—HOURS OF SERVICE LAW—DELAY OF TRAINS—"EMERGENCY."

Delays in the departure of trains caused by the lateness of other trains on connecting lines do not constitute an "emergency" within the Hours of Service Law.

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

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

3. MASTER AND SERVANT ⟸13—RAILROADS—HOURS OF SERVICE LAW—ACCIDENTS.

Delay of the departure of a circus train which circumstances required should be loaded on the main line, due to the act of the circus company's intoxicated employés in running a wagon off a flat car, was an ordinary accident which furnished neither justification nor excuse for a violation of the Hours of Service Law.

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

Suit by the United States of America against the Chicago & Northwestern Railway Company to recover penalties for violation of the Hours of Service Law. Judgment for plaintiff.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Myron H. Walker, Dist. Atty., of Grand Rapids, Mich., and Walter U. Brown, of Washington, D. C., for plaintiff.

Frank A. Bell, of Negaunee, Mich., for defendant.

SESSIONS, District Judge. This is a suit to recover penalties for violations of the Hours of Service Act of March 4, 1907, in keeping telegraph operators on duty for more than 13 hours during periods of 24 hours. The complaint or declaration contains 24 counts, in each of which a separate and distinct violation is alleged. The defendant confesses liability under 14 of the counts, but denies liability under the other 10 counts. The decision of the case in each of 8 counts hinges upon the question of whether or not the time for meals of the operator should be deducted from the hours of his service. The stipulated facts in this regard are as follows:

"As to counts 2, 3, 7, 9, 10, 11, 12, and 13 the employés in each instance were off duty for dinner or supper or both for full regular periods of one hour for each meal sufficient to reduce the period of service to less than 13 hours. And as to these counts it is agreed that the testimony shows that the employé always has a full hour off duty for dinner and also for supper as a uniform and regular practice; that they have no definite recollection as to the particular days in question; that if during a meal hour an unexpected train should arrive at their station they would give it the necessary attention and complete their meal hour after doing so as a common practice; that they were paid for the full amount of overtime charged; and also for their regular service."

[1] From these facts, it is apparent that the operator was always subject to call whenever his services were required, both during meal hours and at other times. It is well settled that, within the meaning of the Hours of Service Act, brief periods allowed for meals and other purposes do not interrupt the continuity of service. Under the circumstances here shown, it must be held that the operator was on duty during the time he was taking his meals. United States v. Chicago, M. & P. S. Ry. Co. (D. C.) 197 Fed. 624–627; M., K. & T. Ry. Co. v. United States, 231 U. S 112–119, 34 Sup. Ct. 26, 58 L. Ed. 144; United States v. Northern Pac. Ry. Co. (D. C.) 213 Fed. 539.

[2] The defense to the causes of action alleged in the remaining two counts (21 and 22) is that, in each case, an emergency existed which excused and justified the excessive time of service. As to count 21, the alleged emergency is thus described in the stipulation of facts:

"A regular passenger train, through from Calumet, Mich., to Chicago, Ill., over the Duluth, South Shore & Atlantic Railway and Chicago & Northwestern, due to be delivered to the Chicago & Northwestern Railway at Ishpeming, Mich., at 6:15, and due out of Ishpeming at 6:30 p. m., was not delivered to the Chicago & Northwestern so that it could leave there until 10 o'clock p. m.: that on its departure the employé went at once off duty; that the operator knew about 5 o'clock p. m. that the train was late; that Ishpeming is a daytime station, and there are no other operators there in the employ of the defendant."

Delays in the arrival and departure of trains are of frequent occurrence and are usual incidents in the ordinary operation of railroads. The fact that the defendant received the through train in question from another railroad is of no consequence. Delays in the departure

of trains caused by trains upon connecting lines being late are common. Such delays do not constitute an emergency within the meaning of the law. United States v. Kansas City Southern Ry. Co., 202 Fed. 828-833, 834, 121 C. C. A. 136; United States v. Kansas City Southern Ry. Co. (D. C.) 189 Fed. 471–478.

[3] The facts, as stipulated, with reference to the overtime service charged in count 22, are these:

"A carnival company was loading its stuff in Norway for removal to Green Bay, Wis. Some of its employés were intoxicated and ran a wagon off a flat car which caused a long delay in the train's departure. On account of physical conditions, this train was of necessity loaded on one of the main lines, and it was necessary to clear said line as soon as possible. The assistant superintendent was on the ground and directed the employé to stay as he did to assist in getting orders for that train. The carnival company had been in Norway several days and was due to leave there at 9 o'clock of the night of Sunday, the 21st. The regular assigned hours for which the employé was regularly paid, including meal hours, were from 7 a. m. to 7 p. m. and the employé was paid overtime from 7 to 12 p. m."

It thus appears that the accident which caused the delay in the departure of the circus train occurred a considerable time before the expiration of the period during which the operator might lawfully have worked. He had been continuously on duty since 7 o'clock in the morning, and the train was not due to leave until 9 o'clock at night. There is no showing that another operator could not have been procured. Accidents of this character often happen and are to be expected. They furnish neither justification nor excuse for a violation of a remedial statute like the one under consideration. United States v. Southern Pac. Ry. Co., 209 Fed. 562, 126 C. C. A. 384.

Judgment will be entered in favor of the plaintiff and against the defendant for the sum of $100 upon each count of the declaration. Plaintiff will recover costs of suit to be taxed.

WALSH'S ADM'X v. JOPLIN & P. RY. CO.

THEOLETE v. SAME.

(District Court, D. Kansas, Third Division, at Ft. Scott.)

REMOVAL OF CAUSES ⇐107—COSTS ON REMAND TO STATE COURT—ATTORNEY'S FEES—"FINAL JUDGMENT."

Under Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), providing that if, in any suit removed from a state court, it shall appear that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the United States District Court, that court shall remand it to the court from which it was removed and make such order as to costs as shall be just, and Rev. St. § 824 (Comp. St. 1913, § 1378), providing, relative to the compensation to be taxed and allowed to attorneys, etc., that on a trial before a jury, or on a final hearing in equity or admiralty, a docket fee of $20, and in cases at law, when judgment is rendered without a jury, $10, shall be allowed, an attorney's docket fee of $10 is an appropriate allowance to be taxed as costs on remand of a case to the state court, as the discretion given the court by section 37, if not absolutely limited by section 824, should at least adapt itself so far as practicable to the spirit of the provisions of that section, and an order remanding a cause, not being reviewable, is in the nature of a "final judgment."

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

For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

At Law. Actions by Walsh's administratrix and by one Theolete against the Joplin & Pittsburg Railway Company. On motion to retax costs after a remand to the state court. Motion granted.

Wm. P. Dillard, of Ft. Scott, Kan., for plaintiffs.

Edward C. Wright, of Kansas City, Mo., for defendant.

VAN VALKENBURGH, District Judge. These cases were commenced in the district court of Crawford county, Kan. The defendant brought them to this court upon petition for removal. Upon appropriate motions they were remanded to the state court at defendant's costs, but no order was made at the time with reference to the amount of such costs, or with reference to attorney's docket fee. Plaintiffs have filed motions to retax the costs, contending that an attorney's fee should be taxed against the removing defendant in each case. It is particularly desired that a rule should be made establishing the practice in this regard for this district.

Section 37 of the Judicial Code makes the following provision:

"If in any suit * * * removed from a state court to a District Court of the United States, it shall appear to the satisfaction of the said District Court, at any time after such suit has been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, * * * the said District Court shall * * * remand it to the court from which it was removed, * * * and shall make such order as to costs as shall be just."

Under the heading "Fees of Attorneys, Solicitors and Proctors," section 824 of the Revised Statutes (Comp. St. 1913, § 1378) provides what attorney's docket fees may be taxed as costs. The paragraphs here applicable are the following:

"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: Provided, that in cases of admiralty and maritime jurisdiction, where the libelant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars."

"In cases at law, when judgment is rendered without a jury, ten dollars."

It would seem that the discretion lodged in the court by section 37 of the Judicial Code, if not absolutely limited by the provisions of section 824, should at least adapt itself, so far as practicable, to the spirit of those provisions. Five cases in which this matter has been up for consideration have been called to the attention of the court. They disclose some contrariety of opinion; but to my mind little difficulty should be experienced in arriving at a rule both just and equitable, and well within the power of the court expressly conferred by statute.

In Smith v. Western Union Telegraph Co. (C. C.) 81 Fed. 242, Judge Baker refused to allow a docket fee, in any amount, upon the ground that such action accorded with the practice in the entire Seventh circuit, and that a practice of the court so long continued ought not to be changed. In all the other cases cited a fee was allowed.

In Josslyn v. Phillips (C. C.) 27 Fed. 481, Judge (afterwards Justice) Brown thought it competent for the court to allow such a fee as is ordinarily awarded on the final disposition of the cause, viz., a docket fee of $20.

In Pellett v. Great Northern Railway Co. et al. (C. C.) 105 Fed. 194, Judge Hanford allowed a fee of $10 upon the following stated ground:

"This being an action at law, and there having been no jury trial, and no depositions having been taken, the only costs which the plaintiff is entitled to recover are the statutory fees of the clerk for services performed at the instance of plaintiff and a docket fee of $10 prescribed by section 824, Rev. St. U. S."

In Riser v. Southern Railway Co. et al. (C. C.) 116 Fed. 1014, Simonton, Circuit Judge, reaches the same conclusion as Judge Hanford upon practically the same reasoning.

In Acker et al. v. Charleston & W. C. Ry. Co. (C. C.) 190 Fed. 288, the rule announced by Judge Simonton was reaffirmed.

It seems clear that by section 37, above quoted, this court has discretion to make such order as shall be just as to costs, which may include an attorney's docket fee. An order remanding a cause is not reviewable, and therefore is in the nature of a final judgment. Rendered without the intervention of a jury, it falls logically within the second paragraph of section 824, supra. An attorney's docket fee of $10 is therefore the appropriate allowance.

It is unnecessary to review the reasoning of the cases cited in which such fees have been allowed as costs. That reasoning is approved, and nothing can be gained by further elaboration. Obviously the rule

involves no discrimination against the removing party. The state court had jurisdiction of the cause. A plaintiff has the undoubted right to bring his action in the forum of his choice, subject to the right of removal where the statutory grounds exist. If the removal is improvidently sought, the removing party should, to this extent, compensate his adversary for the inconvenience and expense to which the latter has been subjected without legal warrant.

It results that the clerk is ordered to retax the costs in each of the above-named cases, by including an attorney's docket fee of $10, in accordance with this opinion.

I am authorized to state that Judge POLLOCK concurs in the views herein expressed.

In re KRICHEVSKY.

(District Court, E. D. Pennsylvania. January 18, 1915.)

No. 4087.

BANKRUPTCY ⊂⊃136—CONCEALMENT OF ASSETS—PAYMENT TO TRUSTEE—CONTEMPT—COMMITMENT.

Where a bankrupt had been found to have concealed money from his trustee, and had fraudulently and defiantly refused to comply with an order requiring him to pay over the money, and the court in contempt proceedings was satisfied that his failure to comply was not because of his inability to do so but because of his obstinate refusal, it was the court's duty to order his imprisonment until the order was complied with, or until the further order of the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⊂⊃136.]

In Bankruptcy. In the matter of bankruptcy proceedings against Morris Krichevsky. Sur rule for attachment for contempt. Rule absolute.

Edwin Fischer and Henry N. Wessel, both of Philadelphia, Pa., for trustee.

Albert L. Moise, of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. There are several principles of the law involved in the disposition to be made of this motion. All of them are in themselves of the greatest importance. Some of them overlap others, and are, because of this, exclusive in their operation. The one we will put first is that affecting the personal liberty of the bankrupt. The power of the court to enforce obedience to its orders must be undoubted. The correlative duty to carry out the mandates of the law is clear. The principle is that no man should be deprived of his liberty until after the verdict of a jury condemning him to its loss, or otherwise by due process of law. The alternative power vested in others than a jury should be exercised in due subordination to this preferred procedure, when personal liberty is at stake. The other principle of due subordination to the law is, however, of equal importance, because the first cannot be secured except through the second. The liberty which

is of value is liberty under the law. Law is of value only when respected, and to be respected it must be enforced. The latter observation is of pressing application to the general situation out of which this particular case springs. Cases of fraudulent insolvency, if frequent, soon raise a public scandal. If the machinery of the law devised for the relief of honest debtors upon whom the misfortune of insolvency has fallen is used as the instrument of fraud, the situation becomes intolerable. That such attempts will be made is to be expected. If amiable weakness palsies the punitive hand of the law when the fraud is exposed, the efforts of those who are charged with the duty of the suppression of such frauds are discouraged.

The facts in this case have received the very fullest investigation. The fraud of this bankrupt is clear. The referee has found it. The court has given its sanction to the finding. A jury has pronounced his guilt to have been proven beyond a reasonable doubt. The bankrupt has been continuously defiant through it all. There could, after this, be but one possible answer to the demand that an attachment issue. The bankrupt might not now be able to comply with the order of the court. Men whose sincerity could not be questioned, and whose opinions command the respect of the court, took this view of the case and interceded for him. His very creditors were believed to be of this mind.

A special reference was made to have the attitude of the creditors found and made known to the court. The referee has returned this to be the position of the creditors as a body. There are, of course, individual exceptions. If the bankrupt is able to satisfy the court of his inability to comply with the order, they do not wish him to be punished for contempt. The duty of the court is clear. We have heard all the bankrupt had to say, and all which could be said for him. The conviction forced upon us is unfavorable to the bankrupt. He takes refuge in statements as to the facts so vague as to be unintelligible. This might be due to a lack of intelligence. He resorts, however, to the most unfounded and scandalous attacks upon every one connected with the investigations which have been made. He has displayed a low cunning, which, although that of an unintelligent, is also that of an evil and criminal, mind. He has plainly sought to "make lies his refuge," and the Book with which he ought to be familiar should have taught him that this is the surest indication of his guilt. He has made a distinctly bad impression, and has confirmed the conviction of his guilt. We would be glad to accept, if we could, the views of those who have interested themselves in his case. This we have found impossible, and we cannot but think that they have been misled by kindness of heart to bestow their confidence upon the unworthy.

We are constrained to find that the order of the court is uncomplied with, not because this bankrupt cannot, but because he will not, comply with it. The case is disposed of by the order filed herewith. The filing of such an order is all we would have felt called upon to do, except for the intercession of the counsel who have appeared for this bankrupt and those who have interested themselves in his cause. The

respect which we feel is due to their opinion alone justifies us in discussing so plain a case.

Rule absolute. Bankrupt committed to Philadelphia county prison until the order requiring payment of $7,280.26 to the trustee is complied with, or until further order of the court.

In re WEBB.

(District Court, N. D. Georgia. January 12, 1915.)

No. 3462.

1. BANKRUPTCY ⟸399—EXEMPTIONS—CLAIM—TIME—EFFECT OF DISCHARGE.
A bankrupt's claim to an exemption should be made when he files his schedules, and in a voluntary case should accompany the same, and cannot be allowed where it was not made until after the bankrupt had obtained his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

2. BANKRUPTCY ⟸399—HOMESTEAD EXEMPTION—ALLOWANCE.
Where a bankrupt permitted his property to be sold without specifying any portion which he claimed as a homestead exemption, and purchased some of the property himself, he could not have an allowance of $1,600 in cash for a homestead exemption, charging against it the purchase price of the property bought, and receiving the difference from the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

3. BANKRUPTCY ⟸399—HOMESTEAD EXEMPTION—WAIVER—CREDITORS.
Creditors of a bankrupt, in whose favor he has waived his homestead exemption, may not have the value thereof turned over to them and distributed after the bankrupt has been discharged.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⟸399.]

In Bankruptcy. In the matter of bankruptcy proceedings of J. J. Webb. On claim for homestead exemption. Overruled.

Owens Johnson, of Atlanta, Ga., for bankrupt.

J. P. Brooke, of Alpharetta, Ga., N. A. Morris, of Marietta, Ga., and J. G. Roberts, of Atlanta, Ga., for trustee.

NEWMAN, District Judge. The bankrupt's original claim of homestead exemption, accompanying his schedules in this case, was clearly insufficient, and amounted to no claim of exemption at all. An amendment was offered, attempting to cure this lack of sufficiency in the original claim, and that is objected to as insufficient also.

[1] It is unnecessary to determine the sufficiency or insufficiency of this amendment, because it was made after the bankrupt had obtained his discharge in bankruptcy, and, in my opinion, it was too late then to claim an exemption. The proper time to claim an exemption is at the time the bankrupt's schedules are filed. In a volun-

tary case it should be a part of the schedules accompanying the application, and in an involuntary case it should be made at the time he files his schedules. Of course, these claims may be amended, if this is seasonably done; but in my opinion it is too late to wait until after he has obtained his discharge.

[2] The bankrupt in this case allowed his property to be sold, expecting, it appears, to get an exemption in cash. He should have specified some portion of his property, realty or personalty, and had the same set apart to him as a homestead exemption early in the bankruptcy proceedings. He not only failed to do this, but allowed the property to be sold, purchased some of it himself, and wished to set up what he owed as the purchase money as part of his homestead, and then wished the trustee to pay him in cash the difference between the purchase price of the property he bought and the $1,600. I do not think such a proceeding as this can be recognized at all.

[3] Another reason would prevent a man from claiming a homestead exemption after he has been discharged in bankruptcy. Under the laws of this state a person may waive his right to homestead exemption, and to allow him to obtain a discharge, and then claim an exemption after his discharge, would defeat the rights of creditors holding these waiver notes. Since the decision of the Supreme Court of Georgia in Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150, there has been a well-recognized and much-used method of enforcing the rights of these waiver note creditors. That is for the appointment of a receiver in the state court, who applies to this court for the exemption to be turned over to him, and then the state court divides this exemption among these waiver note creditors. Of course, if he had been discharged, the debts would be extinguished, and no such right would exist for these waiver note creditors at all.

In my opinion, the application for an exemption on the part of this bankrupt must be denied.

FOSTER v. COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR.

(District Court, E. D. New York. December 8, 1914.)

1. ADMIRALTY ⊂⊃26—PROCEDURE.

In admiralty, it is not good practice to borrow from the other branches of the law, merely for the exigencies of one situation, a different mode of procedure from that ordinarily used, which will conduce to confusion rather than uniformity of practice.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 265–274; Dec. Dig. ⊂⊃26.]

2. ADMIRALTY ⊂⊃65—PLEADING—OFFICE OF EXCEPTION.

Where, by reason of matters alleged in the answer, a libelant is entitled to a more full and particular statement of facts, the proper method of procedure is by exception to the answer, rather than by motion for a bill of particulars.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 515–518; Dec. Dig. ⊂⊃65.]

3. PLEADING ⊂⊃313—"BILL OF PARTICULARS" DEFINED.

A "bill of particulars" was originally used to obtain the items of an account, but has gradually, through the necessities of code practice, been extended to obtaining substantially any information outside of the physical inspection of papers and matters concerned with the litigation.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 949; Dec. Dig. ⊂⊃313.

For other definitions, see Words and Phrases, First and Second Series, Bill of Particulars.]

In Admiralty. Suit by Roger Foster against Compagnie Francaise de Navigation a Vapeur, Cyprien Fabre Et Cie. On motion by libelant for bill of particulars. Denied.

Jacob J. Aronson, of New York City, for the motion.

Butler, Brown, Wyckoff & Campbell, of New York City (Kenneth Gardner, of New York City, of counsel), opposed.

Roger Foster, of New York City, in pro. per.

CHATFIELD, District Judge. [1, 2] The libelant finds the answer of the respondent unsatisfactory, in that it states certain conclusions as to occurrences in France as to which the libelant thinks he should have an exact statement, so far as the respondent can furnish it, of the acts and papers on which the conclusions were based. He has attempted to secure this by making a motion for a bill of particulars, by analogy to the now generally recognized practice in actions at law, both civil and criminal.

[3] It would appear that a bill of particulars, which originally was the method for obtaining the items of an account, has gradually, through the necessities of code practice, been extended to denominate the means of obtaining substantially any information outside of the physical inspection of papers or matters concerned with the litigation.

In admiralty, however, the established practice governing procedure

by rules adopted and published makes it inadvisable to borrow, without uniformity and merely for the exigencies of one situation, a different nomenclature and a different procedure than that ordinarily used. It is not necessary to cause confusion and multiplication of forms by the introduction of analogous practices from other branches of the law, when confusion rather than uniformity or simplicity will be the result.

In the present case, the general matters of information would seem to be properly within the authority of the court to require as a part of the statement by the respondent, and by rules 23 and 32, such information could have been elicited (if the necessity therefor was apparent) either as a part of the allegations of the libel, or if a reply was needed.

But neither of these rules fits the particular case now under consideration, inasmuch as the matters of which information is sought are statements contained in the answer, and no reply is necessary thereto. It can be readily seen that the method of eliciting information by means of interrogatories could only be invoked through an application to amend the libel, and this would result in further confusion of the pleading without corresponding benefit.

Under rule 28, however, exceptions could have been filed to the answer within the time limited by the rule, and through these an amendment to the answer could have been directed which would meet the defect alleged in the present answer.

It would seem that a motion to extend the time to file such exceptions, and to obtain the information which is in the nature of what in other branches of the law would be called a bill of particulars, should be the course pursued by the libelant, and that the present motion should be denied.

In re GRAND UNION CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914. On Petition for Rehearing, January 22, 1915.)

No. 87.

1. SALES ⟸1—WHAT CONSTITUTES.

A "sale" is a transfer of property in a thing for a price in money. The transfer of the property in the thing sold from buyer to seller for a price is the essence of the transaction, and the transfer is a transfer of the general or absolute property, as distinguished from a special property, in the thing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3–5; Dec. Dig. ⟸1.

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

2. WORDS AND PHRASES—"LOAN OF MONEY."

A "loan of money" is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equal to that borrowed. In order to constitute a loan, there must be a contract whereby in substance one party transfers to the other a sum of money which the other agrees to repay absolutely, together with such additional sums as may be agreed on for its use, and if such be the intent of the parties the transaction will be a loan, regardless of its form.

3. SALES ⟸6—TRANSFER AS SECURITY—ASSIGNMENTS.

A contract by which a bankrupt agreed to sell and petitioner agreed to buy certain piano leases for less than their face, the bankrupt to guarantee collection of payments thereunder, and to collect the same for petitioner's benefit, and to repurchase uncollected leases, or substitute others therefor, etc., was not an absolute sale of the leases, but a transfer as security for a loan.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 14; Dec. Dig. ⟸6.]

4. CORPORATIONS ⟸461—ORGANIZATION—POWERS.

Petitioner, an Illinois corporation, was organized under an act authorizing the formation of corporations for any lawful purpose, except banking, insurance, real estate, brokerage, the operation of railroads, and the business of loaning money, and petitioner's charter declared that the general object of the corporation was to do a general brokerage and commission business, and to buy property other than corporate stocks and real estate at judicial, fiduciary, trustees', pledgors', mortgagees', and other liquidating sales, and convert the property into money, but not to engage in the business of loaning money, and to have a place of business where promissory notes or other evidences of indebtedness might be made payable. *Held*, that a contract by which a corporation agreed to purchase certain piano leases, which was in fact a mere loan of money at a usurious rate of interest by the corporation to the bankrupt, was prohibited by the corporation's charter and by the statute, and was therefore void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1814; Dec. Dig. ⟸461.]

5. CORPORATIONS ⟸385—"ULTRA VIRES."

While the phrase "ultra vires" has been used to designate, not only acts beyond the express and implied powers of a corporation, but also acts contrary to public policy or contrary to some express statute prohibiting them, the latter class of acts is now termed illegal, and the "ultra vires" confined to the former class.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1545–1547; Dec. Dig. ⟸385.

For other definitions, see Words and Phrases, First and Second Series, Ultra Vires.]

6. CORPORATIONS ⟸487—CONTRACTS—ILLEGALITY—RECOVERY OF PAYMENTS.
Where a contract by a corporation for a loan of money to a bankrupt on security of assignments of installment piano leases was illegal and executory, the corporation could not recover thereunder money collected by the bankrupt or its representative on the leases assigned, and funds paid over to the corporation on such leases would be credited to the bankrupt, not exceeding the sum actually advanced.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893–1898; Dec. Dig. ⟸487.]

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

This cause comes here on petition to revise and appeal from a final order made and entered in the United States District Court for the Southern District of New York on June 8, 1914, denying a motion made by the Hamilton Investment Company for an order directing the receiver and trustee of the Grand Union Company to account to it for any and all moneys that he had collected or that had come into his possession from the Grand Union Company out of certain leases and for other relief.

The Grand Union Company is a corporation organized under the laws of the state of New York, which maintained a place of business at No. 311 Third avenue, borough of Manhattan, city of New York. It was engaged in the business of selling pianos upon the installment plan and giving leases instead of bills of sale to the purchasers; the purchasers agreeing to pay weekly or monthly, as the case might be, for the pianos purchased. The Hamilton Investment Company is a corporation organized under the laws of the state of Illinois and having its principal office in Chicago in that state.

On January 20, 1912, the Grand Union Company and the Hamilton Investment Company entered into a contract with each other in which the former agreed to "sell" and the latter agreed to "buy" from time to time piano leases. Portions of the contract follow:

"First. First party hereby agrees to sell and second party agrees to buy from time to time such of said contracts which shall draw 6 per cent. interest per annum, and which second party shall indicate will be acceptable to it, paying therefor 70 per cent. of the face value thereof, upon delivery duly assigned and guaranteed and their acceptability duly indicated by second party, and paying a further 20 per cent. of the face value of said contracts as nearly as practicable in quarterly installments, but not to exceed 20 per cent. of the amounts that shall from time to time be thereafter collected upon said contracts until a total of 90 per cent. shall have been paid, as the full purchase price of said contracts.

"When first party shall sell pursuant hereto contracts which shall have been given by divers purchasers payable in installments, and any of which shall not be promptly met, first party shall promptly repurchase any such contracts so in arrears for cash at par for the balance uncollected thereon, or substitute therefor other acceptable contracts of equal value and shall then also pay cash for such portions as shall be then in default.

"Second. First party shall in every case execute an absolute assignment and guaranty satisfactory in form to second party of all its right, title, and interest in and to each of the contracts which upon delivery second party shall control, and second party shall thereafter be alone entitled to receive all moneys due and owing thereon and shall have sole and exclusive charge of the collections of same.

"And whereas, the business of first party is such that it is deemed desirable that the collections on the contracts shall be made at its own office or place of business, it is therefore agreed that first party shall have the right to designate some acceptable person to act as agent of second party to receive all moneys in behalf of second party and to do such other work in con-

nection therewith as the second party may desire. First party hereby guaranteeing and holding itself responsible for the acts of such agent and agreeing that it will see that such agent execute and give acceptable surety bond to protect the interests and rights of second party in the discharge of said acts and duties. By way of remuneration of such services second party hereby agrees to pay said agent the sum of twenty-five dollars per month and it is understood that second party shall at any time in the exercise of its own judgment have power to remove or dismiss from its employ any such agent and replace him by another.

* * * * * * * * * *

"Fourth. First party hereby guarantees the prompt payment of the principal and interest of all such contracts.

"Fifth. It is agreed and understood that in the event of nonpayment at maturity of any of the installments of principal or interest on any of said contracts by reason of the insolvency of the debtors or for any reason, then second party is hereby given the right and option without notice to apply any moneys in its hands or that may thereafter come into its possession, belonging to said first party in settlement and discharge of such installments so in default. * * *

"In the event of failure or refusal of any debtor to retain the merchandise after delivery to him, the title thereto shall revert to and remain in second party until the amount due on any such contracts is fully paid and discharged. * * *

In the event of the failure or refusal of the debtor indicated in any of said contracts for any reason whatsoever to pay the whole amount due upon any contract so purchased or to be purchased by it hereunder, and if first party shall have failed to repurchase the same within the time herein provided, then second party is hereby authorized if it sees fit to institute such legal proceedings as in its judgment or of its attorneys may be necessary or proper to enforce the payment of any such contract. First party expressly agrees to pay and reimburse second party for all costs, expenses, including attorney's and stenographer's fees, which may be incurred thereby."

On January 2, 1913, an involuntary petition in bankruptcy was filed against the Grand Union Company in the District Court for the Southern District of New York and a receiver and trustee were successively appointed in such proceeding. Thereafter, because of the interference by the receiver with the collection by the Hamilton Investment Company of the installments due and payable on the piano leases purchased from the Grand Union Company, the Hamilton Investment Company made application to the District Court for an order permitting it to proceed with the collection of the balances due on all of the leases purchased by it from the bankrupt, and restraining the receiver from in any manner attempting to collect any of the installments maturing under the leases, and directing him to account for any and all moneys that he had collected, or that had come into his possession from the bankrupt arising out of any or all of said leases. It was alleged that prior to the filing of the petition in bankruptcy the Grand Union Company collected on the leases certain moneys amounting approximately to $2,898.33, which under the contract belonged to the Hamilton Investment Company, and which had not been turned over to it. It was also alleged that the receiver had collected or was about to collect all amounts due under the leases assigned and that he intended to include the same in the general fund and assets of the bankrupt estate. The Hamilton Investment Company claims to be the true and lawful owner of the leases assigned to it under the contract.

The trustee opposing the application of the Hamilton Investment Company claims that the contract is not a contract for the sale and purchase of leases, but one providing for loans with the leases as security; that such a contract of loan is contrary to the charter of the petitioner and the statutes of Illinois and is ultra vires and void; that it is contrary to the Banking Law of the state of New York; that the relation between the petitioner and the bankrupt is that of debtor and creditor; that the relief sought should be denied and judgment entered ordering the delivery to the trustee of all the leases assigned by the bankrupt to the petitioner.

Henry J. & Charles Aaron, of Chicago, Ill., for appellant.

Myers & Goldsmith, of New York City (Henry A. Heiser, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The court below denied the petitioner's application because in its opinion the contract was in reality not a contract for the purchase and sale of piano leases as it purported on its face to be, but was one providing for loans with the leases as security. The court was also of the opinion that such a contract of loan was contrary to the charter of the petitioner and the existing statutes of the state of Illinois and was ultra vires and void. It also adjudged the contract to be in violation of the Banking Law of the state of New York, and it held that the transactions between the bankrupt and the petitioner created a relation of debtor and creditor. Judgment was accordingly entered ordering the delivery to the trustee of all the piano leases assigned by the bankrupt to the petitioner, and the petitioner was ordered to account to the trustee for moneys which it had collected on the leases subsequent to the receivership. It was also ordered that all moneys received under the contract by the petitioner prior to the filing of the involuntary petition in bankruptcy should be credited by it to an amount not exceeding the sum actually paid and advanced by it to the bankrupt upon leases in reduction of the indebtedness for moneys paid by it to the bankrupt.

We have to determine in the first place, therefore, whether error was committed in holding that the contract into which these parties entered was one of loan and not of sale. The kind of business the petitioner is engaged in has grown within the past few years to large proportions. There are a number of concerns in different parts of the United States which are engaged in the same kind of transactions. The question involved is new and the case may almost be said to be one of first impression.

[1] A sale is the transfer of property in a thing for a price in money. The transfer of the property in a thing sold from a buyer to a seller for a price is the essence of the transaction. And the transfer is a transfer of the general or absolute property as distinguished from a special property.

[2] A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows.

"In order to constitute a loan there must be a contract whereby, in substance one party transfers to the other a sum of money which that other agrees to repay absolutely, together with such additional sums as may be agreed upon for its use. If such be the intent of the parties, the transaction will be considered a loan without regard to its form." 39 Cyc. 926.

[3] The contract these parties entered into was on its face an agreement on the part of the Grand Union Company "to sell" and on the part of the Hamilton Investment Company "to buy" piano leases. In the transfer of the leases under this contract the Grand Union Com-

pany issued what it stamped "Bill of Sale," in which it set forth in detail the leases, the names of the lessees, the amounts due, and the amounts paid, and declared that it "hereby sells, assigns, and transfers to Hamilton Investment Company" "all right, title, and interest in and to the contracts, leases, and mortgages above named," and "that entries have been made on our books disclosing the absolute sale thereof to the Hamilton Investment Company." The parties appear to have thought, or to have wanted the public to think, if we accept the language they used at its face value, that they were engaged in buying and selling leases. But was that the real nature of the transaction in which they engaged?

As the contract provides in terms for a "sale," we agree that, before we can hold the transaction involved a loan and not a sale, the fact should clearly appear that it was in reality a loan and not a sale. It may be conceded that the evidence to prove a transaction to be different from what it appears to be from the written papers, as to show an absolute deed to be a mortgage, or a transaction fair on its face to be usurious or otherwise illegal, must be clear and convincing. In determining, however, the meaning of the contract which these corporations made and the nature of the transactions into which they entered, it will not be difficult to find out what it was they intended, if we examine the agreement in its entirety and closely examine its various provisions. It is not necessary to go outside of the writing, as is done when a deed absolute on its fact is shown to be a mortgage, to discover the true character of the transaction. The parties have expressed their intention in the written agreement. We arrive at their intention, not from any detached part of the instrument, but from an examination of the whole of the writing. If in the written contract the parties call a transaction in which they have engaged a "sale," we are to assume ordinarily that they have used the term correctly and in its technical sense. But if the contract goes on to set out in detail the facts of the transaction and the statement thus made clearly discloses that what the parties called a sale was in reality not a sale, but a loan or a bailment or a mortgage, the court must decide according to the real nature of the transaction, without regard to the term the parties applied to it. It is necessary in contracts of this nature to scrutinize them closely for the purpose of ascertaining the real import and the real intention of the parties.

A case, in some particulars resembling the case now under consideration, came before the District Court of the United States for the Eastern District of Kentucky in 1913. In re American Fibre Reed Co., 206 Fed. 309. That case, like this one, arose in bankruptcy upon an intervening petition filed by a corporation which claimed to have purchased certain accounts owing to the bankrupt corporation. The trustee in that case, as in this, had proceeded to collect certain of the accounts, which the intervening petitioner alleged had been purchased from the corporations prior to their bankruptcy, and was retaining them in his possession, claiming them as a part of the estates of the bankrupts, on the ground that the transactions between the parties did not amount to a buying of the accounts, but were in substance and

effect nothing more or less than a pledging of the accounts by the corporations to the intervening petitioner for a loan in each instance of a certain per cent. of the face value of the accounts and at a usurious rate of interest. In that case, as in this, the corporations "sold" the accounts to the petitioner, and the accounts were collected by the vendors at their expense, the proceeds to be applied first to the payment of the amount advanced by the vendee to the vendors, and the remainder of the amounts collected went to the vendors for their own benefit. The amount paid by the vendee was about 75 per cent. of the face value of the account, and accounts so "sold" were stamped on the books of the vendors as "sold" to the intervening petitioner. The accounts, having been collected by the vendors, were turned over to their paid employé, a person mutually acceptable to both parties, and he at once transmitted the same to the vendee. If accounts were not paid when they matured and the debtors were insolvent, the vendors were bound to repurchase the accounts within five days of written notice of default. In all this there is a close resemblance to the transactions involved in the present suit. The court refused to recognize the right of the vendee, the intervening petitioner. "In so far," said the court, "as the contracts in question here use words fit for a contract of purchase, they are mere shams and devices to cover loans of money at usurious rates of interest."

It remains, however, to point out an important difference in the facts of that case and the facts in this case. In that case there was no sale, because the absolute property in the accounts was not transferred to the so-called vendee. It was not transferred, because the "vendee" or purchaser only acquired the right to have or to take from the proceeds of the accounts the amount it had advanced thereon and its stipulated usurious interest, and the remainder of the proceeds represented an interest in the accounts which vendors had at all times retained and which was to go to them or for their benefit. To that extent the vendees had retained a property right in the accounts sold, and the court held that this prevented there being an absolute sale, and it construed the transaction to have been a loan at a usurious rate. But in the case at bar the proceeds belonged to the vendee and the vendors retained no right in any part thereof. The case was affirmed in Home Bond Co. v. McChesney, 210 Fed. 893, 127 C. C. A. 552 (1914); the court calling attention to the fact that the record disclosed a mutual intendment that the right at least to 20 per cent. of the full value of each of the accounts receivable was always to remain in the bankrupts, except only for purposes of security, and adding: "This right could not be both sold and owned by the bankrupts."

A second case, which in some particulars also resembles the one now under consideration, came before the United States District Court for the Northern District of Illinois in June of this year. Chase & Baker Co. v. National Trust & Credit Co., 215 Fed. 633. In that case, as in this, a corporation agreed to "buy" from another all acceptable accounts, and the vendor was to act as the vendee's agent, without compensation or cost, to collect and receive in trust for the vendee the amounts paid in on such accounts. But the sums so paid were not

to be commingled with the funds of the vendor, and were to be at once transmitted in the form in which they were received to the vendee. The vendor guaranteed payment and agreed to repurchase at face value all accounts in default. The vendee agreed to pay the face value of the accounts less certain discounts, the amount of which depended on the length of time the accounts ran. These ran from 1 per cent. on 15-day accounts to 7 per cent. on 18-day accounts. The vendee further agreed to pay 78 per cent. on 30-day accounts, and from that down to 73 per cent. on 180-day accounts. In this case the vendor and guarantor of the accounts filed a bill in equity to rescind the transactions and recover back the accounts or the proceeds thereof on repayment of the purchase price, with legal interest, on the ground that the transactions were ultra vires. The basis for the charge of ultra vires was that such sales, viewed from the standpoint of the purchaser, were discounts; that discounting was a banking function; that defendant, although empowered to purchase accounts, could not lawfully engage in the business of purchasing accounts, because that was a banking business, and corporations could not be organized under the general incorporation act of Illinois to do a banking business.

It was claimed that the vendor or seller of the accounts was entitled to an accounting on the ground that the apparent sales were in fact only devices or subterfuges to conceal loans and that such loans were usurious. Circuit Judge Mack held that a court of equity would not be frustrated in ascertaining the real intention of the parties to make a usurious loan by the fact that parol proof thereof would contradict the written evidence of the apparent transaction, and that if in fact both parties intended a usurious loan, then, in so far as the transactions were still executory, the debtor might recover his collateral on payment of the debt, with legal interest. But as the bill in his opinion fell short of making any clear charges that both parties actually contemplated and made loans disguised as sales with guaranties, and merely gave plaintiffs' conclusion of law that the transactions amounted to loans, he declined to dismiss the bill, but gave leave to amend it, so as properly to charge, if plaintiffs were so advised, that the transactions were in fact usurious loans.

We have stated somewhat fully these two cases, because they deal with contracts much resembling the contract involved in the present suit, and also because they are the only cases, so far as we are aware, in which the courts have passed on this class of contracts. While the documents in those cases were not identical with each other, and the documents in neither are identical with those in the case at bar, so that the exact questions in this case were not in those, yet the decisions rendered shed light on the matters to be decided in the pending case.

Stripped of the verbiage with which the parties have sought to clothe their transactions, the naked facts disclose that what they were doing was not a sale, but a loan, and that the leases were turned over simply by way of security. The Grand Union Company needed money, and the Hamilton Company advanced it. The method as set forth in the opinion of the special master was as follows:

"The conduct of the parties in the transactions under the contract of January 20, 1912, was as follows: The rates at which the unpaid balances on the leases are claimed to have been purchased by the Hamilton Investment Company were based on the maturity of the contracts, the following discounts being charged: Six per cent. on contracts maturing in 12 months; 7 per cent. on those maturing in from 12 to 16 months; 8 per cent. on those maturing in from 16 to 20 months; 9 per cent. on contracts maturing in from 20 to 24 months; and 10 per cent. on those maturing in from 24 to 30 months. A further deduction of 20 per cent. was made from the total unpaid balances of the leases purchased, and the amount placed on the books of the petitioner to the credit of what was known as the 20 per cent. reserve account, to be remitted in quarter-annual payments of 20 per cent. of amounts collected and remitted under the leases, provided no leases were in default, in which case the amount of such default was to be deducted from the 20 per cent. reserve. A payment of from 70 to 74 cents on the dollar on the unpaid balance due on each lease was made to the Grand Union Company at the time such lease was assigned and delivered to the petitioner, except where the lease did not mature within 30 months of the date of such transfer. Where the lease exceeded 30 months, the Grand Union Company received from the petitioner only 70 per cent. of such portion of the unpaid balance as would mature within 30 months; the remaining 30 per cent. being represented by the petitioner's discount of 10 per cent. and the amount credited to the 20 per cent. reserve account. The balance of the unpaid installments under the lease which would mature beyond 30 months was placed on the books of the petitioner in what was known as the special reserve account. The petitioner claims to have purchased in its entirety each lease having more than 30 months to run, but that settlement for the installments that would mature beyond 30 months was withheld until the leases had paid off to a point where they would have but 30 months to run. Mr. Rees, president of the Hamilton Investment Company, referring to one of the leases in question which had more than 30 months to run, testified, however, as follows: 'Our method has been this: If an account ran 60 months, as in that case, we would make a settlement for the first 30 months maturing at the time of purchase, and *perhaps* in 12 months we would purchase 12 months additional of that contract. I mean we would make settlement for it. Our object, you understand, is to purchase only paper that matures in 30 months.'"

The money thus advanced was repaid by the Grand Union Company in the following manner: It collected at its own expense all installments of rent as they became due under the leases, put all such moneys into its general funds, and out of such general funds remitted the aggregate amount of its collections to the Hamilton Investment Company at Chicago; and on all sums due under the leases it was paying interest to the Hamilton Investment Company at the rate of 6 per cent. per annum, although the leases themselves bore no interest. It is true that the contract stated that the moneys due on the leases should be collected by one Lesser, who was an agent of the Hamilton Investment Company, and who was to remit to it at Chicago, for which he was to receive a salary of $25 per month. But this device cannot prevent the real nature of the transaction from being disclosed. Lesser is admitted to have been during this whole time the manager of the Grand Union Company, and his salary was paid by it, and he received not one cent from the Hamilton Investment Company. Moreover, Lesser put whatever money he received on the leases, as has been said, into the general funds of the Grand Union Company. We have, then, money advanced to be repaid in installments; the time for payment being determined by the periods fixed in the respective leases for the payment of moneys due on such leases, the contract also provid

ing for the payment of interest, and payment actually made by the Grand Union Company out of its general funds.

The Hamilton Investment Company claims that under the contract the absolute title passed to it for a price in money, and that therefore the transaction was a sale. We cannot concur in this view. The leases passed to it, to be sure; but it took them by way of security, and not as an absolute owner. On the payment of these leases they were returned to the Grand Union Company. The Hamilton Investment Company wrote the Grand Union Company:

"We do not make any indorsement of any sort on the leases, so that when they are paid out you will receive them back from us in the same condition in which we had received them from you."

And if default was made in the payment of any of the leases they were returned to the Grand Union Company, which either paid them itself or substituted other leases in their place. The president of the petitioner was asked:

"Where you purchase a paper [piano lease] under which the purchaser of the piano agrees to make monthly payments, and it appears that you can't collect from that purchaser the amount that you paid initially, the initial payment would then go back to the Grand Union Company, and they either must make a payment to you or substitute some other paper; that is, the loss, if any, under that contract, must be sustained by the Grand Union Company, and not your company?"

And he replied "Yes." The fact that the bankrupt guaranteed payment of principal and interest on all leases "purchased" by the petitioner does not, standing alone, convert the transaction from a sale into a loan. It is, however, a circumstance which we can take into consideration in arriving at the true intent of the parties. If the transaction was in reality a sale, it would seem as though the vendor's duty was at an end when the title passed, and that thereafter there would have been no obligation to guarantee payment or to make the collections. It "sold" at a discount accounts that were good, and made itself responsible for every conceivable loss. If the contract was one of sale, it is strange that after the vendor had sold its right, title, and interest it should have agreed to collect the money due under the leases at its own expense, making itself liable for the acts of the collecting agent, and putting the money it received into its general funds. The purchaser of the leases never looked to the persons obligated by the leases for the money due it; but it looked to the vendor, and to it only. If the lessee failed to pay the vendor, then the vendor repurchased the lease from the vendee for cash at par for the balance due on the defaulted contract.

We observe, also, that when these leases were transferred to the Hamilton Investment Company the latter gave no notice to the debtors of the fact of assignment, although upon the assignment and sale of a chose in action it is almost invariably the case that the assignee gives such notice. These piano leases did not provide for the payment of interest on the installments as they became due, and yet under the contract between the Grand Union Company and the Hamilton Investment Company the latter paid the former from 90 per cent. to 94

per cent. of the face value of the leases, and the Grand Union Company was required to pay the Hamilton Investment Company 6 per cent. per annum on the face of the leases which the latter concern took over. In paying from 90 per cent. to 94 per cent. of the face value of the leases, the Hamilton Investment Company was deducting from 6 per cent. to 10 per cent. interest in advance; that is, it was taking discount. Discount is taking out of the principal sum and the retention by the lender of the interest charged for the use of the principal. That it was discount is made plain, too, by the fact that the Grand Union Company also paid interest monthly at the rate of 6 per cent. per annum. It is rather a surprising proposition we are asked to accept, when we are told that these transactions are sales, and not loans. If the Hamilton Investment Company bought these leases, why does the Grand Union Company pay it interest on them? When a horse or a suit of clothes is sold, whoever heard of an agreement on the part of the seller to pay interest to the buyer on the value of the horse during its life or on the value of the suit of clothes so long as it is worn?

Another important circumstance that indicates that the transaction was not a sale is found in that provision in the contract in which it is agreed that, in event of the failure or refusal of any debtor under a piano lease to retain the merchandise after delivery to him, the title should revert to and remain in the Hamilton Investment Company "until the amount due in any such contract is fully paid and discharged." If the Hamilton Investment Company really purchased the piano leases outright, and took absolute title as purchaser, there would have been no necessity for any such provision as that title should revert to it "until the amount due on any such contract is fully paid and discharged." The amount due on the contract means the amount which the Hamilton Investment Company loaned to the Grand Union Company on that particular lease.

[4] The Hamilton Investment Company is, as we have seen, an Illinois corporation. The Illinois Corporation Act provides, in section 1, chapter 2:

"That corporations may be formed in the manner provided for in this act for any lawful purpose except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning moneys," etc.

The charter of the corporation, originally the Ft. Dearborn Trust Company, the name being afterwards changed to the Hamilton Investment Company, defines its object as follows:

"2. The object for which this corporation is formed is to do a general brokerage and commission business, and to buy property other than corporate stocks and real estate at judicial, fiduciary, trustees', pledgors', mortgagees', and other liquidating sales, and convert the property so bought into money, but not to engage in the business of loaning money, and to have a place of business where promissory notes or other evidences of indebtedness may be made payable."

It thus appears that it is by its charter prohibited from "engaging in the business of loaning money." There is no principle of law better settled than that a corporation cannot enter into a contract which is expressly prohibited by its charter or by statute. A contract so

made is absolutely void. No performance on either side can give it any validity. Jackson, etc., Railway v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515 (1896); Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55 (1891).

[5] But we are told that the defense of ultra vires cannot be raised in this collateral proceeding. The phrase "ultra vires" unfortunately has been used to designate, not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy or contrary to some statute expressly prohibiting them. The latter class of acts are now termed "illegal," and the term "ultra vires" is confined to the former class. "Ultra vires contracts are contracts which are beyond the statutory powers of the corporation, and not contracts expressly prohibited by statute and contrary to the public policy of the Legislature." Cook on Corporations (7th Ed.) vol. 3, p. 2161, note. We do not need to consider when the defense of ultra vires may or may not be interposed. The objection here is, not that the contract is ultra vires, but that it is illegal. While a corporation is held in some states to be estopped from setting up the defense of ultra vires by having received the benefits of the contract, the courts so holding do not apply that principle to cases in which the contract is absolutely void. National Home Building, etc., Co. v. Home Savings Bank, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245; 10 Cyc. 1161, 1162.

[6] The law is well settled that property or money parted with on the faith of an illegal contract can be recovered back. In Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 60, 11 Sup. Ct. 478, 488, 39 L. Ed. 55 (1891), the Supreme Court, speaking through Mr. Justice Gray, said:

"A contract ultra vires being unlawful and void, not because it is in itself unmoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it."

So Lord Justice Mellish, in the English Court of Appeals, in Taylor v. Bowers, 1 Q. B. D. 291, 299 (1876), said:

"If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action. The law will not allow that to be done."

The rule is stated in 2 Comyn on Contracts, 361, as follows:

"Where money has been paid on illegal contract, it is a general rule that if the contract be executed, and both parties are in pari delicto, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so and recover back by action of indebitatus assumpsit for money had and received. And this distinction is taken in the books, that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in

disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

The contract of January 20, 1912, is an executory contract, not having been fully performed, and the trustee is therefore entitled to have transferred to himself all leases assigned to the Hamilton Investment Company by the bankrupt Grand Union Company and all moneys collected by the Hamilton Investment Company subsequent to the filing of the involuntary petition in bankruptcy. As to the moneys received by the Hamilton Investment Company prior to the filing of the involuntary petition, it was proper that that company should be credited with such moneys, not exceeding the sum actually paid and advanced by it to the bankrupt upon leases in reduction of the indebtedness for moneys paid by it to the bankrupt.

We do not find it necessary to consider the other questions raised in this case. We have found no error, and are satisfied that the prayer of the petitioner should be denied, and that the order of the court below should be affirmed.

It is so ordered.

On Petition for Rehearing.

A petition for rehearing is presented and must be denied. The decree denied the relief which the Hamilton Investment Company sought and in addition granted affirmative relief to the trustee. Because such affirmative relief was granted the rehearing is asked.

The petitioner alleges in his petition that "the only pleading filed in his case by the trustee is his answer," and that the answer is purely defensive and does not ask for affirmative relief. The general rule has been as well established as any in the law that to entitle a defendant in equity to affirmative relief he should file a cross-bill, which had to be regularly served, put in issue and heard as any original bill. Rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) of the new equity rules promulgated by the Supreme Court in November, 1912, obviates the necessity of filing a cross-bill, and affirmative relief may be asked now in the answer.

The petitioner, in making this application for a rehearing on the ground above stated, apparently has lost sight of the nature of the proceedings in the court below. This was not a regular suit based upon a bill of complaint and an answer. There was no bill of complaint and no answer. The present petitioner had obtained an order requiring the receiver to show cause why he should not be restrained from collecting any installments under the piano leases which had been transferred to it, and to account for any money he had collected. An affidavit was made by the attorney of the receiver to the effect that the Hamilton Investment Company was not authorized to do business in the state of New York. Judge Mayer granted the motion to show cause, provided the Hamilton Company gave a bond conditioned that it would pay to the trustee anything that it had collected under the piano leases if its claim was overruled, and thereupon referred the whole matter to Mr. Mason as special master. The master reported

that the transactions of the Hamilton Investment Company were ultra vires and that the contract with the bankrupt had no legal effect for that reason. In this situation the trustee was entitled to affirmative relief, to wit, an accounting, and the order to surrender the leases was incidental to it.

COLUMBIA RIVER PACKERS' ASS'N v. McGOWAN et al.†

(Circuit Court of Appeals, Ninth Circuit. November 16, 1914.)

No. 2396.

1. STATES ⊂⊃12—BOUNDARY BETWEEN OREGON AND WASHINGTON.

Sand Island, in the Columbia river, near its mouth, is, and has been since the admission of Oregon as a state in 1859, a part of the territory of that state.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 6–11; Dec. Dig. ⊂⊃12.]

2. STATES ⊂⊃12—TERRITORIAL JURISDICTION—LANDS UNDER WATERS—FORMING BOUNDARIES.

Conceding that the states of Oregon and Washington have concurrent jurisdiction over the waters of Columbia river, where it forms the boundary between them, that fact does not give the state of Washington jurisdiction over the land under the waters of the river in a fixed locality which is within the territorial limits of the state of Oregon.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 6–11; Dec. Dig. ⊂⊃12.]

3. COURTS ⊂⊃266—JURISDICTION—SUIT TO ABATE NUISANCE—SUBJECT-MATTER BEYOND TERRITORIAL JURISDICTION.

Sand Island, in the Columbia river, near its mouth, with its tide lands, are the property of the United States, and wholly within the territorial jurisdiction of the state of Oregon. The government caused a part of the island to be surveyed into fishing sites, to be leased for seining operations, and two of such sites on the south side of the island were leased to complainant. They were used by extending drag nets therefrom and drawing in and landing the same upon the shore. Defendants, under a license from the state of Washington, planted set nets in front of the sites, anchored to the bottom between the shore and channel, and with floats on the surface. Complainant brought suit in the United States District Court for the Western District of Washington, alleging that such structures wholly prevented its operating its drag nets from the shore, that their maintenance constituted a continued trespass and a nuisance, and prayed for an injunction and for their abatement. Both parties then supposed the locality to be within the territorial jurisdiction of Washington, but a later decision of the United States Supreme Court determined that the state boundary was the center of the channel to the north of the island. Thereupon, the court having taken no action beyond the granting of a temporary restraining order, complainant moved to dismiss for want of jurisdiction, which motion was opposed by defendants and denied. *Held*, that the suit was of a local nature, and, both the structures sought to be abated and the property injured being in another state, jurisdiction of the parties did not give the court jurisdiction over the subject-matter.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806–808; Dec. Dig. ⊂⊃266.]

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 8, 1915.

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Suit in equity by the Columbia River Packers' Association against H. S. McGowan, Erick Lindstrom, and J. P. Coyle. Decree for defendants, and complainant appeals. Reversed.

See, also, 217 Fed. 196.

Suit in equity by the appellant (plaintiff in the court below) against the appellees (defendants in the court below) for an injunction, enjoining and restraining the appellees from placing obstructions in any of the waters of the Columbia river in front of or adjoining two certain fishing sites on Sand island, known as "sites Nos. 2 and 3," alleged to belong to the plaintiff, and from interfering with the free and uninterrupted ingress to and egress from such premises, that all obstructions placed in front of such premises be abated, and that the defendants be required to remove the same. The plaintiff is an Oregon corporation. Each of the defendants is a citizen of the state of Washington.

In an amended complaint filed by the plaintiff on August 11, 1908, it is alleged that the United States is the owner in fee of a tract of land situated in the county of Pacific, in the state of Washington, being an island in the Columbia river, near the mouth thereof, generally known and described as "Sand Island," together with all the tide lands, water rights, privileges, and easements surrounding and adjacent thereto and bordering thereon; that by proclamation of the President of the United States, issued on the 29th day of August, 1863, Sand Island was reserved from sale for military purposes, and the same has ever since been held and reserved by the United States; that on May 1, 1908, the Secretary of War of the United States leased to the plaintiff for a good and valuable consideration the portions of Sand Island designated on the maps of the government survey as "sites Nos. 2 and 3," for the term of three years, together with the tide lands, water rights, fishing rights, and riparian rights adjacent thereto, the portion of the island so leased being all the frontage, tide lands, riparian rights, water rights, and privileges south, and the high lands north, of the low-water mark of the Columbia river on the south side of the river; that upon the execution and delivery of the lease from the United States the plaintiff immediately entered into the possession of the fishing sites; that Sand Island, including sites Nos. 2 and 3, consists of a sandy beach from the line of low water to the line of high water; that above the high water it is composed entirely of sand; that practically no vegetation grows thereon, and it is not susceptible to cultivation or agricultural uses; that the bed of the Columbia river below the low-water line is quite level, with a hard, sandy bottom, with a gradual slope for a short distance into deep water; that the main channel of the Columbia river washes the shore of the island, where the waters are navigated by all the ocean-going vessels, and all the vessels that carry the commerce of Washington and Oregon navigate such waters; that the fishing sites leased to the plaintiff are of great value for the right of fishery thereon, and the right to operate seines from the shore into the waters thereof, and to haul and land seines in front thereof, for the purpose of catching salmon during the salmon-fishing season of each year on the Columbia river, the fishing sites having been leased by the United States to the plaintiff for the sole purpose of use as a fishery; that on the 30th day of June, 1908, the plaintiff applied to the fish commissioner of the state of Washington, pursuant to the laws of that state, for licenses to operate three seines upon sites Nos. 2 and 3 on Sand Island; that thereupon the fish commissioner issued to the plaintiff three licenses, whereby the plaintiff became entitled to operate three seines in the waters of the Columbia river within the state of Washington for the period of one year thereafter; that on July 2, 1908, while the lease from the United States to the plaintiff was in full force and effect, as well as the licenses issued by the fish commissioner of the state of Washington to the plaintiff, the plaintiff entered upon the leased premises, together with its

three seines and seining outfit, for the purpose of catching salmon; that in order to operate seines in front of sites 2 and 3 it is necessary that the waters and channel of the river be free and unobstructed, for the reason that it is necessary to lay each seine out into the waters of the river for a distance of 200 or 300 fathoms (the length of each seine), and to permit the seine to drift with the tide and current, and then to haul the seine in onto the shore; that the plaintiff was proceeding to operate its seines under its licenses, when the defendants, without the consent of the plaintiff, placed in the channel of the navigable waters of the Columbia river, directly in front of sites 2 and 3, certain obstructions to the navigation of the waters of the river, consisting of large stones, to which were attached wire cables and chains, and large timbers for a float or buoy; that the obstructions were seven in number, and were placed in the waters of the river about 50 to 100 feet from the shore and about 200 or 300 feet apart; that the stones and anchors and weights were large and of great weight, and were so placed that the plaintiff could not operate its seines in the waters of the river, and could not land its seines on the shores of the island; that the obstructions excluded the public generally from operating either gill nets, drift nets, or seines in the waters of the Columbia river, and prevented the free ingress and egress to and from said premises from and to the navigable waters of the river.

It is further alleged in the amended complaint that the plaintiff removed all of the obstructions, and was proceeding to operate its seines in the waters in front of its premises and on the shores thereof, when the defendants, on the 4th day of July, 1908, against the plaintiff's consent placed six other obstructions in front of the premises in practically the same position as those which had been removed by the plaintiff, the last-mentioned obstructions being of the identical nature of those which had been removed by the plaintiff; that these latter obstructions were placed in such position as to absolutely prevent the plaintiff from operating its seines and landing the same on the shores of Sand Island; that the obstructions were in the navigable waters of the Columbia river, and were so placed as to prevent free ingress to and egress from the premises of the plaintiff; that the plaintiff had expended for the purchase of seines and appliances necessary to conduct seining operations on its fishing sites about $15,000, and had employed a large number of men, and engaged a large number of horses, necessitating an expenditure of $200 per day; that in addition the plaintiff was required to pay as rental for the fishing sites the sum of $5,175 per annum; that the salmon in the Columbia river are of great value, and ascend the river only at certain intervals during each year; that at the time of the filing of the bill they were in the waters of the Columbia river in great numbers.

It is further alleged that the obstructions were placed in the waters of the Columbia river without any authority from the officers of the government of the United States, and in violation of the laws of the United States and of the state of Washington; that the obstructions were not for the purpose of trade or commerce, or for any particular use, but were placed in the waters of the river for the purpose of harassing and annoying the plaintiff and preventing it from operating its seines; that they were not placed in the river in good faith, and each was an obstruction to the navigation of the river.

It was alleged that the trespass of the defendants was continuous, and that the defendants would, unless restrained by the court, continue daily to place obstructions to the operation of plaintiff's seines in the waters of the river in front of the plaintiff's premises, and prevent plaintiff from having ingress to and egress from its premises. It was further alleged that, if the defendants were permitted to maintain the obstructions, plaintiff would not be able to use its fishing grounds or employ its seines, and would by reason thereof be irreparably damaged.

The plaintiff prayed for a preliminary injunction, enjoining and restraining the defendants, and each of them, and their agents and employés, from placing in any of the waters of the Columbia river, in front of or adjacent to sites Nos. 2 and 3 on Sand Island, or from maintaining in front of those premises in the waters of the river, any obstruction whatever, and particularly the obstructions maintained at the time of the filing of the bill, and

from any interference with the free and uninterrupted ingress to and egress from such premises; that all obstructions placed in such waters in front of the premises of the plaintiff be abated and the defendants be required to remove the same; that upon their failure to remove the same the plaintiff be entitled to do so at the cost of the defendants.

On July 7, 1908, a temporary injunction and restraining order was issued by the court below, pursuant to the prayer of the bill, enjoining and restraining the defendants, and each of them, and their servants and employés, from in any manner interfering with the free ingress to and egress from the fishing sites of the plaintiff on Sand Island, and from placing or maintaining any obstruction, anchor, killock, timber, log, or appliance whatever that would interfere with the use of a seine floating upon the navigable waters of the Columbia river in front of or adjacent to sites Nos. 2 and 3 on Sand Island, in the county of Pacific, in the state of Washington.

Answers and cross-bills were filed by the defendants on August 28, 1908. The answers put in issue the material allegations of the bill. It was admitted, however, that Sand Island, together with the fishing sites appurtenant thereto, were in Pacific county, state of Washington, and within the jurisdiction of the court below. It appeared from the answers that on the 2d day of July, 1908, the defendants were engaged in the operation of set nets in the waters of the Columbia river on the south side of Sand Island, the set nets being operated for the purpose of catching salmon under licenses issued by the fish commissioner of the state of Washington; that each of the set nets was situated in front of Sand Island beyond the line of ordinary low water, and between the point of extreme low tide and the adjacent channel of the Columbia river; that each set net was located by a stone anchor weighing about 300 pounds, to which was attached a cable about 5 feet long, which was clamped to a wire rope about 25 feet long, to which was attached a cedar buoy about 4 feet long and 8 inches square. The defendants denied that the set nets constituted any obstruction to the navigable waters of the river, and denied that they were so placed as to prevent free ingress to and egress from Sand Island, or any part thereof. The defendants also denied that the fishing nets were placed or used in the waters of the Columbia river for the purpose of annoying the plaintiff, or that the same were placed there for the purpose of preventing the plaintiff from operating its seines.

In the cross-bills the defendants alleged that neither of the set nets was located upon any part of either site No. 2 or site No. 3; that by reason of the fact that they had been enjoined by the court and prevented from fishing for salmon they had been damaged to the extent of many thousands of dollars, the exact amount of which it was impossible to state; that the plaintiff had threatened to, and would, unless restrained by the court, prevent the defendants from fishing for salmon, or operating their nets for that purpose, and would exercise an exclusive right of fishing at the place where the defendants' set nets were situated at the time of the filing of the bill. The defendants accordingly asked for an injunction, enjoining and restraining the plaintiff from fishing on the locations of the defendants' set nets in the Columbia river, and from interfering with the defendants in the maintenance and operation of the same. The defendants also asked for a judgment for the damages sustained by them by reason of the issuance of the temporary restraining order.

The plaintiff demurred to the cross-complaints. The demurrer was overruled. The plaintiff then answered the cross-complaints, denying the material allegations thereof, and alleging that the acts of the defendants in placing set nets in front of its fishing sites on Sand Island were the continuing trespasses complained of in the bill. The plaintiff further alleged that it had an exclusive right to drag seines over and across the premises then occupied by the obstructions placed by the defendants in front of sites Nos. 2 and 3, which the defendants called "set nets"; that the obstructions which the defendants called "set nets" were obstructions to the navigation of the waters of the Columbia river, and absolutely prevented seining operations on sites Nos. 2 and 3.

On June 4, 1909, the plaintiff filed in the court below a petition, from the allegations of which it appeared that at the time of the institution of this

suit, and long prior thereto, the officials of the state of Washington had contended that Sand Island was wholly within the territorial limits and jurisdiction of the state of Washington, and had denied that the state of Oregon, or its officers, had or could exercise jurisdiction thereover; that the officials of the state of Washington had contended that the south boundary line of the state of Washington was the middle of the channel of the Columbia river, located immediately south of Sand Island; that the claims of exclusive jurisdiction over Sand Island had been asserted and acted upon and sustained by the officers and courts of the state of Washington for many years prior to the institution of this suit; that pursuant to such claims the citizens of the state of Washington and the officials thereof had at all times taken possession of and exercised exclusive dominion over all the fisheries and fishing rights pertaining to Sand Island, and over all of the waters north of the south channel of the Columbia river; that by reason of such acts and claims the plaintiff had been led to believe that Sand Island was within the territorial boundaries and jurisdiction of the state of Washington, and by reason thereof had instituted this suit in the court below, expecting and intending to prosecute it to final determination; that since the institution of this suit the Supreme Court of the United States, by a decision rendered on the 16th day of November, 1908, in a cause wherein the state of Washington was claimant and the state of Oregon defendant, had held and judicially determined that the boundary line between the state of Washington and the state of Oregon then was, and at all times had been, the north ship channel of the Columbia river, located north of Sand Island; and that Sand Island then was, and at all times had been, within the territorial limits and jurisdiction of the state of Oregon. The plaintiff therefore prayed that the suit be dismissed, without prejudice, for the reason that the court below had no jurisdiction over the subject-matter thereof.

The petition to dismiss was denied. Thereupon the plaintiff obtained leave for and filed a supplemental bill in the court below, setting forth the filing of the original bill, the filing of the answers thereto by the defendants, wherein it was admitted that Sand Island and the premises in controversy were situated in Pacific county, Wash., and further setting forth the various proceedings in this suit as hereinabove set forth. The plaintiff prayed that, if the court should be of opinion that it had jurisdiction of the premises and of this suit, the plaintiff have the judgment and decree prayed for in the original bill, but, should the court be of opinion that it had no jurisdiction of the suit, that it be dismissed without prejudice.

The defendants answered the supplemental bill, denying that Sand Island and the fishing sites in controversy were not wholly within the state of Washington, and denying that the same at that time were within the state of Oregon. The defendants admitted that a suit had been brought in the United States Supreme Court by the state of Washington against the state of Oregon for the purpose of determining the boundary line between those states, and that a decision in that suit had been rendered as set forth in the supplemental bill; but they denied that by that decision it had been established that the boundary line between the states was to the north of Sand Island.

The various issues raised by the pleadings, including the issue of jurisdiction, were heard by the court below. Thereafter an interlocutory decree was entered, adjudging that the plaintiff take nothing by the suit and that the temporary injunction and restraining order theretofore issued against the defendants be dissolved and vacated; that the plaintiff be enjoined and restrained from interfering with the quiet and peaceable enjoyment by the defendants of the right to construct, maintain, and operate the set nets and appliances maintained by them in the waters of the Columbia river below the ordinary low tide thereof. The matter was referred to a special master to ascertain and assess the damages suffered by the defendants by reason of the granting of the restraining order. Upon the report rendered by the master a final decree was entered in favor of the defendants for the sum of $22,083. From the final decree the plaintiff had prosecuted an appeal to this court.

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 (after stating the facts as above). There are three questions relating to the jurisdiction of the lower court involved in this case:

First. Is Sand Island, with its south shore or tide lands on that shore, within the territorial limits and jurisdiction of the state of Washington?

If this question is answered in the negative, the next question is:

Second. Is the land under the waters of the Columbia river passing to the south of Sand Island within the concurrent jurisdiction of the courts of the state of Washington with respect to this controversy?

If this question is answered in the negative, the final question is:

Third. Had the lower court equitable jurisdiction by reason of having acquired jurisdiction of the person of the defendants?

If any one of these questions is answered in the affirmative, the jurisdiction of the lower court must be sustained. If they are all answered in the negative, the jurisdiction of the court fails.

[1] 1. The boundary between the states of Oregon and Washington was established by Congress in the act providing for the admission of Oregon into the Union, approved February 14, 1859 (11 Stat. 383, c. 33), and by the act providing for the admission of Washington, approved February 22, 1889 (25 Stat. 676, c. 180). By order of the President of the United States, dated August 29, 1863, Sand Island, at the entrance of the Columbia river, was reserved from sale, and has ever since been retained by the United States as a military reservation. By the act of the Legislature of Oregon passed October 21, 1864, that state granted to the United States all the right and interest of the state of Oregon in and to the land in front of Ft. Stevens and Point Adams, situate in the state of Oregon, and subject to overflow between high and low tide, and also to Sand Island situate at the mouth of the Columbia river in that state. These statutes were the subject of construction by the Supreme Court of the United States with respect to the boundary line between Oregon and Washington in the case of Washington v. Oregon, 211 U. S. 127, 29 Sup. Ct. 47, 53 L. Ed. 118. It was there held that the line followed the middle of the north channel passing to the north of Sand Island, placing that island within the territorial jurisdiction of the state of Oregon.

The defendants in their answer to the supplemental bill admitted that a suit had been brought in the United States Supreme Court by the state of Washington against the state of Oregon for the purpose of determining the boundary line between those states, and that a decision in that suit had been rendered as set forth in the supplemental bill; but they denied that by that decision it had been established that the boundary line between the states was to the north of Sand Island. That contention is renewed in the brief filed by the defendants on this appeal. In support of it, it is urged that the Supreme Court fixed the boundary as "the center of the north channel, changed only as it may be from

time to time through processes of accretion." The defendants assert that the boundary thus fixed was an indefinite roving line, controlled by the fluctuations of the shifting sands of the river; that the testimony in this case showed that the so-called north channel no longer existed to the northward of Sand Island, but had entirely shifted its waters and course to the southward of Sand Island, the territory to the northward of Sand Island having shoaled up by accretion to such an extent that at ordinary low tide a man could walk from Sand Island to the Washington shore. In the decision on the petition for rehearing rendered in the boundary suit on March 8, 1909 (Washington v. Oregon, 214 U. S. 215, 29 Sup. Ct. 632, 53 L. Ed. 969), the Supreme Court considered this very question. It was there said:

"Whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel."

This is a complete answer to the claim of the defendants that the boundary as fixed by the Supreme Court in its first decision in the boundary suit is not the present boundary between the two states. It follows that since the admission of Oregon into the Union, in 1859, Sand Island has been part of the territory of that state.

[2] 2. The next question to be determined is whether the courts of the state of Washington have been vested with concurrent jurisdiction over this controversy.

By section 1 of the act of Congress of March 2, 1853 (chapter 90, 10 Stat. 172), all that part of the territory of Oregon lying north of the "main channel of the Columbia river" was organized into the territory of Washington, and by section 21 of the same act it is provided that:

"The territory of Oregon and the territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia river, where said river forms a common boundary between said territories."

Section 1 of the act of Congress admitting Oregon into the Union (Act Feb. 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the state, provided:

"Including jurisdiction in civil and criminal cases upon the Columbia river and Snake river, concurrently with states and territories of which those rivers form a boundary in common with said state."

In section 2 it is said:

"The * * * state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same."

The act of Congress admitting Washington into the Union, and the Constitution of that state, are silent on the subject of concurrent jurisdiction. There is therefore a question whether the state of Washington has, by appropriate concurrent action, acquired concurrent jurisdiction of the waters of the Columbia river; but we pass that question to

consider whether in any view the courts of Washington have jurisdiction over the locality in controversy.

In Nielsen v. Oregon, 212 U. S. 315, 29 Sup. Ct. 383, 53 L. Ed. 528, one Chris Nielsen was a resident and inhabitant of the state of Washington, and a citizen of the United States. He had a license from the fish commissioner of Washington to operate a purse net on the Columbia river, and was found on the waters of the Washington side of that river fishing with a purse net. He was arrested for violating a law of the state of Oregon prohibiting the taking of fish in that manner. By the law of the state of Washington in force at that time fishing with a purse net was lawful by those having a license so to do from the fish commissioner of that state. Nielsen was tried and convicted in the courts of Oregon for violation of the law of that state. The single question was whether the law of Oregon prohibiting the taking of fish with a purse net extended over the entire waters of the Columbia river, or whether it was confined to the Oregon side. The Supreme Court of the state held that, where adjoining states had concurrent jurisdiction on the waters forming their boundary, the laws of each state regulating the common right to take fish from such waters were valid and binding when not in conflict, and if there was a conflict the law of that state which was the most restrictive in its character must prevail, and to that extent the state which first assumed jurisdiction maintained it to the exclusion of the other. The court accordingly held that the law of Oregon extended over the waters of the Columbia river, and the conviction of Nielsen in the Oregon court was sustained. State v. Nielsen, 51 Or. 588, 95 Pac. 720, 131 Am. St. Rep. 765, 16 Ann. Cas. 1113. The case was taken to the Supreme Court of the United States, where the judgment of the Supreme Court of the state of Oregon was reversed; the Supreme Court of the United States holding that for an act done in the territorial limits of the state of Washington, under authority of a license from that state, a person could not be prosecuted and punished in the state of Oregon. Nielsen v. Oregon, 212 U. S. 315, 321, 29 Sup. Ct. 383, 53 L. Ed. 528.

In the present case the action is in the nature of a bill to restrain a trespass and abate a nuisance. When the action was commenced in 1908 in the United States court in Washington, it was believed by the appellant that the locality of the alleged trespass and nuisance on the south side of Sand Island was within the territorial limits of the state of Washington, and the action was accordingly brought in that jurisdiction. In the appellees' answer to the appellant's bill of complaint it was admitted that Sand Island, in the Columbia river, was in the state of Washington. Upon the final decision of the Supreme Court of the United States on May 24, 1909, holding that Sand Island was within the territorial jurisdiction of the state of Oregon, the appellant moved to dismiss its bill for want of jurisdiction, on the ground that the suit was a local one and concerned real estate and property situate in the state of Oregon. The court denied the motion to dismiss the bill, and, referring to the decision of the Supreme Court of the United States in the case of Nielsen v. Oregon, supra, held that, although the Constitution of the state of Washington defining the state's boundaries made no mention of concurrent jurisdiction on the Columbia river, the state

had not lost its jurisdiction by reason of its failure to assert it by positive enactment. The court, however, placed its decision upon the act of Congress, approved March 2, 1905, dividing the state of Washington into two judicial districts. The act provided that certain counties lying east of the Cascade Mountains, with the waters thereof, should be detached from the judicial district of Washington, "and the residue of said state, * * * with the waters thereof, shall hereafter be the Western district of Washington." 33 Stat. 824, c. 1305.

We are of opinion that, assuming that the state of Washington has concurrent jurisdiction on the Columbia river, with respect to matters occurring on the river, it does not follow that the state has jurisdiction over a locality under the river within the territorial jurisdiction of the state of Oregon, and we do not understand that Nielsen v. Oregon so holds. The court in that case was dealing with the question of jurisdiction on the waters of the Columbia river, and with respect to a purse net or seine operated upon the surface of the water, and in that case the Supreme Court held that Oregon did not have concurrent jurisdiction to impose its laws upon the Washington side of the river. In the present case we are dealing with a complaint relating to the operation of set nets placed upon the ground under the water in a fixed locality definitely known to be within the territorial limits of the state of Oregon. To hold that Sand Island and its shore, within the exclusive territorial jurisdiction of the state of Oregon, are also within the concurrent jurisdiction of the state of Washington, because the waters of the Columbia river separate and pass on both sides of the island, would be to extend concurrent jurisdiction to land for which we find no authority in any of the adjudged cases. We are of opinion that the courts of Washington acquired no concurrent jurisdiction over the locality in question under any construction of the statutes relating to concurrent jurisdiction on the Columbia river.

[3] 3. The final question is: Did the court have equitable jurisdiction of the case by reason of having acquired jurisdiction of the person of the defendants?

To determine this question it is necessary to clearly understand the subject-matter of the controversy. Sand Island, with its shore between high and low water mark, is the property of the United States—the island by reservation of the President of the United States, August 29, 1863, and the shore by grant of the state of Oregon, October 21, 1864, to the United States, of all the tide lands to Sand Island. Both land and shore of this island are within the territorial jurisdiction of the state of Oregon. By act of Congress approved July 28, 1892 (27 Stat. 321, c. 316 [Comp. St. 1913, § 6944]), the Secretary of War was authorized in his discretion to lease, for a period of not exceeding five years, such property of the United States under his control as might not at the time be required for public use. Under this authority, the Secretary of War had the United States engineers make a survey of the island, including the shore, and divide the southwest and south side of the island into fishing sites to be leased for seining operations. The southwest and south side of the island was accordingly divided into five seining sites, and offered for lease to the highest bidder. Sites 2 and 3, with which alone we are concerned in this case, had a front-

age on the south channel of the Columbia river of 3,500 feet each. The first contract of lease was for three years, from 1905 to 1908, when the appellee, McGowan, was interested as a sublessee in the operation of the frontage included in site No. 2, and he carried on fishing operations from the shore of that site without molestation or hindrance. For the term of three years from 1908 to 1911 the appellant and the appellees were rival bidders for sites 2 and 3. The appellant, being the highest bidder, was awarded the lease for this period at a rental of $5,175 per annum, payable in advance on the 1st day of May of each year. The appellees did not, however, abandon the locality, but procured from the fish commissioner of the state of Washington set net licenses, and with this authority they proceeded to occupy the waters and ground below high water in front of the appellant's sites with set nets, practically destroying the value of these shore sites to the appellant for fishing purposes. But manifestly the fish commissioner of the state of Washington had no authority to issue set net licenses to be used at a fixed and definite locality within the territorial jurisdiction of the state of Oregon. It is true the appellant had also procured from the fish commissioner of the state of Washington licenses to fish with drag nets in the waters of the Columbia river. Now, while it may be conceded that these licenses gave to the appellant no greater right to a locality than did the set net licenses of the appellees, the fact remains that the appellant had the right in common with the public to engage in the business of drawing seines in the waters of the Columbia river in front of sites 2 and 3, and the exclusive right of drawing and landing the same upon the shore of the island within those sites; and it is this exclusive right of drawing and landing on shore that we are considering, and not the general right of fishing in the Columbia river, for which the appellant claims no exclusive right. It was when the appellant was proceeding to operate drag nets from the shore within its sites that it met the obstacle and obstruction of set nets placed in front of its sites by the appellees. It was then impossible for the appellant to operate its drag nets from the shore, or draw or land the same on the shore, with the appellees' set nets in front cutting off access to the river. Thereupon the appellant, believing Sand Island to be within the territorial jurisdiction of the state of Washington, brought this suit against the appellees in the United States Circuit Court for that jurisdiction to restrain the trespass that was being committed by the appellees upon the appellant's right of access to and egress from its premises, and to abate the nuisances that were being erected in front of its premises. When the Supreme Court of the United States in its final decision of May 24, 1909, in Washington v. Oregon, 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969, held that Sand Island was within the jurisdiction of Oregon, the appellant moved the court to dismiss the action, on the ground that it was a local action and the court was without jurisdiction to hear the case. The motion was resisted by the appellees, and was denied by the court, on the ground that the court had jurisdiction of the locality involved in this case, under the statutes giving it jurisdiction over the waters in the Northern district of Washington.

In Gilbert v. Moline Water Power & Mfg. Co., 19 Iowa, 320, this precise question was before the Supreme Court of the state of Iowa.

That was a suit brought in the courts of Iowa to abate a dam alleged to be a nuisance, on the Illinois side of the Mississippi river. It appeared that the plaintiff was a citizen of the state of Iowa. It also appeared that the property alleged to have been injured by the maintenance of the nuisance was within the jurisdiction of the Iowa court. The plaintiff based his claim to jurisdiction upon the language of the acts admitting Illinois and Iowa into the Union, and the provisions of the Constitution and statutes of each state defining their respective boundaries. The act admitting Illinois gave to that state concurrent jurisdiction on the Mississippi river with any state or states to be formed west thereof, so far as the same should form a common boundary. The act admitting Iowa contained the same provision as to concurrence of jurisdiction. By the Constitution of Iowa the eastern boundary of the state was the middle of the main channel of the Mississippi river In ruling against jurisdiction the Supreme Court of Iowa said:

"Now, while it is, of course, not claimed that the laws of this state would have any inherent authority beyond the jurisdiction of the state, or that our laws can bind or affect property out of or beyond our territorial limits, it is insisted that this property, or that this alleged nuisance, is so situated that either state may direct the manner of its use, and order its abatement or removal, if found to be of the character charged. That the courts of Illinois might do this, there is, of course, no doubt. But the claim is that our courts have the same concurrent right, on the complaint of one of our citizens, whose property, situated within our jurisdiction, is injured by the alleged unlawful obstruction. We do not believe, however, that the acts and constitutional provisions referred to include cases like that now before us. There is an immense commerce on this great common highway. Water crafts, rafts, and boats of almost every kind and description, are each day floating upon its waters. Thousands of persons are engaged in this commerce. Contracts are made, and obligations assumed, for which these boats and crafts may, under certain proceedings, be made liable. Injuries are inflicted upon persons and property, by persons while *on the river*, for which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases were made to depend on the inquiry whether the boat or vessel was on one side or the other of the main channel, whether the injury was inflicted or crime committed east or west or north or south of such line, it can be readily seen that it would be frequently almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or proceeding; and hence the reason of making the jurisdiction concurrent in all such cases. Such property and persons are, as a rule, transitory, moving—here to-day, and gone to-morrow. Here is a common highway open to the citizens of all states and all nations. It is declared common territory, and, as to matters arising thereon, or persons found thereon, the sovereignties on either side have common or concurrent jurisdiction. Not so, however, as to an obstruction, where the property therein, and the use thereof, is wholly on one side of the channel. It is as though an unhealthy, dangerous, or illegal manufactory should be erected and continued on the Illinois shore, to the injury and annoyance of citizens on the Iowa side; and though such erection should extend below low-water mark, there would be no jurisdiction to declare its abatement in our courts. Such injuries are not *on* the river, within the purview of the acts referred to and relied upon by counsel. And this conclusion is the more warrantable, when we consider that in this case the main dam extends from the shore to the island (Rock Island), that this island, containing hundreds of acres of land, is indisputably a part of the territory of our sister state, and that, to reach this obstruction or nuisance, our courts and the officers thereof must go beyond this island, and decree and procure the removal of a work attached to the main shore, and placed there, too, we are bound to suppose, with the consent of the state to which the corporation owes its life."

The leading case in support of the rule that jurisdiction on the navigable rivers does not extend from one state into another for the abatement or removal of nuisances is Mississippi & M. Railroad Co. v. Ware, 2 Black (67 U. S.) 485, 17 L. Ed. 311. That was a suit brought in the District Court for the District of Iowa, for the abatement of the Rock Island bridge over the Mississippi river from Rock Island, in the state of Illinois, to Davenport, in the state of Iowa. It was alleged that the bridge was a public nuisance. After laying down the rule that a public nuisance may be abated on a bill in equity brought by a private party who has suffered special damage, the Supreme Court of the United States said:

"The bridge is 1,570 feet long, and the number of piers is six. Three of them are on the Iowa side of the river. The draw pier is the fourth. It is 386 feet long at its bottom, and 45 feet wide. The draw space on the Iowa side is 111 feet and on the Illinois side 116 feet wide in the clear. The distance from center to center of the small piers is 257 feet. The long pier stands at an angle with the thread of the current of about 24 degrees, and the small piers are nearly on a line with the thread of the current. The Illinois draw passage is directly over the deepest channel of the river, and directly over the usual track of steamboats before the bridge was built. The Mississippi is about 1,410 feet wide at the bridge, and the middle of the river is about 80 feet westwardly of the long pier. The Illinois draw passage (116 feet), and width of the long pier (45 feet), and the 80 feet between it and the eastern line of Iowa, cover a space of 240 feet of water way, and which embraces the main channel, where steamboats have at all times navigated. It was at the long pier, and in the Illinois draw east of that pier, that the complainant's boats sustained the injuries on which he founded his right to sue the Iowa corporation, and to proceed against the bridge in rem as a public nuisance. An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the courts of that state, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to complainant's boats, giving him the privilege to sue and abate the obstruction were as local as the public right to indict. He asks nothing from the person of the defendant, but seeks to remove a local object, because he has sustained special damage from that object. The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case."

If the Supreme Court of the United States could not sustain the jurisdiction of the Iowa court on the waters of the Mississippi river to the abatement of a nuisance thereon in the state of Illinois, in a case in which a part of the nuisance at least was admitted to extend into the jurisdiction of the court, much less in this case can the jurisdiction of the state of Washington on the waters of the Columbia be extended into the state of Oregon and sustained to abate a nuisance which is entirely within the jurisdictional limits of the state of Oregon.

The appellees, in further support of the claim of jurisdiction, invoke the equitable maxim that equity acts in personam and not in rem. They contend that the jurisdiction of the court below was dependent neither upon the location of Sand Island nor upon the concurrent jurisdiction of the state of Washington and the state of Oregon on the waters of the Columbia river. They assert that, having secured jurisdiction of the parties to the controversy, the court below, as a court of equity, had full jurisdiction to try and dispose of all of

the issues involved; that the injunction issued against the plaintiff operated in personam, and, the plaintiff being within the jurisdiction of the court, it was bound to obey the injunction, although it required the doing of an act beyond the jurisdiction of the court.

Neither the maxim, nor the argument which the defendants adduce from it, is applicable to this case. Pomeroy, in his work on Equity Jurisprudence (3d Ed., § 1318), speaking of actions in personam, says:

"The power to act in personam, through their remedies, is still held by all courts of equity. * * * Of this nature must always be the remedies when the subject-matter, either real or personal property, is situated beyond the territorial jurisdiction of the court, in another state or country. The jurisdiction to grant such remedies is well settled. Where the subject-matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which *directly* affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. As examples of this rule, suits for specific performance of contracts, for the enforcement of express or implied trusts, for the final accounting and settlement of a partnership, and the like, may be brought in any state where the jurisdiction of the defendant's person is obtained, although the land or other subject-matter is situated in another state, or even in a foreign country. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief when granted is such that it *must* act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated; * * * for example, a suit to abate a nuisance"—citing Mississippi & Missouri Ry. Co. v. Ward, supra.

In the Salton Sea Cases, 172 Fed. 792, 812, 97 C. C. A. 214, the objection was made that the Circuit Court of the United States for the Southern District of California had no jurisdiction to decree an injunction in effect abating a nuisance injuring property within the jurisdiction of the court. It was claimed that there was a rule supporting the objection that a court of equity could never compel a defendant to do anything which was not capable of being physically done within the territorial jurisdiction of the court. This court upheld the jurisdiction of the lower court, but placed the jurisdiction expressly upon the ground that the injured property was within the jurisdiction of the court—citing Northern Indiana Ry. Co. v. Michigan Central Ry. Co., 15 How. (56 U. S.) 233, 14 L. Ed. 674; Mississippi & Missouri Ry. Co. v. Ward, supra; Gilbert v. Moline Water Power, etc., Co., supra.

There is nothing in the facts of this case to render these well-settled rules of equity inapplicable, or, when applied, to render their application inequitable. The plaintiff accepting the general belief that Sand Island was within the territorial jurisdiction of the state of Washington, filed his suit in good faith in that district. Answers and cross-complaints were filed by the defendants, and answers to the cross-complaints were filed by the plaintiff after demurrer overruled. That was as far as the suit had progressed, when the Supreme Court decided that Sand Island was within the jurisdiction of the state of Oregon. No hearing had been had and no testimony taken on the

merits of the controversy. After the rendition of the decision of the Supreme Court of the United States in the boundary suit, the plaintiff, in equal good faith, petitioned the court below to dismiss the bill for lack of jurisdiction. At that time the restraining order, issued against the defendants upon the filing of the bill, had been in effect 11 months. The defendants having resisted the motion to dismiss, and having insisted that the suit be heard and determined by the court below, cannot now be heard to complain that the plaintiff insists that the court is without equitable jurisdiction to hear and determine the controversy.

The decree of the court below is reversed, with directions to dismiss the bill. The costs will be divided; the costs prior to the appellant's motion to dismiss the bill to be paid by the appellant, and the remaining costs to be paid by the appellees.

SOUTHERN PAC. CO. v. FORE RIVER SHIPBUILDING CO.

(Circuit Court of Appeals, First Circuit. November 11, 1914.)

No. 1045.

1. CONTRACTS ⊜281—CONSTRUCTION—CONTRACT FOR BUILDING STEAMSHIP—WARRANTIES—"SUCH MANAGEMENT AGREED UPON BY THE PARTIES TO BE PROPER."

A contract for the building of a steamship, with a warranty that it should, "under such management as shall be agreed upon by the parties to be proper," show with a given displacement on a round trip from New York to New Orleans an average speed of 16 knots, with a total average consumption of coal of a stated quality not exceeding 7 tons per hour, required the parties to agree in advance of a trial trip, so far as they reasonably could, upon proper management and conditions whereby the vessel could be given a fair test as to her ability to fulfill the warranty, and an agreement after the trip that the trial had been a fair one was not essential to render it binding upon the builder.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1281–1283; Dec. Dig. ⊜281.]

2. CONTRACTS ⊜281—CONSTRUCTION AND OPERATION—CONTRACT FOR BUILDING STEAMSHIP—WARRANTY.

The provision of such contract for an agreed management on the trial trip precluded the parties, after such agreement had been made, from claiming that the officers and men in charge of the ship were incompetent, or their number inadequate, but not from showing the manner in which the ship was actually handled, for the purpose of determining whether the implied agreement that the tests should be fairly conducted had been complied with.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1281–1283; Dec. Dig. ⊜281.]

3. DAMAGES ⊜123—BREACH OF CONTRACT—FAILURE TO FULFILL WARRANTY.

On recovery in an action for breach of a warranty of speed and coal consumption in a contract for the building of a steamship, which made it necessary for plaintiff to substitute new engines and make other alterations incident thereto, after the ship had been put into service, the plain-

tiff is entitled to recover as elements of damages the cost of such changes and for the loss of the use of the vessel while they were being made.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 320–325; Dec. Dig. ⊂=123.]

Putnam, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Action at law by the Southern Pacific Company against the Fore River Shipbuilding Company. From the judgment, plaintiff brings error. Reversed.

See, also, Fore River Shipbuilding Co. v. Southern Pac. Co., 219 Fed. 387, 135 C. C. A. 129.

Robert M. Morse and William D. Turner, both of Boston, Mass. (Reginald Foster, George Hoague, and Foster & Turner, all of Boston, Mass., on the brief), for plaintiff in error.

Sherman L. Whipple and Samuel H. Pillsbury, both of Boston, Mass. (Guy W. Currier and Philip G. Carleton, both of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM and BINGHAM, Circuit Judges, and MORTON, District Judge.

BINGHAM, Circuit Judge. This action was brought by the Southern Pacific Company, a Kentucky corporation, against the Fore River Shipbuilding Company, a Massachusetts corporation, in the District Court for the District of Massachusetts, to recover damages for an alleged breach of a contract of guaranty as to the speed and coal consumption of a steamship which the defendant contracted to build and sell to the plaintiff for use in its transportation service between the ports of New York and New Orleans, and for certain sums of money alleged to be due for work and labor performed and expenses incurred at the defendant's request. The declaration as originally drawn contained 20 counts. Since then the plaintiff has waived counts 9, 10, 11, 12, 14, 17, 18, 19, and 20; that part of count 3 relating to damages for delay in the completion of the ship prior to its original delivery, and for time required to substitute new boilers; and that part of count 2 relating to expenses to be incurred for new boilers. No question is raised as to counts 5, 7 and 8, upon which verdicts were directed for the plaintiff.

The first count reads as follows:

"And the plaintiff says that on or about the 14th day of July, 1905, the defendant entered into a contract in writing with the plaintiff, of which a copy is hereto attached, marked 'A,' whereby the defendant, in consideration of the sum of $1,000,000, to be paid by the plaintiff in installments, as therein provided, agreed to build for the plaintiff, in accordance with certain plans and specifications, a steamship, to be fitted with twin screw Curtis marine turbine engines and water tube boilers, and to deliver the said steamship, complete and ready for use, at one of the plaintiff's piers in the port of New York, within 20 months from the said 14th day of July, 1905, the date of the execution of said contract, or as much sooner as possible.

"And in and by the fourth clause of said contract the defendant agreed and guaranteed that the said steamship, when constructed in accordance with said plans and specifications, should show an average speed of 10 knots

per hour, in ordinary weather, under such management as should be agreed upon by the parties to be proper, on a displacement not exceeding 10,000 tons on sailing, on a round trip between New York and New Orleans, between the points of sea departure at each port, and further agreed and guaranteed that the total coal consumption for the engines, including auxiliaries, in making the above-named speed, under the said conditions, should not exceed an average of seven tons of coal per hour, of a quality equal to the Clearfield, Berwind-White, or Cumberland, containing not less than 14,000 British thermal units per pound; and it was provided, further, that the defendant should have the right to have an engineer of its own selection present in the engine room of the steamer on any such round trip, who should have opportunity to observe and inspect the coal used.

"And in pursuance of said agreement the defendant constructed a certain steamship, which was named 'Creole'; and the plaintiff paid to the defendant, pursuant to the provisions of said contract, in installments as therein provided, the sum of $900,000, the last installment of $100,000 not being payable until after the plaintiff should accept said ship, which the plaintiff never did because the said ship failed to conform to the requirements of said contract as regards speed and coal consumption; and the defendant, from time to time, after delivering said ship to the plaintiff, made various changes in her propellers and other machinery, in attempting to make her conform to the said requirements as to speed and coal consumption, but without success.

"In order thoroughly to test the said ship as originally completed, and also as altered from time to time by the defendant, the plaintiff allowed the said ship to make 14 round trips between New York and New Orleans under the conditions named in said contract; but the said steamship always failed to make more than an average of about 13½ knots an hour, while, on the other hand, her coal consumption always greatly exceeded the contract requirements, so that the plaintiff was put to great loss and damage, and will be put to still further loss and expense, in order to make said steamship serviceable and profitable for the business for which she was intended.

"And the plaintiff says that, by reason of the breach of said agreement and guaranty on the part of the defendant, the plaintiff has sustained damages to the amount of $600,000, and the defendant owes the plaintiff said amount."

The second count is like the first, with the exception that the concluding paragraph reads as follows:

"And the plaintiff says that by reason of the breach of said agreement and guaranty on the part of the defendant it became necessary for the plaintiff to employ other shipbuilders to remove the said engines and to substitute others, at the reasonable expense of $263,005; * * * and the defendant owes the plaintiff said amount, with interest thereon."

The third count is to recover damages alleged to have been incurred through loss of the use of the ship for 136 days, from August 9, 1907, to December 23, 1907, while she was undergoing repairs after the first trip to New Orleans; for 121 days, from July 4, 1908, to November 4, 1908, while she was laid up and undergoing repairs after the tenth trip; for 182 days, from January 26, 1909, to July 28, 1909, while she was laid up after the fourteenth trip; and for 285 days thereafter, during which time the turbines were removed and reciprocating engines were insalled at Cramp's; and it is alleged that the value of the ship for charter in the market was $400 per day.

The fourth count is to recover the sums paid for insurance while the ship was laid up and repairs were being made during the periods above stated.

The sixth and thirteenth counts are to recover the value of stores and equipment on the ship, alleged to have been used, lost, or destroyed

by the defendant while the ship was in its possession after the first and tenth trips to New Orleans.

The sixteenth count is to recover the expenses alleged to have been incurred in returning the ship to the defendant's yard at Quincy after the first trip, in protecting the plaintiff's property on board the ship while she was in the defendant's possession, and for traveling expenses of officers and men from New York to Quincy to take the ship back to New York after the repairs were made.

The case was originally sent to an auditor, who heard the parties and filed his report. Later it was set for trial before a jury. At the trial the plaintiff introduced the auditor's report, and rested, and at the close of all the evidence, the court having made certain rulings as to the meaning of the guaranty clause in the contract, and having declined to give certain instructions requested by the plaintiff relating to the same subject, the plaintiff excepting, and, in view of the rulings, not desiring to have the issue whether or not there had been a breach of the guaranty submitted to the jury, the jury were directed to return a verdict for the plaintiff for the amount found due by the auditor under the fifth, seventh, and eighth counts of the declaration, with interest from the date of the writ, to wit, for the sum of $2,948.41, the same being for certain towage charges, the cost of shifting the propeller and the expense of the Diamond Shoals trip.

[1] The fourth paragraph of the contract contains a provision wherein the defendant "guarantees that the steamship * * * shall, under such management as shall be agreed upon by the parties to be proper, show, on a displacement not exceeding ten thousand (10,000) tons on sailing on a round trip between New York and New Orleans, between the points of sea departure at each port an average speed in ordinary weather of 16 knots per hour," and "that the total coal consumption in making the above-named speed under the above-named conditions shall not exceed an average of seven (7) tons of coal per hour, including auxiliaries, of a quality equal to the Clearfield, * * * containing not less than fourteen thousand (14,000) British thermal units per pound." The present controversy hinges largely on the meaning which the parties intended to convey by the language used in this provision of the contract.

The plaintiff's contention is that the words, "under such management as shall be agreed upon by the parties hereto to be proper," mean that before a trial trip under the guaranty should take place over the designated route, the parties should agree upon the captain and chief engineer who were to take charge of the ship during the trip, and the number of subordinates, such as assistant engineers, firemen, water tenders, coal passers, and oilers, having due regard for the number ordinarily employed on service boats of this character and the accommodations provided on the ship, and that the chief engineer, as was customary, should select the subordinates; that the practical construction put upon the contract by the parties, as disclosed by the evidence, shows that they so understood the matter and endeavored to act accordingly in arranging the trips. In addition to this, the plaintiff contends that this provision of the contract also means that the parties, by agreeing in advance of a trip upon the men who were to officer the ship and the

number of subordinates, thereafter became precluded from showing not only that the officers and men selected were incompetent and the number of subordinates inadequate, but also that the officers and men on any such trip negligently managed the ship, so that it did not have a fair trial. In other words, that the parties, by agreeing in advance, decided that the officers and men were competent, the number adequate, and that the test would be one by the result of which the parties would be bound.

The defendant, on the other hand, contends that the language of the contract as to this matter is ambiguous; that under the circumstances it would not be reasonable to suppose the parties intended an agreement should be made in advance of a trip that the management would be proper and the trial a fair one, without knowing or having the means of knowing that it was in fact so; that this provision really relates to and was intended to mean that the parties should agree subsequent to a trip that the trial had been a fair one; and that, if they did not subsequently agree, then the trip would be of no consequence in determining the rights of the parties under the guaranty. It is this view of the contract that was taken by the court below in stating his rulings to the jury, and to which the plaintiff excepted. In his rulings the court, after stating the various contentions of the parties and reading from the contract the clause here in question, said:

"The guaranty from which I am reading contains nothing express as to the time when that agreement shall be made. On the one hand, the Southern Pacific Company contends that the agreement means an agreement to be made before the trial trips are entered upon; and, on the other hand, the Fore River Company contends that it does not mean an agreement before the trip, that it does mean an agreement after the trip, and that it was open to the defendant to the Fore River Company, after having knowledge of the management on a given round trip, to claim that it was not proper. * * * Taking the language of the guaranty just as it stands, therefore, there are different meanings which may be given to the contract. The parties have not made it clear by the terms which they have used in contracting just which of those meanings they intended. Under those circumstances, it is the duty of the court to settle the meaning, to determine the meaning, for the purposes of this case. * * * I have, therefore, determined the meaning to be that contended for by the Fore River Company—the meaning of the guaranty on these two points to be that contended for by the Fore River Company, namely, that 'management' means the actual handling of the vessel, and that an agreement regarding it was not an agreement to be made before the trial trips were entered upon, but afterwards. Now gentlemen, in view of those rulings, I have been informed by counsel for the Southern Pacific Company, they do not claim that any agreement was made after the trial trips that the handling of the ship upon those trips was proper, and that in view of the rulings of the court, which I have indicated to you, which they do not accept—to which they object and to which they except for the purpose of ascertaining on appeal whether they are right or not—they do not now ask to have the issue whether or not there has been a breach of guaranty submitted to the jury."

Now, it is apparent from the foregoing that the court ruled the word "management," as employed in the guaranty clause of the contract, meant the actual handling of the ship on any given trip; that the agreement as to management there provided for was to be entered into by the parties subsequent to a trial trip; that there could be no recovery under the guaranty, without proof that after one or more of the

trips shown in evidence the parties had agreed that the management of the ship on such trip or trips was proper and the trials fair ones; and that in view of the rulings, thus limiting the issue, the plaintiff did not care to go to the jury, preferring to rely upon its exception.

This being the situation, we are of the opinion that the ruling of the court was erroneous. The meaning of the contract as to this matter is reasonably certain, especially when viewed in the light of the conduct of the parties in their endeavor to comply with its terms before the trips took place, and that is that the parties intended by this clause of the contract to provide in advance, so far as they reasonably could, means whereby a fair trial or test of the ship's ability to comply with the terms of the guaranty could be had, and that no test under the guaranty should take place unless the parties agreed before a trip was had upon the officers who should take charge of the ship, and the number of subordinates who were to work under them. This is the limit to which their express agreement as to management extends. The contract does not provide, as is sometimes the case, that the agreed management shall constitute a board of arbitrators to make tests and state results by which the parties shall be concluded, and contains no provision that the tests shall be fair. It does, however, provide for trial tests, and such being the case the law will imply an obligation that the tests called for shall be fair. Arkwright Mills v. Aultman Co., 145 Fed. 783, 76 C. C. A. 347. But it does not follow from this that the parties contemplated that an agreement subsequent to the trials was necessary in order to determine their rights under the guaranty, or that they would not be bound by the result, if the trips were made under an agreed management and were fairly conducted. There was evidence from which it could have been found that the parties agreed in advance upon the management of the vessel as herein defined, that trial tests were had under such management on which the ship failed to make the round trip at an average speed of 16 knots an hour or within the specified coal consumption, and that the tests were proper. The plaintiff, therefore, was entitled to go to the jury upon these questions, and should not have been required to show an agreement subsequent to the tests that they had been properly conducted.

[2] The effect of the provision for an agreed management is this: If the parties enter into the agreement, trips made by the vessel over the designated course under such management would be tests under the guaranty by which the rights of the parties could be determined. In such case evidence that the officers and men in charge of the ship were incompetent or their number inadequate would not be admissible to show that the management was improper and the trials unfair, for, to this extent, the parties would be precluded by their agreement; while evidence as to how the ship was actually handled on any such trip would be admissible for the purpose of determining whether the implied obligation, that the tests should be fairly conducted, had been complied with. If the parties fail to enter into the agreement as to management, trips made by the vessel over the course would not be tests under the guaranty. In that event the plaintiff could not maintain its action for breach of guaranty, and it would avail the defendant

nothing to show that the officers and men who conducted the trips were incompetent or their number inadequate.

The auditor has found and the evidence discloses that on all of the 14 trips that were made the ship failed to comply with the guaranty and to maintain an average speed of 16 knots per hour, to say nothing of the coal consumed, and that it did not equal the time fixed in the regular service schedules of the Southern Pacific Company on the last four trips, if it did on any. These facts do not seem to have been controverted at the trial. It further appears that, notwithstanding the repairs and alterations made to the ship after the first trip, the performance of the ship grew steadily worse until the end of the tenth, when she was laid off. A conference was then had in New York between Mr. Jungen, the manager of the Southern Pacific Company and Admiral Bowles, president of the Fore River Company, and other representatives of the two companies. At this conference Jungen informed Bowles that the ship had been laid off, and asked what he was going to do about it. Bowles replied that he was not going to do anything, that the failure of the ship was due to bad management, to inefficient and inadequate fireroom service, and to the use of salt and muddy water. To this Jungen replied that he (Bowles) had selected the guaranty engineer (for the last eight or nine trips), who had authority to select his own assistants and the whole fireroom crew, and if that was his attitude he wanted him to write a letter to the president of the Southern Pacific Company and state his case, that he (Jungen) would write a letter to the president telling him to call the guaranty of the Fore River Company, and that he would also recommend taking out the turbines and putting in reciprocating engines. Thereupon Bowles said they had better come to an understanding. A discussion ensued as to what could be done to make the ship good. It was then arranged that the ship should go back to the defendant's yard at Quincy for repairs, that a forced or assisted draft should be installed in the fireroom, a vacuum augmenter should be added, and a more efficient screw installed. There was discussion as to whether the Southern Pacific Company would pay for the forced draft. Jungen declined to pay any of the expense, on the ground that it was up to the Fore River Company to make good under the contract. Bowles finally agreed that his company would "make good," but in giving his testimony said that it was on the understanding that Jungen would accept the ship and put her on the line of the Southern Pacific Company, if she could make her schedule on a decent coal consumption. On the other hand, there was evidence that Jungen said he would recommend the acceptance of the ship, if she could make the schedule on a reasonable coal consumption, and the auditor finds the latter is the true version. Except as to the last proposition, the evidence of all the witnesses is in accord, and the only reasonable conclusion that could be drawn from the arrangement here presented is that the Southern Pacific Company agreed to forego any right it then had to enforce the guaranty for failure on the part of the ship down to that time to meet the contract requirements as to speed and coal consumption; that the Fore River Company agreed to make the repairs and alterations, and to forego any right it had to insist that the previous trips were not fairly managed; that past dif-

ferences were to be eliminated, and the rights of the parties under the guaranty determined by the result of the future trials or tests, after the repairs and alterations then agreed upon were made. Whether the guaranty, as respects future trials, was modified, so as only to require the ship to equal the time fixed in the service schedules of the Southern Pacific or not is of little consequence, for, as above stated, the ship never equaled that time on any round trip after the tenth. But, however this may be, we think that what took place at this time would not warrant a finding that the guaranty was waived, and that there was no evidence in the case that would justify the conclusion that the plaintiff lost its right to require the defendant to comply with the guaranty, either as originally drawn or as modified, if it could be found to have been modified. No claim of this kind was made until after this litigation was begun, and the conduct of the parties discloses they understood that the guaranty was in full force down to the interview after the tenth trip, and was in force in its original or modified form thereafter, and that from the beginning to the end it was their endeavor to comply with the contract, and to see if the ship, equipped as it was with turbine engines and water tube boilers, could fulfill the guaranty.

The rights of the parties under the guaranty, not being dependent upon the success or failure of the trips prior to the eleventh, evidence in relation to them on a subsequent trial of the case will be of no consequence in determining the issues, and should not be received. But as their rights are to be determined by the success or failure of the trials that took place after the tenth trip, and as the contract contemplates an implied obligation that those trials should be fairly conducted, it will be open to the parties to show that on the subsequent trips the officers and men engaged were careful or otherwise in the performance of their duties, and that the trials were fair or unfair, as the case may be.

It is unnecessary to consider further the plaintiff's exceptions to evidence. From what has already been said, it can be readily understood what was competent and what should not have been received.

The verdict ordered for the plaintiff, to the extent that it goes, is undoubtedly correct, and, although the judgment entered thereon must be reversed, no reason appears why the verdict should not be allowed to stand, so that it may be added to any further sum that may be found due the plaintiff.

The ship having failed on the eleventh, twelfth, thirteenth, and fourteenth trips to comply with the guaranty as originally drawn or as modified, at a subsequent trial of the case it will be incumbent upon the plaintiff to prove (1) that the parties agreed in advance upon the management for one or more of the four above-named trips, and that they were made under such management; (2) that the failure of the ship to comply with the guaranty was due to its inability to fulfill the contract and not to the want of a fair trial; and (3) the damages it sustained.

[3] Upon the question of damages the auditor has found that the reasonable expense incurred by the plaintiff in substituting the reciprocating engines and making the accompanying alterations and repairs

was $263,500; that the time consumed in making these alterations and repairs was 288 days; that the fair value of the use of the ship was $400 per day; and that the damage sustained by the plaintiff from the loss of the use of the ship during this period was fairly recoverable as a part of the cost of making the ship comply with the guaranty This was also the view taken by the court at the trial. We see no reason why these items are not proper elements of damage for the jury to consider. If, as is probable, the expense of insuring the ship during this period was included in the $400 per day, which the auditor finds was the fair value of the use of the ship, and which the plaintiff alleges was the value of the ship for charter in the market, then this sum should not be again included; otherwise, it may be considered, as we think it is fairly a part of the expense of making the ship comply with the guaranty.

The auditor has found against the plaintiff as to the other items of damage claimed in the various counts in the declaration, and, as the plaintiff does not insist upon them, we do not pass upon them.

It is understood that there is no disagreement among members of the court as to the construction of the contract; that the disagreement relates to whether the questions discussed are properly before the court on the exceptions taken by the plaintiff in error to the rulings of the trial judge.

The judgment of the District Court is reversed, the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers its costs of appeal.

PUTNAM, Circuit Judge (dissenting). I am compelled to dissent in this case. It is too important a case to be disregarded in the particulars to which I call attention. The opinion of the court is based upon severed portions of the record, when everywhere it is properly understood that the whole of a record or of any instrument should be taken together, under the ordinary rules of interpretation, by virtue of which various portions of any instrument or record are to be construed in the light of the context.

Quite early in the trial of the case the following colloquy between the court and counsel for the Southern Pacific Company occurred, namely:

"Mr. Morse: But your honor has not ruled that that was not what the parties agreed upon as proper management, and that is what we are contending for. We say that it was the clear intention of this contract, as expressed in the contract, that the parties should agree before each trial in regard to the management for that trial, and that having agreed upon that management then the Southern Pacific is no more responsible for the carelessness or the neglect of an individual.

"Dodge, J.: I understand you say that, but I have been obliged to rule that I cannot take it that way; that I must regard 'management' as meaning what was done, how the ship was actually handled during the trial trip.

"Mr. Morse: We have not so understood your honor. Do I understand, from that, that if an individual water tender or fireman failed in his duty, the Southern Pacific is responsible for it?

"Dodge, J.: Oh, no; I have not said that; I have not said that.

"Mr. Morse: Well, I don't quite understand your honor's ruling. We say that before each trial these parties agreed upon the management under

which the ship should be sailed. Take, for instance, the ten trials, where Mr. Bowles himself selected the chief engineer, and paid for the chief engineer, and the ship was run under his management. Now, are we responsible for those if they were defects, if there were failures, on the part of men to perform their duty? Where is there room for any questions? The parties have agreed on the management; they have agreed that Jacobs shall be captain; they have agreed that Goudy shall be chief engineer; and they have agreed, as the evidence will show, that the chief engineer shall select his subordinates.

"Dodge, J.: I have not undertaken to rule in detail on exactly what 'management' shall mean during the trip; but I have ruled that I cannot say that, because you put the ship into agreed hands at the beginning of a trip, therefore the whole management during that trip was agreed on as proper.

"Mr. Morse: It is pretty difficult to follow that statement. If the parties before the voyage say that 'we agree that this ship shall be managed and operated in a certain way and by certain people, and that the results of that operation shall establish whether or not she performs the guaranty or not,' we say that, after they have agreed to that, and that is an agreement that that shall be a test of the ship.

"Dodge, J.: I understand that, but I cannot quite see it in that way. Well, I will consider this until to-morrow morning."

These extracts state clearly the issue involved as the case was made by the parties to it. The Southern Pacific Company claimed that, inasmuch as certain persons had been selected for the management of the ship during the trial trips, the selection was conclusive, to which proposition the Fore River Company did not agree. The court, in substance, maintained that, inasmuch as the ship had been intrusted to the possession and custody of the Southern Pacific Company to make the trial trips, the duty of ordinary diligence which the law imposes on a bailee rested throughout on the Southern Pacific Company. Notwithstanding the particular expressions used by the court, this was its position throughout the subsequent case; and this was the real issue in controversy. When the court finally determined that it should so rule, the Southern Pacific Company abandoned the contest and relied upon its exceptions as to the law. On that issue the court was correct, and that overshot all other issues in the case.

Before understanding the case, it must all be examined from the departure point of the extract which we have made.

FORE RIVER SHIPBUILDING CO. v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, First Circuit. November 19, 1914.)

No. 1046.

1. CONTRACTS ⇐205—CONSTRUCTION—CONTRACT FOR BUILDING STEAMSHIP—WARRANTY.

Plaintiff contracted to build a steamship for defendant, with a warranty that "under such management as shall be agreed upon by the parties to be proper" it should show, with a given displacement, on a round trip between New York and New Orleans, a certain average speed, with not to exceed a stated average coal consumption. After being turned over to defendant, the vessel made a number of trial trips, but failed on any of them to fulfill the warranty. *Held*, that the stipulation for agreed

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

management did not shift the responsibility for the conduct of the officers and crew in the actual handling of the ship from defendant, whose servants they were, and that in an action to recover a deferred installment of the price plaintiff was entitled to show that she was capable of complying with the warranty under proper management, and failed only because of negligent and improper handling, which damaged her motive power.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 878, 905; Dec. Dig. ⊂⊃205.]

2. CONTRACTS ⊂⊃205—CONSTRUCTION—CONTRACT FOR BUILDING STEAMSHIP.

A provision in the contract that the last installment of the price should become due and payable when the performance of the ship should have equaled, "in the opinion of" the purchaser, in a satisfactory and substantial manner the requirements of the warranty as to speed and coal consumption, called for actual performance on the part of the ship and to the satisfaction of the purchaser; but the purchaser waived his right to insist on actual performance to his satisfaction, if after delivery of the ship to him its structure was so damaged through his negligence as to render it incapable of complying with the warranty; and under such circumstances the purchaser may be required to pay the installment, on its being established that the ship, when delivered, had the capacity to meet the stipulated requirements as to speed and coal consumption.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 878, 905; Dec. Dig. ⊂⊃205.]

3. CONTRACTS ⊂⊃261—BREACH—ELECTION OF REMEDIES.

On a breach of a contract by one party, the other party has his election to rescind or proceed under the contract, and, having elected to proceed, he is bound thereby.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174–1180; Dec. Dig. ⊂⊃261.]

4. CONTRACTS ⊂⊃232—CONSTRUCTION BY PARTIES—ALTERATIONS MADE BY BUILDER OF STEAMSHIP.

Where the builder of a steamship under contract voluntarily made alterations after delivery in recognition of its obligation under the original contract, the law will not imply a contract on the part of the purchaser to pay for the same.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1071–1094; Dec. Dig. ⊂⊃232.]

Putnam, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Action at law by the Fore River Shipbuilding Company against the Southern Pacific Company. Judgment for defendant, and plaintiff brings error. Reversed.

See, also, Southern Pac. Co. v. Fore River Shipbuilding Co., 219 Fed. 378, 135 C. C. A. 120.

Sherman L. Whipple and Samuel H. Pillsbury, both of Boston, Mass. (Guy W. Currier and Philip G. Carleton, both of Boston, Mass., on the brief), for plaintiff in error.

Robert M. Morse and William D. Turner, both of Boston, Mass. (Reginald Foster, George Hoague, and Foster & Turner, all of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM and BINGHAM, Circuit Judges, and MORTON, District Judge.

BINGHAM, Circuit Judge. This action was brought by the Fore River Shipbuilding Company against the Southern Pacific Company, in the District Court for the District of Massachusetts, to recover the final payment of $100,000 under a contract in which the plaintiff agreed to construct and deliver to the defendant a steamship for use in its transportation service between the ports of New York and New Orleans, or, in the alternative, to recover the difference between the actual cost of the ship and the sums paid therefor by the defendant, and to recover the expense of certain repairs and alterations made in the ship by the plaintiff after it was delivered to the defendant.

The declaration contains four counts. The first count is to recover the final payment of $100,000, called for by the contract; the second is to recover $546,929.52, the difference between the alleged actual cost of the ship and the sum of $900,000, which the defendant has paid the plaintiff; and the third and fourth counts are to recover $120,572.-90 for expenses incurred in repairing and altering the ship on two occasions—the first occasion being after the first trial trip to New Orleans, when the expenditure amounted to $69,579.98, and the other after the tenth trip to New Orleans, when the expenditure was $50,992.92.

The case was originally heard by an auditor, who reported his findings. Later it was set for trial before a jury. At the trial the auditor's report and other evidence were introduced, and at the close of all the evidence the court directed a verdict for the defendant, subject to the plaintiff's exception. The case is now here on the plaintiff's bill of exceptions, and the errors assigned are to the order of the court directing a verdict for the defendant and to the exclusion of certain evidence.

In the contract it was provided that the defendant should pay for the steamship $1,000,000 in 10 payments of $100,000 each. The first payment was to be made when the keel was laid and the steel material was ordered, and the title to the ship and the material purchased therefor was thereupon to pass to the defendant. The ninth payment was to be made when the ship was delivered; the tenth, when the steamship was "finally accepted," and "when the performance of the vessel shall have equaled, in the opinion of the Pacific Company, in a satisfactory and substantial manner, the guaranty requirements herein set forth as to speed and coal consumption." The intervening payments became due at stated times as the work progressed. All of the payments, prior to the tenth, were met in accordance with the terms of the contract. The guaranty as to speed and coal consumption was that the steamship "shall, under such management as shall be agreed upon by the parties hereto to be proper, show, on a displacement not exceeding ten thousand (10,000) tons on sailing, on a round trip between New York and New Orleans, between the points of sea departure at each port, an average speed in ordinary weather of 16 knots per hour," and "that the total coal consumption when making the above-named speed under the above-named conditions shall not exceed an average of seven (7) tons of coal per hour, including auxiliaries, of a quality equal to the Clearfield, Berwind-White, or Cumberland, containing not less than fourteen thousand (14,000) British thermal units per pound."

[1] The evidence discloses, and the auditor has found, that 14 trial trips or tests under the guaranty were had, on none of which did the ship maintain an average speed of 16 knots per hour, or keep within the required coal consumption, and that on this account the defendant declined to accept the ship as complying with the guaranty, and to make the final payment of $100,000.

Assuming these facts to be true, the plaintiff contends there was evidence from which it could reasonably have been found that the ship was capable, under proper management, of complying with the terms of the guaranty, and was prevented from so doing through the negligence of the defendant; that the evidence would not only authorize a finding that the ship's failure to comply with the guaranty was due to a lack of skillful handling on these trips, but would also justify the conclusion that the engines, boilers, and machinery comprising the motive power of the ship were so damaged by the defendant's negligent conduct that the ship was prevented from doing what it would otherwise have accomplished; that the ship being capable, under proper management, of complying with the guaranty, and her structure being so damaged through the defendant's negligence as to prevent her complying therewith, it became the duty of the defendant to restore the ship to the capacity she possessed when received from the plaintiff, and upon the defendant's failure to do this the plaintiff would be excused from showing actual performance on the part of the ship under an agreed management in accordance with the terms of the guaranty.

The defendant contends that the guaranty calls for actual performance on the part of the ship; that it is therefore unimportant whether the ship was ever capable of complying with the guaranty; that the management for 14 trial trips was agreed upon in advance, on all of which the ship failed to meet the guaranteed requirements; and that if the ship's structure was damaged on these trips through the negligence of the officers and men employed, their conduct, they having been agreed upon in advance, would not be attributable to the defendant, and would not impose a duty upon it to restore the ship to the condition she was in when received, or excuse the plaintiff from seeing that she actually complied with the guaranty.

The auditor has found that during the voyages to New Orleans the ship was in the possession and control of the defendant, and the voyages were made as trips in its transportation service. This is but another way of stating that the officers and men employed on these trips were the servants and agents of the defendant, for whose conduct it was legally chargeable. The stipulation in the guaranty calling for an agreed management does not have the effect, when a management is agreed upon, of shifting the responsibility for the conduct of these officers and men from the defendant to the plaintiff. Its effect, as pointed out in our decision in Southern Pacific Co. v. Fore River Shipbuilding Co., 219 Fed. 378, 135 C. C. A. 120, is to preclude the parties from thereafter claiming or being permitted to show that the officers and men were incompetent, or their number inadequate, and leaves the responsibility for their conduct in the actual handling of the ship chargeable to the defendant, the same as it would have been had

the guaranty contained no such stipulation and no agreement as to the management had been made. Then, again, if the management of the ship on these trips was not agreed upon in advance, there could be no question but that the officers and men in charge of the ship were the servants and agents of the defendant, for whose negligent conduct in damaging the structure of the ship it would be responsible. We are therefore of the opinion that the contention of the plaintiff, as above set forth, presents the matter in the true light, and as there was evidence from which it might have been found that the ship on the three occasions when she was turned over to the defendant was capable of complying with the guaranty, and that her structure was thereafter so damaged by the negligent conduct of the officers and men who were under the defendant's control as to prevent her from complying therewith, that the court erred in directing a verdict for the defendant on the first count.

The contention of the plaintiff that it was also entitled to go to the jury on the first count, upon the ground that the finding of the auditor allowing the plaintiff to recover the final payment of $100,000 was some evidence of its right to recover that sum, cannot be sustained. To entitle the plaintiff to recover this payment it was incumbent upon it to prove: (1) That the ship under an agreed management actually fulfilled the terms of the guaranty to the satisfaction of the Southern Pacific Company; or (2) that the guaranty had been waived; or (3) that, while the ship was capable of complying with the terms of the guaranty, actual performance was prevented or excused by the defendant's conduct. An examination of the auditor's report shows that recovery was not allowed on either of these grounds, as he found against the plaintiff upon all of them. The theory upon which the auditor proceeded was that inasmuch as the Southern Pacific Company, in its action against the Fore River Company for breach of the guaranty, had allowed in its statement of damages (the damages claimed being the sum expended by the Southern Pacific Company upon the ship to enable her to meet the terms of the guaranty) an offset of the final payment of $100,000, the plaintiff was entitled to recover that sum in its suit on the contract. This was clearly erroneous.

Evidence of negligent management of the ship on the trips to New Orleans prior to the eleventh should not have been received. As pointed out in our opinion in Southern Pacific Co. v. Fore River Shipbuilding Co., the parties, by the arrangement which they entered into subsequent to the tenth trip, agreed to eliminate past differences; the Southern Pacific Company was to forego any right it then had to enforce the guaranty for failure on the part of the ship down to that time to meet the contract requirements as to speed and coal consumption; and the Fore River Company was to make the suggested repairs and alterations, and forego any right it had to insist that the previous trials had been negligently managed; and at a subsequent trial of the case the Fore River Company will be entitled to show that the ship, when she was returned to the Southern Pacific Company prior to the eleventh trip, was capable, under proper management, of complying with the guaranty in a substantial manner, and that her structure

was thereafter so damaged by the negligent conduct of the officers and men under the defendant's control as to prevent her from complying therewith.

[2] It has been suggested that under the terms of the contract the final payment was not to become due and payable, even though the ship on sailing over the designated course under agreed management equaled the terms of the guaranty; that it would become due only in case the turbine engines and water tube boilers proved entirely satisfactory to the Pacific Company; and that this sum was to be withheld by the Pacific Company to enable it to substitute reciprocating engines and Scotch boilers, if it concluded so to do. This plainly is not a correct view of the matter. According to the contract, the final payment was to become due when the performance of the ship under agreed management, in the opinion of the Pacific Company, equaled the terms of the guaranty as to speed and coal consumption in a substantial and satisfactory manner. If, therefore, we assume that, when trial tests under the contract are fairly conducted, and the performance of the ship, in the opinion of men in general, fairly complies with the terms of the guaranty, the performance of the ship under such circumstances would not fix liability for the final payment, as the defendant might still refuse to pay, because in its opinion the ship's performance does not equal the terms of the guaranty, it does not follow that the defendant can avoid payment, even though in its opinion the ship's performance does not equal the guaranty, if her failure is due to the defendant's misconduct. As we construe the contract, the ship is entitled to a fair trial. If it is not given one, the conditions never come into existence on which it is agreed the defendant may exercise its judgment; and if the failure is due to the defendant's misconduct, it waives its right to interpose, as a defense to a suit to recover the final payment, that in its opinion the ship's performance does not equal the terms of the guaranty and is not to its satisfaction. Daggett v. Johnson, 49 Vt. 345, 349; Singerly v. Thayer, 108 Pa. 291, 299, 2 Atl. 230, 56 Am. Rep. 207; Exhaust Ventilator Co. v. Chicago R. R., 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257.

The provision in the contract—that "if the said turbines and boilers * * * do not prove entirely satisfactory to the Pacific Company, and if the said Pacific Company decides to install in said steamship reciprocating engines in place of steam turbines, and Scotch boilers in place of water tube boilers, then, and in that event, the Shipbuilding Company, at its own expense, will, if requested within six months after delivery of said ship, stiffen up the hull of said steamship as required by the Pacific Company—was inserted out of abundant caution, and to give the Pacific Company the right to require the Fore River Company, at its own expense, to stiffen the hull of the ship so that the Pacific Company could install reciprocating engines and Scotch boilers, if it so desired, notwithstanding the performance of the ship, equipped as she was, in its opinion equaled the terms of the guaranty in a substantial and satisfactory manner when the tests took place. If the last payment was not to be made until the Pacific Company was entirely satisfied with the turbines and water tube boilers, the parties

would not have provided, as they did, that it should become due when the performance of the ship equaled the requirements of the guaranty, but would have omitted that provision altogether, and made its payment dependent upon the turbines and water tube boilers being entirely satisfactory to the Pacific Company. This they did not do.

It is difficult to perceive what the ground is on which the plaintiff bases its right to recover under the second count. The defendant received the ship when it was ready for delivery, and made all its payments in accordance with the terms of the contract, down to and including the ninth. The tenth payment was not to become due until after the ship was subjected to tests under the guaranty, and was properly withheld to await their outcome. If the plaintiff's position is that the defendant did not have the right under the contract to require the alterations and changes that were made in the smokestack, shaft, and struts of the ship before she was delivered, and that its conduct in requiring them to be made, and that of the plaintiff in making them, operated as an abandonment of the contract by mutual consent, the evidence fails to warrant any such conclusion. In addition to the evidence above set forth, showing that payments to the amount of $900,000 were made by the defendant and received by the plaintiff under the terms of the contract, and that several of these took place after the changes were required to be made, it appeared that just prior to the delivery of the ship the plaintiff wrote the defendant, requesting it to arrange for insurance on the vessel when delivered "in accordance with paragraph 7 of the contract," and that the defendant stated, in a letter acknowledging the delivery of the ship, that she was received "subject to the terms of the contract," and that after certain trial tests were had the plaintiff sent the defendant a statement requesting payment of the last installment of $100,000. In fact, all of the evidence discloses that neither party acted upon the assumption that the contract had been abandoned, and a finding that it had been would not be warranted.

[3] Then, again, if the plaintiff's theory is that the defendant's conduct in regard to these changes operated as a breach of the contract, there is no evidence that the plaintiff has ever put itself in the position of rescinding the contract by returning or offering to return the payments made under the contract, or that it treated the contract as broken when the changes were required to be made. If the contract was then broken, that was the time for the plaintiff to have exercised its right to elect whether it would go on under the contract or treat it as rescinded, and, having chosen the former course, it is now too late to adopt the latter. Forbes v. Appleyard, 181 Mass. 354, 63 N. E. 894.

Furthermore, it seems to us that the evidence fails to disclose that these changes exceeded what the plaintiff could be required to make under the terms of the contract, and that the parties so understood the matter. They do not appear to have even regarded the changes as extras for which additional compensation could be had, for no agreement in writing was entered into before they were made, which was necessary under the terms of the contract in order to have them

treated as extras and to entitle the plaintiff to additional compensation therefor. The direction of a verdict for the defendant on this count was correct.

[4] After the first and tenth trips the ship was sent back to the plaintiff's yard at Quincy for alterations and repairs, and in the third and fourth counts of the declaration the plaintiff seeks to recover the expenses thus incurred. The auditor has found that there was no agreement, express or tacit, that the defendant should pay for these expenses. It appears that after the first trip the plaintiff obtained permission to test the ship on a trip to the Diamond Shoals, during which one of the engines broke down and her performance was generally unsatisfactory. This trip lasted some three days. Admiral Bowles, president of the plaintiff company, testified that at the end of the trip he was in New York, at the office of Mr. Jungen, the general manager of the defendant company, and was shown wireless messages from the ship, reporting her performance; that while there Jungen questioned him as to what should be done with the ship, and that he agreed she should go back to the yard at Quincy for repairs; that he then understood the changes and repairs that were to be made were to be at the expense of the Fore River Company, and that they were made at its expense. There was no evidence to warrant a verdict putting the expense of these repairs on the defendant.

The circumstances under which the ship was returned to Quincy for repairs and the installation of a forced draft, after the tenth trip, are fully set forth in our opinion in the action brought by the Southern Pacific Company. From what is there said it will be seen that the defendant's representative, on being requested to pay for the forced draft, in case it was installed, declined to bear any of the expense that was to be incurred, and that after being thus informed the plaintiff's representative agreed to take the ship back and make the changes and repairs for the purpose of making good under the contract.

Now, as on both of these occasions the expenses in question were incurred voluntarily, and in fulfillment of the plaintiff's obligation under the original contract, the law will not imply a contract on the ground of benefits conferred; and, as there was no contract in fact, apart from the original, for their payment, the court did not err in directing verdicts for the defendant on the third and fourth counts.

We do not deem it necessary, in view of the conclusions reached, to pass upon the other assignments of error.

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 of appeal.

PUTNAM, Circuit Judge (dissenting). The contract in this case is a very simple one, though the relations of parties are very peculiar and marked. The Fore River Shipbuilding Company was evidently interested in promoting the Curtis marine turbines and water tube boilers, which were apparently in an experimental state at the time the contract in this case was made. The contract shows on its face that the Fore River Shipbuilding Company was sufficiently desirous of

securing the practical success of those turbines and boilers to take a considerable hazard in reference thereto. It was therefore agreed that the ship in controversy should be constructed with those turbines and water tube boilers, in accordance with the detailed terms of the contract in suit. The contract, consequently, provided that if the turbines and boilers referred to in the plans and specifications attached to the contract did "not prove entirely satisfactory to the Pacific Company, and if the Pacific Company decided to install in the steamship reciprocating engines in place of steam turbines, and Scotch boilers in place of water tube boilers, then and in that event the Shipbuilding Company, at its own expense, will, if requested within six months after delivery of the ship, stiffen up her hull as required by the Pacific Company." Then follows the guaranty set out in the opinions, which we need not repeat. Then comes the stipulation for payments for the steamship, which concludes as follows:

"One hundred thousand dollars when the steamship is delivered to the Pacific Company.

"One hundred thousand dollars when the steamship is finally accepted by the Pacific Company.

"The final payment of $100,000 shall be made when the performance of the vessel shall have equaled, in the opinion of the Pacific Company, in a satisfactory and substantial manner, the guaranty requirements herein set forth as to speed and coal consumption."

It is apparent that the Fore River Company was to have advantage of a fair test, whatever it might be worth, to be made by the Pacific Company before the parties undertook to determine whether or not the guaranty was complied with. But it is also clearly a part of the contract that the Southern Pacific Company should not be required to make the final payment for the ship of the $100,000 now in controversy, unless, in the judgment of the Southern Pacific Company, she complied with the guarantee. It was not enough that she did in fact comply with the guaranty; but the Southern Pacific Company was to be relieved from all hazard in reference to this experiment, according to its own judgment, and it was not to be required to take any chances as to compliance with the guarantee, so far as its own judgment was concerned. Clearly, in this respect, the contract was a personal matter, and the judgment of the Southern Pacific Company was not to be forestalled or superseded by the judgment of any other persons or of any tribunal, whether it was court or jury, judges or arbitrators. The Southern Pacific Company was to be guarded from exactly the kind of controversy which has appeared in the cases before us. The arrangement was a very peculiar one. The Southern Pacific Company was to make the trial of the ship, and to take possession of her before she was actually completed, and before final payment of the last $100,000 was due, and whatever else might have happened, the Southern Pacific Company was left with this $100,000 in its own hands as a fund to cover the installation of reciprocating engines and Scotch boilers, or their equivalents.

Under this contract we are not called on to say what the rights of the parties might have been if the conditions had been such as suggested by the opinion of the court, because the Southern Pacific Com-

pany sought to protect itself at all events from being drawn into litigation of the kind which has occurred. So far as the $100,000 are concerned, this is a suit on the contract itself for the recovery of part payment provided for by it, and we are not called upon to say what the rights of the parties might have been if the Fore River Company had brought suit for a breach of duty or obligation as thus suggested.

In the suit of the Southern Pacific Company against the Fore River Company the present condition did not arise in its present precise form, with the burden resting on the Fore River Company at the outset of its litigation to show that it had fulfilled the contract in accordance with its terms. Therefore we were not led into the consideration of any proposition such as that now submitted, but only of the proposition whether or not, in a suit on the contract itself, the Fore River Company could maintain with propriety that the Southern Pacific Company was liable for this final payment of $100,000, except on precise proof by the Fore River Company that the ship had actually proved herself to have conformed to the terms of the contract in the judgment of the Southern Pacific Company. As no such issue was presented, or could have been presented, the judgment of the court should have been, on that part of the case, for the Southern Pacific Company.

The other issues in this case failed to show any contract, expressed or implied, raising any obligation for the payment of the moneys demanded. Consequently judgment on those parts of the case should have been for the Southern Pacific Company, and all the interlocutory rulings in relation thereto necessarily proved ultimately immaterial. The judgment of the District Court in this suit for the Southern Pacific Company was right, and it is inconsequential whether the reasons given therefor were right or not.

The law of the case has, however, been settled by the court on this writ of error, and also on the cross-writ of error, to be otherwise than as viewed by us. We must accept the law, of course, as stated by the court, notwithstanding our views expressed in dissent. The result is that on this writ of error it is ordered that there shall be a new trial; that on that new trial the Fore River Company will be entitled to show, to use the language of the court, that there was, or may be, "evidence from which it might have been found that the ship, on three occasions when she was turned over to the Southern Pacific Company, was capable of complying with the guaranty, and that her structure was thereafter so damaged by the negligent conduct of the officers and men who were under the Southern Pacific Company's control as to prevent her from complying therewith." On the other hand, on the cross-writ of error there will be a new trial, as to which the court has decided that the verdict and judgment for the Southern Pacific Company in the case of $3,183.43 and costs were correct, so far as they went, and that the verdict therefor should be allowed to stand, and that any other sums found due the Southern Pacific Company may be added thereto; that the ship having failed on the eleventh, twelfth, thirteenth, and fourteenth trips to comply with the guaranty, the Southern Pacific Company may prove, among other things, that the failure of the ship to comply with the guaranty was due to her inability to fulfill the con-

tract, and not to actual mismanagement on those trips; and that additional damages may be recovered, as stated in the opinion.

Beyond this, the opinion of the court on this writ of error holds that the amounts claimed on the second, third, and fourth counts in this suit cannot be recovered, as to which we have already expressed our concurrence with the court. We express no opinion whether the judgments ordered by the conclusions of the court on its opinions, on this writ of error and the cross-writ, can be worked out harmoniously.

ROOT MFG. CO. v. JOHNSON.

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

No. 2097.

1. BANKRUPTCY ⟸164—"UNLAWFUL PREFERENCES"—TRANSFERS CONSTITUTING.

Payments in discharge of a valid lien, legal or equitable, or payments which do not diminish the estate of the bankrupt, though made within four months before bankruptcy proceedings are instituted, are not "unlawful preferences," within Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (Comp. St. 1913, § 9644).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⟸164.

For other definitions, see Words and Phrases, Second Series, Unlawful Preference.]

2. BANKRUPTCY ⟸161—UNLAWFUL PREFERENCES—TRANSFERS CONSTITUTING.

A bankrupt contracted with a railroad company to construct buildings, and defendant furnished materials under a contract by which it waived all right to a lien. Not having been paid according to its contract, defendant refused to furnish any more material unless the railroad company would see that it was paid, which that company promised to do, and defendant thereupon continued to furnish materials, and subsequently filed a notice of lien. Disputes having arisen, a contract was made between the contractor, the railway company, and the contractor's suretics, reciting that various liens had been filed, and that it was desired to prevent the costs and expenses of litigation, and providing that the railway company waived all claims against the contractor, that it would pay a specified amount in satisfaction of all claims against it, that the sureties would furnish a further amount, that these amounts would be deposited in the names of the attorneys for the railway company and the sureties as trustees, and used in paying lienable claims, but that no claims except judgments should be paid, unless approved by all of the parties. This agreement was made, and the fund in question deposited, more than four months before the institution of bankruptcy proceedings, but within the four months defendant was paid from the fund a part of its claim in settlement of the claim. *Held* that, assuming that defendant did not have a valid lien, his claim was, nevertheless, one of those for the payment of which the fund was created, especially where it appeared that in the negotiations leading up to the agreement all legitimate claims for labor and material were regarded as lienable claims, and as the fund was entirely segregated from the bankrupt's estate more than four months before the bankruptcy proceedings, the payment to defendant was not an unlawful preference, though the bankrupt approved the claim within the four months, as in doing so he acted merely as a trustee of the fund; the payment having in no way depleted the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⟸161.]

3. BANKRUPTCY ⊜161—UNLAWFUL PREFERENCES—TRANSFERS CONSTITUTING.
Such agreement created an equitable lien on the fund, either in favor of defendant or in favor of the railway company, for its protection against liability on its special promise to pay defendant, the payment of which lien was valid as against the trustees in bankruptcy, though made within the four months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⊜161.]

4. BANKRUPTCY ⊜188—"EQUITABLE LIENS"—CREATION.
An express executory agreement in writing, whereby specific property or a fund is clearly identified to constitute security for a debt or other obligation, creates an "equitable lien" upon the property or fund, enforceable whether the property is in the hands of the promisor or of third parties not bona fide purchasers for value.

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

For other definitions, see Words and Phrases, First and Second Series, Equitable Lien.]

In Error to the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Action by Elwyn R. Johnson, trustee in bankruptcy of the Warren Construction Company, against the Root Manufacturing Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Plaintiff in error, the Root Manufacturing Company, seeks to reverse a judgment for $6,658.31, recovered by Johnson, as trustee in bankruptcy of Warren Construction Company, on account of a preferential payment of $6,447.67, with interest thereon. The action was tried before the court on waiver of a jury. The facts as found by the court may be summarized as follows:

The Warren Construction Company (hereinafter called the bankrupt) was adjudicated a bankrupt on August 8, 1912, on a petition in involuntary bankruptcy filed against it July 18, 1912. The bankrupt was insolvent since 1910. The Root Company knew of this condition on and after December, 1911. The payment was made April 10, 1912, as hereinafter described, for a preexisting indebtedness of double the amount, and is a larger percentage than unsecured creditors have received or will receive.

The antecedent facts out of which the payment arose are stated in substance as follows: The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter referred to as the Railway Company) and the bankrupt, on May 9, 1910, entered into a written contract whereby the bankrupt undertook to erect certain buildings for the Railway Company, furnishing material and doing work for which the Railway Company was to pay nearly $300,000, upon monthly estimates of the work done, after deducting 15 per cent. thereof for reservations provided. Final payment was to be made within thirty days after completion of the work. This contract contained a provision as follows: "If at any time there shall be evidence of any lien or claim for which, if established, the owners of said premises might become liable and which is chargeable to the contractors, the owners shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim."

In connection with this contract a bond was executed by the bankrupt and the National Surety Company & Bankers' Surety Company as sureties for the faithful performance thereof.

In 1910 the plaintiff in error entered into written contracts with the bankrupt to furnish certain materials for use in the buildings, aggregating nearly $30,000. The contracts contain the following provision: "The subcontractor hereby, for the consideration hereinafter named, waives and releases all lien

or right of lien now existing or that may hereafter arise for work or labor performed or material furnished under this contract under any lien laws upon said building, the land upon which same is situated, and upon any money or moneys due or to become due from any person or persons to said contractor, and agrees to furnish a good and sufficient waiver of lien on said premises from every person or persons and corporation furnishing labor or material for said premises under the subcontractor."

In the summer of 1911, the plaintiff in error notified the Railway Company that it was not being paid for material delivered under its contracts with the bankrupt and that it would not furnish any more material unless the Railway Company would see that it was paid. The Railway Company gave such assurances and in reliance thereon plaintiff in error continued to furnish materials called for by its contract.

On November 25, 1911, the plaintiff in error filed notices of its intention to hold a lien upon the property of the Railway Company for the amount then due, which notices are in the form provided by the Indiana statute for the purposes of a lien and were filed in the recorder's office as provided by statute.

The plaintiff in error fully completed its contracts and received from the bankrupt part payment therefor, but $12,895.34 thereof remained unpaid on November 18, 1911.

In December, 1911, meetings were held between representatives of the Railway Company, the bankrupt, and the various creditors thereof, including plaintiff in error, for the purpose of settling differences between the parties. At this meeting and as well at a subsequent meeting for like purpose, the surety companies above mentioned were represented and an agreement was entered into January 12, 1912, between the Railway Company, the bankrupt and the two surety companies, which contains recitals and provisions as follows:

"Whereas, a controversy has arisen and exists between the Railway Company and the said Construction Company as to whether said contract has been fully performed and as to certain claims each of said parties respectively has against the other growing out of said contract and matters connected therewith, all of which matters the parties desire to settle and adjust by this agreement; and

"Whereas, there have been filed by various individuals and corporations liens and claims on account of labor and materials furnished on said buildings, on which liens suits have been brought or suits are threatened; and

"Whereas, certain suits in attachment against the Railway Company have been filed seeking to reach amounts alleged to be due the Construction Company; and

"Whereas, the amount of said lienable claims exceeds the amount hereinafter conceded and agreed to be due the Construction Company by the Railway Company, and the Railway Company is asserting its right to recover from the surety companies any amount it may be required to pay on account of lienable claims over and above the amount hereinafter agreed and conceded to be due the Construction Company; and

"Whereas, all the parties hereto desire to provide funds necessary to take care of such of said claims as may be lienable against the property of said Railway Company, to the end that costs and expenses of litigation may be avoided and said claims adjusted:

"Now, therefore, in consideration of the mutual covenants and agreements herein contained to be performed by each of the respective parties hereto, the said parties hereby agree and stipulate as follows:

"(1) The Railway Company hereby agrees to accept from the Construction Company the buildings to be constructed under said contract in their present condition as having been completely constructed according to said contract, except that the work being performed by subcontractors shall be fully completed by such subcontractors or by said Construction Company.

"(2) The Railway Company agrees to cancel any claims it may have against the Construction Company on account of its failure to fully perform said contract, or by reason of any omissions in said contract, or claims in connection with said contract, including demurrage claimed on cars of materials

used in said buildings, and to pay in the manner hereinafter stated the sum of forty-two thousand dollars ($42,000) in full payment, release, and satisfaction of all claims and demands of whatsoever kind or nature against it in favor of said Construction Company, and the said Construction Company hereby agrees to accept the said sum of forty-two thousand dollars ($42,000) to be paid in the manner hereinafter stated, in full payment, release, and satisfaction of all claims of every kind or nature it has or may have against the said Railway Company growing out of or in anywise connected with said contract, and to execute proper receipts and releases for said sum.

"(3) The said sum of forty-two thousand dollars ($42,000), together with the sum of twenty thousand dollars ($20,000), hereby agreed to be furnished by the surety companies, making a total of sixty-two thousand dollars ($62,000), shall be deposited in the Fletcher-American National Bank of Indianapolis, Indiana, in the names of Romney L. Willson and Frank L. Littleton, as trustees for the parties hereto, the same to be used in paying lienable claims which may have been or may hereafter be filed against the Railway Company growing out of said construction contract. No claims, except judgments, shall be paid out of said fund, except upon the approval of the Railway Company, the surety companies, and the Construction Company. Such claims shall be paid by check bearing the personal signature of each of said trustees. The lienable claims shall include, in addition to the claims proper, such court costs or attorney fees as may be adjudged against said Railway Company in any suit upon any such claims. The surety companies shall bear the burden and expense of litigating any claims asserted to be lienable, and may also defend such attachment suits or assist in their defense. If the above funds shall not be sufficient to pay lienable claims in full, the surety companies shall furnish such additional sums as may be necessary to pay said claims.

"(4) After all lienable claims are paid, the balance, if any, of said fund remaining shall first be paid to the surety companies to reimburse them for the amount contributed by them to said fund, and after reimbursing them in full, the balance, if any, shall be paid to the Construction Company, subject to such attachments as may be filed against said sum."

The payment in controversy of $6,447.67 was made by the trustees out of the $62,000 fund on April 10, 1912, pursuant to a written agreement then made between the plaintiff in error, the bankrupt, the Railway Company, and the surety companies, which reads as follows:

"Whereas, said first party has a claim against the Warren Construction Company for $12,895.34, amount unpaid on work done and material furnished by said first party on certain buildings and shops of said Cleveland, Cincinnati, Chicago & St. Louis Railway Company at Beech Grove, Indiana, by virtue of two written contracts between said first party and said Warren Construction Company, one being dated September 10, 1910, and the other November 9, 1910, and claims a mechanic's lien for said unpaid amount against the real estate of said Railway Company upon which said shops are located and against the right of way of said Railway Company in Marion county, Indiana; and

"Whereas, said Railway Company has in its hands certain money held back by it by virtue of its contract with the Warren Construction Company, whereby said Warren Construction Company agreed to erect said buildings and shops at Beech Grove, Indiana, and which contract provided that said money should be held back by the said Railway Company for the purpose of protecting itself against liens filed by any subcontractor whom said Warren Construction Company might fail to pay:

"Now, therefore, this agreement witnesseth that said first party agrees to accept and said second parties agree to pay in settlement and by way of compromise of said claim the sum of $6,447.67 to be paid from said fund retained by said Railway Company, and in which all of said second parties have an interest, and said first party agrees to assign its claims against said Warren Construction Company to Romney L. Willson, trustee, and to release any and all liens it may have on account of said claim or claims against any of the property of said Railway Company.

"Said first party further agrees that said cash payment shall pay 60 per

cent. of its total claim against said Warren Construction Company and to surrender and cancel the notes of said Warren Construction Company now held by it, heretofore given as evidence of part of this indebtedness in excess of 40 per cent. of its total claim of $12,895.34.

"Said second party further agrees that said Romney L. Willson, trustee shall assign without recourse the unpaid portion of said claim, to wit, 40 per cent. thereof, back to said first party as soon as the attachment suits now filed in the county of Marion, Indiana, against said fund, in said Railway Company's hands, claimed by said attachment creditors to be due said Warren Construction Company, shall be settled or dismissed."

Frank S. Roby, of Indianapolis, Ind., for plaintiff in error.

C. C. Shirley and W. H. Thompson, both of Indianapolis, Ind., for defendant in error.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). [1] The judgment against the plaintiff in error rests entirely on the proposition, that the payment of $6,447.67, accepted by it in settlement of its claim of lien, constitutes a preferential payment obtained from the bankrupt in violation of section 60 of the Bankruptcy Act. It was received by the claimant within four months prior to the proceedings in bankruptcy against the debtor (Warren Construction Company) and with knowledge of the fact of the bankrupt's insolvency, so that the plaintiff in error cannot escape liability therefor to the trustee as adjudged—notwithstanding the undisputed bona fides of the transaction otherwise—if the nature and circumstances of the claim and settlement thus made do not exclude the transaction from the well-defined meaning of the provision referred to. On the other hand, it is unquestionable that the statute does not denounce as preferential all payments so obtained by a creditor within the four-months period; that payment may lawfully be accepted for discharge of a valid lien, either legal or equitable; that payments or benefits obtained in various other transactions, as exemplified in recent decisions (Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 Sup. Ct. 339, 49 L. Ed. 571; Newport Bank v. Herkimer Bank, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042; Continental Trust Co. v. Chicago T. & T. Co., 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268), are not within the meaning of the statute; and that a transaction is not an unlawful preference (Id.) unless "the estate of the bankrupt was thereby diminished." While payment of such exceptional claims is preferential in the sense of receiving a benefit not authorized in favor of general creditors (not "of the same class"), it is not an unlawful preference. So the facts in evidence must establish a case clearly within the narrow range of these exceptions to defeat recovery.

[2] In the "special findings of fact" filed below the evidential facts (all undisputed) are set forth at considerable length, and they are epitomized in the foregoing statement, together with copies of the two agreements (of January 12 and April 10, 1912) on which the controversy hinges, mainly, if not entirely. Mention, therefore, of these contract relations and pertinent circumstances will suffice for understanding of the ultimate issue as presented: In 1910 the

Warren Construction Company (bankrupt) entered into a contract with the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to construct buildings and works, at times and prices fixed, aggregating about $300,000; and bonds were executed by National Surety Company and Bankers' Surety Company, as sureties, for performance of the work and covenants. For carrying out this work the contractor sublet various portions to numerous subcontractors; and the plaintiff in error was one of the subcontractors, under two contracts, amounting to $5,400 and $24,100, respectively, each containing a provision for waiver of liens for the work. During operations under the general contract in 1911, difficulties and delays arose, resulting in dissatisfaction both of the Railway Company and various subcontractors, filing of suits and liens by the latter, and disagreement between the Railway Company and its contractor over liabilities. The plaintiff in error had notified the Railway Company of nonpayment by the contractor for work performed under its subcontract, and completed its work under promises on the part of the Railway Company "to see that it was paid." On November 25, 1911, the plaintiff in error had completed its subcontract, and $12,895.34 thereof was unpaid and undisputed; and it then filed and recorded its claim for a mechanic's lien against the property of the Railway Company in conformity with the Indiana statute. In December, 1911, meetings were held attended by representatives of the Railway Company, the bankrupt, and both surety companies, and by various subcontractors, inclusive of the plaintiff in error, for settlement of differences between the parties, resulting in an undisputed written agreement, dated January 12, 1912, and executed by (a) the Railway Company, (b) the bankrupt, and (c) both surety companies. This agreement was completed and the entire fund thereby provided for payment of claims was deposited more than six months prior to the commencement of bankruptcy proceedings. Settlement of the claim of plaintiff in error for payment out of such funds was concluded April 10, 1912, under the further agreement of that date, signed by all parties to the agreement of January 12, together with the plaintiff in error, and it thus falls within the inhibited four-months period, if the statute is applicable to such payment.

One of the contentions for reversal is that the plaintiff in error had a valid and enforceable mechanic's lien for this unpaid claim, notwithstanding its so-called waiver thereof, and much of the argument on this appeal is directed for and against the dual propositions on which it rests, namely: (a) That the stipulation of waiver is not an independent one, but dependent on the ensuing stipulation for final payment to be made "within forty days after the contract is fulfilled"; and (b) that such waiver in an executory contract of the lien provided by the Indiana statute "is contrary to public policy and void." We have not been impressed with either of these theories as tenable, either on the oral argument or upon examination of the authorities cited in the briefs, and they appear to be met and overruled by a decision of the Appellate Court of Indiana (since the hearing of this appeal, called to attention by supplemental brief) in the suit of Carson-Payson Co. v. C., C., C. & St. L. Ry. Co.—for enforcement of

the statutory lien by one of the above-mentioned subcontractors, under an analogous stipulation of waiver—reported 105 N. E. 503. Proceeding, therefore, on the assumption that the lien filed by the plaintiff in error on November 25, 1911, was not enforceable at law, in a suit founded alone on the contract for the work, the issue is limited to the force and effect of the above-mentioned agreement of January 12th and the segregation of fund thereby provided to entitle the plaintiff in error to receive payment of its claim thereunder, irrespective of bankruptcy proceedings against the debtor.

The agreement thus relied upon (in connection with the undisputed facts in reference to the claim) to render the payment lawful is entirely free from doubt as to its bona fides and purposes. It plainly provides a fund which was completely segregated from the estate of the bankrupt so long as any claim within its purview remained unsettled. It is free from ambiguity in any of its terms, except as to the meaning with which the term "lienable claims" was used therein. It was executed by both parties to the primary contract for the work and by both sureties for its performance by the contractor (bankrupt), and it expressly recites: An existing controversy between the Railway Company and the contractor in reference to performance and liabilities thereunder, to be adjusted; that various liens had been filed by parties who had furnished labor and materials, wherein suits were threatened and attachments had been brought to reach amounts due from the Railway Company; that "the amount of said lienable claims exceeds the amount hereinafter conceded" to be due the contractor, and the Railway Company asserts claim against the sureties for any amount it is required "to pay on account of lienable claims" in excess thereof; and that all parties "desire to provide funds necessary to take care of such claims as may be lienable against the property" of the Railway Company "to the end that costs and expenses of litigation may be avoided and said claims adjusted." The contract then provides, in substance: (1) The Railway Company accepts the buildings in their present condition "as having been completely constructed according to said contract, except that work being performed by subcontractors shall be fully completed." (2) The Railway Company cancels its several claims (as mentioned) for breach of the contract; and it agrees to pay and the Construction Company agrees to accept $42,000 in satisfaction of all claims thereunder. (3) This payment, together with $20,000 furnished by the surety companies, making $62,000, is to be deposited in a bank (specified) "in the names of" Willson and Littleton "as trustees for the parties hereto," and "used in paying lienable claims" which have been or may be filed against the Railway Company, but "no claims, except judgments, shall be paid out of said fund, except upon approval of the Railway Company, the surety companies, and the Construction Company"; and "lienable claims" shall include all costs adjudged against the Railway Company in suits, and the surety companies "shall bear the burden and expense of litigating any claims asserted to be lienable" and shall furnish any additional sums if the above fund proves insufficient. (4) If any balance of the fund remains "after all lienable claims are paid," the Surety Companies are to be reimbursed therefrom for their contribu-

tions, and any remainder is "to be paid to the Construction Company." Succeeding provisions do not bear upon the present inquiry, except that one (8) may be mentioned as requiring the "trustees" to "render each of the parties hereto an itemized statement showing the disposition of such trust fund," and to serve "without compensation other than such as may be paid them by the parties they respectively represent." The evidence shows that Littleton represented the Railway Company, and Willson the surety companies, as their respective attorneys in the settlement.

We are of opinion that these recitals and provisions clearly establish the purposes of the fund thereby created to be: First, to protect the Railway Company, in consideration of its paying in $42,000 (when it was questionable whether even half that sum was due the contractor), against all lien claims (then estimated in excess of $60,000) and litigation thereof, so that it was to be free from further liability; second, to protect the surety companies from their ultimate liability for the expenses and delay of litigation over the claims, in consideration of their contribution to the fund, by providing (in lieu of a judgment) for their settlement out of the fund on joint approval of the parties; third, to assure the lien claimants (who participated in the negotiations, but are mentioned only as a class), as the ultimate beneficiaries, of such dedication of the fund so set apart for settlement of their claims without litigation, on approval thereof. The bona fide provisions and purposes so described, not only constitute an equitable arrangement for all interests therein, but, thus made more than four months prior to the bankruptcy proceedings, are immune from the statute. Its purpose to provide for settlement of "liens and claims on account of labor and materials furnished on said buildings" for which lien claims had been filed is expressly mentioned, so that it is not open to question, as we believe, that the plaintiff in error, having long theretofore filed his lien claim, is clearly identified as a beneficiary for settlement out of the fund whenever his claim is either adjudicated or approved by the parties; and this view arises irrespective of the equities presented both in its favor and in favor of the Railway Company, under the facts (stated in the findings) of its completion of the work after payment therefor had been assured on behalf of the Railway Company. Furthermore, the contention in support of the judgment, that the term "lienable claims," as used in the agreement, is to be construed as excluding any claim not legally enforceable as a lien against the property, impresses us to be inconsistent, both with the provisions as an entirety and with the undisputed testimony as to the negotiations leading up to the agreement that the parties "considered all claims" lienable "which were legitimate claims for labor and material"; and no discussion or suggestion arose whether any of the numerous claims represented at the meetings were or were not enforceable as valid liens. Indeed, the agreement to avoid litigation and substitute approval by the parties in lieu of adjudication is strongly persuasive that all just claims for labor and materials were embraced in the provision.

The fund of $62,000 thus provided must be treated as an entirety for carrying out its purposes. While it refers to Willson and Little-

ton as trustees thereunder, they are in truth mere custodians of the fund, without discretion or authority to pay any claims not in judgment, unless approved by all of the contracting parties. It is plainly made a trust fund, entirely segregated from the estate of the bankrupt, which requires complete administration by the parties to perform its purposes. In effect, therefore, the parties have charged themselves with that power and duty, through the requirement that they shall severally ascertain and approve the claims to be paid. Thus performance of that function becomes the act of each as representative or trustee of the trust fund and not on his personal behalf, so that the mere fact that the bankrupt joined with his cotrustees in approval (within the four months period) of the subsequent settlement of the claim in suit, is without force to invalidate the settlement. This distinction of duality, between the action of one in his capacity as trustee or representative of a fund and his action merely personal (as bankrupt), is aptly pointed out in Clarke v. Rogers, 228 U. S. 534, 544, 33 Sup. Ct. 587, 57 L. Ed. 953, and cases cited. The settlement so made, within the terms of the contract and in good faith, for payment out of the trust fund, binds all parties and we do not understand that payment thereupon is open to question on the part of the trustee in bankruptcy. In that aspect of the case, the payment in suit is exclusively attributable to this fund, so that the payment not only caused no depletion of the bankrupt's estate, but tended in fact to augment it to the extent of the reduction of 50 per cent. exacted for the settlement; and the assignment of error for that cause may rightly be sustained on the pertinent authority of Continental Trust Co. v. Chicago T. & T. Co., supra, and cases cited. The above-mentioned clause as to disposition of any remainder of the fund after payment of all claims—that the surety companies are to be reimbursed for their contribution and if any balance remain it is to be paid to the bankrupt—although evidently inserted as a formality in reference to the bankrupt when the claims appeared to be in excess of $60,000, plainly entitles the estate to be paid any balance which so remains out of the sums paid in by the Railway Company. The evidence shows: That all claims have been settled and paid except one, which is in litigation in the state courts; that most (if not all) of them were settled at considerable discounts, making an aggregate of about $35,000 disbursed, and that, laying aside the $20,000 (unused) contributed by the surety companies, $7,572.12 remains in the fund unexpended; that the outstanding claim (in litigation) is that of Carson Payson Company of $16,202.95, for which the claimant elected to proceed for enforcement of an alleged mechanic's lien, instead of accepting settlement out of the fund—presumably the above-mentioned case wherein such enforcement has been denied on appeal from like denial below.

[3] We are of opinion, however, that the judgment is likewise erroneous upon another ground (not called to attention in the arguments), based on the effect of the agreement of January 12th, in connection with the findings of fact proving the equities of the claim presented by the plaintiff in error. Its subcontract contained a clause which made it questionable, to say the least, whether performance of

the work would entitle it to the security of a mechanic's lien for payment; and when the difficulties arose on the part of the contractor for meeting payments, the plaintiff in error refused to proceed with its work until expressly assured by the Railway Company that its claim would be provided for. Relying on such promise, the work was carried on and completed, and the lien claim was duly filed, evidently as a precautionary measure to preserve all rights. The plaintiff in error participated in the December meetings to arrange for settlement of the claims, was advised of the ensuing agreement and its provisions therefor, and rested in reliance upon it for payment of its claim without suit. We understand the agreement thus concluded to create an equitable lien upon the entire fund, enforceable alike, either for protection of the Railway Company under its special promise referred to, or in favor of the plaintiff in error as a beneficiary thereof—identified as such by the express reference above mentioned to lien claims filed, if not otherwise sufficiently identified as of the class referred to as having "lienable claims"—clearly within the well-settled definition of equitable liens, which are uniformly upheld when good faith appears, both as against a holder who is not a purchaser for value and against trustees in bankruptcy. Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865; Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Van Iderstine v. Nat. Discount Co., 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652; Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339; and by this court in McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554.

[4] This doctrine of equitable liens is fundamental in equity whenever the intention, bona fides, identity, and segregation appear, without perfection as a common-law pledge by actual possession in the pledgee; and Walker v. Brown, supra, is an instructive case for its definition and application. It defines the rule to be (in substance) that an express executory agreement in writing, whereby specific property or a fund is clearly identified to constitute security for a debt or other obligation, creates an equitable lien upon the property or fund, enforceable whether the property is in the hands of the promisor, or of third parties not bona fide purchasers for value; and it approves the rule under these circumstances: Brown had delivered to Lloyd Mercantile Company, for assisting its credit, municipal bonds amounting to $15,000, which remained so placed after reorganization of the company, when the new company requested a line of credit with Walker & Co., on the strength of such holding, for large purchases of goods. Such credit was not extended, however, until after Brown had agreed in writing, that the bonds should so remain in the hands of the debtor "as long as there remained any debt due to Walker & Co." Subsequently, without the creditor's knowledge, Brown obtained return of the bonds to him, when the debtor was in truth insolvent and indebted to Walker & Co. in a large amount; and later Brown transferred the bonds to his wife as a gift. An equitable lien was upheld making the bonds chargeable as security for the indebtedness to Walker & Co.

In the recent case of Sexton v. Kessler, supra, the ruling in support of an equitable lien is even more notable in the circumstances of the debtor's possession of the securities. It arose in a suit by the trustee in bankruptcy to set aside the bankrupt's transfer of securities to a creditor, made within less than a month of bankruptcy proceedings and with knowledge on the part of the creditor of the insolvency. The bankrupt was a New York firm and the creditor an English corporation, and they had long been engaged in a course of business, whereby the latter made advances to the former under a so-called "drawing credit." As security for the advances, it was the express agreement and constant practice for the New York firm to set aside negotiable securities, purchased in their own business, which were placed in a package "upon a separate shelf of the New York firm's vault," and marked as "Escrow for Account" of the English Company, "intended as a protection against our long drawings against your good selves"; and during recent years the agreement and practice included periodical certificates made by the debtor and sent to the creditor, naming the securities so held by the former. The agreement further provided that the New York firm were at liberty to withdraw any of the securities so held "and replace them by others of equal value," and such changes were frequently made by the New York firm throughout the course of their dealings, which were continuous for several years, up to the moment when the New York firm became insolvent and so notified a representative of the English corporation. The package of securities then held as above described were immediately delivered to such representative. While the good faith of the transactions was challenged by the trustee in bankruptcy, the opinion overrules both that objection and the contention of unlawful preference, and rules (in effect) that the arrangement conferred and preserved an equitable lien upon the securities so held and transferred, so that their surrender was not preferential.

In Van Iderstine v. Nat. Discount Co., supra, and Greey v. Dockendorff, supra, assignments of book accounts as security for advances are upheld as conferring equitable liens, good faith appearing; and the objection raised "that this lien was secret" is overruled as without force. In McDonald v. Daskam, supra, an equitable lien is recognized and enforced in favor of a creditor and against a trustee in bankruptcy, through notations on fire insurance policies left in the hands of the insurer's agent.

We believe the findings of fact clearly authorize our above stated conclusions of law, and thus establish the right of the plaintiff in error to retain the payment made to it out of the fund described.

The judgment is therefore reversed, and the cause remanded to the District Court, with direction to enter judgment thereupon in favor of the defendant below.

BOTHWELL v. FITZGERALD et al.

In re AMERICAN FALLS CANAL & POWER CO.

(Circuit Court of Appeals, Ninth Circuit. January 4, 1915.)

No. 2431.

1. BANKRUPTCY ⊜440—MODE OF REVIEW.
The methods of revision prescribed by Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (Comp. St. 1913, § 9608), by appeal, and section 24b, by petition for review, are exclusive of each other.
[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.]

2. BANKRUPTCY ⊜440—REVIEW—ORDER DISSOLVING INJUNCTION—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDINGS."
An order dissolving a temporary injunction restraining the maintenance of proceedings, in the state court, for the appointment of a receiver to reconstruct certain irrigation works started by the bankrupt, was a "controversy arising in bankruptcy proceedings," reviewable by appeal, as provided by Bankr. Act, § 24a, and not by petition for revision, under section 24b.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊜440.
For other definitions, see Words and Phrases, Second Series, Controversy Arising in Bankruptcy Proceedings.]

3. COURTS ⊜356—FEDERAL PRACTICE—APPEAL—INTERLOCUTORY ORDERS.
Appeals from orders or decrees not final are limited by Judicial Code (Act March 3, 1911, c. 231), §§ 128, 129, 36 Stat. 1133, 1134 (Comp. St. 1913, §§ 1120, 1121), to orders or decrees granting, continuing, refusing, dissolving, or refusing to dissolve interlocutory injunctions.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊜356.]

4. APPEAL AND ERROR ⊜874—GRANTING OR REFUSING PRELIMINARY INJUNCTION—REVIEW.
The rule that the granting or refusing of a preliminary injunction ordinarily rests in the sound discretion of the trial court, and that a review by an appellate court is limited to whether there has been an abuse of discretion in granting the right, does not apply to an appeal from an order dissolving a preliminary injunction, in which case the appellate court is not limited to the question of abuse of discretion, but may inquire concerning all the circumstances connected with the proceedings as they appear of record and the effect the dissolution may have on the rights of the parties.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530–3540; Dec. Dig. ⊜874.]

5. BANKRUPTCY ⊜391 — COURTS — JURISDICTION — PROCEEDINGS IN STATE COURT—INJUNCTION.
Since the Bankruptcy Act and the jurisdiction of the federal courts in bankruptcy, when properly invoked, is paramount in the administration of the affairs of bankrupts, and is essentially exclusive, bankruptcy proceedings having been instituted against an irrigation company, it was error for the federal court to dissolve a preliminary injunction restraining proceedings by creditors of the bankrupt in the state court, for the appointment of a receiver, to reconstruct a portion of the irrigation com-

pany's works with money to be collected from contract holders, which was claimed by the trustee to constitute assets of the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. ⊂⊃391.]

Appeal from the District Court of the United States for the District of Idaho, and Petition for Revision under Section 24b, Bankr. Act July 1, 1898; Frank S. Dietrich, Judge.

In the matter of bankruptcy proceedings of the American Falls Canal & Power Company. Petition by Glenn R. Bothwell as bankrupt's trustee to restrain T. E. Fitzgerald and another from maintaining proceedings in the state court for the appointment of a receiver, with authority to reconstruct a portion of a bankrupt's irrigation system, in order to afford water to the complainants' premises. From so much of an order as dissolved a temporary injunction against the proceedings in the state court, the trustee appeals, and also files a petition for review. Order dissolving injunction reversed, and petition for revision dismissed.

On the 3d day of February, 1901, the state of Idaho entered into a contract with the American Falls Canal & Power Company, a public service corporation of the state of Utah, by the terms of which the canal company agreed to construct a canal and irrigating system from a point on the west bank of the Snake river, into and through certain counties in the state of Idaho, according to certain specifications embodied in the contract, for the irrigation of certain lands which had been segregated by the state of Idaho under and by virtue of the provisions of the act of Congress of August 18, 1894, 28 Stat. 422, c. 301, § 4 (Comp. St. 1913, § 4685), known as and designated the "Carey Act." T. E. Fitzgerald and W. A. West were the owners of certain lands included within the area to be irrigated by the irrigating system of the canal company, and as such owners were also the owners of certain shares of perpetual water right out of the waters appropriated by the Canal Company for its irrigating project.

On March 22, 1913, Fitzgerald and West filed suits in the district court of the Fifth judicial district of the state of Idaho for the recovery of damages alleged to have been sustained by them through loss of crops by reason of the failure of the canal company to supply their lands with water pursuant to the contract for the delivery of such water between each of the plaintiffs and the canal company. It was claimed in these suits that the failure of the canal company to deliver water to each of the plaintiffs therein was caused by the fact that a certain branch or lateral of the canal company, known as "Lateral No. 33," had been defectively constructed and maintained, in violation of the agreement between the parties. On September 17, 1913, a judgment was rendered in the action of Fitzgerald against the canal company for the sum of $2,715. Subsequently a judgment by confession was rendered in the suit of West against the canal company in favor of the plaintiff therein for the sum of $2,715.

On February 24, 1914, the American Falls Canal & Power Company filed its voluntary petition in bankruptcy in the United States District Court for the District of Utah, and on February 27, 1914, that court entered its order adjudging the company a bankrupt. The judgment for $2,715 obtained by Fitzgerald in his suit against the canal company was listed by the bankrupt in its schedules as a claim against the bankrupt. The judgment by confession for $2,715 obtained by West in his suit against the canal company was not so listed. On March 16, 1914, the appellant herein, Glenn R. Bothwell, was appointed trustee of the bankrupt estate.

On April 6, 1914, Fitzgerald and West filed a complaint against the American Falls Canal & Power Company in the district court of the Fifth judicial

district of the state of Idaho, in and for Power county, wherein they alleged that the canal company after its organization had proceeded to construct and build its canal and irrigating system, but that the same never had been constructed or completed, so as to carry and deliver water for the irrigation of the lands of the plaintiffs; that sufficient water was not available under the irrigating works of the canal company to furnish the water right holders under the system who were to take their water from lateral No. 33 with sufficient water to properly irrigate their lands, and that the plaintiffs were suffering great damage and loss by reason of the destruction of their crops and trees planted on their lands, by reason of their failure to receive water and to have lateral No. 33 completed. The plaintiffs further alleged that the canal company was insolvent in law and in fact, and was unable to pay its debts or meet its current obligations as they became due, and was without means to complete its system, and especially lateral No. 33, so as to deliver water to the plaintiffs' lands. It was further alleged that there were certain deferred payments due and owing from various water right holders to the canal company, and that the plaintiffs were entitled to have such deferred payments collected and applied toward the completion of lateral No. 33. The plaintiffs therefore asked that some competent and proper person be appointed by the court, as receiver of the canal company, with power to complete its irrigating system, and with full power to collect sufficient moneys due and owing, or to become due and owing, to the canal company, from the holders of water rights, and to expend so much of the moneys so collected as should be necessary to complete the irrigating system of the canal company, and especially lateral No. 33, so that the plaintiffs might be supplied with the amount of water to which they were entitled under their agreements with the canal company. On the date of the filing by Fitzgerald and West of their complaint for the appointment of a receiver, the state court issued an order to show cause why a receiver should not be appointed pursuant to the prayer of the bill, with full power to complete the canal and irrigating system of the canal company, and especially lateral No. 33 thereof.

On April 11, 1914, the appellant herein, as trustee of the bankrupt canal company, filed a petition in the United States District Court for the District of Idaho, setting forth the bankruptcy proceedings then pending in the United States District Court for the District of Utah, and also setting forth the fact that suit had been brought in the state court of Idaho by Fitzgerald and West, against the canal company, for the appointment of a receiver, for the purposes set forth in the complaint in that suit. The petitioning trustee further alleged that Fitzgerald and West were by their suit in the state court attempting to secure preferences and advantages over other creditors of the bankrupt corporation, and were also seeking to compel the application and use of the assets of the estate to their own special benefit and advantage, and that it would be advisory and to the advantage of the estate that some suitable person be appointed ancillary trustee by the United States court, to act for and in connection with the petitioner in the administration of the estate. The trustee asked for an order to show cause against Fitzgerald and West, and their attorneys, why they should not be permanently enjoined from instituting or prosecuting any proceeding in the state court of Idaho against the trustee, or the bankrupt canal company, and that upon final hearing of such order the court designate and appoint some proper and suitable person as ancillary trustee in bankruptcy of the canal company.

On April 13, 1914, the United States District Court for the District of Idaho issued an order to show cause against Fitzgerald and West and their attorneys, and thereafter, and on April 17, 1914, Fitzgerald and West, through their attorneys, in response to the order to show cause filed their answer, wherein they admitted that they had commenced an action in the state court of Idaho against the canal company with the object of securing the appointment of a receiver to complete lateral No. 33 of the canal system of the bankrupt corporation, and to have the receiver authorized and directed to collect certain deferred payments from the water right holders in an amount sufficient for that purpose. They denied that the application of these de-

ferred payments to the completion of the lateral would in any wise damage the creditors of the bankrupt estate, and, among other things, alleged that the deferred payments to the amount necessary to complete lateral No. 33 were not properly assets of the bankrupt estate. They therefore asked that no restraining order be made as prayed for in the petition filed by the trustee in bankruptcy, but that, if the court concluded that the deferred payments were assets of the estate and should be under the control of an ancillary trustee to be appointed by the court, then that the court treat their complaint filed in the Idaho state court as their petition for the appointment of such trustee, and that the relief prayed for therein be granted by the District Court for the District of Idaho, and that the ancillary trustee appointed by that court be directed to complete lateral No. 33, and that he be authorized to collect the deferred payments for that purpose. A hearing was had before the court below upon the petition for the order to show cause, the order to show cause, and the answer thereto, and on April 17, 1914, that court made and entered the following order:

"* * * It appearing to the court that said bankrupt was possessed of property located within the state of Idaho and that the legal title and possession of said property was in the trustee prior to the institution of said proceeding (the proceeding by Fitzgerald and West in the Idaho state court); and it further appearing that it is the duty of the said trustee in bankruptcy to apply to the referee in bankruptcy for authority to reconstruct and rebuild a certain lateral conveying water from American Falls Canal & Power Company system to the lands of said T. E. Fitzgerald and W. A. West, commonly known as Lateral No. 33, so as to properly irrigate said lands:

"It is ordered that said T. E. Fitzgerald and W. A. West be and they are hereby enjoined and restrained from proceeding further in said action in the district court of the Fifth judicial district of the state of Idaho, in and for Power county, wherein the said T. E. Fitzgerald and W. A. West are plaintiffs, until further order of this court; and

"It is further ordered that the said Glenn R. Bothwell, as trustee in the matter of the bankruptcy of the American Falls Canal & Power Company, make application at once for authority from the said bankruptcy court within the District of Utah, to reconstruct and rebuild said lateral No. 33 in such manner as to convey water from the main canal of the American Falls Canal & Power Company system to the lands owned by the said T. E. Fitzgerald and W. A. West for the proper irrigation of said lands, pursuant to the contracts attached to complaint in said action and to the petition herein as Exhibit B, the expense of such reconstruction work to be paid as directed by said bankruptcy court; and

"It is further ordered that the said Glenn R. Bothwell, as such trustee, report to this court his proceedings in the matter on the 5th day of May, 1914, at the hour of 10 o'clock a. m."

Pursuant to the above order, and on May 2, 1914, the appellant herein, as trustee of the bankrupt estate, presented to the judge of the United States District Court for the District of Utah a petition for the determination and adjudication of the controversy between Fitzgerald and West and the American Falls Canal & Power Company. In this petition there were set forth all of the proceedings in the matter of the bankruptcy, the suit instituted by Fitzgerald and West in the state court of Idaho for the appointment of a receiver, and all proceedings therein, the issuance of the restraining order by the District Court for the District of Idaho, and the order of that court above set forth. Referring to that order, the petitioner alleged "that in and by said order so made by the United States District Court for the District of Idaho, the court directed and provided that proceedings and controversies in respect to the construction of said lateral No. 33 should be carried on and determined by the United States District Court for the District of Utah as a court of bankruptcy, and directed your petitioner to file in said United States District Court for the District of Utah a petition suggesting the situation, and providing for such repairs, alterations, and changes as this court might determine with respect to said lateral No. 33."

A copy of the order of the District Court for the District of Idaho was annexed as an exhibit to the petition. The petitioner prayed as follows:

"That the court determine and adjudicate all controversies with respect to the matters in the foregoing petition set forth. That the court adjudge and decree the claims of the said W. A. West, Mary A. Fitzgerald, and T. E. Fitzgerald wholly invalid, and that upon final hearing the said parties be restrained and enjoined from making any claim adverse to the rights of your petitioner, as such trustee in bankruptcy, and from in any manner interfering with the estate of said bankrupt, and that in the meantime and pending such final hearing, the said W. A. West, Mary A. Fitzgerald, and T. E. Fitzgerald be enjoined and restrained from in any manner interfering with the estate of said bankrupt or the possession or administration thereof by your petitioner.

"That if the court should determine it proper and within the power of your petitioner, as such trustee in bankruptcy, so to do, authority be given to your petitioner to reconstruct said lateral No. 33, as suggested in the order made by said United States District Court for the District of Idaho, and for that purpose that the court determine the nature and extent and the amount of money to be expended for such construction work, and that the court determine at whose expense and in what manner such work should be done.

"That in the event the court shall determine that any of the claims of the said W. A. West, Mary A. Fitzgerald, and T. E. Fitzgerald are defensive to the equity of your petitioner in and to said contracts, or are defenses at all under said contracts, that the equity and right of your petitioner in and to said contracts be converted into cash, that said equity be sold free and clear of all defenses, and that the said W. A. West, Mary A. Fitzgerald; and T. E. Fitzgerald be required to resort to the funds so obtained for the satisfaction of said claims."

On May 4, 1914, pursuant to the order of April 17, 1914, of the District Court for the District of Idaho, the trustee presented to that court his report, wherein he stated that immediately after the entry of the order of April 17, 1914, "wherein he was required to make application to the District Court of the United States for the District of Utah for instructions respecting lateral No. 33 of the American Falls Canal," he proceeded to secure such information as he deemed necessary to fully present the matter to the Utah court, and thereafter he had presented the matter to the judge of that court, in chambers, and he was there informed that the court would not be able to hear the matter until May 2, 1914; that subsequently the petitioner had again called on the judge of the Utah court, and was again informed that the matter could not be heard until May 2, 1914; that on the latter date the petition of the trustee for the determination of the controversy between Fitzgerald and West and the Canal Company had been presented to the judge of the Utah court, and the matter fully explained to him, and it was at that time taken under advisement. The petitioner further reported that by the petition and the exhibits thereto attached the entire controversy had been fully and fairly presented to the Utah court for a full and proper determination of the controversy. The report of the trustee was presented to the judge of the court below, in chambers, in the presence of counsel for the respective parties, and thereupon, after hearing, the following order was entered by the judge of that court:

"The court having heretofore, to wit, on April 17, 1914, made an order temporarily restraining T. E. Fitzgerald and W. A. West from taking certain proceedings in the district court of the Fifth judicial district of the state of Idaho, in and for Power county, and having directed the applicant for the injunctive order, Glenn R. Bothwell, trustee in bankruptcy, to make an application at once for authority from the bankruptcy court in Utah to reconstruct and rebuild a certain lateral therein referred to as lateral No. 33, in such manner as to convey water from the main canal of the American Falls Canal & Power Company's system to the lands owned by T. E. Fitzgerald and W. A. West; and it now appearing to the court from a report made and filed herein that no such application has been made to the bank-

ruptcy court of Utah, but that, on the other hand, an application has been made to the bankruptcy court of Utah for the rejection of the claim of said Fitzgerald and said West that such lateral be constructed under their contracts; and it further appearing to the court that there is danger that unless such lateral is constructed without delay said Fitzgerald and said West will not be able to irrigate their lands during the irrigating season for 1914:

"It is therefore ordered that said former order, dated April 17, 1914, be and the same is hereby vacated and set aside, and the injunctive relief prayed for by the trustee in bankruptcy is denied."

The trustee in bankruptcy has prosecuted an appeal to this court from the last-mentioned order, to the extent that the order vacated the interlocutory decree of April 17, 1914, granting to the trustee injunctive relief, enjoining Fitzgerald and West from the further prosecution of their suit in the state court of Idaho. The trustee has also filed in this court a petition for revision of the order of May 4, 1914, as well as the order of April 17, 1914, under section 24b of the Bankruptcy Act of July 1, 1898.

The appellant's petition to the lower court for a supersedeas order, upon giving a supersedeas bond, was denied. Subsequently, upon application to a member of this court, a supersedeas bond was taken and a supersedeas order issued, continuing in force the temporary injunction.

Charles C. Dey, A. L. Hoppaugh, L. R. Martineau, Jr., and Isaac Blair Evans, all of Salt Lake City, Utah, for appellant and petitioner.

W. E. Sullivan and L. L. Sullivan, both of Boise, Idaho, for appellees and respondents.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] This case comes here by appeal, and also upon a petition for revision. The assignment of errors indicates that the appeal is taken under section 24a of the Bankruptcy Act. The petition for revision is under section 24b of that act. As each of these methods of procedure is exclusive of the other (In the Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; In re Mueller, 135 Fed. 711, 68 C. C. A. 349), we must determine which of the two methods this court is authorized to entertain.

[2] We are of the opinion that the question at issue is a controversy arising in bankruptcy proceedings, and comes here for review under section 24a of the Bankruptcy Act. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Mitchell Store Building Co. v. Carroll, 232 U. S. 379, 34 Sup. Ct. 410, 58 L. Ed. 650. In such case the appeal takes the course prescribed in the act establishing the Circuit Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 826; Mitchell Building Co. v. Carroll, supra). Section 7 of that act (section 129 of the Judicial Code) provides for an appeal to the Circuit Court of Appeals, where upon a hearing in equity in a District Court an injunction is granted, continued, refused, or dissolved by an interlocutory order. This is an appeal from an interlocutory order made and entered in the United States District Court of Idaho on May 4, 1914, vacating and setting aside a previous order made and entered in that court on April 17, 1914, enjoining and restraining the appellees, until the further order of the court, from proceeding further in their suit in the state court of

Idaho against the American Falls Canal & Power Company, a corporation, bankrupt. The order of April 17, 1914, contained two separate and distinct orders. The first order directed that an interlocutory injunction issue restraining and enjoining Fitzgerald and West from proceeding further in their action in the state court against the bankrupt corporation; the second order directed that the trustee in bankruptcy should make application to the bankruptcy court in the district of Utah for authority to reconstruct and build lateral No. 33 in the manner therein directed. Both of these orders were set aside and vacated by the general order of May 4, 1914. The appellant, considering himself aggrieved by that part of the order of May 4, 1914, setting aside and vacating the previous order of April 17, 1914, granting the temporary injunction, appealed from that part of the order of May 4, 1914, to this court, and that is the appeal and order now under consideration. The remaining order of April 17, 1914, directing the trustee in bankruptcy to make application to the bankruptcy court in Utah for authority to reconstruct and build lateral No. 33, was also vacated and set aside by the general order of May 4, 1914; but from that part of the latter order no appeal has been taken to this court.

[3] Appeals from orders or decrees not final are limited by statute to orders or decrees granting, continuing, refusing, dissolving, or refusing to dissolve interlocutory injunctions. Sections 128 and 129, Judicial Code. The order or decree of May 4, 1914, vacating and setting aside that part of the order of April 17, 1914, granting an interlocutory injunction, is appealable under the statute as an order dissolving an injunction; but that part of the order of May 4, 1914, vacating and setting aside that part of the order of April 17, 1914, directing the trustee in bankruptcy to apply to the bankruptcy court in Utah for authority to reconstruct and rebuild lateral No. 33, is clearly not appealable under any statute, unless the order be held to be a final order or decree, and appealable under section 128 of the Judicial Code. But whether it is or is not a final order or decree is not material in the present inquiry, since no appeal has been taken from that order, and it is therefore not before us for review.

[4] This brings us to the consideration of the only question involved in this appeal: Was the lower court right in dissolving the interlocutory injunction? The rule that the granting or refusing of a preliminary injunction ordinarily rests in the sound discretion of the trial court, and a review thereof by an appellate court is limited to the inquiry whether there was an abuse of discretion in granting the writ, is based largely upon the consideration that the object and purpose of the preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs according to the course and principles of equity. Blount v. Société Anonyme du Filtre Chamberland Systeme Pasteur, 53 Fed. 98, 3 C. C. A. 455; Kings County Raisin & Fruit Co. v. United States Con. Seeded Raisin Co., 182 Fed. 59, 104 C. C. A. 499. But no such consideration obtains where the trial court dissolves a preliminary injunction. The granting of an injunction to preserve the status quo may be a substantial

and persuasive reason for continuing it in force. It follows that when a preliminary injunction has been dissolved the appellate court will not be limited to the question whether the trial court has abused its discretion in dissolving the injunction, but may inquire into all of the circumstances connected with the proceedings as they appear of record, and the effect the dissolution of the injunction may have on the rights of the parties.

In the brief of the appellees there is a statement of what transpired in the court below when that court made its order of April 17, 1914, and how that order came to be vacated, as provided in the order of May 4, 1914. The statement was repeated upon the oral argument of this case. The proceedings referred to relate to a supposed understanding between the parties as to the petition to be presented to the Utah court relating to the reconstruction and rebuilding of lateral No. 33, and the failure of the appellant to comply with that understanding in his petition to the Utah court is stated as the reason for the order of May 4, 1914. The proceedings are not contained in the record, and it seems superfluous to state that an appellate court cannot inquire into and determine facts relating to a supposed verbal understanding concerning orders of a trial court in determining a controversy relating to such orders. Such an understanding should be made of record, either by written stipulation, or by an order to which the consent of the parties is made to appear. The matter referred to is not available in this case, in the manner presented, to determine the question involved in this appeal.

[5] The effect of dissolving the interlocutory order granting the injunction was to permit the state court, in a suit brought subsequent to the commencement of bankruptcy proceedings, to proceed with the suit in that court, appoint a receiver with power to complete the irrigating system of the bankrupt corporation, collect sufficient moneys due and owing, or to become due and owing, from the holders of water rights entered into with the bankrupt corporation, and to expend the moneys so collected, or so much thereof as should be necessary to complete the irrigating system of the bankrupt corporation, and especially to complete lateral No. 33, so that the plaintiffs in that suit might be supplied with water to be delivered to them pursuant to the provisions of their deeds. The result of such proceedings in the state court would be to withdraw from the bankruptcy court all questions relating to the rights of Fitzgerald and West, as against the estate of the bankrupt corporation, and to remit those questions to the state court for determination.

The object of the Bankruptcy Act was to establish a uniform system of bankruptcy, and with that end in view to take from the state courts the decision and determination of all such questions and controversies as are by the act placed within the jurisdiction of the bankruptcy courts. Under the provisions of section 2 of the act, the District Courts of the United States, as courts of bankruptcy, are invested with jurisdiction:

"* * * (2) To allow claims, disallow claims, reconsider allowed and disallowed claims, and allow or disallow them against bankrupt estates; (3)

appoint receivers, * * * for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto; * * * (19) transfer cases to other courts of bankruptcy; and (20) exercise auxiliary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in another bankruptcy proceeding pending in any other court of bankruptcy."

"The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive." In re Watts & Sachs, 190 U. S. 1, 27, 23 Sup. Ct. 718, 724 (47 L. Ed. 933).

"It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition." Acme Harvester Co. v. Beekman Lum. Co., 222 U. S. 300, 307, 32 Sup. Ct. 96, 99 (56 L. Ed. 208).

It was not intended by Congress that after the passage of this act the determination of controversies arising thereunder, or growing out of proceedings instituted pursuant to its provisions, should be submitted to tribunals other than those especially designated in the act. In United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 217, 32 Sup. Ct. 620, 625 (56 L. Ed. 1055) the Supreme Court of the United States, in construing the provisions of section 2 of the Bankruptcy Act, said:

"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them. * * * A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when * * * an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern."

The merits of the controversy respecting the reconstruction and rebuilding of lateral No. 33, as claimed by Fitzgerald and West, and the method of meeting the expense to be connected with such reconstruction and rebuilding, if ordered, should be determined upon the issues presented by the trustee in bankruptcy in his petition to the District Court of Idaho, invoking the ancillary jurisdiction of that court in the administration of the bankrupt estate in Idaho, or the questions should be presented to and determined by the bankruptcy

court of original jurisdiction in Utah. In the order of April 17, 1914. it was provided that the expense of reconstructing and rebuilding lateral No. 33 should be paid as directed by the bankruptcy court of Utah. That order has been vacated, but the questions are still presented by the petition of the trustee in bankruptcy whether the deferred payments due to the bankrupt corporation in the amount necessary to reconstruct and rebuild lateral No. 33 are or are not assets of the bankrupt estate for the payment of that expense, and whether the application of such deferred payments in that amount would constitute a preference in favor of Fitzgerald and West under the bankruptcy act. These questions call for decision prior to the entry of any order by either the Utah court in the exercise of its original jurisdiction, or the Idaho court in the exercise of its ancillary jurisdiction providing for the reconstruction and rebuilding of lateral No. 33. The creditors of the bankrupt corporation are clearly entitled to have this controversy dealt with under the Bankruptcy Act and by a bankruptcy court authorized to cause the estate of the bankrupt corporation to be collected, reduced to money, and distributed, and all controversies determined in relation thereto, and pending such determination the temporary injunction should be continued in force, enjoining and restraining Fitzgerald and West from proceeding further in the action in the state court respecting the same subject-matter.

The order of this court will therefore be that the order of the District Court of Idaho of May 4, 1914, dissolving the temporary injunction provided in the order of April 17, 1914, be reversed, and that the temporary injunction issued, and heretofore continued by supersedeas, be further continued in force until the further order of the District Court, and that the court take such further proceedings in the matter as are not inconsistent with this opinion. The petition for revision will be dismissed.

PUGH et al. v. LOISEL (two cases).†

In re JOSEPH WEBRE CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1915.)

Nos. 2658, 2663.

1. BANKRUPTCY ⟸20—POSSESSION OF PROPERTY—RECEIVER.
The possession of a bankrupt's property by a receiver appointed by the state court, whose appointment was the act of bankruptcy alleged in the petition, does not deprive the bankruptcy court of the right to the possession and control of the property.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⟸20.]

2. BANKRUPTCY ⟸20—CUSTODY OF PROPERTY—FORECLOSURE OF MORTGAGE.
Property which was in the possession of a bankrupt at the time the petition was filed against him is in the custody of the bankruptcy court from the date of the filing of the petition, and the state court cannot,

after the petition but before adjudication, make an order for the foreclosure of a mortgage against part of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⊂⊃20.]

3. BANKRUPTCY ⊂⊃105—ENJOINING PROCEEDINGS IN STATE COURT—DISCRETION.

A showing that the amount secured by registered mortgage as against a bankrupt's property is more than the property can be sold for does not show that the bankrupt has no equity in such property, so that the bankruptcy court abused its discretion in enjoining state foreclosure proceedings, since it does not show what amount is still due on the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156–158, 162; Dec. Dig. ⊂⊃105.]

4. BANKRUPTCY ⊂⊃105—ENJOINING PROCEEDINGS IN STATE COURT—APPEARANCE OF TRUSTEE.

A trustee in bankruptcy, who appeared in foreclosure proceedings in the state court for the sole purpose of questioning the jurisdiction of that court, did not thereby submit to the jurisdiction of the state court so as to be precluded from asking an injunction by the bankruptcy court against further proceedings by the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156–158, 162; Dec. Dig. ⊂⊃105.]

Pardee, Circuit Judge, dissenting.

Appeal from, and Petition to Superintend and Revise Order of, the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Bankruptcy proceedings against Joseph Webre Company, Limited, in which Victor Loisel was trustee. From an order of the District Court restraining Edward N. Pugh and another from selling property of the bankrupt, under proceedings in the state court for the foreclosure of a mortgage, Edward N. Pugh and another appeal, and file a petition to superintend and revise. Judgment affirmed, and petition to superintend and revise denied.

E. N. Pugh, of Donaldsonville, La., and Charlton R. Beattie, of New Orleans, La., for appellants.

Ralph J. Schwarz, Wm. B. Le Bourgeois, Edwin T. Merrick, and Philip Gensler, Jr., all of New Orleans, La., for appellee.

Before PARDEE and WALKER, Circuit Judges, and SHEPPARD, District Judge.

WALKER, Circuit Judge. Between the dates of the filing of a petition to have the Joseph Webre Company, Limited, adjudged an involuntary bankrupt, and the adjudication in pursuance of that petition, the holder of a mortgage, which had been made by the bankrupt nearly a year before the institution of the bankruptcy proceeding, instituted in a Louisiana state court a proceeding for the enforcement of the lien created by that mortgage; that proceeding being one the sole purpose of which was the enforcement of the mortgage lien, no personal judgment against the mortgagor being sought. By an appeal and also by a petition to superintend and revise, the mortgagee brings into question the validity of an order of the court below for the is-

suance of an injunction enjoining and restraining the mortgagee and the sheriff, who had made a seizure of the mortgaged property under the proceedings for the enforcement of the mortgage lien, from selling, claiming possession of, holding, or in any wise claiming or exercising dominion or control over the property embraced in the mortgage.

The mortgagee claims the right to proceed in the state court to enforce his mortgage lien without interference by the court of bankruptcy, and complains of the action of the latter court as an unauthorized meddling with and obstruction of the exercise of the right claimed. The question presented is whether the bankruptcy court exceeded its authority in taking the action which is complained of.

[1] The record discloses nothing other than the seizure under the foreclosure proceeding that could be regarded as an obstacle to the bankruptcy court's exercise of control over the bankrupt's property. At the time the petition was filed, the property embraced in the mortgage was so situated as to be as much subject to be taken into custody by the bankruptcy court as if it had then been in the actual possession of the bankrupt, as plainly the act of bankruptcy alleged in the petition, namely, the alleged bankrupt's causing a receiver of its property to be appointed within four months prior to the filing of the petition, could not have had the effect of depriving the bankruptcy court of the right to the possession and control of the bankrupt's property. Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 546 [Comp. St. 1913, § 9587]) § 3, subd. 4; In re Hecox, 164 Fed. 823, 90 C. C. A. 627. The record does not indicate that the receiver appointed by the state court asserted any right of possession as against the trustee in bankruptcy.

[2] In the argument by which the claim made is sought to be supported much reliance is put on the rulings made in the cases of Hiscock v. Varick Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, and Jones v. Springer, 226 U. S. 148, 33 Sup. Ct. 64, 57 L. Ed. 161, and especially upon certain expressions used in the course of the opinion rendered in the first mentioned of these cases. Nothing that was said by the court in making disposition of the case of Jones v. Springer indicates any departure from the propositions stated in previous decisions (Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Acme Harvester Co. v. Beekman Lum. Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208) to the effect that the filing of a petition to have one adjudged a bankrupt is a caveat to all the world, and in effect an attachment and injunction, and that property of the bankrupt which was in his possession when the petition against him was filed is to be regarded as in custodia legis from the date of the petition as against a subsequent attachment or seizure of it under process of another court. On the contrary, the court, in the opinion rendered in that case, distinctly recognized that such property was to be regarded as having been subject to the control of the bankruptcy court from the date of the petition; but it was held that where, under an attachment from another court, levied before the petition was filed in a distant state, property of the bankrupt had been, without notice of the petition, put into the hands of a receiver appointed

by the court from which the attachment issued, that court, having the actual custody of the res, had the power to preserve the subject-matter of the controversy that necessarily was incident to such conditions, and that a sale of the property under its order, on the ground that it was "of a perishable nature, and liable to be lost or diminished in value before the final adjudication of the case," within the terms of a local statute providing for a sale in such circumstances, was to be regarded, not as the exercise of a power over the property inconsistent with that acquired by the bankruptcy court as a result of the filing of the petition, but as within the authority which, from the necessity of the case, a court having the actual custody of a thing possesses to preserve that thing while in its custody. It was on this ground that it was held that the sale stood, with the result that the claim of the trustee was transferred to the proceeds, which were presumed to represent the fair value of the property and to take its place. The decision in that case by no means recognized the existence of power in the court which by its receiver took possession of property of the bankrupt after the petition against him was filed to withdraw that property from the grasp of the bankruptcy court. It simply recognized the propriety of the action taken by the court which had the actual custody of perishable property in ordering its sale for the benefit of all persons who might assert claims to it, not because that court had the right to determine to what claim the property so converted into cash should be subjected, but because the thing might have perished while in its custody, with the result of defeating the beneficial exercise of power over it by either that court or any other one that might have a superior right to its custody and administration. In that case the court, which by its receiver took possession of property of the bankrupt after the petition against him was filed, was not held to have thereby acquired any other power than that of preserving the subject of controversy while in its actual custody.

In the case of Hiscock v. Varick Bank of New York, supra, it was held that the pendency of a petition to have one adjudged a bankrupt did not invalidate a sale of personal property by his pledgee who at the time the petition was filed had both the title and possession of the subject of the sale. The court did not in that case deal with the question of the right of another court, by a seizure under process issued by it in suit brought after the petition in bankruptcy was filed, to remove beyond the reach of the bankruptcy court property, or the administration of it, of which at the time the petition was filed the bankrupt had possession and the title, though subject to a lien sought to be enforced by the suit brought in such other court. It dealt with the case of a sale by one who at the time the petition was filed, and long before that date, was in possession of the thing sold, having a title to it which was good against the bankrupt and all the world. Collier on Bankruptcy (9th Ed.) 948. It is not permissible to give to any expression used by the court in the opinion rendered in that case the effect of a decision that the existence of a valid lien on property of the bankrupt which was in his possession at the time the petition

against him was filed enables another court, in which the enforcement of that lien subsequently is sought, to withdraw the subject of the lien beyond the reach of the bankruptcy court. Many provisions of the bankruptcy statute forbid the conclusion that the right of the court of bankruptcy to control the administration of the bankrupt's estate extends only to that part of it, if any, which may happen to be unincumbered by a valid lien. We think it is apparent that the bankruptcy act, as a whole, contemplates the taking possession and control of the bankrupt's estate by the court of bankruptcy acting through its trustee. The property is taken into custody in the condition in which it is found at the time of the filing of the petition, subject to all existing valid liens upon it. The filing of the petition, of course, does not displace or disturb such liens; but neither the existence of such liens, nor attempts of the lienors to enforce them without resorting to the court of bankruptcy for that purpose, constitute obstacles to the exercise by that court of the right to take into custody the bankrupt's estate and to control the administration of it. The court is vested with ample power to protect the rights of lienholders otherwise than by permitting them to be enforced in some other court or courts. Whitney v. Wenman, 198 U. S. 539, 552, 25 Sup. Ct. 778, 49 L. Ed. 1157; Bankruptcy Act, §§ 2, 57, 67, 69a, 70. In reference to the power of the bankruptcy court from the time of the filing of the petition, the following was said in the opinion rendered in the case of Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 306, 32 Sup. Ct. 96, 99 (56 L. Ed. 208):

"Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in Mueller v. Nugent, 184 U. S. 1, 14 [22 Sup. Ct. 269, 275 (46 L. Ed. 405)] where it is said: 'It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403 [25 L. Ed. 866]); and on adjudication, title to the bankrupt's property became vested in the trustee (sections 70, 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court'—it is none the less certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under section 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt; but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings. Paragraph 5, § 70a, in reciting the property which vests in the trustee, says there shall vest 'property which, prior to the filing of the petition, he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him' (the bank-

rupt). Under section 67c, attachments within four months before the filing of the petition are dissolved by the adjudication in the event of the insolvency of the bankrupt, if its enforcement would work a preference. Provision is made for the prompt taking possession of the bankrupt's property, before adjudication if necessary (section 69a). Every person is forbidden to receive any property after the filing of the petition, with intent to defeat the purposes of the act. These provisions—and others might be recited—show the policy and purpose of the Bankruptcy Act to hold the estate in the custody of the court for the benefit of creditors after the filing of the petition and until the question of adjudication is determined. To permit creditors to attach the bankrupt's property between the filing of the petition and the time of adjudication would be to encourage a race of diligence to defeat the purposes of the act and prevent the equal distribution of the estate among all creditors of the same class which is the policy of the law. The filing of the petition asserts the jurisdiction of the federal court, the issuing of its process brings the defendant into court, the selection of the trustee is to follow upon the adjudication, and thereupon the estate belonging to the bankrupt, held by him or for him, vests in the trustee. Pending the proceedings the law holds the property to abide the decision of the court upon the question of adjudication as effectively as if an attachment had been issued, and prevents creditors from defeating the purposes of the law by bringing separate attachment suits which would virtually amount to preferences in favor of such creditors."

What has just been quoted was said in support of the conclusion, reached in that case, that the right of the bankruptcy court to the custody of property of the bankrupt, which was in its possession when the petition was filed, prevailed over a claim made in behalf of a state court from which an attachment issued after the petition was filed but before there was an adjudication upon it. So much effect was there given to the filing of the petition, though under the law which was applicable to that case the trustee in bankruptcy took only such title as the bankrupt had, and the bankruptcy proceedings did not operate as a judicial seizure which conferred new and greater rights on the creditors of the bankrupt or on the trustee as their representative. The case at bar arose after the bankruptcy act had been changed by the amendment of its forty-seventh section by the act of 1910, which added to that section the following provision:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien, by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." Collier on Bankruptcy (9th Ed.) 650.

This change of the law has the effect of making the filing of a petition to have one adjudged a bankrupt the institution of a proceeding having for one of its objects the vesting in the trustee to be appointed therein, as to all property in the custody or coming into the custody of the bankruptcy court, all the rights, remedies, and powers of a creditor having a lien by legal or equitable proceedings thereon, and also the vesting in such trustee, as to all property not in the custody of the bankruptcy court, of all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. In other words, the filing of a petition to have one adjudged

a bankrupt is now in effect the institution of a suit for the establishment and enforcement of newly created statutory liens upon the estate of the alleged bankrupt. The creation and enforcement of such liens are not at all incompatible with the due recognition and enforcement in the same proceeding of previously created and superior liens upon the whole or any part of the bankrupt's estate. It seems plain that Congress, while thus making express provision for substantial additions to the powers of the bankruptcy court in the matter of its custody and control of the bankrupt's estate and enlarging the means available to that court for retaining its hold upon and subjecting such estate, could not have contemplated that the exercise by that court of the powers so conferred upon it could be permitted to be thwarted by a superior lienholder's resort to another tribunal for the enforcement of his lien, with the result of removing the subject of the statutory liens so provided for beyond the control of the court expressly vested with authority to establish and enforce them. In many instances the power of the bankruptcy court in the administration of the bankrupt's estate would fall far short of being paramount and exclusive—as the whole tenor of the bankruptcy act shows that it was intended to be (Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448; Lazarus, Michel & Lazarus v. Prentice, 234 U. S. 263, 266, 34 Sup. Ct. 851, 58 L. Ed. 1305)—if, by a stipulation in a contract made by the bankrupt at any time before the petition against him was filed, he could confer upon another tribunal the right, without regard to the pendency of bankruptcy proceedings against him, to draw to itself the custody and administration of the whole or any part of his estate for the enforcement of a contract lien thereon, or for any other purpose. A debtor cannot, by a contract with one or more of his creditors, render unavailable or ineffective remedies, which, in the event of his insolvency, the Bankruptcy Act provides for the common benefit of all his creditors.

It may be that already more than enough has been said to indicate the grounds which it is believed support the conclusion reached, that the court below did not exceed its power in taking the action which is complained of.

[3] It is suggested that, even if the court below had the power to take the action complained of, it abused its discretion in doing so because it was made to appear that the bankrupt's equity in the mortgaged property was of no value. We do not think that the record conclusively shows that such was the fact. What is relied on in this connection is the statement in Edward N. Pugh's answer to the rule to show cause:

"That said property will not sell at the outside for more than $30,000, and the mortgages bearing and covering the same are over $50,000, as appears by the certificate of mortgages hereto annexed."

The certificate so referred to discloses merely what mortgages are of record. It does not show what remains due or owing on the debts secured by the mortgages, or that the amount of the secured indebtedness exceeds the value of the mortgaged property. The record in the instant case contains an illustration of the inconclusiveness of

the showing made by such a certificate so far as the amount of indebtedness secured by mortgages mentioned is concerned. The certificate shows that the mortgage sought to be foreclosed secured an indebtedness of $25,000; but it appears from the statement of the mortgagee that the debt actually due to him was $20,000 and interest thereon. The certificate cannot be accepted as conclusive proof of what, if any, actual indebtedness was secured by the other mortgages.

[4] The contention was made in argument that the trustee in bankruptcy, by his appearance and participation in the suit brought in the state court, submitted himself to the jurisdiction of that court and estopped himself from later applying to the court below for relief. This contention is untenable. The trustee's appearance in the state court plainly was for the sole purpose of questioning its right to exercise the jurisdiction which was claimed in its behalf. He is not to be held to have voluntarily submitted himself to the jurisdiction of that court by protesting against its exercise of jurisdiction. Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053.

The judgment appealed from is affirmed, and the prayer of the petition to superintend and revise is denied.

PARDEE, Circuit Judge (dissenting). The case shows:

(1) On January 9, 1914, in the matter entitled "The Receivership of Joseph Webre Company, Limited," being No. 2444 of the docket of the Twenty-Seventh judicial district court for the parish of St. James, that the court took jurisdiction and through proper orders in the appointment of a receiver took into custody and possession all the property of the Joseph Webre Company, Limited, including the res involved in this case.

(2) On the 13th day of February, 1914, a petition in involuntary bankruptcy against the Joseph Webre Company, Limited, was filed in the United States District Court, Eastern District of Louisiana, but no receiver or other possession of property was asked for or ordered.

(3) That on the 20th of February, 1914, Edward N. Pugh, a citizen of the United States, obtained from the Twenty-Seventh judicial district court in and for the parish of St. James, La., an order of seizure and sale against the property mortgaged by Joseph Webre Company, Limited, on the 28th of February, 1913, under an authentic act of mortgage importing confession of judgment, with the pact de non alienando, duly recorded in the parish where the property is situated, and by this order the custody of the property in the state court was continued and confirmed.

(4) That under said writ the sheriff of the parish of St. James gave due notice to pay, and on the 26th of February, 1914, seized and took into his actual possession for the state court the mortgaged property duly described in said act of mortgage.

(5) That said sheriff under said writ of said state court, and to pay and satisfy the same, duly advertised said mortgaged property to be sold at public auction on April 18, 1914.

(6) That on the 6th of March, 1914, said Joseph Webre Company, Limited, was adjudicated a bankrupt.

(7) That on the 2d of April, 1914, Victor Loisel, trustee of said bankrupt, took a rule sua sponte against said sheriff J. B. Dornier, and against said Edward N. Pugh, seizing creditor, in said Twenty-Seventh judicial district court in and for the parish of St. James, asking said court to recall its writ issued in the matter of said Edward N. Pugh v. Joseph Webre Company, Limited, No. 2873 of the docket of said court, and to relegate the entire matter to the United States District Court in Bankruptcy.

(8) That issue was joined in said rule thus taken by said trustee in said state Court, tried contradictorily, argument had, and judgment rendered on April 7, 1914, by said state court refusing to recall its writ.

(9) That from said judgment thus rendered by said state court said trustee obtained an order of appeal to the Supreme Court of Louisiana, suspensive and devolutive.

(10) That on the 15th day of April, 1914, said trustee obtained an order from the District Court, Eastern District of Louisiana, ordering said sheriff and said Edward N. Pugh to show cause on the 18th of April, 1914, why an injunction should not issue restraining and enjoining them and each of them from selling, claiming possession, or control over said property, and from interfering or disturbing said trustee in the possession of the assets of the said bankrupt, and further ordering that until the termination of this order to show cause said sheriff and said Edward N. Pugh are stayed and enjoined from selling or disposing of the said property or otherwise interfering or disturbing the said trustee in possession of the same.

(11) That issue was duly joined on said rule to show cause, and it was shown that the sheriff of the parish of St. James, acting under orders of the Twenty-Seventh judicial district court in and for the parish of St. James, La., did on the 26th day of February, 1914, take actual and corporeal possession of said mortgaged property, and was in actual possession of the same on the day of the trial of said order to show cause why an injunction should not issue, and had retained possession thereof from the 26th of February, 1914.

(12) That as appears by the sworn statement of Edward N. Pugh, and the same is not controverted, the mortgaged property in controversy will not sell for more than $30,000, and the valid mortgages thereon exceed the sum of $50,000. The certificate of mortgages in the record shows registered mortgages exceeding $55,000.

(13) That hearing was had on the pleadings and the exhibits thereto, no evidence being taken, and the District Court entered a decree ordering the issuance of the injunction applied for; and this order has been brought to this court for review.

On this showing, I conclude:

1. That as the property involved was taken into the possession and custody of the state court before any proceedings were instituted in the court of bankruptcy, and the custody was retained under the executory proceeding filed by E. N. Pugh, the trustee in bankruptcy, if he desired or claimed possession, was well advised to seek relief as he did by applying to the state court setting up his alleged title, and after

such application and the decision of that tribunal he ought not to be heard in questioning the same otherwise than by appellate proceedings. Grant v. Buckner, 172 U. S. 232, 238, 19 Sup. Ct. 163, 43 L. Ed. 430; Winchester v. Heiskell, 119 U. S. 450, 7 Sup. Ct. 281, 30 L. Ed. 462, and cases there cited.

2. That as the mortgage on which the executory proceedings in the state court were based was granted nearly one year before the bankruptcy proceedings were instituted and imported a confession of judgment and contained a nonalienation pact, it is a valid lien with an executory remedy attached under the laws of the state of Louisiana not subject to be attacked as an unlawful preference under, nor be considered as impaired or affected by, the proceedings in bankruptcy. See section 67d of the Bankruptcy Law. And clearly the lienor's right would be impaired if his remedy under the state law should be taken away.

Hiscock v. Varick Bank of New York, 206 U. S. 28, 27 Sup. Ct. 681, 51 L. Ed. 945, is decidedly in point. In one of the syllabi it is announced that:

"The bankruptcy act does not deprive a lienor of any remedy with which he is vested by the state law."

And at page 37 of 206 U. S., at page 684 of 27 Sup. Ct. (51 L. Ed. 945), the court says:

"The contracts of pledge were made, executed, and to be performed in the state of New York, and the rights of the parties were governed by the law of that state. No preference under the bankruptcy act was alleged or proved, nor was there any allegation or proof that the pledge of the securities was in fraud of the rights of the creditors or trustee. The questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court."

Acme Harvester Co. v. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208, does not appear to me as applicable to the facts in this case, nor in any wise conflict with my views herein.

3. As the property involved was before the proceedings in bankruptcy were instituted and is now in the custody of the state court, and, particularly, as the case shows no fraud nor any race among creditors for preference nor any equity to be administered by the trustee in bankruptcy, the injunction of the District Court was improvident, and to insist upon and enforce the same can only result in delay in settling the bankruptcy case, or in a conflict of jurisdiction between the bankruptcy court and the state court, which is not only to be deprecated, but should by all means be prevented on general grounds of comity.

In my opinion the order of the District Court should be reversed, with instructions to the trustee to seek his remedy in the state courts, whose jurisdiction he invoked, and, if there denied, he can go direct to the Supreme Court of the United States.

UNION PAC. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4174.

1. POST OFFICE ⊂⊃21—TRANSPORTATION OF MAIL—LIABILITY OF CARRIER—NEGLIGENCE OF SERVANTS.

A railroad carrying the mails under a contract by which, for a consideration, it agreed to perform the service under the conditions prescribed by law and the regulations of the department, cannot claim exemption from liability to the United States for the loss of mail equipment in a wreck caused by the negligence of its servants on the ground that it was engaged in performing a governmental function, and therefore not liable for the negligence of its servants, if it used proper care in selecting them.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 27–39; Dec. Dig. ⊂⊃21.]

2. POST OFFICE ⊂⊃21—TRANSPORTATION OF MAIL—LIABILITY OF CARRIER—SETTLEMENT.

Where the Post Office Department, after having full knowledge of the facts, deducted from the compensation of a mail carrier a penalty for the loss and damage to mail and equipment in a wreck, under the provisions of Rev. St. § 3962 (Comp. St. 1913, § 7450), authorizing the Postmaster General to make deductions from the pay of mail contractors, and to impose fines upon them for failure to perform the service and other delinquencies, and Postal Regulations, § 1335, authorizing the imposition of such fine for permitting the mail to be wet, lost, injured, or destroyed, such deduction is a full settlement of all claims by the United States for any loss from the wreck, including a claim for the value of the registered mail destroyed thereby.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 27–39; Dec. Dig. ⊂⊃21.]

3. JURY ⊂⊃37—RIGHT TO JURY TRIAL—DIRECTING JUDGMENT FOR REVERSAL.

The Circuit Court of Appeals cannot, on reversing a judgment on a verdict directed for plaintiff on the ground that it should have been directed for defendant, enter judgment for the defendant, but must remand the case for a new trial to conform to Const. Amend. 7, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the course of the common law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 220; Dec. Dig. ⊂⊃37.]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Action by the United States of America against the Union Pacific Railroad Company. Judgment for the plaintiff, and defendant brings error. Reversed, and new trial ordered.

This action was brought June 4, 1912, by the United States against the railroad company, to recover damages for the loss of registered mail and mail equipment alleged to have been destroyed through the negligence of the company. At the trial the facts were agreed upon.

Counsel for the United States moved for a directed verdict, and counsel for the railroad company did likewise. The trial court directed a verdict for the United States in the sum of $5,788.05, and denied the motion of the railroad company. This action of the court is assigned as error. The facts material to the disposition of the case in this court are as follows:

Registered mail of the value of $5,402.48 and mail equipment belonging to

the United States of the value of $385.57 was destroyed in a wreck on the line of the railroad company in Wyoming December 7, 1905. The circumstances under which the wreck occurred are as stated by the general superintendent of the railroad company, W. L. Park, in a letter to Post Office Inspector Durand, dated April 7, 1906. The letter reads as follows:

"Dear Sir: I have your letter of April 4th, with reference to case 57,931D, and in reply would state that Extra West 1,658, Conductor Darrell, Engineer Brink, received order No. 64 at Wamsutter, running four passenger trains (Nos. 1st and 2d 10, 6 and 2) on the same schedule. These trains were delayed west of Green River by an accident of some kind, coming in there together and departing about ten minutes later. Later the dispatcher gave this train, Extra 1,658, an order giving them time order specifying that the train would run one hour and forty minutes late on order No. 64, which enabled them to reach Rock Springs. At this point they received order No. 89 specifying that the trains in question would run two hours late, which enabled them to go (—) Ah Say for these trains. After stopping at the west end of the side track the conductor washed up and sat down at his desk to make out his tonnage reports; shortly after this the 1st 10 passed; ten minutes thereafter the 2d 10, and thirteen minutes later No. 6. When No. 6 passed the engineer of the freight train whistled off brakes and started to pull out; the conductor went to the door of the caboose and remarked to the rear brakeman: 'That is not No. 2'—identifying train by absence of observation car which is on No. 2. The conductor then said to the brakeman that they must have run No. 2 around No. 6 and allowed engineer to proceed. They left Ah Say at about 2:25 a. m., consumed five minutes getting out of the side track and shutting the switch, and at about 2:43 a. m. struck No. 2 on curve west of Ah Say pump house. Engineer Brink must in some way have miscounted, and the others, relying on him, were also led into the fatal error. In the subsequent investigation it was found that every rule of the operating department had been complied with so far as the handling of the train orders were concerned; we had also just completed a series of examinations of every train and engine man on the system, covering all the rules and regulations of the operating department. Conductor Darrell had always been considered a competent conductor; had been on this division for many years; was exceptionally loyal to the company; and was considered by the superintendent to be one of his best conductors. Engineer Brink was also considered to be an efficient employé by all the mechanical and operating departments. Both engineer and conductor were men of good habits and highly respected by their fellow men. From the evidence given, the freight engineer undoubtedly discovered the passenger train coming first and shut off as steam from the relief valves rose in front of his headlight, obscuring it to some extent from engineer of passenger train. The fireman on the freight train saw No. 2 coming, as did also the brakeman. They both got down on deck of engine, the fireman got down on the steps, facing the engine, and when he jumped brakeman was still standing in the gangway and engineer was sitting on his seat, probably manipulating his air. Engineer on No. 2 did not leave his engine; the fireman was engaged in putting in fire, and did not see the approaching freight train at all."

The stipulation of facts continues as follows:

"(1) That prior to the times mentioned herein there had been duly established, by authority of the Post Office Department of the United States, a postal route known and designated as postal route No. 157,001 from U. P. transfer (N. O.) to Ogden, Utah. That on, to wit, the 15th day of September, A. D. 1902, there was in effect a contract between the plaintiff and the defendant herein for the carriage by the defendant of the United States mail over and upon said postal route No. 157,001 from U. P. transfer (N. O.) to Ogden, Utah, the same being for the period from July 1, 1902, to June 30, 1906. That subsequently, and at the expiration of said contract, another contract for the same route between the same points was entered into by and between the parties hereto, for the carriage of United States mail matter by the defendant over the route aforesaid, the same extending from July 1, 1906, to July 30, 1910. That thereafter another contract was entered into by and be-

tween the parties hereto for the carriage of United States mail matter by the defendant over the route above described and numbered, extending from July 1, 1910, to June 30, 1914, which said contract is still in effect. * * * That the carriage and transportation of United States mail in the trains of this defendant, and over the aforesaid postal route No. 157,001, between Council Bluffs, Iowa, and Ogden, Utah, at all times since the 30th day of June, 1902, up to and including the present time, was and has been by virtue of and in accordance with the aforesaid contract, and the designation and adjustment of pay therein set forth, and not otherwise, or at all.

"(2) That the collision between the stations of Wilkins and Ah Say, in the state of Wyoming, on the lines of this defendant, on the 7th day of December, 1905, between defendant's east-bound passenger train, known and designated as train No. 2, and a certain west-bound freight of the defendant, designated as Extra 1,658, occurred and took place, and the loss, damage, and destruction of registered mail matter and equipment involved in this action occurred and took place while and during the term, existence, continuance, and performance of the aforesaid contract, and designation and adjustment of pay for the carriage of said mail of June 30, 1902.

"(3) That at the time and place of said collision there was attached to said east-bound passenger train No. 2, and being hauled in said train, under and by virtue of the contract aforesaid, post office car of the United States, known and designated by the United States as Cheyenne and Pocatello Railway Post Office. That said post office car was then and there being conducted and operated by the Post Office Department of the United States, and that said post office, car, and the contents thereof, were in the sole and exclusive charge, custody, and control of the said Post Office Department of the United States. That the letters and packages therein contained were inclosed in government mail bags or other receptacles, secured by locks provided by the United States, taken in charge by agents and employés of the government in said car. That said car was of the kind and character designated, prescribed, and required by the general government. That all mail matter therein contained was handled by government agents in said car, and by them delivered or to be delivered to other agents of the government for transmission or delivery to the addressees. That the mailable matter was at all times in charge of government agents and appointees. That the defendant herein had no knowledge of the contents of any of the said mail sacks, and had no authority or right to control these sacks, except to obey the instructions of the Post Office Department, if any; and in the transportation of said post office car and its contents the defendant herein had nothing to do with the car or its contents, except to haul said car in said train over said mail route."

Thereafter the following correspondence was had between the parties:

"Case No. 57,931–D

"Post Office Department.

"Office of Inspector in Charge, Denver Division—Arizona, Colorado, New Mexico, Utah, Wyoming.

"J. R. Harrison, Inspector in Charge.

"Denver, Colorado, September 4, 1907.

"Mr. H. P. Thrall, Supt. Mail Service, Union Pacific R. R., 135 Adams St., Chicago, Ill.—Sir: The above-numbered case relating to the wreck of your Cheyenne-Pocatello R. P. O. Tr. 2, at Wilkins, Wyoming, December 7, 1905. The investigation of this case has established that the wreck in question was due to the negligence of A. E. Brink and Roy Darrell, the engineer and conductor, respectively, of a west-bound freight train. As a large number of registered letters were destroyed in this wreck, I have decided to make a demand upon your company for the amount of the losses sustained by the senders of the above-mentioned registered letters. Investigation has established that there were several hundred registered letters destroyed that contained nothing of value, or that contained notes, etc., that could be duplicated without cost to the sender. Such cases have been returned to the department for closing without further action. The investigation of the remaining cases has necessarily proceeded very slowly, as many of the letters were mailed in

Guam, Pago Pago and Hawaii. Matters were further complicated by the San Francisco disaster, so that I have not yet completed the investigation of all the cases that bear upon this wreck. I have on hand approximately four hundred cases, the investigation of which will be completed as soon as possible, and you will then be furnished with an itemized statement of the contents of these letters. I have completed the investigation of six hundred and thirteen (613) and inclose herewith as Exhibit A, an itemized statement that shows the contents of each registered letter, the number of the letter, the names of the offices of mailing and of address, and the names of the sender and the addressee. As the amount of the losses in these six hundred and thirteen cases is $6,970.48, I hereby make demand upon your company for the above-mentioned sum. The value of the contents of each of the above-mentioned six hundred and thirteen registered letters has been determined by securing from the sender a sworn statement of the facts. In the event that you desire to verify the proofs in these cases, I shall be pleased to extend to you an opportunity to examine the papers in any or in all of these six hundred and thirteen cases. If you cannot arrange without inconvenience to come to Denver, it is possible that the papers could be brought to Chicago, Ill., for the purpose of giving you an opportunity to examine them. I have addressed this demand for $6,970.48 for the value of six hundred and thirteen registered letters to you on the assumption that your company will refer the matter to you so that time will be saved by sending the demand direct. The demand for the value of the contents of the remaining letters will be forwarded as soon as practicable. In the event that this demand is refused I will thank you to have such letter of refusal signed by some officer of your company that is authorized to bind the company in such matters, if you are not so authorized. Please advise me of your decision in the matter as soon as practicable.

"Yours respectfully, [Signed] J. R. Harrison, Inspector in Charge."

"H. P. Thrall, Mail Traffic Manager, 112 W. Adams Street, Chicago, Ill.

"November 6, 1907.

"Mr. J. R. Harrison, Post Office Inspector in Charge, Denver, Colorado—Dear Sir: Referring to your letter of September 4, 1907, making demand through this office upon the Union Pacific Railroad Company for the sum of $6,970.48, alleged value of certain registered letters claimed to have been destroyed in the wreck of the Union Pacific train 2 near Wilkins, Wyoming. December 7, 1905. In reply I beg to advise that I am authorized to inform you that this claim is respectfully declined.

"Very respectfully, [Signed] H. P. Thrall."

"Case No. 57,931—D. L. E. B.

"Post Office Department.

"Office of the Inspector in Charge, Denver Division—Arizona, Colorado, New Mexico, Utah, Wyoming.

"W. E. Cochran, Inspector in Charge.

"Denver, Colorado, March 17, 1909.

"Mr. H. P. Thrall, Mail Traffic Manager, Union Pacific R. R., Chicago, Ill.—Sir: This case related to the wreck of your Cheyenne and Pocatello R. P. O. train 2, near Wilkins, Wyoming, on the morning of December 7, 1905, in which a large number of registered letters and parcels were destroyed. Under date of September 4, 1907, Mr. J. R. Harrison, post office inspector in charge, addressed a letter to you in which he set forth the facts as established in the investigation of this case and made a demand upon your company for the sum of $6,970.48, representing the value of six hundred and thirteen registered letters and parcels destroyed in the wreck, and stated in his letter that another demand would be made as soon as the investigation of the remaining cases could be completed. As Mr. Harrison has been transferred from this division, I have been instructed by the department to make another demand upon your company, such demand to include the value of the remaining registers destroyed in this wreck which were not included in the previous demand. This demand is based upon the fact that the wreck

was caused by the negligence of the employés of your company, A. E. Brink and Roy Darrell, the engineer and conductor, respectively, of the west-bound freight train that collided with the mail train. Demand is hereby made upon your company for the total sum of $11,847.09, which includes the value of the registers mentioned in the previous demand. In the event you desire to verify the proofs in these cases, I shall be pleased to extend to you, or any of your representatives, an opportunity to examine the papers in any and all of the cases. It has been impracticable to complete the investigation at an earlier date, as many of the letters were mailed to foreign countries or the senders removed to foreign countries. If this demand is refused kindly advise me of that fact as soon as practicable.

"Very respectfully, [Signed] W. E. Cochran, Inspector in Charge."

"H. P. Thrall, Mail Traffic Manager, 112 West Adams St.

"Chicago, Ill., March 22, 1909.

"Mr. W. E. Cochran, Post Office Inspector in Charge, Denver, Colo.—Dear Sir: I beg to acknowledge the receipt of your letter of the 17th inst. making demand upon the Union Pacific Railroad Company for $11,847.09, which includes $6,970.48 demanded by Inspector J. R. Harrison, October 4, 1907. It is understood that the amount you demand is the alleged value of certain registered mail claimed to have been destroyed in wreck of Union Pacific train 2 near Wilkins, Wyoming, December 7, 1905. In reply I beg to advise that I am authorized to inform you that this claim is respectfully declined.

"Very respectfully, [Signed] H. P. Thrall."

"57,931—L. Case No. 180,191—A et al.

"Post Office Department.

"Office of Inspector in Charge, Denver Division—Arizona, Colorado, New Mexico, Utah, Wyoming.

"W. E. Cochran, Inspector in Charge.

"Denver, Colo., July 19, 1909.

"Mr. H. P. Thrall, Mail Traffic Manager, Union Pacific R. R. Co., 135 Adams St., Chicago, Ill.—Sir: Under date of March 17, 1909, this office made demand upon your company for the sum of $11,847.09, under our case No. 57,931—D. which represented the value of registered mail matter destroyed in the wreck of your Cheyenne and Pocatello Railway Post Office, train 2, near Wilkins, Wyoming, on the morning of December 7, 1905, as shown by the investigation of cases completed to that date. Since March 17, 1909, this office has completed the investigation of seven additional cases relating to seven registers destroyed in the above-mentioned wreck, the total loss in these seven cases being $36.25. In accordance with instructions received from the department, another demand is hereby made upon your company for the sum of $36.25, to cover the loss in these seven cases. Your early reply will be appreciated.

"Very respectfully, [Signed] H. G. Durand,

"Actg. Inspector in Charge."

"H. P. Thrall, Mail Traffic Manager, 112 West Adams St.

"Chicago, July 21, 1909.

"Mr. W. E. Cochran, Inspector in Charge, Denver, Colo.—Dear Sir: I beg to acknowledge the receipt of your letter of the 19th inst. making demand upon the Union Pacific Railroad Company for $36.25, which is in addition to your previous demand of $11,847.08, account of alleged loss of registered mail in wreck of Union Pacific train 2 near Wilkins, Wyoming, December 7, 1905. In reply I beg to advise that I am authorized to inform you that this claim is respectfully declined.

"Very respectfully, [Signed] H. P. Thrall."

"H. P. Thrall, Mail Traffic Manager, 112 W. Adams St. Chicago, Illinois.

"July 8, 1910.

"Chief Post Office Inspector, Post Office Department, Washington, D. C.—Dear Sir: On December 7, 1905, Union Pacific train 2 (Cheyenne and Pocatello R. P. O.) was wrecked near Wilkins, Wyoming, and about one thousand

pieces of registered matters was destroyed by fire. Demands were made upon the company by Inspectors Harrison and Cochran for a total of $11,883.34, alleged value of the lost registered mail, see your case No. 57,931—D. If consistent, will you kindly advise me of the total amount of the Post Office Department's liability in this case—see section 900, P. L. & R.; also the total number of registered pieces involved in this liability.

"Respectfully, [Signed] H. P. Thrall."

"Wilkins, Wyoming, Wreck of Mail Train December 7, 1905.

"Post Office Department.

"JRC—OAW

"Office of Chief Inspector, Washington.

"Case No. 57,931—D July 8, 1910.

"Mr. H. P. Thrall, Mail Traffic Manager, 135 Adams St. Chicago, Ill.—Sir: Receipt is acknowledged of your letter of July 8, 1910, requesting to be advised of the total amount of the Post Office Department's liability in the above-numbered case, which relates to the wreck of the mail train at Wilkins, Wyoming, December 7, 1905, and the total number of registered pieces involved in the wreck. This case is being handled in accordance with section 157½, as amended, Supplement of 1907, Postal Laws and Regulations of 1902, a copy of which is transmitted herewith, and information about the case cannot be given pending the adjustment.

"Respectfully, [Signed] Theo. Ingalls,

"Acting Chief Inspector, T. J."

"Division of Inspection, Post Office Department.

"Second Assistant Postmaster General.

"Address reply to this office, division of inspection, and refer to files No. 6,762—13.

"Washington, D. C., May 6, 1910.

"Sir: This office is in receipt of information to the effect that the wreck of Cheyenne and Pocatello R. P. O. train 2, near Wilkins, Wyo., route 157,001, U. P. Transfer (N. O.) Iowa, to Ogden, Utah, December 7, 1905, a quantity of mail and equipment was lost and damaged. Any statement the company may submit in connection with the matter will be given due consideration. If it should appear from all the evidence at hand when the case is passed upon that the Union Pacific R. R. Co. is at fault, a (di-ciplinary) fine will be imposed.

"Very respectfully, [Signed] Joseph Stewart,

"Second Assistant Postmaster General.

"Mr. H. P. Thrall, Mail Traffic Manager, U. P. R. R. Co., 135 Adams St. Chicago, Ill."

"H. P. Thrall, Mail Traffic Manager, 112 West Adams St., Chicago, Ill.

"June 10, 1910.

"Hon. Joseph Stewart, Second Assistant Postmaster General, Washington, D. C.—Dear Sir: In reply to your letter of May 6, 1910 (LVBM) file 6,762—13, regarding loss and damage to a quantity of mail and equipment in the wreck of Union Pacific train 2 near Wilkins, Wyoming, December 7, 1905, I beg to state that this loss was due to an accident which was unavoidable so far as the Union Pacific Railroad Company was concerned.

"Respectfully, [Signed] H. P. Thrall."

The stipulation of facts again continues as follows:

"(5) That under date of April 5, 1906, through the office of the Second Assistant Postmaster General of the United States, notice was sent to this defendant stating that the sum of one hundred fifteen and $^{52}/_{100}$ dollars ($115.52) had been deducted from the pay of the defendant company for the quarter ending March 31, 1906, for the carriage of mail on route No. 157,001, for 'failure to perform service, train 2, Wilkins, Wyoming, to Council Bluffs, 817.64 miles, December 6, 1905.' * * *

"(6) That under date of July 1, 1910, a notice was received by H. P. Thrall, mail traffic manager of the defendant herein, at Chicago, Illinois, from the office of the Second Assistant Postmaster General of the United States, division of inspection, stating that there had been deducted from the pay of the defendant company for the month of June, 1910, for the carriage of mail on route No. 157,001, the sum of three thousand dollars ($3,000), 'because of the loss of and damage to mail and equipment in the wreck of Cheyenne and Pocatello R. P. O. train No. 2 near Green River, Wyoming, December 7, 1905.' * * *

"(7) That the sum of one hundred fifteen and $^{52}/_{100}$ dollars ($115.52) was deducted from the pay due under and by virtue of the terms of the contract covering the period from July 1, 1902, to June 30, 1906; and the sum of three thousand dollars ($3,000) was deducted from the pay of the defendant company for the carriage of United States mail that accrued for the month of June, 1910, under and by virtue of the contract then existing between the plaintiff and defendant, covering the period from July 1, 1906, to June 30, 1910.

"(8) That on, to wit, July 8, 1910, the plaintiff herein issued to the defendant on its Post Office Department settlement warrant No. 1,077, and paid to this defendant the sum of one hundred twenty-seven thousand three hundred ninety and $^{64}/_{100}$ dollars ($127,390.64), in payment for the transportation of mail over route No. 157,001, during the month of June, 1910, which sum was the difference between the total amount due the defendant for the month of July, 1910, for the carriage of mail over the aforesaid route by virtue of the contract between the parties hereto of July 1, 1906, for the earnings of said mail, and the three thousand dollars ($3,000) deduction above set forth."

The letters which notified the company of the deductions said that the deductions were made in pursuance of authority conferred by section 3,962, R. S. U. S.

"(9) That the said deduction of three thousand dollars ($3,000.00) above set forth has, ever since the same was made, been retained by the plaintiff herein.

"(10) That at the time of the destruction of the mail matter involved herein, to wit, December 7, 1905, the indemnity provided for by the rules and regulations of the Post Office Department of the United States, made in accordance with authority of law, did not exceed the sum of twenty-five dollars ($25) for any one registered parcel, and the limit of the liability of the plaintiff to the senders of the registered letters, packages, and parcels involved herein did not exceed the sum of twenty-five dollars ($25) in any one case; and in no case involved herein did the plaintiff pay the sender or senders of any letter, package, or parcel, involved herein, any sum in excess of twenty-five dollars ($25). That the total amount of money paid by the plaintiff herein to the senders of the letters, packages, or parcels on the ninety-four (94) items set forth in the schedule filed herein, with a stipulation as to the value thereof, amounted to the sum of five hundred sixty and $^{10}/_{100}$ dollars ($560.10)."

The railroad company, in consideration of a payment to it of a stipulated sum, agreed as follows:

"In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railway company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the department. Horace G. Burt, President or General Manager."

George H. Smith (N. H. Loomis, of Omaha, Neb., and P. L. Williams and J. V. Lyle, both of Salt Lake City, Utah, on the brief), for plaintiff in error.

William W. Ray, U. S. Atty., of Salt Lake City, Utah (David S. Cook, Asst. U. S. Atty., of Ogden, Utah, on the brief), for the United States.

Before CARLAND, Circuit Judge, and MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge (after stating the facts as above). [1] The legal relation existing between the United States and the railroad company was contractual. The company agreed, in consideration of the payment of a stipulated sum for the service, that it would "accept and perform the service upon the conditions prescribed by law and the regulations of the department." This language in express terms made all applicable provisions of law and regulations a part of the contract. We think this relation of the parties renders inapplicable the contention that the railroad company, in performing the service in question, was engaged in the performance of a governmental function, and therefore, not liable for the negligence of its employés, providing it used ordinary care in their selection. Whatever may be the rule as to the liability of the company to the owners of mail being transported, it must be admitted, we think, that under its contract it owed the United States the duty to use ordinary care in transporting the mail over the route in question. This would certainly be so as to the mail equipment which was the property of the United States. The railroad company was not, it is true, a common carrier of the mail (A., T. & S. F. Railway Co. v. United States, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236), and is not liable to the United States as such, but it had possession of the property of the United States, speaking now of the equipment, and was being paid a consideration agreed upon for transporting the mail contained therein, and no good reason can be found for denying a liability for the negligent destruction of this equipment. When we come to determine the liability of the railroad company for the registered mail not owned by the government, a very different question is presented, and one in the solution of which many difficulties suggest themselves.

The United States is seeking to recover the value of the registered mail which they did not own and for the loss of which they are not liable exceeding the sum of $25 in any one case, so that it is difficult to see how they could be subrogated to the rights of the owners, whatever they may be. In the case of National Surety Co. v. United States, 129 Fed. 70, 63 C. C. A. 512, which was an action by the United States for the breach of a bond given by a letter carrier upon which the surety company was surety, the mail carrier received, for delivery, letters containing money and stole their contents. It was held by this court that the act of the carrier was a breach of the condition of the bond for which the United States could maintain an action, and that they were entitled to recover the money taken from the letters. Assuming that the condition of the bond was sufficient to cover the default of the carrier, the serious question was then presented as to the amount of damage which the government was entitled to recover. Judge Sanborn, delivering the opinion of this court, placed the right to recover the full amount of the money taken from the letters, upon the theory that the government was the bailee of the owner and entitled to recover against a wrongdoer the full value of the property taken by the carrier, and that this right was not dependent upon the liability of the government to

answer over to the owner. The opinion of Judge Sanborn was followed by the Circuit Court of Appeals for the Fourth Circuit in the case of U. S. v. American Surety Co., 163 Fed. 288, 89 C. C. A. 658. In United States v. Atlantic Coast Line R. R. Co., 215 Fed. 56, 131 C. C. A. 364, the United States Court of Appeals for the Fourth Circuit, in a case as to one of its branches parallel to the case at bar, used the following language:

"(2) It is well settled that the United States has a property right in the mails. Searight v. Stokes, 3 How. 151, 11 L. Ed. 537; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. This being so, it may recover, from any person to whom it intrusted its mails, damages for their loss or delay due to the bailee's negligence. The direct damages for loss of mail would be the labor and time necessary in the effort to recover the various parcels and the disarrangement of the post office business. The government could also recover the value of the mail lost for the benefit of the owners of the mail, *provided the contract did not negative the idea of the liability extending that far.* It does not matter what we call the relation between the government and the railroad; the essential thing is that the railroad company assumed the obligation to use due care to have a safe track for the mail car to run on; and when it was negligent in that respect it became responsible for any damage to the government due either to its own negligence or that of its servants. The distinction urged between the negligence of the company itself and its servants on an issue of this sort is artificial and unsupported by any substantial reason. It may be true that, as between the owner of the mail matter seeking to fix the liability on the railroad for his lost property and the railroad itself, the railroad is a public agency; but as between the government and the railroad contracting to carry its mail, the railroad company is liable as a party to a private contract." (The italics are those of the court delivering the opinion.)

[2] We do not find it necessary, however, in the present case to determine just what the rights of the government are in respect to the registered mail in question, for we are clearly of the opinion that under the agreed facts presented in the record it exhausted the remedy provided by law for whatever damages may have resulted from the railroad wreck in question prior to the commencement of this suit.

As we have before stated, the railroad company agreed to accept and perform the service upon the conditions prescribed by law and the regulations of the department. Section 3962, R. S. U. S. (Comp. St. 1913, § 7450), reads as follows:

"The Postmaster General may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier."

Postal Regulations, § 1335, provides that fines will be imposed under authority vested in the Postmaster General by section 3962, for each of the following delinquencies:

"Suffering the mail, or any part of it, to become wet, lost, injured, or destroyed, or conveying or keeping it in a place or manner that exposes it to depredation, loss, or injury."

The agreed statement of facts shows that on April 5, 1906, through the office of the Second Assistant Postmaster General of the United States, notice was sent to the railroad company stating that the sum of

$115.52 had been deducted from the pay of the railroad company for the quarter ending March 21, 1906, for the carriage of mail on route No. 157,001, for "failure to perform service, Train 2, Wilkins, Wyoming, to Council Bluffs, 817.64 miles, December 6, 1905." In the notice of this deduction, it was stated that it was made in pursuance of authority conferred by section 3962, R. S. U. S., above quoted. The facts also show that under date of July 1, 1910, a notice was received by the railroad company from the office of the Second Assistant Postmaster General, stating that there had been deducted from the pay of the railroad company for the month of June, 1910, for the carriage of mail on route No. 157,001, the sum of $3,000, "because of the loss of and damage to mail and equipment in the wreck of Cheyenne and Pocatello R. P. O. train No. 2 near Green River, Wyoming, December 7, 1905." The deduction of $3,000 was made for loss and damage to mail and equipment. There would be no reason for thinking otherwise, as the amount deducted was nearly ten times the value of the equipment, as stated in the agreed statement of facts. The wreck occurred December 7, 1905. Correspondence commenced in regard to this loss and damage September 4, 1907, and ended June 10, 1910. So that, at the time the deductions were made, it must be presumed the Post Office Department had full knowledge of the amount of the loss and acted with such knowledge in making the deductions. Whether the deductions were too large or too small, it was a matter entirely in the hands of the United States, and the conclusion reached ought to be binding upon them.

The United States Court of Claims has frequently construed section 3962, supra, and in Otis v. United States, 24 Ct. Cl. 72, it said:

"The service to be performed (in the carriage of the mails) is of such a character that a provision (such as that made by this section) is essential to the successful performance of the most important function incident to the executive branch of the government. If the Post Office Department were subjected to the ordinary remedy for a violated contract, the measure of protection would be incommensurate to the wrong inflicted, and the mail service might thereby be impaired in that efficiency required by public policy. * * * If this court were to so construe the law that these defendants could only recover for a violation of contracts according to the usual mode of assessing damages, the postal service might be stripped of that efficiency required by public necessity."

In Parker v. United States, 26 Ct. Cl. 357, the same court said:

"No man is obliged to be a mail contractor against his will; and the statute is operative against no man until by voluntarily entering into a contract or performing a mail transportation service he expressly or impliedly agrees to submit the differences which may arise to the arbitrament of the Postmaster General. The only effect of the statute is that it requires the Post Office Department to exact this agreement from all mail carriers, and that it takes such contracts to this extent out of the ordinary rules of law which regulate penalties and liquidated damages. * * * The vast area of the post office system, its complexity of routes, the remoteness and distance of its operations from the seat of the government, require that a summary method of dealing with its innumerable contractors and subcontractors shall exist, though its administration may often involve instances of individual injustice."

In United States v. Atlantic Coast Line R. R. Co., supra, the Court of Appeals of the Fourth Circuit said:

"The main difficulty is as to the measure of liability, for the railroad's negligent loss of mail; that is, whether it extends to the value of the property lost. The government is not responsible to the owner of mail lost in transportation. The postal regulations of the government under which its mail is carried, and which the railroad assumes as part of its contract, set out numerous duties and obligations imposed on railroads. There is a very strong presumption that, if the intention had been to impose upon railroad companies the very onerous obligation of being responsible for the value of all mail lost through its negligence, this obligation of such vast consequence to both parties would have been clearly and directly expressed in the regulations. The absence of such expression creates a strong implication that it was not the intention to impose such liability. The implication against liability in such case is strongly indicated in German, etc., Co. v. Home, etc., Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; Atchison, T. & S. F. Ry. v. United States, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236. This view is further supported by the fact that where the government intends to impose such liability it is usually expressed in the written undertaking exacted from the party who undertook to carry the mail. National Surety Co. v. U. S., 129 Fed. 70, 63 C. C. A. 512; United States v. American Surety Co. (C. C.) 155 Fed. 941; United States v. American Surety Co. (C. C.) 161 Fed. 149; Id., 163 Fed. 288, 89 C. C. A. 658."

We are therefore of the opinion that, taking into consideration the facts as they appear in the record, the matters in difference between the United States and the railroad company, arising out of the wreck in question, have been settled and settled in the way provided by law. This view of the case ought not to be objected to by the United States, as it leaves with them a full and complete remedy at all times by the imposition of such penalties and deductions against mail contractors, as will fully reimburse the government for whatever loss it may have sustained.

The fact that no law has ever been passed by Congress and no regulation made by the Post Office Department, making those who carry the mail responsible for its loss, except as herein specified, and the fact that Congress by section 3962, supra, has authorized the Postmaster General to make deductions from the pay of mail contractors for failures to perform service according to contract and to impose fines upon them for other delinquencies, and the fact that the Postmaster General by regulation No. 1335, above quoted, has specified the acts for which penalties may be imposed and deductions made and the loss of the mail in question being within the terms of said regulation, and the fact that heretofore, during the existence of the government, no case like the one at bar has been instituted, except United States v. Atlantic Coast Line R. R. Co., supra, leads irresistibly to the conclusion that the remedy of the United States for the loss of mail through the default of contractors is through the imposition of fines and the making of deductions, as provided for in said section above quoted.

[3] It results that the judgment of the trial court must be reversed, and a new trial ordered. We feel that we have no authority to direct the proper judgment below, in view of the decision of the Supreme Court in Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK et al. v. NORTH PLATTE VALLEY IRR. CO. et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

Nos. 4249 and 4261.

1. MECHANICS' LIENS ⟸38—LIEN FOR SERVICES—SUPERINTENDENCE.
Under Comp. St. Wyo. 1910, § 3799, providing that every mechanic or other person performing any work or labor upon or furnishing any material, etc., for any building, erection, or improvement shall have a lien for his work, labor, or materials, etc., the superintendent and engineer in charge of the construction of a plant who, besides the work of superintending such construction, also performed work and labor was entitled to a lien for his salary, especially as the old doctrine that lien statutes, being in contravention of the common law, must be strictly construed has given way to a more liberal doctrine for the purpose of carrying out the purposes of such statutes, and the tendency of modern decisions is toward allowing liens to engineers and architects designing and superintending the construction of improvements.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 42; Dec. Dig. ⟸38.]

2. MECHANICS' LIENS ⟸260—ENFORCEMENT—STATUTORY LIMITATIONS—COMMENCEMENT OF SUIT.
Within the Wyoming statutes, providing that materialmen's liens shall cease to exist six months from the filing thereof unless within that time an action shall be commenced and prosecuted without delay to final judgment, where a lienor was brought in as a defendant in a suit to foreclose a trust deed and filed a cross-bill, and the mortgagor's officers testified as to the validity of the lien, the filing of the cross-bill was equivalent to the commencement of a suit, though no process thereon was issued, especially in view of equity rule 30, providing that a defendant may state in short and simple form any counterclaim against the complainant which might be the subject of an independent suit against him, and that such counterclaim shall have the same effect as a cross-suit so as to enable the court to pronounce final judgment in the same suit on the original and the cross claims.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 456, 458–468; Dec. Dig. ⟸260.]

3. MECHANICS' LIENS ⟸132—PROCEEDINGS TO PERFECT—TIME FOR FILING LIEN—COMPLETION OF CONTRACT.
Within the Wyoming laws, requiring lien statements to be filed by materialmen within 90 days from the accrual of the indebtedness, where though the last cement furnished by a materialman in car load lots was furnished on June 8, 1911, five barrels were delivered on June 15, 1912, pursuant to the old arrangement, and not for the purpose of renewing a lien which had been lost, and there was testimony that the account with the lienor had been open continuously until June 15, 1912, the statement was properly filed within 90 days from that time, especially as the entirety of a running account does not depend upon the length of time between the last items, but on whether the material is furnished for the same general purpose.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 190, 192–207; Dec. Dig. ⟸132.]

4. CORPORATIONS ⟸482—DEED OF TRUST—CLAIMS—PRIORITY OF DEEDS.
In a suit to foreclose a corporate deed of trust a court of equity had no authority to establish equitable liens superior to the lien of the trust deed, where the claims did not occur within six months prior to the ap-

pointment of a receiver and were not for operating expenses and there had been no diversion of income.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. ⊂⊃482.]

5. CORPORATIONS ⊂⊃480—MORTGAGES—PRIORITY BETWEEN MORTGAGE AND MECHANICS' LIENS.

An irrigation company, at the date of a deed of trust on its property, had completed a gravity system for the distribution of water, consisting of a reservoir and canals, and was contemplating the construction of a hydroelectric plant for irrigating land which, on account of its elevation, could not be irrigated by the gravity system. The hydroelectric system subsequently constructed consisted of pipe lines, a power house, a transmission line, and a pumping station, the dam of the gravity system not being touched in any way except to connect one of the pipe lines therewith. The deed of trust covered property thereafter acquired or constructed. *Held*, that under Comp. St. Wyo. 1909, § 3799, giving every person performing work or furnishing material, etc., for any building, erection, or improvement on land a lien on such building, erection, or improvement and on the land belonging to the owner to the extent of one acre or in a town, city, or village on the lot of land upon which the building, erection, or improvement is situated, and section 3801, providing that such lien shall attach to the building, erection, or improvements for which the materials were furnished or the work done in preference to any prior lien, incumbrance, or mortgage, persons performing labor and furnishing materials for the construction of the different units of the hydroelectric system did not acquire a lien on the dam, or any part of the gravity system, superior to the lien of the deed of trust, but if given a superior lien on the entire hydroelectric system, would be liberally treated.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⊂⊃480; Mortgages, Cent. Dig. §§ 290–323, 326–455.]

6. CORPORATIONS ⊂⊃482—FORECLOSURE OF MORTGAGES—DISPOSITION OF PROCEEDS—HEARING.

In a suit to foreclose a deed of trust on the property of an irrigation company which would be best sold as an entirety, but upon a part of which there were certain liens superior to the deed of trust, the court should have granted the parties a hearing and from the evidence produced thereon should have determined the value of the property as a whole and the value of the part upon which there were such superior liens as a basis for the distribution of the proceeds of a sale between the lienors and the mortgagee, instead of using an ex parte appraisement of the property by appraisers appointed by it as a basis for such distribution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. ⊂⊃482.]

7. CORPORATIONS ⊂⊃482—FORECLOSURE OF MORTGAGES—SALE.

Where a deed of trust given by an irrigation company covered its gravity system for the distribution of water consisting of a reservoir and canals, and also a hydroelectric system, used for irrigating land, which could not be irrigated by the gravity system, consisting of pipe lines whereby water was conducted from the gravity system dam to a power house and used in generating electric power transmitted by wires to a pumping station, used to elevate water to the high land, though there were liens for labor and materials on the hydroelectric system superior to the lien of the deed of trust, upon a foreclosure of the mortgage the property should be sold as a whole, as a purchaser of the gravity system would have the power to render the electric system worthless if they were sold to different parties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. ⊂⊃482.]

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit to foreclose a deed of trust by the Continental & Commercial Trust & Savings Bank, as trustee, and others against the North Platte Valley Irrigation Company and others. From a decree of foreclosure and from an order denying an application to modify the decree, complainants appeal. Appeal from order dismissed. Decree modified and affirmed.

Charles L. Powell, of Chicago, Ill., and Eldon Bisbee, of New York City (Levy Mayer, of Chicago, Ill., and William C. Kinkead, of Cheyenne, Wyo., on the brief), for appellants.

John D. Clark, of Cheyenne, Wyo. (Gibson Clark, of Cheyenne, Wyo., on the brief), for appellees O. L. Walker Lumber Co., Wagner Electric Mfg. Co., and Otto H. Falk, as receiver of Allis-Chalmers Co.

William W. Grant, Jr., of Denver, Colo. (Ernest Morris, of Denver, Colo., on the brief), for appellees Fred W. Hart, Hendrie & Bolthoff Mfg. & Supply Co., C. P. Allen General Contracting Co., Colorado-Portland Cement Co., Pioneer Iron & Wire Works Co., Florence Hardware Co., and W. A. Rawlings.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. The bill in this case was filed by appellants to foreclose a trust deed made and executed by the North Platte Valley Irrigation Company, a Wyoming corporation, hereinafter called the Irrigation Company, on December 18, 1909, to secure an authorized bond issue of $2,000,000. A decree of foreclosure was entered February 9, 1914. From this decree appellants appealed, and that appeal is numbered 4249. There was an application to modify the decree of foreclosure, which was denied, and a separate appeal was taken from the order of denial, and that appeal is numbered 4261. If the decree was right so was the order refusing to modify the same, and as the record in appeal No. 4261 has been consolidated with that of No. 4249, the appeal in No. 4261 may be dismissed, as all matters in controversy may be considered on the appeal from the main decree. The complaint of the appellants concerning the decree of foreclosure grows out of the establishment in the decree of certain statutory liens as superior to the liens of the trust deed. Complaint is also made of the manner of sale and the way in which the decree provides that an appraisal of the property shall be made for the purpose of fixing a basis for the distribution of the proceeds of the sale. As the liens are the cause of the controversy, it is perhaps best to first consider the objections of the appellants thereto, reserving for subsquent discussion the question as to what property the several liens held to be valid ought to cover. It was adjudged that the C. P. Allen General Contracting Company had a statutory lien under the laws of Wyoming superior to the lien of the trust deed in the sum of $20,438.47 on what in this opinion may be called for the sake of brevity, the dam, power house, wood stave pipe line,

pumping station, steel pipe line, and poles erected for the transmission line. The amount of this lien was a balance due upon a contract to construct the "wood stave pipe line" for $48,000. It is contended that as all the material furnished and work performed under this contract was for the construction of the wood stave pipe line, the lien should be restricted to that structure. As this same question arises as to some of the other liens, the discussion thereof will be postponed until the objections to all the several liens, as liens, have been stated.

[1] It was adjudged that Fred W. Hart had a statutory lien, under the laws of Wyoming, superior to the lien of the trust deed in the sum of $10,374.14 on the dam, power house, wood stave pipe line, pumping station, steel pipe line, and poles erected for the transmission line. Hart was superintendent and engineer in charge of the construction of the so-called "hydroelectric plant" which with the exception of the dam was composed of the structures hereinbefore mentioned. His salary was $10,000 per year. Besides the work of superintending the construction of the system, he performed work and labor. It is contended that he is not within the Wyoming statute, which provides that:

"Every mechanic or other person who shall do or perform any work or labor upon * * * any building, erection or improvement * * * shall have for his work or labor done * * * a lien upon such building, erection or improvement."

There is a conflict of authority upon the subject as to whether a person in the position of Hart is entitled to a lien under statutes similar to the one above mentioned. In Massachusetts an engineer or architect cannot secure a lien for plans, but may for superintendence, and where services in these two capacities cannot be distinguished, the lien is lost. Mitchell v. Packard, 168 Mass. 465, 47 N. E. 113, 60 Am. St. Rep. 404. In Iowa, Wisconsin, and Nebraska the lien is upheld for plans alone without supervision. Parsons v. Brown, 97 Iowa, 699, 66 N. W. 880; Fitzgerald v. Walsh, 107 Wis. 92, 82 N. W. 717, 81 Am. St. Rep. 824; and Henry v. Halter, 58 Neb. 685, 79 N. W. 616.

It seems, however, that the tendency of modern decisions is toward allowing liens to engineers and architects designing and superintending the construction of improvements. Wetzel Ry. v. Tennis, 145 Fed. 458, 75 C. C. A. 266, 7 Ann. Cas. 426; Trust Co. v. Richmond (C. C.) 54 Fed. 723; Cascaden v. Wimbish, 161 Fed. 241, 88 C. C. A. 277; Phœnix Furn. Co. v. Hotel Co. (C. C.) 66 Fed. 683; Hughes v. Torgerson, 96 Ala. 346, 11 South. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105; and Alvord v. Hendrie, 2 Mont. 115.

The following are cases in which architects have been allowed liens under statutes similar to that of Wyoming: Mulligan v. Mulligan, 18 La. Ann. 20; Insurance Co. v. Rowland, 26 N. J. Eq. 389; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746; Knight v. Norris, 13 Minn. 473 (Gil. 438); Van Dorn v. Mengedoht, 41 Neb. 525, 59 N. W. 800; Field v. Water Co., 25 R. I. 319, 55 Atl. 757, 105 Am. St. Rep. 895; and Stryker v. Cassidy, 76 N. Y. 50, 32 Am. Rep. 262.

Appellants claim that it was decided in Wyman v. Quayle, 9 Wyo. 326, 63 Pac. 988, that Wyoming took her mechanic's lien statute from Missouri, and that in Blakey v. Blakey, 27 Mo. 39, the Supreme Court of Missouri had held prior to the adoption of the statute by Wyoming that a superintendent at a stated salary to superintend the work of others was not entitled to a lien. An examination of that case, however, shows that all that was decided was that where a builder took a contract for the erection of a house, he could not maintain a lien for superintending his own workmen. Edgar v. Salisbury, 17 Mo. 271, simply held that where lienable and nonlienable charges were stated together in one charge, so that it was impossible to ascertain how much was lienable, the entire lien would be lost. Murphy v. Murphy, 22 Mo. App. 18, was disposed of on the same point, and Nelson v. Withrow, 14 Mo. App. 270, followed Blakey v. Blakey, supra. The old doctrine that these lien statutes, being in contravention of the common law, must be strictly construed has given way to a more liberal doctrine, in modern times, for the purpose of carrying out the purposes of the statute. Upon full consideration of the authorities bearing upon the question, we are of the opinion that a liberal construction of the Wyoming statute requires us to hold that Hart is entitled to a lien, the extent thereof to be hereafter discussed.

[2] It was adjudged that the Hendrie & Bolthoff Manufacturing & Supply Company had a statutory lien under the laws of Wyoming superior to the lien of the trust deed in the sum of $4,606.57, on the dam, power house, wood stave pipe line, pumping station, steel pipe line, and poles erected for the transmission line. The material furnished by this company went into the power house, the pumping station, and transmission line. Under the Wyoming law these statutory liens cease to exist after six months from the date of the filing of the same, unless within that time an action shall be commenced and prosecuted without delay to final judgment. The lien of this claimant was filed August 26, 1912. It answered the bill in this case and filed a cross-bill on December 30, 1912. No process was issued, however, on the cross-bill. It is contended that as no process was issued, no suit was commenced within the requirement of the law as above stated, and that, the irrigation company never having had its day in court, there was no authority to adjudge the lien. It hardly needs the citation of authority to establish the proposition that the filing of a cross-bill is the commencement of a suit. Humane Bit Co. v. Barnet (C. C.) 117 Fed. 316; Carter v. Peurrung (C. C. A. 6) 99 Fed. 888, 40 C. C. A. 150; Flower v. MacGinniss (C. C. A. 2) 112 Fed. 377, 50 C. C. A. 291; Farmers' Loan Co. v. Railway, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; and Story, Eq. Pl. (4th Ed.) § 7.

In regard to the failure to issue process so that an issue could be framed between the irrigation company and the other codefendants and the complainants, we must consider the status of the case at the time the cross-bill was filed. The Bolthoff Company had been brought in as a defendant by the complainants, and the officers of the

Irrigation Company testified in the case as to the validity of the lien, and at the time of the final hearing of the case, it had been provided by rule 30 of the new equity rules (201 Fed. v, 118 C. C. A. v) that a defendant might state, in short and simple form, any counterclaim against the complainant which might be the subject of an independent suit in equity against him, and that such counterclaim, when set up, should have the same effect as a cross-suit, so as to enable the court to pronounce final judgment in the same suit both on the original and the cross claims. We think under the facts appearing in the record, the objection that no process issued on the cross-bill is very technical, and it does not appeal to our sense of justice.

We think the court clearly had jurisdiction to establish the lien. It was adjudged that the Pioneer Iron & Wire Works Company had a statutory lien of $165, superior to the lien of the trust deed under the laws of Wyoming on the dam, power house, wood stave pipe line, pumping station, steel pipe line, and poles erected for the transmission line. The material furnished went into the pumping station and power house. The lien in this case was filed July 3, 1912. Cross-bill filed December 31, 1912. The same objections are made to this lien as were made to the Bolthoff lien, just considered, and what we have said there disposes of the objections as to this lien.

[3] It was adjudged that the Colorado-Portland Cement Company had a statutory lien under the laws of Wyoming for $3,949.33 superior to the lien of the trust deed on the dam, power house, wood stave pipe line, pumping station, steel pipe line, and poles erected for the transmission line. The cement went into the construction of the power house and pumping station. The lien statement in this case was filed August 26, 1912. This statement shows that the last cement furnished by the cement company in car load lots, was on June 8, 1911. The law of Wyoming required the lien statement to be filed within 90 days from the time the indebtedness accrued, so that if June 8, 1911, is to be the date, the lien statement was not filed in time. There was, however, an item of five barrels of cement delivered on June 15, 1912. If the latter date is the time the indebtedness accrued, then the lien statement was filed in time. Mr. C. S. Stamm, bookkeeper for the Irrigation Company, testified that the account began July 31, 1909, and ended June 15, 1912; also that the account had been open continuously from the organization of the new company. We think from a consideration of the evidence in the record that there was no intention, by delivery of the five barrels of cement, to renew a lien which had been lost, but that the delivery was made pursuant to the old arrangement, and we are not disposed to cause a forfeiture of the lien by holding that the time the indebtedness accrued was on June 8, 1911.

The length of time between the last items of a running account and the size of the items are not tests of the entirety of the account, but the test is whether the material is furnished for the same general purpose. Davis v. Bighorn Lbr. Co., 14 Wyo. 517, 85 Pac. 980; Darlington Lbr. Co. v. Smith, 134 Mo. App. 316, 114 S. W. 77; Canton Mach. Co. v. Rolling Mill Co. (C. C. A. 4) 168 Fed. 465, 93 C. C. A. 621; and Farnham v. Richards, 91 Me. 559, 40 Atl. 553.

We see no error in allowing this lien.

It was adjudged that the Florence Hardware Company had a lien superior to the trust deed for $3,209.17, under the laws of Wyoming on the power house, pumping station and tunnel. No errors are assigned or relied upon as to this lien.

[4] It was adjudged that the O. L. Walker Lumber Company had an equitable lien superior to the lien of the trust deed for $444.10, and that W. A. Rawlings had an equitable lien in the sum of $167 superior to the lien of the same. So far as the liens of the O. L. Walker Company and W. A. Rawlings are concerned, it must be admitted at the threshold that there was no power in the trial court to establish these as liens superior to the trust deed or as liens at all. In the case of Illinois Tr. & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481, Judge Sanborn, speaking for this court, stated the rules under which a court of equity is authorized to establish a lien superior to a mortgage, and the cases upon the subject are there fully cited. This case was followed in Rodger Ballast Car Co. v. Ry. Co., 154 Fed. 629, 83 C. C. A. 403. Without going into a discussion of the question, we may say that the court was without power to establish these liens for the following reasons: First, they did not occur within six months prior to the appointment of the receiver; second, they were not for operating expenses; third, there had been no diversion of income and, there being no diversion, there could be no restoration.

[5] We now take up the question as to the extent of the liens held to be valid. The priority of the liens are fixed by the statute of Wyoming. The sections of the statute material to the present inquiry are as follows:

"Sec. 3799. Who Entitled to, and Extent of Lien. Every mechanic or other person, who shall do or perform any work or labor upon, or furnish any material, fixtures, engines, boilers or machinery for any building, erection or improvement upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his or her agent, trustee, contractor, or subcontractor, upon complying with the provisions of this chapter, shall have for his work, or labor done, or materials, fixtures, boiler or machinery furnished, a lien upon such building, erection or improvements, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre, or if such building, erection or improvements be upon any lot of land in any town, city, or village, then such lien shall be upon such building, erection or improvement and the lot or land upon which the same are situated, to secure the payment for such work or labor done, or materials, fixtures, engine, boiler or machinery furnished. (R. S. 1887, sec. 1517; R. S. 1899, sec. 2889.)

"Sec. 3800. Extent of Lien. The entire land, to the extent aforesaid, upon which any such building, erection or other improvement is situated, including as well that part of the said land which is not covered with such building, erection or other improvement, as that part thereof which is covered with the same, shall be subject to all liens created by this chapter, to the extent of all the right, title and interest owned therein by the proprietor or owner of such building, erection or improvement for whose immediate use and benefit the labor was done, or things or material furnished. (R. S. 1887, sec. 1518; R. S. 1899, sec. 2890.)

"Sec. 3801. Priority of Lien. The lien for the things or materials furnished or work and labor performed shall attach to the building, erection or im-

provements for which they were furnished, or the work and labor was done, in preference to any prior lien or incumbrance or mortgage upon the land upon which said buildings, or erection, improvements or machinery have been erected or put, and any person enforcing such lien may have such building, erection or improvements sold under execution, and the purchaser thereof may remove the same within a reasonable time thereafter; and such lien shall be preferred to all other incumbrances which may be attached to or upon such building or other improvements or the ground, lot or land upon which they are situated or located, or either of them, subsequent to the commencement of such buildings or improvements. (R. S. 1887, secs. 1519, 1523; R. S. 1899, sec. 2891.)"

In order to intelligently solve the question as to the extent of the liens, a knowledge of the condition of the property covered by the trust deed on December 18, 1909, the date when it was executed, is necessary. On that date what is known as the "gravity system" was practically completed, with the exception of an extension on the main ditch and a few laterals, which has no bearing on the question under discussion. The dam was completed beyond dispute. This gravity system for the distribution of water for irrigation purposes consisted of the La Prele Reservoir, La Prele Canal, the Westside Canal, and Syphon Canal. The water stored in the reservoir was received from a mountain watershed of 170 miles square in area. The water is distributed by the force of gravity through canals and ditches to the lands lying below the reservoir. Nothing remained to be done to this system when the trust deed was executed except as above stated. The irrigation company, however, at that time did have in contemplation the construction of a hydroelectric plant, which was to be used in elevating water for irrigation purposes to land, which on account of its elevation could not be irrigated by the gravity system. This fact is not only shown by the evidence, but in the trust deed, in describing the property mortgaged, the following language is found:

"* * * and the entire irrigation and hydraulic system of the company, together with all power stations, power houses, power privileges, and all pumps and pumping stations, pumping houses, pumping privileges; and all hydroelectric machinery, and all transmission lines and the appurtenances connected with the said system, now owned by the company, and which it may hereafter acquire or construct * * * and all * * * construction machinery. * * * All reservoirs, dams, canals, pumping machinery, transmission lines and hydroelectric equipment. * * *"

The scheme involved the conducting of water from the dam of the gravity system through a wooden stave pipe line and steel pipe line to a power house, the water there to be used in the generation of electric power, which was thence to be transmitted about 14 miles by wires strung upon poles to a pumping station, which was to elevate water to the high land. All the work done and materials furnished for which liens are claimed was done and furnished in the construction of this hydroelectric system. The dam was not touched in any way, except to connect the wooden stave pipe line therewith. The hydroelectric system, therefore, consisted of the wood and steel pipe line, power house, transmission line, and pumping station. The gravity system does not depend in any manner for its operation upon the hydroelectric system.

Section 3799, above quoted, provides that the person doing work or furnishing materials as therein specified shall have a lien upon "such building, erection or improvements."

Section 3801, provides that the—

"lien for the things or materials furnished or work and labor performed shall attach to the building, erection or improvements for which they were furnished, or the work and labor was done, in preference to any prior lien or incumbrance or mortgage upon the land upon which said buildings, or erection, improvements or machinery have been erected or put."

It thus appears that the liens established by the decree were only superior to the lien of the trust deed, in so far as the buildings, erections, or improvements are concerned. We have carefully examined the authorities cited by both sides upon the subject as to how far these liens ought to extend. In the last analysis, each case must stand upon its own facts and circumstances as applied to the statute creating the lien. We think that a mere reading of the statute demonstrates that the court would be giving the same a very liberal construction in extending these liens over what is known as the hydroelectric plant, and that to extend them to the dam or any part of the gravity system would be extending the liens in direct opposition to the mandate of the statute. The lien claimants are not the only parties whose rights are to be considered in this action. The trust deed was upon record when the work and labor was done, and the materials furnished, and according to the decree, the bondholders have invested more than $1,000,000 in this enterprise.

The court is not called upon to so act in their behalf, as to subject a property upon which they have no lien to the payment of the liens in preference to the lien of the trust deed. It is not consistent with equity or justice. The following cases have been carefully considered: Brooks v. Burlington Ry., 101 U. S. 443, 25 L. Ed. 1057; Canal Co. v. Gordon, 6 Wall. 561, 18 L. Ed. 894; Springer Land Association v. Ford, 168 U. S. 513, 18 Sup. Ct. 170, 42 L. Ed. 562; State Bank of Chicago v. Plummer, 54 Colo. 144, 129 Pac. 819; Pacific Rolling Mills Co. v. Bear Valley Irrigation Co., 120 Cal. 94, 52 Pac. 136, 65 Am. St. Rep. 158; Eufaula Water Co. v. Addyston Pipe & Steel Co., 89 Ala. 552, 8 South. 25; Pusey & Jones v. Pennsylvania Paper Mills (C. C.) 173 Fed. 634; McDonald v. Minneapolis Lumber Co., 28 Minn. 262, 9 N. W. 765; Paddock v. Stout, 121 Ill. 571, 13 N. E. 182; Wharton Bros. & Co. v. Douglas & Son, 92 Pa. 66; Hooven Owens, etc., Co. v. Featherstone's Sons, 111 Fed. 81, 49 C. C. A. 229; Steger v. Refrig. Co., 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580; and Packing Co. v. Allen, 116 Fed. 312, 54 C. C. A. 648. We do not find anything in these cases which would require us to construe the statute in question, so as to extend the liens to the gravity system. On the contrary, some of the cases cited are direct authority for the view herein taken. It was adjudged that there were outstanding bonds, secured by the trust deed in the sum of $944,000, which were now due and payable; that the amount due on said bonds at the date of the decree was $1,063,095.04. It was further adjudged that the property covered by the trust deed should be sold as an entirety without redemption.

Clyde M. Watts, Charles C. Carlisle, and William R. Schnitger were appointed appraisers to appraise the property to be sold, and it was ordered that they should appraise separately each of the improvements upon which liens had been declared superior to the lien of the trust deed. This appraisement was to be made and returned to the court within 26 days from the date of the decree. On March 27, 1914, the appraisers filed an amended report in words and figures as follows:

Reinforced concrete power house described in decree in paragraph VI	$32,000 00	
Machinery paid for in power house	8,000 00	
Wood stave pipe line described in said paragraph VI of said decree	40,000 00	
Reinforced concrete pumping station also described in said paragraph VI of said decree	12,750 00	
Machinery in pumping station outside of Allis-Chalmers and Wagner Electric Company	2,250 00	
The line of poles for transmission line, also described in said paragraph	10,000 00	
Land on which said pumping station stands, being in the southeast quarter of section 2, township 33, north range 75 west	2 00	
Total		$105,002 00
We appraise the reinforced concrete dam described in paragraph VI of said decree at	200,000 00	
We appraise the tunnel described in paragraph XI of said decree at	8,800 00	
We appraise the La Prele Canal at	65,000 00	
We appraise the West Side Canal at	34,951 00	
We appraise the laterals at	18,276 00	
We appraise all other property of the North Platte Valley Irrigation Company, including tools, implements, office furniture, surveying instruments, water permits, etc., at	5,000 00	
Total		$332,027 00
		$437,029 00

In the matter of the water contracts referred to in said decree, we are of the opinion that the same are worth $250,000, and that said sum represents the entire income or return that can be derived from the gravity system. The said sum of $250,000 as the value of said water contracts, does not represent an asset in addition to those found on page 2 of this appraisement, but does represent the gross amount, in our opinion, that can be derived from the operation of the gravity system. For the purpose of this appraisement we have assumed that the hydroelectric unit is a feasible project, and the appraisement of the improvements connected therewith, as set forth herein, is made from that point of view. If said unit is completed we believe that approximately 5,000 acres can be irrigated at about $50 per acre, making the gross income from that unit amount to about $250,000. If said unit is not completed or if said project is not feasible, in our opinion, the structures connected with said unit are valueless, for the reason that there is no other purpose for which they can be used.

Complainants made a motion to set aside this report and filed exceptions thereto. On March 27, 1914, the complainants also filed an application for modification of the decree. This application came on for hearing April 20, 1914, and was by the court denied. On April 20,

1914, the motion of complainants to set aside the amended report of the appraisers on exceptions thereto was overruled and denied. The decree appealed from further provided:

"It is further ordered, adjudged, and decreed that the funds arising from such sale of the property herein ordered to be sold as an entirety shall be applied as follows:

"(a) To the payment of the amount due on the receiver's certificates and the costs and expenses of the receiver.

"(b) To the payment of the costs of this suit and the proper costs and expenses of the sale, including the disbursements and compensation of the special master commissioner.

"(c) To the payment of the amounts found due and payable to defendant, W. A. Rawlings.

"(d) To the amount herein found due upon the outstanding bonds secured by the trust deed, and to the aggregate amount found due to the respective defendant lienors, except W. A. Rawlings, as found in this decree in the proportion, which the total appraised value of the property herein directed to be sold in an entirety diminished by the appraised value of the property described in paragraphs VI, XI, and XIa of this decree bears to the appraised value of the property in said paragraphs VI, XI, and XIa of this decree described; and all such aggregate sum so distributable to the defendant lienors shall be distributed to them as follows: To O. L. Walker Lumber Company such amount of said aggregate sum as appears from the appraisement was realized on account of the value of the land on which the pumping station is located and its pro rata share of such sum as is realized on the sale of the pumping station, as appears from the appraisement, not exceeding the amount in this decree found due to it; to Florence Hardware Company such amount of said aggregate sum as appears from the appraisement was realized on account of the value of the tunnel in paragraph XI described, and its pro rata share of such sum as is realized on the sale of the power house and the pumping station as appears from the appraisement, not exceeding the amount in this decree found due to it; and to Fred W. Hart, the C. P. Allen General Contracting Company, the Hendrie & Bolthoff Manufacturing & Supply Company, the Pioneer Iron & Wire Works Company, and the Colorado-Portland Cement Company pro rata such amount of said aggregate sum as appears from the appraisement was realized on account of the value of the dam, transmission line, pipe line, and their pro rata share of such sum as is realized on the sale of the power house and pumping station as appears from the appraisement, not exceeding the amount in this decree found due to each of them, and that any excess over such aggregate sum so distributable to the defendant lienors, remaining after satisfying said liens, shall be applied to the payment, to the extent of said excess, to the amount so found to be due on the bonds secured by said trust deed."

[6] Complainants complain of this provision of the decree and the other portion which provides for the appointment of appraisers, on the ground that it permits an ex parte appraisement of the mortgaged property to be used as a basis for the distribution of the proceeds realized from the sale. It is argued that as there are conflicting claims to the fund which will arise from the sale, an ex parte appraisement might result in depriving complainants of their property without due process of law, in view of the paragraph from the decree above quoted, as they have no chance to be heard in a proceeding which is to determine the proportion of the proceeds arising from the sale that each claimant shall have. This was the reason that a motion was made to modify the decree and also to set aside the report of the appraisers. We think there is justice in this claim, and are of the opinion that in this particular case a hearing ought to be had by the court itself, or by a mas-

ter if it should be deemed advisable, to determine the value of the properties, at which hearing the parties in interest should have a right to appear and by competent evidence and argument support their several theories; that at this hearing the value of the property on which the several mechanics' lienholders have a priority should be ascertained as well as the total value of all the remaining property subject to the mortgage; that the property consisting of the hydroelectric plant and the gravity system, including the water contracts, should be sold as an entirety.

[7] The question of whether the property shall be sold as an entirety is not the same as the question arising as to the extent of the mechanics' liens. It is apparent that if the gravity system was sold to one purchaser and the hydroelectric system to another, the owner of the gravity system would have the power to render the electric system worthless; therefore it should be sold as a whole, and the proceeds of the sale, after paying the necessary costs and expenses of administering the receivership and other prior charges, should be divided among the bondholders and the mechanics' lien claimants in the same proportion as the value of the property upon which the lien claimants have a superior lien, considered as a part of the whole system, bears to the total value of the mortgaged property, diminished by the value of the property subject to the superior lien.

The trial court, after the return of the appraisers, fixed an upset price of $250,000. It can be seen that the practical working out of this procedure might result in an injustice to the bondholders. We are therefore of the opinion that the claims for liens of the O. L. Walker Lumber Company and W. A. Rawlings should be disallowed; that the decree below be modified so as to provide for a hearing of all parties interested upon the question as to the value of the property upon which the several mechanics' lienholders have a superior lien, and also as to the value of the entire mortgaged property; that the property be sold as an entirety, and the proceeds divided in the proportion above mentioned.

The trial court will undoubtedly fix a new upset price after the value of the properties are established. That portion of the decree, providing for appraisers, the appointment thereof, and their report is hereby vacated and set aside. Let the decree be modified according to the views herein expressed and otherwise affirmed.

OSCAR BARNETT FOUNDRY CO. v. CROWE.

(Circuit Court of Appeals, Third Circuit. January 18, 1915. Rehearing Denied March 2, 1915.)

No. 1902.

1. CONTRACTS ⊂=262—EQUITY ⊂=65—INEQUITABLE CONDUCT OF COMPLAINANT.

The fact that a licensor under a patent himself violated his contract with the licensee, as was judicially determined in litigation between them, does not preclude him from maintaining a suit in equity to enforce a rescission because of subsequent breaches by the licensee.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1181–1183; Dec. Dig. ⊂=262; Equity, Cent. Dig. §§ 185–187; Dec. Dig. ⊂=65.]

2. CONTRACTS ⊂=261—GROUNDS FOR RESCISSION BY PARTY—BREACH.

A breach of a covenant, which goes to the whole consideration of a contract, gives to the injured party the right at his election to rescind the contract, but otherwise if the breach is of a covenant which is subordinate and incidental to the main purpose of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174–1180; Dec. Dig. ⊂=261.]

3. CONTRACTS ⊂=261—GROUNDS FOR RESCISSION—ELECTION TO RESCIND—NOTICE.

Complainant granted a license to defendant under a patent by a contract which required it to make and sell the patented article and at stated times to make returns and pay the stipulated royalties. By its own admission defendant entirely ceased to manufacture under the contract. On learning such fact, complainant notified defendant that the contract was rescinded. *Held*, that the breach of the covenant to make and sell went to the entire consideration, and that complainant's notice effected a rescission and termination of the contract from the time it was given.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174–1180; Dec. Dig. ⊂=261.]

Appeal from the District Court of the United States for the District of New Jersey; Edward G. Bradford, Judge.

Suit in equity by Paul L. Crowe against the Oscar Barnett Foundry Company. Decree for complainant, and defendant appeals. Modified and affirmed.

For opinion below, see 213 Fed. 864. See also, 80 N. J. Eq. 112, 86 Atl. 915; 81 N. J. Eq. 515, 87 Atl. 160.

Russell M. Everett, of Newark, N. J., for appellant.

W. P. Preble, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from the decree of the District Court entered upon an opinion reported in 213 Fed. 864, which states in detail the involved controversy of which this case is but a part. For the purposes of this appeal, therefore, nothing more than a relatively brief outline of the facts is necessary.

This action, and others presently to be noticed, had their origin in a contract bearing date January 29, 1908, between Paul L. Crowe, the

complainant, and the Oscar Barnett Foundry Company, the defendant, hereafter referred to, respectively, by the names of Crowe and the foundry company.

Crowe was the inventor and patentee of certain improvements in mechanical stokers, which, by the contract, he licensed the foundry company to make and sell in a prescribed territory at a fixed royalty, under a covenant on his part to protect the licensee against infringement, in consideration of undertakings on the part of the foundry company that it would manufacture and sell stokers covered by the patents, that quarterly it would make returns of all stokers sold, and pay the royalties agreed upon.

Differences between the parties arose immediately. In 1909 Crowe sold stokers of the type of his invention in competition with the foundry company in its licensed territory; and in an action instituted against him by the foundry company in the Court of Chancery of the state of New Jersey, Crowe was held to have violated his contract, and against him damages were assessed to the amount of his profits. Oscar Barnett Foundry Co. v. Paul L. Crowe, 80 N. J. Eq. 112, 86 Atl. 915.

While that suit was pending, Crowe incorporated the Ironworks Company, through which he proceeded to do the same thing, whereupon, in 1911, the foundry company, claiming that Crowe, indirectly through his corporation, was infringing his own patents and violating his covenant to protect the foundry company against infringement, instituted another action in the Court of Chancery of the state of New Jersey against Crowe and the Ironworks Company. Before the determination of that case the foundry company instituted the third action in the same court against the Ironworks Company and Battelle & Renwick; the latter defendant being under contract with the former to purchase from it the alleged infringing stokers. Evidence was heard before the Vice Chancellor in the latter two proceedings on September 30 and October 1, 1912, and a decree entered against the defendants, finding breaches of the contract by Crowe, and restraining the defendants from using, manufacturing, and selling stokers of the type therein contemplated. From the decrees in the several cases, appeals were taken to the Court of Errors and Appeals, and affirmed. 80 N. J. Eq. 258, 86 Atl. 915;[1] 81 N. J. Eq. 515, 516, 87 Atl. 160. The actions in the courts of New Jersey relieve us of a consideration of the misconduct of Crowe, which, by those proceedings, has been judicially established.

At the hearing before the Vice Chancellor in the actions last named, it developed that, through all the controversies between the parties, the foundry company manufactured stokers, made reports, and paid royalties, as provided by the contract, until January 10, 1912, after which day, without notice or explanation, the foundry company ceased rendering quarterly reports and making quarterly payments. It also developed at the same hearing, upon the testimony of Gerald Hanney, secretary and treasurer of the foundry company, that some time be-

[1] Reported in full in the Atlantic Reporter; reported as a memorandum decision without opinion in 80 N. J. Eq. 258.

tween January 10, 1912, and September 30, 1912, the foundry company stopped making and selling stokers under the contract of license. The testimony, in part, is as follows:

"Q. What is the date of your last payment of royalty? A. January 10, 1912. Q. Your company is still making and selling stokers and installing stokers under this contract of license, is it not? A. No. Q. It has stopped working under the license, then? A. Yes."

Other testimony tends conclusively to prove the same thing.

While after January 10, 1912, Crowe knew perfectly well that the foundry company had failed to make quarterly reports of stokers sold and had refused to make quarterly payments of royalties earned, and therefore knew that the foundry company had made breaches of certain of its covenants, it was not until the hearing before the Vice Chancellor on September 30, 1912, it is claimed, that he had an intimation that the foundry company had ceased to make and sell stokers under the contract. Upon learning of the breach of its principal undertaking, Crowe promptly notified the foundry company that he considered the contract rescinded and himself discharged from its provisions. This act of Crowe occurred during the interval between the final hearing and the entry of the decree of the last two chancery proceedings. Hence the question of the rescission of the contract was neither raised before nor decided by the Court of Chancery in the cases referred to. That question, therefore, was left open for subsequent judicial determination.

Out of this irrepressible conflict the question of the rescission of the contract immediately arose and became the matter in dispute in an action instituted by Crowe against the foundry company in the United States District Court for the District of New Jersey, and now before this court on appeal. By the bill filed in that case, Crowe alleged that the defendant had not paid royalties under its contract nor made reports since January 10, 1912, and had announced that since that date it had stopped making stokers and had ceased to work under the contract, and prayed that an order rescinding and canceling the contract be made, together with a writ of injunction perpetually restraining the defendant from claiming any right under the contract to make or sell mechanical stokers, and also prayed for a discovery and accounting of profits. The foundry company challenged the right of Crowe to obtain redress in a court of equity, and denied that it had announced that it had ceased work under the contract, and said:

"It is not informed as to whether the stokers it has manufactured and sold since January 10, 1912, are within the scope of the contract of January 29, 1908, or not, and therefore leaves the plaintiff to make such proof thereof as he may."

The District Court entered a decree "that the contract of January 29 1908, between the parties, * * * be and the same is hereby rescinded and annulled as and of this 21st day of May, 1914 (the date of the decree); and it is further ordered, adjudged, and decreed that a perpetual injunction * * * be directed to the said defendant, Oscar Barnett Foundry Company, * * * enjoining and restraining them from operating or attempting to operate under said contract of January 29, 1908," further decreeing that the costs and expenses be

imposed upon the parties equally, and that neither party is entitled to an accounting or to recover damages as against the other.

Before the foundry company had time to take and complete an appeal from this decree, Crowe availed himself of its injunctive feature, charged the foundry company with disobedience, and moved the District Court to commit it for contempt. This motion was based upon the contention that the foundry company continued to make and sell stokers embodying the features of patents under which the foundry company theretofore was licensed by the contract, thereby raising, in a proceeding for contempt, a question whether the foundry company had violated the injunction by making stokers under rights lost by the rescission of the contract, or whether, by the stokers made, the foundry company had infringed the patents released by the rescission of the contract. Recognizing the difficulty, if not the impossibility, of determining these questions on a motion to commit for contempt, the District Court deferred action awaiting the decision by this court upon this appeal.

We are of opinion that the decree of the District Court, with certain modifications, should be affirmed. While in the main we agree with the learned court in its consideration of the testimony and disposition of the contentions thereupon made, nevertheless there are features of the case that suggest a somewhat different decree, entailing somewhat less perplexing consequences.

The questions that merit consideration are two in number; one being a question of evidence and the other of substantive law.

First. The foundry company insists that, before it can be adjudged to have committed a breach of the contract justifying rescission, Crowe must show, first, that it has ceased manufacturing the licensed device; and, second, that it "has failed to exert itself in good faith to install his apparatus wherever in reason it was feasible," relying upon the construction placed upon a contract of license in Neenan v. Otis Elevator Co. (C. C.) 180 Fed. 997, 1000, 1001. The rules applicable to the two cases are distinguished by the difference in the nature and scope of the covenants broken.

In the Neenan Case, the device licensed was an untried and somewhat experimental safety appliance for use upon elevators, and the contract of license required the licensee, in addition to making substantial payments of money, to make tests of the device, and, when found satisfactory, to "put the apparatus into practical use," "within such reasonable time as is convenient," and thereupon to pay certain royalties. The defendant made all the payments covenanted, but failed to install the apparatus within what was found to be a reasonable time, and thereby committed a breach of one of its covenants. The court held, notwithstanding, that, in failing to define the amount of "practical use" to which the defendant was required to put the device, the complainant put himself within the defendant's control, from which position he could not retreat without affirmatively showing that the defendant had "failed to exert itself in good faith to install the elevators." The court further held that, although the defendant was found to have made a breach of its covenant to install the apparatus

within a reasonable time, it nevertheless was not a breach of a covenant that went to the whole consideration, and therefore did not warrant rescission.

In the case under consideration, the foundry company has relieved Crowe of the necessity of proving what the court required of the complainant in Neenan v. Otis Elevator Co., by admitting every essential thing. The whole consideration moving from the foundry company to Crowe in the contract of license was the manufacture and sale of stokers, and thereafter the making of quarterly reports of sales and quarterly payments of royalties. The defendant admitted breaches of all of these undertakings by admitting that after January 10, 1912, it neither made stokers, submitted reports, nor paid royalties—in short, that it had "stopped working under the license." In the face of these admissions, there was left nothing necessary to be proved, leaving for determination only the question whether the facts as proved supported the claim of a rescission.

Second. Against Crowe's claim of a rescission of the contract, the foundry company makes two contentions: First, that the contract is not rescinded but is in full force, and although under it stokers may or may not have been made and royalties may or may not be due, Crowe is without remedy in a court of equity to enforce the contract or recover for its breach, because of his adjudged misconduct; and, second, that "it is not informed as to whether the stokers it has manufactured and sold since January 10, 1912, are within the scope of the contract of January 29, 1908, or not, and therefore leaves the plaintiff to make such proofs thereof as he may." Preceding the making of these two defenses, the foundry company made the admissions adverted to.

[1] With reference to the first contention, we, of course, admit the full force of the maxim that "he who has done inequity cannot have equity," and recognize the principle that equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. Weegham v. Killefer (D. C.) 215 Fed. 168, 171. The question here is whether this is a case for the application of that principle.

While the misconduct of Crowe at various stages of the controversy is established by the chancery proceedings in the New Jersey courts, the record in this case discloses, with equal certainty, reprehensible conduct on the part of the foundry company. The whole controversy between the parties was not involved in the question submitted for adjudication in the case instituted in the District Court, from which this is an appeal. Many phases of it had been adjudicated elsewhere, which do not bear upon the question submitted in this action, in respect to which no relief was sought. What was before the District Court, and what is before this court on appeal, is a question whether certain acts of the parties, not determined by the adjudications before referred to, justify and constitute a rescission of the contract. While Crowe may have forfeited a right to appeal to a court of conscience for equity in matters growing out of his misconduct, his previous conduct does not foreclose against him all opportunities to have

his contractual relations with the foundry company ascertained and adjudged. As that is what he has asked in this case, we are of opinion that he is not improperly in court.

To the second contention of the foundry company that it is not informed whether, since January 10, 1912, it made stokers under the contract, and therefore leaves that for Crowe to prove and the court to decide, we are unable to yield, for we feel that by its testimony it has decided that question itself. In addition to the testimony for Crowe, the foundry company admitted breaches of its covenants. This being true, the only questions remaining are, first, what is the character of the covenants broken, and what is the legal effect of the breaches, and, if the contract was rescinded, what was the date of its rescission?

[2] These questions are controlled by the principle of law that a breach of a covenant, which goes to the whole consideration of a contract, gives to the injured party the right to rescind the contract or to recover damages for the breach; or, stated conversely, a breach of a covenant, which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract or warrant its rescission by the injured party. Kauffman v. Raeder, 108 Fed. 172, 47 C. C. A. 278, 54 L. R. A. 247; Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536; Neenan v. Otis Elevator Co. (C. C.) 180 Fed. 997, 1000.

While every breach of a contractual obligation confers a right of action upon the injured party, it is thus seen that every breach does not operate as a discharge. A breach which permits a rescission of the contract, discharging the other party, must be of an absolute part of the obligation—that is, a breach of that part of the obligation which goes to the whole consideration, and may be made, first, when the party renounces his liabilities under it; second, when by his own act he makes it impossible to perform; or, third, by failing fully to do what he promised. When this occurs, the party offended against may consider the contract rescinded and himself exonerated, or sue upon the contract for such damages as he has thereby sustained. Anson on Contracts, 276–285; 9 Cyc. 600, 635.

[3] The main purpose of the contract in dispute was to secure the manufacture and sale of stokers of a certain kind, which the foundry company undertook to do. When it failed in that undertaking, it committed a breach of a covenant that went to the very essence of the contract, and to the covenant to make and sell stokers; all other covenants were subordinate and incidental. Therefore it appears that some time prior to September 30, 1912, the defendant committed breaches of covenants of the contract that went to the whole consideration.

Being thus for the first time informed of the foundry company's breach of its main covenant, Crowe found himself possessed of the right to pursue one of several courses, first, to hold the contract rescinded and to consider himself exonerated from its obligations, or, second, to sue on the breach for damages. He elected the former, and on November 2, 1912, wrote the foundry company of his election, and

pronounced the contract rescinded, to which no reply was made. In this we think Crowe was within his rights, and the legal effect of the action of the two parties was a rescission of the contract, a termination of the contractual relations between them, and a restoration to Crowe of the rights under his patents theretofore licensed to the foundry company.

Of the same opinion was the District Court, and in the reasoning and conclusion of the learned judge we concur, but we think that instead of adjudging that the contract "be and the same is hereby rescinded and annulled as and of this 21st day of May, 1914" (the date of the decree), the District Court should have adjudged that the contract had been rescinded by the complainant availing himself of the defendant's breach when and at the time he communicated his election to the defendant. In other words, we are of opinion that the contract was rescinded by the acts of the parties and not by the decree of the District Court, and that it was rescinded on November 2, 1912, and not on May 21, 1914. The difference is material because of the difference in dates.

It may be gathered from the evidence that since November 2, 1912, the foundry company has manufactured stokers of the type contemplated by the rescinded contract of license. If this be true, the foundry company did not manufacture and sell them under the contract of license, for upon that date the contract was annulled, the license ceased to exist, and the patent rights thereunder were restored to Crowe. Whether stokers of the type embraced within the patents have since been manufactured by the foundry company is a proper matter of inquiry upon a suit for infringement of Crowe's patents. That question was indirectly brought into this case as a matter of defense, but it is a question that can be properly adjudicated only in an action instituted by one party against the other, not under the contract, nor on a motion to commit for contempt of the court's injunction, but in a suit for infringement of patents.

We think the District Court erred in granting an injunction against the foundry company, enjoining and restraining it and its servants from operating or attempting to operate under the contract of January 29, 1908. Upon our theory of the case, the contract was rescinded on November 2, 1912. Upon that date, the contractual relations between the parties ended, and upon each of them was placed the consequences of their subsequent acts. The remaining part of the decree, refusing an accounting and withholding the right of action for recovery of damages by either party against the other, dispenses with the necessity of an injunction and relieves the situation of consequent embarrassments.

It is therefore ordered that the decree of the District Court be modified to conform with this opinion, and, when so modified, that it be in all respects affirmed.

KLINK et al. v. CHICAGO, R. I. & P. RY. CO.†

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4126.

1. JUDGMENT ⊂=72—RENDITION—PLEADINGS—CONSENT.
Where, on a motion for judgment on the pleadings, the court gave plaintiffs' counsel the option of voluntarily dismissing the action or submitting to judgment on the pleadings, whereupon counsel elected to submit to judgment on the pleadings, such election was not a consent by plaintiffs that judgment should be so rendered, but only that the court should render such judgment on the pleadings as it deemed lawful.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 130; Dec. Dig. ⊂=72.]

2. PLEADING ⊂=343—JUDGMENT ON PLEADINGS—VALIDITY.
A judgment rendered on the pleadings is valid only in case it is sustained by undisputed facts appearing in the pleadings.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048–1051; Dec. Dig. ⊂=343.]

3. APPEAL AND ERROR ⊂=185—REMOVAL OF CAUSES—IMPROPER FEDERAL DISTRICT—WAIVER—QUESTIONS NOT RAISED AT TRIAL.
Where citizens of Colorado and a citizen of Montana sued defendant railroad company, a corporation of Illinois and Iowa, in the state court of Colorado, and the railroad company removed the case to the federal District Court of Colorado, and plaintiffs made no motion to remand, the objection that the cause was not removable to such district because all of the plaintiffs in error were not citizens of Colorado was waived, and could not be urged for the first time on a writ of error.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1176, 1375; Dec. Dig. ⊂=185.]

4. APPEAL AND ERROR ⊂=725 — ASSIGNMENTS OF ERROR — JUDGMENT ON PLEADINGS.
Where the court has rendered judgment on the pleadings for either party, an assignment of error, stating generally that the court erred in rendering judgment on the pleadings, is sufficient.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3002–3005; Dec. Dig. ⊂=725.]

5. APPEAL AND ERROR ⊂=758—BRIEFS—SPECIFICATION OF ERRORS.
Where about the only question discussed in the brief of plaintiffs in error was an alleged error in rendering a judgment on the pleadings, the Court of Appeals would not refuse to consider the question because the assignment that the court erred in rendering judgment on the pleadings was not set forth in the brief of plaintiffs in error under the head of "specification of errors."
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. ⊂=758.]

6. PLEADING ⊂=345—INTERSTATE COMMERCE—TRANSPORTATION OF ANIMALS—FEEDING IN TRANSIT—JUDGMENT ON PLEADINGS.
Where plaintiffs pleaded breach of an interstate railroad company's contract to transport, feed, and fatten sheep in transit, and then retransport them to market for sale, and also pleaded wrongful appropriation of the proceeds of the sale to the carrier's use, the fact that the carrier may not have had authority under its filed tariffs to feed and fatten the sheep in transit did not entitle it to judgment on the pleadings.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055–1059; Dec. Dig. ⊂=345.]

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 19, 1915.

7. CARRIERS ⊂=207—TRANSPORTATION OF ANIMALS—FEEDING IN TRANSIT—CONTRACT—VALIDITY.

Where an interstate carrier's filed tariffs for the transportation of animals provided for feeding in transit and prescribed particular prices for feed when animals were held for a greater or less time than 15 days, there being no limitation on the time, a carrier's contract to feed animals in transit without reference to time would be valid if the same privilege was allowed to all shippers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129–239; Dec. Dig. ⊂=207.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Fred Klink and others against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant on the pleadings, and plaintiffs bring error. Reversed and remanded.

John T. Bottom and Milnor E. Gleaves, both of Denver, Colo., for plaintiffs in error.

Paul E. Walker, of Topeka, Kan., and William V. Hodges, of Denver, Colo., for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. It is assigned as error that the trial court erred in rendering judgment in favor of the railway company, upon the pleadings: First, because it had no jurisdiction; second, because the pleadings did not warrant such a judgment. The action was commenced in the district court for the city and county of Denver, and was removed to the Circuit Court of the United States for the District of Colorado by the railway company. The amended complaint of plaintiffs in error alleged, in substance: That they were on February 12, 1908, the owners of 22,334 head of yearling wethers at Gallego, state of Chihauhua, republic of Mexico, and on said date entered into an agreement with the railway company for the transportation of said sheep from Gallego via El Paso, Tex., to Stockdale, Ill., there to be unloaded by the railway company and fed and fattened for the Chicago market, and then transported to the Union Stockyards, Chicago, Ill. That the consideration for the care and feeding of said sheep at Stockdale, Ill., over and above the transportation charge, was about $1 per head per ton on hay, corn, and screenings above the weekly market price of said feed. That as a part of said agreement the Railway Company represented to plaintiffs in error that said sheep would be ready for the Chicago market within 45 or 60 days after their arrival at the said feedyards of the railway company, and that said railway company had in its employ men thoroughly competent to care for and feed said sheep for the Chicago market. That in pursuance of said contract plaintiffs in error delivered said sheep to the railway company for transportation, consigning 11,310 head in the name of Klink and Simonson to Smith Bros., Commission Company, Union Stockyards, Chicago, Ill., and 11,024 head in the name of C. W. Trimble to Clay, Robinson & Co., to the same destination. That the Railway Company received and ac-

cepted said sheep in pursuance of said agreement and transported the same to its feedyards at Stockdale, Ill. That the Railway Company, its officers, agents, and employés wholly failed to give said sheep the proper care and attention, or to properly feed them, and wholly failed to carry out the terms of its said contract, and wrongfully failed to fatten said sheep and to get them ready for the Chicago market; and as a result of the want of care, as aforesaid, and by reason of the negligence of the defendant, its officers, agents, and employés in the care and feeding of said sheep, many of said sheep, exceeding 1,094 in number thereof died. That the remainder of said sheep, by reason of the failure and neglect of the defendant, its officers, agents, and employés to properly feed and care for them were reduced in flesh and injured and not fattened according to said agreement, and were damaged to such an extent that they were not marketable as agreed. That under and by virtue of the agreement between plaintiffs in error and the railway company, said sheep would have been fattened for market at a date prior to May 15, 1908, but that the majority of the sheep, because of the railway company's wrongful failure to properly feed and fatten said sheep, and because of their damaged condition thereby occasioned, were not and could not be marketed or otherwise disposed of as fattened sheep, until the latter part of June, 1908. That they were, on or about the last-mentioned date, sold at Chicago, and by the wrongful direction of the railway company the moneys received from the sale of said sheep was improperly paid to and the railway company wrongfully received the same, falsely representing that the moneys so received by them of the proceeds of the sale of said sheep, $18,980.93, was to cover freight charges, and $68,963.11 to cover its charges for the care, feeding, and fattening of said sheep. That by reason of the want of care and negligence on the part of the railway company, its officers, agents, and employés, and by reason of the wrongful appropriation and withholding of the money as alleged in the complaint, plaintiffs in error were damaged in the sum of $75,000. The plaintiffs then prayed judgment against the railway company for the sum of $75,000, with interest. The railway company filed an answer to this complaint.

For the sake of brevity it does not seem necessary to set forth all the allegations of the answer, which are quite lengthy, but only to set forth that part of the answer which, according to the brief of the railway company, justified the judgment below. In other words, it is not necessary to set forth those allegations of the answer which merely created an issue with the complaint, or which would require proof in order to be availed of as a defense. The answer of the railway company alleged that subsequent to the 12th day of February, 1908, plaintiffs in error tendered to the railway company for shipment at Texhoma, Okl., 22,334 head of yearling wethers, being the same animals mentioned in the complaint; that the railway company accepted said sheep for shipment to Chicago, Ill., by way of the town of Stockdale, Ill., and thereupon issued its certain live stock contracts in writing, which contracts were signed by the plaintiffs in error or their duly authorized agents. The answer further alleged:

"That at the time when the shipments of sheep alleged in the complaint were made, the defendant was a common carrier engaged in interstate com-

merce and subject to each and every of the provisions of the act of Congress approved February 4, 1887, entitled, 'An act to regulate commerce,' and all acts amendatory thereof. That under and by virtue of said act of Congress and all acts amendatory thereof, it had theretofore jointly with connecting carriers, issued and published and filed with the interstate Commerce Commission of the United States, and posted and filed as required by said acts, certain official tariffs known and designated as follows:

"'1. Southwestern Tariff Committee's Tariff No. 7–M.

"'2. Chicago, Rock Island and Pacific Railway Company's Tariff No. 18400.

"'3. Chicago, Rock Island and Pacific Railway Company's Tariff No. 21500.'

"Which said tariffs were then and there in force and effect and were the only tariffs applicable to the shipment of sheep referred to in the complaint and under which the same could be lawfully moved, by this defendant or its connecting carriers; that in and by said tariff designated as 'Southwestern Tariff Committee's Tariff No. 7–M,' it was provided that the rate upon sheep from El Paso, Tex., to Chicago, Ill., shipped in double deck cars, with a minimum weight of 22,000 pounds, at shipper's risk, with the released valuation with right to feed in transit, was and should be 74½ cents per hundred pounds, with an additional charge of $2 per car for delivery of such sheep to the Union Stockyards in Chicago, Ill.; that for a similar shipment without limitation upon the carrier's liability, a rate of 120 per cent. of said rate of 74½ cents per hundred pounds should be charged; that in and by said tariff designated as 'Chicago, Rock Island & Pacific Railway Company's Tariff No. 18400,' it was provided as follows:

"'Feeding in transit is only allowed on live stock at regular feeding stations, which are Eldon, Muscatine and Valley Jctn., Iowa, Silvis and Stockdale, Illinois, the above points having capacities for the following number of head and kinds of live stock:

Station.	Pens.	Capacity.			
		Cattle	Sheep	Hogs	Horses
Eldon	58	1000	.....	....	750
Muscatine	12	600	1000	840	250
Silvis	52	1560	3120	3120	1560
Stockdale	..	....	25000b	....	....
Stockdale	..	....	10000c	....	....
Valley Jctn.	14	....	.....	840	....
Valley Jctn.	3	90	.....	....	90

(b) In Bars. (c) In Pasture.

"'When shipments are tendered you with shipping directions to stop and feed at stations other than those mentioned above, or to fill up or partially unload commodities, you will call the attention of the shippers to our rules, and if they insist upon the shipping instructions, you will bill to the point at which they desire car to be stopped at full tariff rate (instead of to ultimate destination), noting on billing "Car to be forwarded to ——— (ultimate destination)," and advise the shipper that the charges will be at full local rates to and from stopping points.'

"That in and by said tariff designated as Chicago, Rock Island & Pacific Railway Company's Tariff No. 21500, that the defendant should charge for feed supplied to sheep in transit while at said Stockdale Yards, or other yards on the line of this defendant where feeding in transit is permitted by said tariff, as follows:

"'*When held for more than fifteen days:* $16.00 per ton for prairie hay, $20.00 per ton for alfalfa hay, $24.00 per ton for corn, 75 cents per bushel for oats, $16.00 per ton for screenings and 75 cents per 100 lbs. for bedding.

"'*When held less than fifteen days:* $20.00 per ton for prairie hay, $22.00 per ton for alfalfa hay, $30.00 per ton for corn, 75 cents per bushel for oats, $20.00 per ton for screenings and 75 cents per 100 lbs. for bedding.'"

Plaintiffs in error filed a reply to the answer of the railway company, denying a large part of the answer and praying for judgment as originally demanded in the complaint. As to the allegation hereinbefore quoted from the answer, in regard to the tariffs of the railway company, plaintiffs in error in their reply alleged:

"That as to whether or not the defendant and its connecting carriers had published and filed a tariff or tariffs, as in said defense alleged, these plaintiffs cannot, within the time permitted for the filing of this replication, obtain sufficient knowledge or information upon which to base a belief, and, for the purposes of this replication, as to said defense, therefore deny the same."

[1] On these pleadings the railway company moved for judgment. The trial court gave counsel for plaintiffs in error the option of voluntarily dismissing the action or submitting to judgment on the pleadings. Counsel for plaintiffs in error elected to submit to judgment on the pleadings, whereupon judgment was entered on the pleadings in favor of the railway company and against the plaintiffs in error for costs. It may be said here that the election of counsel for plaintiffs in error was not a consent that judgment should be rendered against the plaintiffs in error on the pleadings, but that the court should render such judgment on the pleadings as the court deemed lawful. The court, of course, did not need the assistance of counsel to do this, but the result of the proceedings was simply that the court gave to counsel for plaintiffs in error the privilege of dismissing the case if they were so advised.

[2] The judgment which was rendered, in order to be valid, must be sustained by undisputed facts appearing in the pleadings. The mere fact that the answer denied material allegations in the complaint, of course, would give no authority to render judgment against the plaintiffs in error on the pleadings any more than it would allow the court to render judgment against the railway company on the pleadings. It is claimed that the language above quoted from the reply of plaintiffs in error, in regard to the railway company's tariffs, did not constitute a denial under the system of pleading prevailing in Colorado; it being contended that the tariffs are a public record of which all parties interested must take notice, and that one may not deny the existence of a public record on information and belief. This criticism of the reply is probably well founded, but we pass the consideration of the same for the reason that in disposing of the case we will take the allegations of the answer in regard to the railway company's tariffs as being correct. Before proceeding to the merits we will dispose of some preliminary objections made on each side. Counsel for plaintiffs in error claim that the case should be reversed and remanded to the lower court with direction to remand the same to the state court wherein it originated, for the reason that the United States Circuit Court for the District of Colorado never obtained jurisdiction of the same. This contention is based upon the following facts:

[3] It appears from the petition for removal that the plaintiffs in

error, Fred Klink, Charles W. Trimble, and Edgar H. Trimble were, at the time of the commencement of the action and ever since, citizens of the state of Colorado; that plaintiff in error, Lee Simonson, was at the time of the commencement of the action and at all times since a citizen of the state of Montana; that the railway company was at the time of the commencement of the action and ever since has been a corporation duly organized and existing under and by virtue of the laws of the states of Illinois and Iowa. It thus appears that the district of Colorado is not the district whereof all the plaintiffs in error are citizens. We think, however, that this objection to the jurisdiction of the trial court was a matter that could be waived. The railway company by removing the case from the state court, of course, made no objection to the place of trial, neither did the plaintiffs in error by a motion to remand, and first raised the question of jurisdiction in this court. It was said in Re Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164:

"As we have seen in this case, the defendant applied for a removal of the case to the federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction."

The following cases sustain the same proposition: Western L. & S. Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; Kreigh v. Westinghouse, Church, Kerr & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984; Louisville & Nashville R. R. Co. v. Western Union Tel. Co., 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 1356; McPhee & McGinnity Co. v. U. P. R. R. Co., 158 Fed. 5, 87 C. C. A. 619 (C. C. A., 8th Cir.).

We think that under the facts appearing in the record the trial court clearly had jurisdiction.

[4] It is objected by counsel for the railway company that no sufficient assignments of error appear in the record to authorize this court to review the action of the lower court in entering judgment, and the case of Choctaw, O. & G. R. Co. v. Jackson, 192 Fed. 792, 114 C. C. A. 12, is cited in this behalf. In the case cited there was a full trial, and it was suggested that an assignment of error in the following words: "The court erred in entering the judgment finally entered in this cause"—was not sufficient to command consideration.

It appears, however, that this court did, in the case cited, proceed and consider the point which it suggested was not sufficiently raised. Whatever may be the rule in ordinary cases, we think that in a case where the court has rendered judgment upon the pleadings for either party, an assignment of error, stating generally that the court erred in rendering the judgment upon the pleadings, is sufficient, as it directs the attention of this court directly to the point to be considered.

[5] It is next claimed by counsel for the railway company that there is no specification of the errors relied upon, set forth separately and particularly in the brief of counsel for plaintiffs in error. It is true that the assignment of error that the court erred in rendering judgment against the plaintiffs in error on the pleadings is not set forth

in the brief of their counsel under the direct head of "specification of errors," but as it is about the only question discussed in the whole brief, we think it would be hypercritical not to consider the point raised for this reason. We come now to what may be called the merits.

Counsel for the railway company in their brief rely alone upon the following proposition to sustain the action of the court below in rendering the judgment against the plaintiffs in error.

"(d) The agreement to feed and fatten, upon which the amended complaint is predicated, required the defendant in error to exercise skill as an agister, outside of carriage, and outside of the obligation to furnish, within reasonable limits, such food as a shipper might wish to buy for the care of his stock in transit. Such an obligation the carrier did not offer to assume towards the public generally, nor did it make or publish a tariff therefor. Such a contract, had it been in fact made, would have been unlawful and void, and the court did not err in directing judgment on the pleadings."

We understand this proposition to mean that, conceding for the sake of argument that the railway company made a contract with plaintiffs in error to transport its sheep and feed and fatten them at Stockdale, Ill., for the Chicago market, such an arrangement is not extended to all shippers by the tariffs of the railway company on file with the Interstate Commerce Commission, and that therefore the contract is void as discriminatory under the following decisions:

"In the matter of rates, Kansas City, Memphis & Birmingham Railroad Company, 8 Interst. Com. R. 121, at p. 135; Shiel v. Illinois Central R. Co., 12 Interst. Com. R. 211; Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers' Elevator Co., 226 U. S. 426 [33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203]; N. Y., N. H. & H. R. Co. v. I. C. C., 200 U. S. 361 [26 Sup. Ct. 272, 50 L. Ed. 515]; Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155 [32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501]; Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639 [33 Sup. Ct. 391, 57 L. Ed. 683]; Clegg v. St. Louis & S. F. R. Co., 203 Fed. 971 [122 C. C. A. 273]; Elwood Grain Co. v. St. Joseph & G. I. Ry. Co., 202 Fed. 845 [121 C. C. A. 153] (C. C. A., 8th Cir.); Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, 204 Fed. 849 [123 C. C. A. 145]; Engemoen v. Chicago, St. P., M. & O. Ry. Co., 210 Fed. 896 [127 C. C. A. 426]; Winn v. American Express Co., 149 Iowa, 259, 128 N. W. 663; Siemonsma v. Chicago, M. & St. P. Ry. Co. [158 Iowa, 483] 139 N. W. 1077; St. Louis, I. M. & S. Ry. Co. v. West Bros. [Tex. Civ. App.] 159 S. W. 142; Chicago, Rock Island & Pacific Ry. Co. v. Beatty (Okl.) 141 Pac. 442."

[6] This in our opinion, however, is taking a one-sided view of the cause of action stated in the complaint. It overlooks the fact which appears in the complaint that the railway company got all the mutton by wrongfully appropriating the proceeds arising from the sale thereof to its own use. Conceding for the sake of argument that the railway company had no authority under its filed tariffs to feed and fatten sheep in transit, it by no means follows that, having made such a contract, they can, by virtue thereof, take possession of the sheep and convert them to their own use and benefit. We are not now determining who may be in the right in regard to this controversy. We are simply now considering whether the plaintiffs in error on the record before us have a right to a judicial hearing for the purpose of determining as to what has become of the flock of sheep that they once owned. The plaintiffs in error admit in their pleading that the railway company is entitled to their lawful charge for transporting the sheep and

for feed furnished them at Stockdale, Ill., but they complain that the railway company not only got this lawful charge, but also sold the sheep and wrongfully appropriated the proceeds thereof in the sum of over $68,000 by falsely representing that they were entitled to this whole amount for feeding the sheep, and by falsely claiming the sum of $18,980.93 to cover freight charges. It must be conceded that the railway company had the right to grant the feeding in transit privilege mentioned in its published tariffs, providing the same is granted to all shippers. The question then suggests itself, What is this feeding in transit privilege for? Of course it is for the purpose of feeding the stock for market. This means improving their condition as to flesh. Is it not the custom of railway companies to care for and feed the stock of all shippers desiring it at these feeding points. The tariffs themselves do not make a contract to do so unlawful or discriminatory, so far as the pleadings show. What the evidence at the trial may show is another matter. It appears from the answer of the railway company: That the railway company's tariff No. 18400 provides for feeding in transit of live stock at regular feeding stations, which are Eldon, Muscatine, Valley Junction, Iowa; Silvis and Stockdale, Illinois—the capacity thereof being as shown in the answer above quoted. That in the railway company's tariff No. 21500 the schedule of prices to be charged by the railway company at the Stockdale Yards are classified according to the time the stock is held. Plaintiffs in error did not pretend to state in their complaint the exact charge for hay, corn, and screenings; hence on the pleadings proof of discrimination does not necessarily appear as to this matter.

[7] It appears, therefore, that the railway company permits a feeding in transit privilege at Stockdale, Ill., and when the stock are held for more than 15 days certain prices are charged. When held less than 15 days a different price is charged; the price seeming to be less as the time of holding increases. The tariff provides that the stock may be held more than 15 days; how much more does not appear. Certainly there is no limitation upon the time, and if the feeding in transit privilege is valid for one day, there is no reason why it may not be valid for six months if allowed to all shippers.

We are satisfied that the judgment entered below against the plaintiffs in error was erroneous, and therefore are of the opinion that it should be reversed, and the case remanded for a new trial; and it is so ordered.

SHEFFEY et al. v. DAVIS COLLIERY CO. et al.

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

No. 1241.

1. EXECUTORS AND ADMINISTRATORS ⟸431—SUIT BY EX OFFICIO ADMINISTRATOR—VALIDITY—JURISDICTION OF COURT.

Where the state statute, under certain prescribed conditions, made the sheriff ex officio an administrator, the fact that he did not authorize a suit brought in his name as such administrator did not deprive the court of jurisdiction or render its decree invalid.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 764, 767, 819, 1664, 1679–1682; Dec. Dig. ⟸431.]

2. JUDGMENT ⟸504—COLLATERAL ATTACK—JUDGMENT PREMATURELY ENTERED.

Under a statute authorizing service of process on nonresident defendants by publication, where such publication has been duly made and completed, the court acquires jurisdiction, and the fact that a decree is prematurely entered before the time allowed the defendant to answer has expired does not render it a nullity, but only irregular, and it is not subject to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 944–947; Dec. Dig. ⟸504.]

3. EXECUTORS AND ADMINISTRATORS ⟸383—SALE OF DECEDENT'S LANDS—COLLATERAL ATTACK—JURISDICTION OF COURT.

Under the law of West Virginia, although a court of equity is authorized by statute to sell lands of a decedent at public auction only, a decree authorizing a private sale, made by the court on evidence that it is for the best interest of the estate, which sale is duly confirmed, is not without jurisdiction and is not subject to collateral attack.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1554; Dec. Dig. ⟸383.]

4. ADVERSE POSSESSION ⟸70 — CHARACTER OF POSSESSION — WILD TIMBER LANDS.

A purchaser at a judicial sale, in form at least, of a large tract of forest land, which was mountainous and unimproved, who continuously thereafter, during more than the statutory period, paid the taxes, employed an agent to look after the property, remove trespassers, and prevent the cutting of timber, and otherwise exercised such acts of exclusive ownership as the character of the land permitted, *held* to have acquired title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 394–414; Dec. Dig. ⟸70.]

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

Suit in equity by Maggie Sheffey and others against the Davis Colliery Company and others. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 204 Fed. 337.

John W. Davis and Osman E. Swartz, both of Clarksburg, W. Va. (H. G. Kump, of Elkins, W. Va., and Davis, Swartz & Templeman, of Clarksburg, W. Va., on the brief), for appellants.

E. A. Bowers, of Elkins, W. Va., and George E. Price, of Charleston, W. Va., for appellees.

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

KNAPP, Circuit Judge. A brief recital of facts which are not in dispute will indicate the questions to be decided. Other facts will be referred to in connection with the various points discussed.

Hugh W. Sheffey, a resident of Staunton, Va., and a lawyer of prominence and extensive practice, died intestate in May, 1889, possessed of a large tract of land in Randolph county, W. Va., containing between 4,000 and 5,000 acres. His heirs at law were a surviving brother and the descendants of deceased brothers, one of whom was a half-brother. His law partner, James Bumgardner, Jr., was appointed administrator and undertook the settlement of his estate. Bumgardner was also the administrator of Mrs. Sheffey, who died about a month after her husband. It turned out that the affairs of Sheffey were badly involved and his liabilities much in excess of the salable value of his property.

On the 24th of March, 1893, a chancery suit was instituted in the circuit court of Randolph county, in the name of A. J. Long, sheriff, administrator, against James Bumgardner, Jr., the Virginia administrator, O. C. Womelsdorf, and a number of other persons alleged to be the heirs of Sheffey, and such proceedings had therein that a sale of the tract of land in question was confirmed to Womelsdorf, and a deed therefor subsequently executed to him by the special commissioner appointed for that purpose. The appellee Davis Colliery Company is the last successor in interest of Womelsdorf and claims title to this tract of land under the deed to him and the decree confirming the same. Since 1893 all taxes assessed against this land have been paid by Womelsdorf and those succeeding to his title.

In October, 1910, this suit was brought by the appellants, who are the heirs of Sheffey and claim to own this land by inheritance from him, to set aside and cancel the deed to Womelsdorf, and all the subsequent conveyances mentioned, as clouds upon their title, on the ground that the entire proceedings in the circuit court of Randolph county, including the decree confirming the sale to Womelsdorf, were wholly void for lack of jurisdiction. The Davis Colliery Company asserts the validity of its title under this decree, and also sets up adverse possession and other defenses, which will be referred to later in this opinion. The case was tried and the suit dismissed, for reasons stated in the opinion of the District Judge, and the heirs have appealed to this court.

It cannot be denied that, if the circuit court of Randolph county had such jurisdiction of the parties and subject-matter as authorized it to make the decree confirming the sale to Womelsdorf, that decree is not open to collateral attack, whatever irregularities may be found in the proceedings. We come, then, to consider the principal grounds upon which it is contended, in brief and oral argument, that the decree in question is a nullity because the court was without jurisdiction.

It is alleged that Sheriff Long, the plaintiff in the chancery suit, did not authorize the bringing of that suit, or sanction the use of his name by the attorney who conducted it, and in fact had no knowledge that such a suit was brought; and he so testified as a witness in this case. But it appears that he himself receipted to the clerk for the original

summons issued in his name as administrator; that it was personally served by his deputy on Womelsdorf; and that after the service he indorsed in his own handwriting on the back of the summons the amount of his fees. It is not altogether easy to see how he can be heard to deny knowledge of this suit when the process by which it was commenced was certainly in his hands soon after its service and presumably also when he signed for it on the process book of the clerk. Moreover, the order of publication was posted on the front door of the courthouse and appeared for four successive weeks in a local newspaper. The attorney who carried on the suit, and who has since died, is shown to have been prominent and highly regarded; and it would seem almost a matter of course that a transaction of so much importance as the sale of this large tract of land by order of the court, in the progress of a suit brought in Long's name, must have been generally known in that community. It is certainly more reasonable, upon the evidence of record, to infer that he had forgotten the circumstance than to believe that it occurred without his knowledge.

[1] But we are not convinced that it was necessary for him to be personally advised, or that lack of knowledge on his part would vitiate the proceedings. He was only a nominal plaintiff, and it did not require his consent to make him the administrator of Sheffey. For aught that appears, he had no discretion in the matter, since the statute made him an instrumentality which might be used against his will under prescribed conditions. Nor is it of any consequence that no funds came into his hands as administrator in this instance. Sheffey left no personal property in West Virginia, and the proceeds of the sale of his real estate were received and distributed under order of the court by a special commissioner. Even if it be assumed that Long did not authorize the suit, or have any knowledge of it until long afterwards, we are of opinion that the court was not thereby deprived of jurisdiction or its decree rendered invalid.

It is also claimed that the court was without jurisdiction by reason of the following facts: The summons in the chancery suit was sued out on March 14, 1893, and the bill of complaint bears the indorsement, "Filed April Rules, 1893." All the defendants named therein were nonresidents of West Virginia, except Womelsdorf, who was personally served in that state on the 27th of March. Upon affidavit of such nonresidence, made by the plaintiff's attorney on the 3d of April, an order of publication was duly entered which described briefly the object of the suit and required the nonresident parties to appear within one month after the date of its first publication. The applicable statute then in force reads as follows:

"Every order of publication shall state briefly the object of the suit, and require the defendants against whom it is entered, or the unknown parties to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests. It shall be published once a week for four successive weeks in some newspaper published in the county in which the order is made or directed, if one is so published, unless the circuit court of such county otherwise order; and if no newspaper be published in the county, then in such other newspaper as the court may prescribe; or if none be so prescribed, as the clerk may direct. It shall be deemed to have been duly published on the day of the fourth publication thereof. It shall

also be posted at the front door of the courthouse of the county wherein the court is held, at least twenty days before judgment or decree is rendered." Code 1891, c. 124, § 12.

The first publication of the order occurred on the 5th of April, 1893, and a copy was posted the same day on the front door of the courthouse. The subsequent publications were on the 12th, 19th, and 26th of that month. The month within which the absent defendants were required to appear did not expire, as is claimed, until the 5th of May. But on the preceding day, the 4th of May, a decree pro confesso was entered, which confirmed the sale to Womelsdorf and appointed the plaintiff's attorney special commissioner to cause the lands to be surveyed, ascertain the number of acres, collect the cash and notes which Womelsdorf was to give in accordance with his agreement to purchase, and make report of his proceedings with the view to a further decree.

The argument of appellees that this decree was properly entered on the 4th of May is based upon another provision of the statute which says:

"When such order shall have been so posted and published, if the defendants against whom it is entered, or the unknown parties, shall not appear at the next term of court, after such publication is completed, the case may be tried or heard as to them." Section 13.

[2] The decree in question was entered at the next term of court after the publication was completed, and it is contended that this was a compliance with these statutory provisions taken together. But we are not prepared to sustain this contention and shall therefore assume that the decree was prematurely entered. Nevertheless, we are of opinion that the court had already acquired jurisdiction of the absent defendants, for the purposes of the suit, by reason of the completion of the required publication on the previous 26th of April, and that the decree was not rendered a nullity, but merely irregular and voidable, because entered sooner than a full calendar month after the first publication. It is well settled, in cases of personal service, that the entry of judgment before the time allowed for answer expires is not a jurisdictional defect which exposes the judgment to collateral attack, but rather an irregularity which can be availed of only in the original suit. We see no reason why the same rule should not apply in cases of service by publication, and the weight of authority is clearly to that effect. Under the West Virginia statute, as under similar statutes of other states, the publication provided for is a substitute for personal service; and when all the requirements of the statute in that regard have been observed and the publication completed, the power of the court thereupon attaches to exercise its functions in respect of the subject-matter of the suit; and this is expressly held in Tennant's Heirs v. Fretts, 67 W. Va. 569, 68 S. E. 387, 29 L. R. A. (N. S.) 625, 140 Am. St. Rep. 979, the syllabus upon this point reading as follows:

"The statute * * * providing for service of process on a nonresident by publication, or by personal service out of the state, cannot authorize the rendition of a personal judgment, or decree, against a nonresident so served; but it does authorize any court, whether of law or of equity, to pronounce a judgment or decree binding in rem, in any case in which such court would

otherwise be competent to do so, if the defendant were personally served within the state."

In this connection it may be observed that the bill filed in the chancery suit is adequate and even ample in its allegations of a cause of action, the affidavit of nonresidence is not open to criticism, the order of publication contains everything which the law requires, and that order was posted and published in strict conformity with the statute. When all this was done, the jurisdiction of the court was complete, in our judgment, to grant the relief sought, and it cannot be reasonably held that a decree which would have been perfectly valid if rendered on the 5th of May was an absolute nullity because entered the day before.

The case at bar seems to us clearly distinguishable from that of Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116, which is apparently relied upon by appellants. In that case the validity of the sale in the state court was attacked upon the ground that proper notice of the proceedings had not been given as required by the Florida statute, which provides in substance that nonresident defendants may be cited to appear within four months, by a publication to be made once a week for the four months. The notice given required the absent defendants to appear and answer the bill on or before the first Monday in December, which was the first day of that month, and the notice was first published on the 9th of August. The Supreme Court held that, since the interval between the 9th of August and the 1st of December was less than four calendar months, the notice had not been published as the statute required, and therefore jurisdiction of the absent defendants had not been acquired. But in this case, as already stated, the publication was in precise compliance with the West Virginia statute and was fully completed, as obviously it could be, before the expiration of the month allowed to the defendants to appear and "do what is necessary to protect their interests." We are persuaded that the premature entry of this decree was a mere irregularity which did not affect the jurisdiction of the court, because that jurisdiction had already been obtained, and that the decree cannot for that reason be questioned in a collateral suit.

The statute above quoted, which requires publication for only four weeks; without other effort to give notice to absent defendants, is undoubtedly drastic. But its harshness is very much mitigated in practical effect by another provision then in force, allowing such defendants five years to get relief, which reads as follows:

"Any unknown party or other defendant, who was not served with process in this state, and did not appear in the case before the date of such judgment, decree or order, or the representative of such, may, within five years from that date, if he be not served with a copy of such judgment, decree or order, more than one year before the end of said five years, and if he was so served, then within one year from the time of such service, file his petition to have the proceedings reheard in the manner and form provided by section 25 of chapter 106 of this Code, and not otherwise; and all the provisions of that section are here made applicable to proceedings under this section." Section 14.

[3] It is further and earnestly contended that the decree in question is void because it confirms a private sale, which was beyond the power of the court, since the statute required a sale in such case to be made at public auction. It appears that in June, 1892, a contract was entered into for the sale of this tract of land to Womelsdorf. It was signed by him and by Bumgardner, the Virginia administrator. It purports to be signed also by Maggie Sheffey, a niece of the intestate who lived with him, but she denies having executed it. By this contract Womelsdorf agreed to pay $3 an acre for the land; the tract to be surveyed and the number of acres ascertained. Payment was to be made upon specified terms within a certain number of days after the "sale is ratified and confirmed by the circuit court of Randolph county, W. Va., in a suit or other proceedings instituted in said court to ratify and confirm this contract." Of course Bumgardner had no authority to bind the heirs by such a contract, and Maggie Sheffey was not an heir at that time. It amounted, therefore, to an offer by Womelsdorf to purchase the land, at the price and on the terms recited, subject to the ratification provided for, and it was undoubtedly so regarded by the court which afterwards confirmed the sale. On the 28th of April, 1893, pursuant to notice duly published, depositions were taken of two witnesses, who are described as men well known and of high standing, whose statements showed that they were familiar with this tract of land and with the value of lands of like character in that section, and who testified to the effect that it would be advantageous to both the creditors and the heirs to accept the offer of Womelsdorf, because in their judgment it was more than the land would bring at public sale under decree of the court. Indeed, one of these witnesses expressed the positive opinion that a public sale would not realize as much as $10,000 for the entire tract. It was evidently upon the showing so made, and in the belief that it was for the interest of all concerned to accept the offer, which amounted to upwards of $13,000, that the court entered the decree of May 4, 1893, and appointed a special commissioner for the purposes therein recited.

Under the circumstances stated, we are of opinion that the decree in question was not in excess of the power of a court of equity, and that it is not now subject to collateral attack, although it be conceded that a statute of the state required a sale at auction. The law to be followed in this case, whatever rule may elsewhere obtain, is the law of West Virginia, and this court is bound to accept, as the law of that state, the decisions of its court of last resort. This being so, we find ourselves unable to distinguish the case at bar, as respects the principle involved in the question now considered, from the case of Klapneck v. Keltz, 50 W. Va. 331, 40 S. E. 570, decided by the Supreme Court of Appeals in November, 1901. In that case there was an order for a public sale and several efforts to dispose of the property at public auction, with resulting failure to get satisfactory bids. Thereupon, after some delay, the court directed the acceptance of a private offer subsequently made and confirmed the sale to the party making such private offer. In this case the court was judicially satisfied in advance, by evidence which appears reliable and convincing,

that an offer had been made and was then open to acceptance which would realize more for creditors and heirs than there was any probability of getting if a public sale were ordered. In the former case the court confirmed a private sale after attempts to sell at public auction had apparently failed; in the latter case the court acted in the first instance upon adequate proof that a public sale would involve expense and undoubted loss, as compared with the sum which Womelsdorf stood ready to pay. In the last analysis, what difference is there between the two cases? It was contended in the Klapneck Case, as appellants contend here, that the court was without power under any circumstances to sanction a private sale, in a suit of this character, because the statute required a sale at public auction. But surely the court did not get its jurisdiction, otherwise wholly wanting, to decree a private sale, by reason of the circumstance that a public sale previously ordered had not resulted in an acceptable bid. The power which was exercised in that case, independent of and in disregard of the statute, was not derived from and could not be conferred by the fact that a futile effort had been made to sell at public outcry. And yet the sale was held valid, even upon direct appeal, because the court had inherent authority, springing from the general nature of its powers, to order and confirm a private sale, when it was made to appear that the interest of all concerned would thereby be promoted. As the Supreme Court of Appeals said:

"Notwithstanding the statute there are circumstances under which for the purpose of doing equity and justice the court must have the power to make a sale of property without resort to public outcry."

In other words, the failure to comply with the statute, for reasons which induced that course, did not deprive the court of jurisdiction or render its action void in ordering a private sale. This proposition, as it seems to us, is necessarily involved in the decision in Klapneck v. Keltz. But if there are circumstances in which a court can order a private sale notwithstanding the statute, as this West Virginia case distinctly holds, then it must be for the court, in which the action is pending, to determine whether the facts of the particular case justify noncompliance with the statute, and its determination in that regard cannot be reviewed in a collateral suit, but only, if at all, in the original proceeding. It is also to be noted in that case that the court gives great effect to the decree of confirmation, as will be seen by the following excerpt from the opinion.

"In the present case there is no error claimed in the decree of confirmation, but the circuit court sets it aside for the sole reason that the decree of sale authorized the commissioners of sale after abortive attempts at public sale to take private offers in writing and report them to the court. If this be erroneous, the weight of authority to the contrary notwithstanding, it would not justify the court in setting aside the decree of confirmation. For, as we have seen, though a commissioner be directed to sell at public auction and he sells privately and the court confirms the sale, the decree of confirmation cannot be disturbed. It is the confirmation that makes a judicial sale, and nothing that happens prior thereto."

The same doctrine is laid down, both as to the jurisdiction of the court and the effect of confirmation, in an Arkansas case (Apel v.

Kelsey, 52 Ark. 341, 12 S. W. 703, 20 Am. St. Rep. 183), which involved the precise question here considered and is therefore directly in point.

We have carefully examined the other defects alleged in the proceedings in the chancery suit, and are satisfied that the objections thus raised are founded upon mere irregularities which did not affect the jurisdiction of the court and cannot support a collateral attack upon its decree.

We are therefore constrained to hold, in the light of the facts as they appear in this record, and upon the authority of the decisions above cited, that the decree confirming the sale to Womelsdorf was not beyond the power of the court which rendered it and is not open to question in the present suit.

[4] If we are correct in these conclusions, the action of appellants cannot be maintained, and there is little need of further discussion. But since the court below based its decision upon different grounds, we deem it suitable to give brief expression to our views upon the other defenses set up by the appellees. After careful study of the evidence, it seems reasonably clear to us that the successors of Womelsdorf have sustained their claim of title by adverse possession. The sale to him was a judicial sale, at least in form, and had the undoubted effect, even if the decree was void, of giving color of title to the purchaser. From the time of the confirmation of that sale, he and his successive grantees have openly and continuously asserted their ownership of this Sheffey tract. Since 1896 the land has yearly been assessed against them and all taxes paid by them. The agent employed by Sheffey in his lifetime, who continued to look after the property upon his death, recognized Womelsdorf as the new owner, and became his agent soon after the purchase was made. Squatters were removed from the tract by his authority, and an arrangement made by him with another man to take charge of the tract. This man moved onto the land about 1895 and resided there for the next five or six years. The appellants deny that the clearing where he lived was within the Womelsdorf purchase, and the fact in that regard is a matter of controversy. But even if the appellants are right upon this point, which we regard as immaterial, there is apparently no question that this man moved to the place where he lived at the instance of Womelsdorf's agent and under an arrangement with him to look after the property. In the nature of things there was little physical occupation. It was an extensive tract of forest land, mountainous, unimproved, unfenced, and visited mainly by hunters and fishermen. While it was allowed to remain in a state of nature, there was practically nothing to do, except to guard against fires and prevent trespassers from cutting the timber. So far as we can see, the actual occupation of this tract was suited to its location and character. The question of possession in such a case depends upon its particular facts and circumstances and the nature and condition of the land whose possession is in dispute. It seems to us beyond reasonable doubt that Womelsdorf and his successors, for at least 14 or 15 years before this suit was commenced, were in possession of this tract under color of title and continuous assertion of ownership. That pos-

session was open, notorious, uninterrupted, and adverse, and we think the preponderance of proof shows that it was also exclusive. Without referring to the evidence in greater detail, and giving due consideration to the testimony of appellants upon this point, we content ourselves with expressing the opinion that title to this land had been acquired by adverse possession.

Of the remaining defenses which were sustained in the court below, the acquisition of title under the West Virginia statute by the payment of taxes, and the alleged laches of appellants, it is sufficient to say, without reviewing the argument, that we see no reason to question the substantial correctness of the conclusions reached by the learned District Judge.

It follows that no sufficient ground for reversal has been made to appear, and the decree appealed from will therefore be affirmed.

KEYSTONE OIL & MFG. CO. v. BUZBY.

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

No. 2065.

1. TRADE-MARKS AND TRADE-NAMES ⟸70—UNFAIR COMPETITION—ACTS CONSTITUTING.

Where, before defendant entered into the sale of lubricants, plaintiff had manufactured and sold lubricating greases and oils under the trade-name of "Keystone Lubricating Company," which had become known as "Keystone greases," and the word "Keystone," as applied to lubricating oils, had come to mean plaintiff's products, any simulation on the part of defendant of such designations for such goods, calculated to palm off defendant's products on purchasers as plaintiff's products, would entitle plaintiff to an injunction and other equitable relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. TRADE-MARKS AND TRADE-NAMES ⟸70—UNFAIR COMPETITION—ACTS CONSTITUTING.

To sanction relief against alleged unfair competition, there must be a deceptive use of a name or word amounting to a fraud on the public, as the essence of the wrong consists in the sale of the goods of one manufacturer or dealer for those of another; but the deception may be practiced by the fraudulent use of the corporate name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70.]

3. TRADE-MARKS AND TRADE-NAMES ⟸73—UNFAIR COMPETITION—NAMES.

Where, though plaintiff had been selling lubricating oils and greases, which had become known as "Keystone greases," under the trade-name of "Keystone Lubricating Company," before defendant engaged in that business in Chicago, defendant succeeded a company engaged in the sale of Pennsylvania oils, oil products, and lubricants, under the name of the "Pennsylvania Oil Company," and, a reincorporation being desirable, substituted the word "Keystone" for the word "Pennsylvania" before plaintiff opened its branch office in Chicago, without knowledge or intimation of plaintiff's business, or of his trade-name, and no officer or authorized representative of defendant understood or intended that its goods and

markings were calculated to deceive purchasers or simulate in any respect plaintiff's products, or were sold or tendered as plaintiff's products, there being no fraud in connection with the origin and use of the corporate name, its use in connection with the sale of lubricating oils and greases should not have been enjoined.

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

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃97—UNFAIR COMPETITION—INJUNCTION—CONDITIONS.

Where defendant's agents, in some instances, had by deceptive representations or conduct palmed off defendant's goods on purchasers as plaintiff's Keystone greases, it would be enjoined from selling its lubricants under its corporate name, without inscribing on each package a notation that the product was not that of the Keystone Lubricating Company.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ⊂⊃97.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Bill by Augustus C. Buzby, doing business under the firm name of the Keystone Lubricating Company, against the Keystone Oil & Manufacturing Company. Decree for complainant (206 Fed. 136), and defendant appeals. Reversed, with directions.

The appellant, Keystone Oil & Manufacturing Company, an Illinois corporation, is defendant in a bill filed by the appellee, Buzby, charging unfair competition in trade on the part of the appellant in the use of its corporate name, and this appeal is from a decree of the District Court, on final hearing of the issues, perpetually enjoining the appellant from doing business in the sale of lubricating oils or lubricating greases "under the name of Keystone Oil & Manufacturing Company" or under any corporate name containing the word "Keystone," also from holding out or representing said defendant "to be the same as the complainant Keystone Lubricating Company," and also from representing its lubricating greases to be "genuine Keystone grease," or "Keystone grease." The facts in evidence, in so far as they are deemed material, are mentioned in the ensuing opinion.

Francis W. Parker, of Chicago, Ill., for appellant.

Carlos S. Andrews, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The bill filed by the appellee, Buzby, and the decree in conformity therewith granting injunctional relief against the appellant, rest on charges of unfair competition in the sale of lubricating greases, arising mainly, if not entirely, out of the use by the appellant of its corporate name, Keystone Oil & Manufacturing Company. While the bill avers long possession, registration, and use by appellee of "the arbitrary symbol of the Keystone of an arch as a trade-mark" in his business, the evidence is undisputed that such trade-mark has never been used by the appellant, and that no infringement thereof has been committed in its business; and the ruling of the Circuit Court of Appeals for the Eighth Circuit, in Buzby v. Davis, 150 Fed. 275, 80 C. C. A. 163,

10 Ann. Cas. 68, in reference to conceded use of such trade-mark, which is greatly relied upon for support of the present decree, is inapplicable and furnishes no aid in that direction.

[1] These material averments, however, are established by the evidence: That the appellee has conducted his business, since the year 1885, at Philadelphia, Pa., in the manufacture and sale of "lubricating greases" and oils under "the trade-name of the Keystone Lubricating Company" (without incorporation); that the name "Keystone greases" has been applied to his lubricating oil products throughout such times, and the word "Keystone" so applied "is known to buyers to mean" his products; and that his trade has extended to various states, with "branches and sales agencies" in different places, one branch "being now established at Chicago" under his trade-name. As it further appears that the appellant (located at Chicago) entered into the sale of lubricants, in connection with the sale of various kinds of oil and oil products, long after the appellee had established his business in Philadelphia as above described, the rule is elementary in equity that proof of simulations on the part of the appellant of either of the above-mentioned designations for such goods, calculated to palm them off on purchasers as the appellee's production, would entitle the defrauded manufacturer to an injunction and other equitable relief. But no such simulation is either proved or asserted in respect of labeling or dressing the goods or packages, or advertising them in any manner as appellee's lubricants. On the contrary, it appears in evidence that the appellant's lubricants were conspicuously named and marked "Phillip's Special Banana Cup Grease." Moreover, the opinion filed below correctly states:

"The only infringement of the complainant's trade-mark, if any, consists in the use of the word 'Keystone' in the defendant's corporate name, and in the fact that it is claimed that the public has been deceived by such similarity, in that the defendant's lubricating grease has been purchased on some occasions by persons believing they were buying the complainant's brand. The cans in which the complainant and defendant sold their goods are radically different. The color, lettering, and descriptive matter are wholly distinct, as well as the odor of the grease itself."

[2] The decree as entered is directed to the issue thus narrowed, and proceeds upon the theory that use of the appellant's corporate name in the sale of lubricants, under the circumstances in evidence, constitutes unfair trade within the meaning of the established rule of equity thereupon. That rule is aptly defined in Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140, 25 Sup. Ct. 609, 614 (49 L. Ed. 972), as follows:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if the defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

And the authorities concur that deceptive use of a name or word employed by another dealer, amounting "to a fraud on the public," must appear to sanction relief under this rule. Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 451, 462, 31 Sup. Ct. 456, 55 L. Ed. 536.

It is unquestionable, however, that such deception may be practiced by fraudulent use of a corporate name, and in that view the circumstances of the adoption and use by the appellant of its name may bear upon the issue.

[3] The undisputed facts are: That the appellant is the successor of a company engaged in business at Chicago, under the name of "Pennsylvania Oil Company," in the sale of various Pennsylvania oils and oil products and lubricants; that its purchase of the business occurred in October, 1900, and, reincorporation being desirable, the word "Keystone" was substituted for "Pennsylvania" (as having like meaning for origin of goods) in the corporate name which was then adopted; that such name was adopted more than a year prior to any location of the appellee in Chicago, and without knowledge or intimation either of the appellee's business or of his trade-name; that the sale of lubricants has at all times constituted a minor portion of the appellant's business, but is nevertheless a natural and valuable constituent thereof; and that no officer or authorized representative of the appellant has at any time understood or intended that its goods and markings were either calculated to deceive purchasers as to their origin, or simulated in any respect the appellee's products, or were sold or tendered otherwise than as appellant's brand of lubricants. We believe it to be unmistakable, therefore, that both origin and use of the corporate name so adopted were in good faith and entirely free from taint; that all "the indicia of fraud are lacking" (Brown Chemical Co. v. Meyer, 139 U. S. 540, 544, 11 Sup. Ct. 625, 35 L. Ed. 247) in respect of use of such name; and that the injunction against use thereof in the sale of appellant's lubricating oils and greases cannot be upheld.

The contention on behalf of the appellee for support of the decree, as we understand it, is this in effect: That the word "Keystone" has been so appropriated by the appellee in his business that his rights have become exclusive for its use in the marking and sale of lubricants. Such broad view, however, is untenable under the entire current of authorities. Words which are common to the public cannot be thus appropriated for exclusive use, beyond the limited extent recognized for the protection either of trade-marks against infringers or of trade-names against deceptive imitators. In the leading trade-mark case of McLean v. Fleming, 96 U. S. 245, 252, 24 L. Ed. 828, speaking in reference to trade-mark rights of a person in his own name, the opinion states the rule that:

"Such a party is not, in general, entitled to the exclusive use of a name, merely as such, without more. * * * Instead of that, he cannot have such a right, even in his own name, as against another person of the same name, unless such other person uses a form of stamp or label so like that used by the complaining party as to represent that the goods of the former are of the latter's manufacture."

Infringement, however, and not deceit, is the basis of a suit for violation of a trade-mark, although infringement is often ascertained from tendency to deceive. On the other hand, when a trade-name has become established for business or goods, protection is granted against wrongful and deceptive use by another under the above-stated doc-

trine of unfair competition, requiring proof of fraudulent conduct as the basis of relief. No person can acquire exclusive rights to employ any name or word, as part of his trade-name; but one may acquire reputation for his business or goods under any designation he has adopted therefor, and other traders are excluded under the rule from filching his trade by deceptive use of like designation.

We believe the other injunctional provisions of the decree to be alike unauthorized under the evidence above referred to, so that the decree as an entirety must be reversed.

[4] The testimony, however, clearly discloses three instances of deceptive representations or conduct on the part of agents of the appellant, whereby the appellant's goods appear to have been palmed off on purchasers as the appellee's "Keystone grease," and in view of such evidence we are of opinion that cause appears for relief against such impositions, by requiring the appellant to inscribe upon each of its packages of lubricant offered for sale a notation, in effect, that the product is not that of "Keystone Lubricating Company" of Philadelphia.

The decree of the District Court is therefore reversed, with direction to enter an injunctional decree against the appellant defendant, providing for the above-mentioned notice upon packages of lubricants offered for sale, together with costs, and the costs of this appeal are to be taxed against the appellee

---

ALLEGHENY VALLEY BRICK CO. v. C. W. RAYMOND CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 75.

1. REFORMATION OF INSTRUMENTS ⟸30—ACTIONS AT LAW.

In an action at law on a contract, the court could neither reform the contract to include a provision as to the time for performance by plaintiff, nor recognize as an equitable defense plaintiff's failure to perform the omitted provision, as while courts of equity, in cases of mutual mistake, may make the written evidence of an agreement correspond to the understanding of the parties, in the federal courts the distinction between suits in equity and actions at law is maintained.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 117, 118; Dec. Dig. ⟸30.]

2. REFORMATION OF INSTRUMENTS ⟸45—SUFFICIENCY OF EVIDENCE.

A court of equity cannot reform a written agreement for mutual mistake, unless the mistake is proved by clear, convincing, and satisfactory evidence.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157–193; Dec. Dig. ⟸45.]

3. CONTRACTS ⟸212—CONSTRUCTION—TIME OF PERFORMANCE—"REASONABLE TIME."

Where written agreements by a manufacturer of brick-making machinery, whereby it sold certain machinery to defendant, and agreed to furnish defendant complete working drawings for the construction of a patented kiln, and to license defendant to use such kiln, specified no time for delivering the machinery, drawings, and license, performance within a

reasonable time was implied, and what was a "reasonable time" depended on the circumstances of the particular case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 944–955; Dec. Dig. ⊂⊃212.

For other definitions, see Words and Phrases, First and Second Series, Reasonable Time.]

4. TRIAL ⊂⊃177—DIRECTION OF VERDICT—MOTION BY BOTH PARTIES.

Where, in an action on a contract, both parties moved for a directed verdict, and neither party asked to go to the jury, the trial court's findings, supported by evidence, that plaintiff was not in default when defendant repudiated the contract, would be accepted by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. ⊂⊃177.]

5. CONTRACTS ⊂⊃279—PERFORMANCE—TENDER OF PERFORMANCE—WAIVER.

Under a contract to furnish complete working drawings for the construction of a patented kiln, and to license defendant to use it, in consideration of defendant's agreement to pay a specified amount against sight draft with license and drawings attached, a tender of the license and drawings was not necessary, where defendant wired plaintiff that all consignments of any kind would be refused by it, as a tender is waived where a tenderee makes any declaration amounting to a repudiation of the contract, or takes any position rendering a tender a vain and idle ceremony.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1233–1248; Dec. Dig. ⊂⊃279.]

6. SET-OFF AND COUNTERCLAIM ⊂⊃24—CAUSE OF ACTION.

In an action on a contract for the sale of machinery, and to furnish working drawings of a patented kiln and a license to use it, in which defendant counterclaimed for delay in performance by plaintiff, when the court determined that there was no breach of the contract by plaintiff, the counterclaim necessarily failed.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 39–42; Dec. Dig. ⊂⊃24.]

7. TRIAL ⊂⊃177—QUESTIONS OF LAW OR FACT.

In an action on a contract, in which defendant counterclaimed for delay in performance by plaintiff, the contention that the dismissal of the counterclaim involved a finding of law on conflicting testimony was without force, where both parties subsequently moved for a directed verdict, and the court decided for plaintiff, thereby holding in effect that there was no unreasonable delay by plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 400; Dec. Dig. ⊂⊃177.]

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

This cause comes here on writ of error to the District Court of the United States for the Western District of New York to review a judgment entered on February 3, 1914, in favor of the plaintiff, the C. W. Raymond Company, for the sum of $3,250.50 damages, together with the sum of $255.74 costs.

The plaintiff below, the C. W. Raymond Company, is a corporation organized and existing under and by virtue of the laws of the state of Ohio, resident and doing business in Dayton, in said state, and will be hereinafter referred to as plaintiff. The defendant below, the Allegheny Valley Brick Company, is a corporation organized and existing under and by virtue of the laws of

the state of New York, resident and doing business at Olean, in said state, and will be hereinafter referred to as defendant.

On or about March 18, 1911, plaintiff and defendant entered into a contract in writing wherein it was agreed that plaintiff would grant a license to defendant to use and operate one continuous producer gas-fired kiln, containing certain improvements set forth in letters patent of the United States then owned and controlled by plaintiff. It was also agreed that plaintiff would furnish defendant with complete working drawings for the construction of one compartment-type gas-fired continuous kiln having 18 compartments or sections, each holding about 40,000 paving blocks, 10 pounds burned. The consideration was an agreement by defendant to pay to plaintiff "the sum of $2,500 cash against sight draft with license and drawings attached." The defendant also agreed that plaintiff's patents are valid and that it would not contest them.

The plaintiff, on or about March 27, 1911, sent its representative to Olean to locate the kiln to be constructed in pursuance of the plans specified in the contract, and he met the superintendent and general manager of defendant and looked over the ground with reference to production of the plans and location of the kiln. The ground was at that time in unsuitable condition for construction work, owing to recent rains, and defendant was so informed, and was also told that the necessary drawings would be forwarded in a short time. The plaintiff subsequently prepared the drawings and specifications, and about May 27, 1911, forwarded to defendant the license. On May 27, 1911, the plaintiff drew a sight draft on defendant for $2,500, to which was attached the drawings and specifications and other necessary details incident to the construction and forwarded the same to the defendant. A license statement was also attached. Payment of the draft was refused.

It also appears that on March 18, 1911, the defendant placed an order with the plaintiff for certain machinery and supplies, and for which it was agreed to pay $10,190 and freight from Dayton, Ohio. The title to the machinery was to continue in plaintiff until paid for in full. The plaintiff at once entered upon the construction and manufacture of the machinery thus ordered; and on May 24, 1911, defendant telegraphed plaintiff: "All consignments of any kind will be refused by us." Plaintiff, after giving due notice to defendant and after advertising the sale, sold at public sale the materials manufactured under defendant's order, and realized the sum of $7,250. The difference between the amount realized and the amount defendant had agreed to pay was $2,940.

The plaintiff sued upon two causes of action therefore: First, for the breach of the contract in refusing payment of the draft for $2,500; second, for the difference between the amount defendant agreed to pay for the machinery and the amount realized at the public sale—$2,940. Judgment was asked in the sum of $5,440, with interest.

The defendant's answer denied due performance on part of plaintiff, and denied any tender of plans and specifications, and claimed that the delay on the part of plaintiff in furnishing the plans, specifications, drawings, and machinery was unreasonable. Defendant also set up a counterclaim for damages by reason of the failure and delay of plaintiff in furnishing plans, specifications, drawings, and machinery, which prevented the brick kiln from being installed in the spring of 1911.

Hastings & Larkin, of Olean, N. Y., for plaintiff in error.

Robert E. Murrin, of Olean, N. Y. (Henry P. Nevins, of Salamanca, N. Y., of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The plaintiff corporation is a manufacturer of brick-making machinery of all kinds, and also of brick kilns, and among the latter of the Youngren

patented continuous fire kilns. It entered into the two written contracts referred to in the preliminary statement.

[1, 2] The first of the two contracts is the one in which plaintiff agreed to furnish defendant with complete working drawings for the construction of a kiln and did not specify a time within which delivery was to be made. Defendant in its answer, however, alleged that delivery was agreed to be made within two weeks, but that this portion of the agreement was omitted from the writing by mutual mistake. And it asked that the writing should be reformed by adding to it the words:

"That said license and said complete working drawings are to be furnished by the plaintiff to the defendant within two weeks from the date hereof."

It is, of course, within the province of a court of equity, in cases of mutual mistake, to make the written evidence of an agreement correspond to the understanding of the parties. A common-law court, however, possessed no such power. In some of the states the distinction between actions at law and suits in equity has been abolished, and a suit for the reformation of a written contract, which would under the former system have been a suit in equity, is in such states a civil action under the Code. But in the federal courts the distinction between suits in equity and actions at law is maintained, and in a common-law action, such as this is, a federal court is without power to reform a contract, or to recognize as an equitable defense the failure of one of the parties to perform a condition which is alleged to have been omitted by mutual mistake from the contract as written. Moreover, in a court of equity it is not within its province to reform a written agreement, unless the evidence of the mutual mistake is clear, convincing, and satisfactory. And if in this action the court had the power to reform, there is no such clear, convincing, and satisfactory evidence that anything was left out of the writing which the parties intended to put into it as would be required to enable the court to exercise the power.

As respects the second contract, that for the machinery which was to be manufactured, no time was specified for the delivery of the machinery. It is not seriously claimed, however, in respect to this contract that any certain time was fixed within which delivery of the machinery was to be made. The testimony showed that the matter of time was discussed at the time the contract was written, but objection was made to specifying the time, and it was intentionally omitted.

[3] As no time for performance is specified in either contract the implication is that a reasonable time was intended. What is "a reasonable time" depends upon the circumstances of each particular case. Whether the question of what is reasonable time is one of law for the court, or of fact for the jury, is not important in this case, as each side asked for direction of a verdict and dismissal, respectively, and neither asked to go to the jury on the whole case or any part of it.

[4] It appears that on April 25, 1911, defendant wrote plaintiff inquiring as follows:

"Will you kindly give us this information? In your opinion would your Mr. ——— be a suitable and competent man for us to hire in the construction of your Youngren kiln?"

To this the following reply was returned, dated April 28, 1911:

"Answering your communication of the 25th inst., we wish to say that, if we thought the party referred to therein was competent to build, construct, and start a kiln, the connection between him and ourselves would not be severed on the last day of this month, as will be done by request of ourselves. You will doubtless within the next few days receive a communication from a man by the name of ———, who has had experience with a kiln, and we are confident is capable of building it. He stated to us that he would be willing to contract for the construction of the kiln; furthermore, we desire to say to you that during May some time we will have released from Mason City, Iowa, a young man who has built a large kiln and started, or is with Mr. Vater while it is being started. We know that this young man is thoroughly competent to look after your kiln, and if you will not need any one before that time we believe he would be the best party whom we could recommend to you."

This correspondence does not indicate that any breach of contract had occurred, or that plaintiff was regarded by defendant as being in default. The brick kiln to be built was plaintiff's Youngren continuous brick kiln, and it was to be built according to plaintiff's plans, specifications and drawings, which defendant now insists plaintiff agreed to furnish within two weeks from March 18, 1911, when the contract was executed. If plaintiff was in default, or was improperly delaying the forwarding of the plans and specifications, the natural thing would have been to have called attention to the matter in defendant's letter of April 25th, and to have urged immediate delivery. Moreover, there is testimony in the record showing that the machinery which defendant ordered could not be manufactured in less than 90 days, and that plaintiff began the manufacture of it as soon as the order was received.

No other communication than that already mentioned passed between these parties until May 23, 1911, when defendant telegraphed plaintiff that, owing to its long delay in furnishing plans and machinery, the order was canceled.

As both sides left the case to the court, its findings that plaintiff was not in default will be accepted by us. That the trial court found adversely to defendant on the question of reasonable time must be inferred from the fact that plaintiff obtained judgment on both causes of action.

[5] The defendant alleges that nowhere in the complaint has plaintiff alleged that the plans, specifications, drawings, and license, together with the draft for $2,500 attached, were duly presented by plaintiff, and acceptance refused by defendant. The plaintiff alleged that in performance of its contract it prepared the necessary drawings and specifications called for in the contract, and forwarded the same to defendant in Olean, N. Y., in connection with a draft for $2,500, which draft is specifically set forth in words and figures, and that attached to the draft was the license, as called for in the contract; that the draft was duly presented to the Exchange National Bank of Olean, N. Y., for payment, and payment was refused. Defendant asserts that a search of the record will reveal that it is barren of any proof whatever showing that the plans, specifications, drawings, and license were ever presented to defendant and refused by it. The evidence shows that plaintiff sent a draft drawn on defendant to the Exchange National Bank of Olean,

which was returned with notice of protest, and that attached to the draft were drawings, specifications, and the license, as called for by the contract.

It is also argued that if plaintiff relied upon a waiver of presentment, because of the attitude of defendant in refusing to accept any consignments, then this waiver should have been alleged and proved upon the trial. As the complaint was drawn with the idea in mind of due performance, we are told that it was incumbent upon plaintiff to show that it had performed every act necessary to be performed on its part in order to put defendant in default. But plaintiff was under no necessity of alleging tender of performance by plaintiff and refusal to perform by defendant. The law does not require an idle ceremony to be gone through. A tender is waived where a tenderee makes any declaration which amounts to a repudiation of the contract, or takes any position which renders a tender a vain and idle ceremony. Columbia Bank v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Duffy v. Patten, 74 Me. 396. When defendant sent its telegram of May 24, 1911, saying, "All consignments of any kind will be refused by us," it waived a tender. In the face of this distinct and unqualified repudiation of the contract it is idle to claim that plaintiff should have gone through the futile ceremony of a formal tender.

At the time plaintiff was informed by defendant that all consignments of any kind would be refused, it had already manufactured about 40 per cent. of the machinery ordered by defendant. It completed the manufacture of the remainder of the machinery. All the machinery manufactured under the contract was sold by plaintiff at public auction. Notice of sale was given in advance to defendant, who was at the same time informed that it would be held liable for any loss which might be occasioned thereby. The sale was also duly advertised. The amount realized from the sale was $7,250, but the property was subsequently sold for $9,900, making a loss of $290, which plaintiff was allowed to recover in the second cause of action, along with certain other charges making the total $390, with interest. In the first cause of action plaintiff was allowed to recover $2,500, with interest.

[6, 7] It is assigned as error that the court dismissed the defendant's counterclaim. The counterclaim asked damages to the extent of $10,000 for the plaintiff's failure to perform its contract in accordance with its terms and conditions, thereby preventing defendant from manufacturing brick, to its great loss and damage. The defendant's right to recover under the counterclaim was based upon the theory of unreasonable delay on the part of plaintiff in complying with the contract. Surely the plaintiff could not be entitled to recover upon its contract, and defendant at the same time have a right to recover upon its counterclaim damages it alleges it suffered by the failure of plaintiff to perform the contract. When the court determined that plaintiff had not been guilty of a breach of contract, the counterclaim, based on the theory that plaintiff had been guilty of a breach, was inevitably eliminated from the case. Moreover, defendant failed as matter of fact to show upon the trial as the basis of its counterclaim that it had actually been delayed by reason of any act or failure to act upon the part of plaintiff. As the trial court, with the assent of both sides, found as a fact that there

was no unreasonable delay, there is no force in the contention that the dismissal of the counterclaim, which antedated the final disposition of the case, involved a finding of law on conflicting testimony, especially as the counterclaim set up in the answer was not for "unreasonable delay," but for failure to furnish complete working drawings and specifications "within two weeks after" the parties had entered into the agreement of the 18th day of March, 1911.

There are numerous assignments of error relating to admission or exclusion of testimony. But as there was no unreasonable delay on the part of plaintiff in performing its contract, no error was committed in excluding testimony to show the amount of the damages sustained by defendant because of such delay as actually occurred.

Judgment affirmed, with costs.

THE PRINZ OSKAR.

(Circuit Court of Appeals, Third Circuit. January 8, 1915.)

No. 1882.

1. COLLISION ⊂⊃43—STEAM AND SAILING VESSELS—GENERAL DUTY OF CARE.
   It is the duty of a steamship, passing out by the Delaware Capes at night, and crossing the path of coastwise vessels, many of which are sailing vessels, to take every precaution for safety, and an important part of that duty is to maintain a lookout as far forward and as near the water as possible to note the lights of crossing vessels and avoid them, while it is the duty of a sailing vessel to show her lights and keep her course.

   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 43–47; Dec. Dig. ⊂⊃43.]

2. COLLISION ⊂⊃49—STEAMSHIP AND CROSSING SCHOONER—IMPROPER LOOKOUT.
   A decree finding a steamship, passing out of the Delaware at night, solely in fault for a collision with a coastwise schooner, *held* sustained by the evidence, which showed that the schooner's lights were burning brightly, and that she kept her course, while the lights were not seen from the steamship in time to avoid collision through inattention and the fact that she had no lookout forward.

   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 55; Dec. Dig. ⊂⊃49.]

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

Suit for collision by Abram J. Slocum, master of the schooner City of Georgetown, in which the International Salt Company intervened, against the steamship Prinz Oskar. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 216 Fed. 233.

H. R. Edmunds, of Philadelphia, Pa., and Haight, Sandford & Smith and John W. Griffin, all of New York City, for appellant.

Howard M. Long, of Philadelphia, Pa., and Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal by the steamship Prinz Oskar from a decree of the District Court adjudging her at fault in sinking the schooner City of Georgetown, and awarding damages against the Oskar to the owners of the schooner. The opinion of that court is reported at 216 Fed. 233. By reference thereto, descriptions of the vessels, their courses, weather conditions, and other pertinent matters will be as satisfactorily seen as though here repeated. We have carefully re-examined the case and find no error in the decree below. Instead, therefore, of restating in other language what has been so fully set forth in the opinion referred to, we limit ourselves to briefly stating such general matters as we deem pertinent.

[1] The collision took place near the Five Fathom Bank Light, which is the point at the south end of New Jersey where ocean-bound vessels coming out of the Delaware cross the much-traveled path of coastwise vessels going north and south. As large numbers of the vessels following this coast-line path are sailing vessels, and as rule 20 makes it the duty of steamers to give way to them, it is evident the situation is one that calls upon steamers, crossing this known path, to take every precaution that tends to safety. The general duty of the sailing vessel is to show her lights and hold her course, and the general duty of the steamer crossing her path is to note such lights and avoid them.

[2] The night in question was clear and the conditions so favorable that the collision could not have occurred if, first, the schooner's lights were burning properly, and, second, if the steamer acted on such lights. In such case, if the schooner's lights were burning, and she kept her course, she complied with the rule and was without fault. The first inquiry, therefore, is: Were the schooner's lights set and burning? The City of Georgetown was a substantial, four-masted schooner of 500 tons. Her sails were handled by steam, and she had a crew of eight men, consisting of her master, mate, engineer, steward, and four able seamen. She had a cargo of salt and had about four feet of free board amidship. The collision occurred at 12:55 a. m. The master of the schooner, a man of many years' experience as a master mariner, was on the watch from 8 to 20 minutes after 12, just preceding the collision. With him on watch were the engineer and two seamen.

The testimony of Slocum, the master, was that the lights were set and burning; that they were the regular standard lights; that they had been used on the vessel for some years and had never given any trouble; that he went forward and examined them that night, at 12:10 a. m., just before he left the deck; that during the watch the lookout also reported the lights to him. At 12:20 the master went below, leaving Johnson, the mate, in charge. The course, to which the mate's attention was then called, was southwest. At this time the Oskar was not in sight.

Petersen, the engineer, was on watch with the mate. He testified: That it was his duty to take care of the lights; that he had himself

gotten them ready that night, had trimmed and lighted them, and seen the man put them in place, and that they were filled with oil; that the lights in the two years he had been on the vessel had been satisfactory; that he cleaned the lights the day before, and on the evening of the collision they were thoroughly clean; that at 12 o'clock he went forward and examined the lights before he went off duty, as it was his duty to do; that he found the lookout of his watch, Olsen, had been relieved, and his place taken by the lookout of the next watch; and that the lights were burning all right and even.

Olsen, the lookout on the mate's watch from 10 to 12, was a first-class seaman, and was at the wheel from 8 to 10. He testified he got the lights from the engineer and put them up the night of the collision; that they were burning at 10 o'clock, when he stood lookout, and that, when he left the watch at 12 o'clock, he looked and saw they were burning just as when he had put them on; that he reported to the lookout who followed him that the lights were burning right.

Johnson, the mate, relieved the captain at 12 and got from him directions to steer southwest. He testified he sighted the Oskar's lights several miles away; that when she was a mile and a half or two miles away, and coming for the schooner, he went forward to the lookout's post and looked to see whether the schooner's lights were right, and found they were burning brightly.

Antonio Malmberg, a first-class seaman, came on deck at 12 o'clock and was lookout from then until the collision. He testifies that, as soon as he came on watch, he looked at the schooner's lights, and that they were burning brightly; that they were burning brightly from then on, and that he looked at them as he was leaving the forecastle just before the collision, and they were burning brightly; that the mate came to the forecastle just before the collision to see if the lights were all right; that they both looked at the lights then, and they were in first-class condition.

The testimony of these witnesses that the green light was burning is corroborated by the captain of the Oskar. He had returned to the chartroom after giving directions for setting the steamer's course for the ocean trip, when he heard the order to shift the wheel by which the Oskar attempted to avoid the collision. We quote his testimony:

"Q. Now, just go ahead and tell what happened from then on. A. Then I heard the order given to hard astarboard the wheel. Q. Where were you at the time that order was given? A. I was in the chartroom. Q. Then what happened? A. Then I heard the engine telegraph rung up, and then I ran out. Q. Where did you go? A. I went right out on the bridge. Q. Did you see the second officer there then? A. Yes, sir; but the third officer was on top of the wheel house. Q. What, if anything, did you see when you got out there? A. Well, of course, as I came from a lighted place right out to where it was dark, I could not see anything at first, but then, as soon as I got my bearings, I would make out this schooner. Q. How long was it after you got out before you made out the schooner? A. That could not have been more than a second. Q. In what position was this schooner at the time that you then saw it? A. That schooner was then at right angles to our boat. Q. That was at right angles to the course that you were upon? A. Yes, sir; she was just about at right angles to our course. That is the way that it appeared to me. Of course I could not get the exact angle, but that was just about it. Q. When you saw the schooner at that time, were the vessels almost

in collision? A. It was apparent that there was going to be a collision, but they did not strike right away. Q. How soon did they strike? A. It was in a few moments after I got out there when the schooner actually hit us. Q. Were you able to see any light on the schooner at that time? A. Yes, sir; I could make out the green light of the schooner. Q. What kind of a light did it appear to you to be? A. It was a very weak light, the way that it was showing then. * * *

"XQ. And it was at that time that the schooner was about at right angles to your course, as near as you could judge? A. Yes, sir. XQ. And the collision was about to happen? A. Yes, sir. XQ. Was it at that time that you saw the green light of the schooner? A. Yes, sir; in a second or two after I got out, because when I first got out I could not see very well on account of coming from the light room into the darkness. * * * XQ. You did not have time enough to examine it? A. No, sir; only to see it and then the collision happened."

The testimony of Luensee, the Oskar's second officer, is:

"Q. Up to the time that the schooner struck, had you seen any light from that vessel? A. Yes, sir; just before. Q. What light did you then see? A. Just before she struck I saw a white light as if a man was carrying it along the deck and running along there. It might have been a lantern he had or some such white light. Q. About how far away was the schooner then? A. I should judge that she was just about a vessel's length away then. Q. Did you see any other light from the schooner at any time before she struck, and, if so, what was it? A. Just before she struck the green light came into view. Q. How did it come into view, that green light I refer to? A. I have an impression that the vessel was turning up into the wind, and that the green light came into view gradually. Q. Just how would you yourself describe that light? A. Well, it had the appearance to me of being a broadening out light. It appeared very small at first, and then got broader and broader, as if the vessel was coming up into the wind, and then suddenly it appeared to be in full view. I could see it plainer each second as I saw it. * * * Q. How long did you say it was before the vessels came together that you saw the green light of the schooner? A. I should judge that it would be about 15 seconds before the vessels actually hit. Of course in the excitement of the collision it would be a very hard matter to estimate the time. * * *

"XQ. You saw this light, didn't you? A. Yes, sir; just before the collision. XQ. Well, you had a pretty good look at it then? A. True. XQ. And it looked like a pretty good strong light to you? A. It looked strong enough when I got a good look at it. XQ. You did not see any imperfection in that light, did you? A. Not that I could make out in the time that I saw it. XQ. And there was nothing which you could find wrong with it? A. No, sir; not as far as I could see, there was not."

The testimony of the third officer, Zarn, as to the green light, was:

"Q. How long before the collision was it when you were able to make out that green light? A. I should judge that it was not more than ten seconds before the vessels were into each other when I saw that green light. Q. Had you been able to see anything of that green light before that? A. No, sir; she had not been showing it to us before that. Q. If that green light had been showing to you, could you have been able to have seen it before you did? A. Yes, sir; if that green light had been where I could see it plain, I would have been able to see it all right all of the time. Q. At the time that you first made out the green light, how did it show to you; how did you see it, I mean? A. The first I could see of it, it appeared very little to me. Q. Do you mean by that, that it did not show up well to you? A. No, sir; at first I could hardly see it, and then it began to get brighter. Q. How did it finally appear to you? A. Then in a short time I could see it plainer; but at first only at a small angle. Q. Then, afterwards, as I understand, you saw it broad? A. Yes, sir; finally I was able to see the light all right. * * *

"XQ. What kind of a light did this seem to you when you saw it? A. It did not seem to me as if it was a very good light. XQ. Would you call it a poor light? A. I would call it a weak light. XQ. What was the matter with the light? What do you complain about it? A. I don't know what the matter was. I could not tell. XQ. Do you know whether there was anything the matter with it at all? A. I could not tell what was the matter with that light, but I know that it looked to me as if it was not a good light. XQ. Of course, you can't say that there was anything the matter with that light or not? A. No. sir; not for certain, I could not. * * *

"RXQ. You said that you saw the green light of the schooner just before the collision? A. Yes. sir; that was just a few seconds before the collision happened that I saw that. RXQ. Did it look the same as the ordinary side lights of a schooner when you saw it then? A. Yes. sir; because it was very close to us. RXQ. It looked just the same as the lights on other vessels? A. Yes, sir; when I got very close to it, it did."

Hansen, the steamer's lookout on the crow's nest, said as to the lights on the City of Georgetown, as follows:

"The second report I made was a weak white light on the port bow. That was about a point and a half on our port bow, and was about in line with the Lightship when I first saw it. I thought then that it was a light belonging to the Lightship, in the cabin or something like that, but as we went on, I saw that it moved clear of the Lightship, and then I reported it. I heard no answer to that report. I heard no answer to my first report either. The third report that I made was when I saw the sails. I called out then, 'Light on the port bow.' This was a weak green light. I thought it was some little distance away first, but it proved to be close to. I saw the green light and turned around to report, and when I had turned around we had struck. First, I saw the loom of the sails, and then I looked sharp and saw a very weak green light, and then I turned to report."

It will thus be seen that all these witnesses agree on the fact that the schooner's green light was burning just before the collision, and the difference between them and the schooner's witnesses is as to the light being then weak or otherwise. The steamer's people all say that no green light was visible until just before the collision; and from the fact that some one was seen hurriedly running forward with a light just prior to the collision, we are asked to infer that the green light was then lighted. This contention does not commend itself to us. One fact stands out clearly in the testimony, and that is that the schooner twice showed an electric light. By the schooner's men, this was when she was two miles distant from the steamer; by the steamer's lookout, it was six or seven minutes before the collision:

"Q. The white light that you say you saw six or seven minutes before the collision on your port bow, did that light remain in view from the time you first reported it up to the collision? A. No. Q. What became of it? A. It became weaker and it vanished altogether. It came into sight again, very weak, just like a gas buoy that is rising and falling on the water."

It being thus established the white light was twice shown, we are warranted in finding it was shown because the schooner's watch was apprehensive the steamer did not see her lights. Such being the case, added weight is given to the testimony of the schooner's men that the green and red lights were then looked at to see if they were right. Taking the testimony as a whole, we are of opinion its weight shows the schooner's lights were in good order and burning brightly, and that she properly kept to her course. The court below was of opinion that

the failure of the officers of the steamer to note the schooner's lights was due to their being then intent on the very important work of laying their course across the Atlantic. That there was inattention on the part of the steamer is clear. Hansen, the lookout, reported the white light from the port side as it came out from the line of the Lightship. He reported the light, but got no reply from the bridge that his report was heard. He admits he got no answer showing his report was received, but he neither repeated his report or made a second report when he saw it again. To this evidence of inefficient work may be added the fact that those on the bridge, when they looked, may have had their attention centered on the lights of the Lightship, just as was the case with the lookout, and thereby failed to catch the schooner's green light. Neither of the officers saw the flares of the schooner's electric light, which were seen by the lookout. The failure of these two officers to see such a light correspondingly weakens their testimony that they were intent on discovering lights. If they were alert and could have seen the green light, why did they not see the twice shown electric light, which the schooner's people say they made and the lookout says he saw? To this may be added the steamer's grave omission, as then situate, to have a lookout as far forward and as near the water as possible. She was coming at speed out of inland waters. She had not passed the Five Fathom Lightship, and was about to cross the intersecting pathway of the coastwise trade. In her course she was likely to meet the low-lying sailing vessels that traveled the coast. We cannot too strongly emphasize the imperative duty of swiftly moving, tall steamers to take every possible precaution to avoid collision with low-lying sailing vessels. Amongst those precautions courts experienced in maritime affairs have recognized that of placing the lookout as low and as far forward as possible. It suffices from the cases to which reference might be made (Chamberlain v. Ward, 62 U. S. 548;[1] The Ottawa, 70 U. S. 268[2]) to refer only to that of Eastern Dredging Co. v. Winnisimmet Co., 162 Fed. 860, 89 C. C. A. 550, which fairly summarizes them as follows:

"The Supreme Court has been constantly rigid in holding vessels to maintaining lookouts as far forward and as near the water as possible. Especially where the water is dark, with otherwise a fairly clear night, it is important that the lookout should be as near it as possible, in order that his eye may follow the surface, and thus be in position to detect anything low down which may be approaching."

Viewing the case as we do, we find no fault on the part of the schooner. With her lights duly set and burning, it was her duty to hold her course. She saw the steamer's lights, and she had a right to assume the steamer saw hers. She took the additional precaution of throwing an electric light on her sails, in order that she might intensify what her lights showed, namely, that her course was bearing towards the steamer. It is urged she was at fault for not burning a torch. But what effect that would have had is wholly speculative. The vessels were two miles apart; the electric light was flashed on the sails; the schooner had every reason to think that light would be seen. It was seen and was ineffectively reported, and its presence had absolutely no effect on those controlling the steamer. There was still time for the

[1] 16 L. Ed. 211. [2] 18 L. Ed. 165.

steamer to have acted, but the light was ignored. With this indifference shown to the light that was twice shown, it would be highly speculative for this court to now hold the showing of a torch by the schooner would have averted this collision.

Without entering into further discussion, we are satisfied the cause was rightly decided by the court below, and its decree must be affirmed.

HOSLER et al. v. IRELAND et al.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4071.

1. DISMISSAL AND NONSUIT ⟸73—"MOTION TO DISMISS"—QUESTIONS CONSIDERED.

A "motion to dismiss" is in fact a demurrer to the complaint and reply, in the consideration of which the pleadings alone are involved.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 167, 168; Dec. Dig. ⟸73.

For other definitions, see Words and Phrases, First and Second Series, Motion to Dismiss.]

2. DISMISSAL AND NONSUIT ⟸58—GROUNDS—COMPLAINT—REPLY.

Where complaint was based on certain notes which on their face imported a joint obligation, but bore an indorsement of receipt from one of the makers of $200 recited to be in full payment of his share, an answer setting up such indorsement, and also a state statute providing that a release of one or more joint debtors is a payment on the indebtedness of the full proportionate share of such debtor or debtors and that the remaining debtors shall not be liable for more than their proportionate share of the indebtedness, with a reply alleging that the agent who made the indorsement had no authority to make it, raised a question of fact and hence a motion to dismiss was properly overruled.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134–139; Dec. Dig. ⟸58.]

3. APPEAL AND ERROR ⟸219—FINDINGS—REVIEW.

Where there were no objections to evidence or request for findings of fact, a finding by a court sitting as a jury in favor of plaintiffs and assessing their damages at $3,786.55 could not be reviewed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315, 1317–1320, 1322, 1323; Dec. Dig. ⟸219.]

4. RELEASE ⟸28—JOINT AND SEVERAL OBLIGATION—STATE STATUTE.

A state statute, providing that a release of one or more joint debtors is a payment on the indebtedness of the full proportionate share of such debtor or debtors, etc., presupposes a joint indebtedness afterwards made several, and has no application to a debt alleged to have been several in its inception.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 57–62; Dec. Dig. ⟸28.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Frank N. Ireland and another against B. B. Hosler and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. W. Arrington, of Pueblo, Colo., for plaintiffs in error.

Arthur Ponsford and Charles F. Carnine, both of Denver, Colo., for defendants in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. Plaintiffs in error were sued on two notes, both dated December 6, 1907, each for $1,800, payable to the order of Robert Burgess & Son, the first 14 months, and the second 2 years, after date, with interest at the rate of 8 per cent. per annum. The notes were signed by E. E. Hill, O. P. Adams, Allen Berry, Hosler Bros., W. M. Walker, J. F. Wormuth, H. Theo. Vashius, and John Richardson. They were assigned to defendants in error before maturity, and at the time of the assignment bore the indorsement hereinafter referred to. The notes were given for the purchase price of a stallion. All of the signers were sued except Hill and Walker. The answer sets up two defenses:

(1) That at the time of the purchase it was verbally agreed "that each of the purchasers should be responsible only for his proportionate share or interest in the horse so purchased," and that when any of the nine signers should pay the sum of $400 he should be released and discharged from all liability thereon; and that, prior to the assignment, the defendants were advised of this agreement.

(2) Failure of consideration.

There was no testimony tending to sustain the second defense, and it will not be further considered.

As a part of the first defense, the answer sets out the notes with the indorsements thereon. The indorsement appearing on each note and relied upon by plaintiffs in error as evidence that the indebtedness represented by the notes is several, and not joint, is as follows: "Rec'd from E. E. Hill two hundred dollars on within note in full payment of his one share." The reply of defendants in error disclaims knowledge of the making of the verbal agreement, and denies that they were advised of it at the time of the assignment of the notes. With regard to the indorsement, the reply states that:

"The plaintiffs admit that each of said notes bears the indorsements as alleged, but plaintiffs are informed and believe, and upon such information and belief allege, that none of said indorsements nor were any of them on either of said notes, made by Robert Burgess & Son, the payees, or by either of them, but that all and each of said indorsements were made by an agent of the payees, and that in making any indorsements on either or on both of said notes as and for in any manner, a release and discharge of or as a payment in full by any of the makers of or any maker of said notes or either of them, said agent was acting wholly beyond and in excess of and without his authority."

The plaintiffs in error before trial filed a motion to dismiss the "action" on the ground that the court had no jurisdiction of the amount involved in said cause; the pleadings showing, according to their contention, that the liability, if any, was several, and not joint, and that no one was liable for more than four hundred dollars of the principal sum. This motion was overruled. The case was submitted to the

court, sitting as a jury, upon the pleadings and testimony, and judgment was rendered for defendants in error. The specifications of error were that the court erred:

(1) In overruling the motion to dismiss made before trial.

(2) In holding the evidence sufficient to entitle plaintiffs to judgment.

(3) In overruling motion to dismiss at the close of the evidence.

[1] The first motion to dismiss was, in fact, a demurrer to the complaint and reply. Haug v. Great Northern Ry., 102 Fed. 74, 42 C. C. A. 167.

[2] In considering that motion the pleadings alone are involved. The note on its face was a joint obligation. The alleged verbal agreement was denied in the answer. The argument to sustain the first assignment of error is based on the indorsement and the statute of the state of Colorado modifying the common-law rule as to the effect of a release of a joint debtor. By that statute a release of one or more joint debtors is held to be a payment on the indebtedness of the full proportionate share of such debtor, or debtors, and further that none of the remaining debtors shall be liable for more than his proportionate share of the indebtedness. The reply alleged that the agent who made the indorsement had no authority to make it. That raised a question of fact. The first motion to dismiss was, therefore, properly overruled.

[3] The second specification of error goes to the sufficiency of the evidence to sustain the judgment. There were no objections to evidence, and therefore no exceptions to rulings thereon. Neither was there any request for findings of fact, either general or special. The only finding made by the court was as follows:

"And the court, after hearing the evidence produced and hearing the arguments of counsel, finds the issues here joined in favor of the plaintiffs and doth assess their damages at the sum of $3,786.55."

Such a finding by a court sitting as a jury cannot be reviewed. Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; Lloyd v. McWilliams, 137 U. S. 576, 11 Sup. Ct. 173, 34 L. Ed. 788; Coddington v. Richardson, 10 Wall. 516, 19 L. Ed. 981; Corliss v. Pulaski, 116 Fed. 289, 53 C. C. A. 567; Packer v. Whittier, 91 Fed. 511, 33 C. C. A. 658.

The record does not disclose the ground on which the second motion to dismiss was based. The assignment of error contained two specifications on the overruling of this motion:

(1) Want of jurisdiction.

(2) Insufficiency of the evidence.

In considering the second motion to dismiss it was necessary to take into account the testimony. As in the first motion to dismiss, so in the second, the question of jurisdiction depended upon a controverted fact. The testimony as to that fact was conflicting. The finding of the court therefore upon that fact was conclusive, in the absence of objections to testimony upon which the finding was based. To the extent that the second motion is based on insufficiency of evidence the same rule applies as in the second specification of error, based on the same ground.

It is contended in the brief of plaintiffs in error that, in order to render effective the repudiation by defendants in error of the indorsement admitted by them to have been made by their agent, it was necessary to return, or offer to return, to Hill the sum of money paid by him.

[4] The answer does not set up the contract made at the time of the indorsement, but one made at the time of purchase. The answer does not plead a release of Hill, such as would, under the Colorado statute, change the indebtedness from joint to several, but alleges the debt to have been several at its inception. The statute presupposes a joint indebtedness afterwards made several. Under the pleadings and testimony the rule invoked is not applicable.

It follows that the judgment of the lower court must be affirmed, and it is so ordered.

In re BUCHANAN (four cases).

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

Nos. 18, 22, 24, 148.

1. BANKRUPTCY ⊂⊃391—ACTIONS AGAINST BANKRUPT—PERMITTING PROSECUTION.

Where, prior to bankruptcy, suits were commenced by creditors in the state courts under Real Property Law N. Y. (Consol. Laws, c. 50) § 98, making the income from a trust in excess of that necessary for the beneficiary's support liable to the claims of creditors, it was not improper for the bankruptcy court to allow the suits to be prosecuted to judgment, as this would be a convenient way of liquidating the claims of the creditors, the amount of which was disputed; but the prosecution thereof beyond judgment should not be permitted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637–655; Dec. Dig. ⊂⊃391.]

2. BANKRUPTCY ⊂⊃391—ACTIONS AGAINST BANKRUPT—PERMITTING PROSECUTION.

Where, prior to bankruptcy, creditors had brought suits to recover the income of a trust fund beyond that necessary for the bankrupt's support under Real Property Law N. Y. § 98, and a majority of the creditors in number and amount voted against authorizing the trustee in bankruptcy to bring a similar action on the ground that they did not believe it could be maintained by him, orders allowing the prosecution of the creditors' suits on condition that the amount recovered after the payment of costs and expenses of the suits should be turned over to the trustee for distribution, and that the bankrupt estate in the event of nonsuccess should not be called upon to defray the costs and expenses, were proper and could not be complained of by creditors or the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637–655; Dec. Dig. ⊂⊃391.]

3. BANKRUPTCY ⊂⊃391—ACTIONS AGAINST BANKRUPT—PERMITTING PROSECUTION.

It was not improper to include in one of such orders a provision that it should be without prejudice to any rights of the suing creditors under an assignment of the income from one of such trusts, as, if the assignment was void, invalid, or inoperative, as contended by the bankrupt, the provision was harmless, while, if the assignment gave those creditors

superior rights, it would be unfair to prejudice them by the order to which they assented for the convenience of all parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637–655; Dec. Dig. ⊂⊃391.]

4. BANKRUPTCY ⊂⊃408—DISCHARGE—GROUNDS FOR DENIAL.

Under Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. 1913, § 9598]) § 14, subd. b(1), providing for the discharge of a bankrupt unless he has committed an offense punishable by imprisonment as therein provided, where the state courts had held that under Real Property Law N. Y. § 98, making the income of trust funds beyond that necessary for the beneficiary's support liable to creditors, a trustee in bankruptcy could not recover such income, and, though the bankruptcy act was subsequently amended, there had been no decision passing upon the effect of the amendment, and a majority of the creditors in number and amount voted against authorizing the trustee to sue for such income on the ground that he could not maintain such an action, it was improper to deny a discharge on the ground that the bankrupt made a false oath and rendered a false account because he failed to set forth such income in his sworn schedules.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. ⊂⊃408.]

5. BANKRUPTCY ⊂⊃408—DISCHARGE—GROUNDS FOR DENIAL.

The failure of a bankrupt on demand to assign to the trustee in bankruptcy the income of a trust fund beyond that necessary for his support made liable to creditors by Real Property Law N. Y. § 98, was not ground for denying a discharge, since, if such surplus income passed to the trustee in bankruptcy, an assignment was unnecessary, while, if it did not pass, the bankrupt should not be coerced into assigning it by refusing a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. ⊂⊃408.]

Petitions to Revise and Appeal from Orders of the District Court of the United States for the Southern District of New York.

This cause comes here upon petitions to revise and an appeal to review various orders of the District Court, Southern District of New York, which will be enumerated in the opinion.

Roderick Robertson, of New York City, for petitioner.

A. P. McKinstry and Hugh Bayne, both of New York City, for respondents.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Charles P. Buchanan, upon his voluntary petition, was adjudged a bankrupt on July 29, 1913. At the time of such adjudication, he was entitled to an income for life from trusts created by the wills of his father and mother. This income was in excess of $18,000 a year, and it is sought to sequestrate part of it under section 98 of Real Property Law of New York, which reads as follows:

"The surplus income of trust property liable to creditors. When a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution."

[1] Prior to bankruptcy four suits were begun by creditors of Buchanan in the state courts to reach the alleged surplus of income. To recover in these suits it would be necessary to prove the amount of indebtedness, which is disputed, and also to prove that there was a surplus of income. Upon the initiation of the bankruptcy proceedings, an order of the District Court was entered, staying the further prosecution of these suits. Subsequently an order was made vacating such stay order. This vacating order is brought here on petition to revise. The question presented seems to be academic because these original suits are practically temporarily abandoned, and suits, brought with the assent of the trustee in bankruptcy, are being prosecuted instead. However, if this were not so, there would be no impropriety in the District Court allowing these original suits to be prosecuted to judgment; it would be a convenient way of liquidating the claims of the creditors, which claims have been filed in the Bankruptcy Court. Beyond judgment, however, they should not be prosecuted for the present, and a modification of the order sought to be revised to that extent will be made. As so modified it is affirmed.

[2] The next two orders, which are brought here on petition to revise, authorize the bringing of actions against the respective trustees of the two trust funds to reach the alleged surplus. In Butler v. Baudouine, 84 App. Div. 215, 82 N. Y. Supp. 773, it was held that a trustee in bankruptcy did not come within the class of persons who could avail themselves of the remedy conferred by section 98 supra. Subsequent to that decision section 47 of the Bankrupt Act was amended so as to vest a trustee in bankruptcy as to all property not in the bankruptcy court, with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. Since that amendment was passed in 1910, there has been no adjudication in the state courts passing upon the effect of that amendment, or holding that the additional rights and powers conferred upon the trustee entitled him to the remedy provided by section 98. Conceiving that he is entitled to such remedy, the trustee in this case undertook to obtain the consent of the creditors to his bringing suit in the state courts. A majority of the creditors in number and amount voted against authorizing him to bring such action, upon the ground that they did not believe such action could be maintained. The trustee then entered into negotiations with the creditors who had brought suits in the state courts before bankruptcy and as a result of such negotiations the orders complained of were entered. They give leave to these creditors to institute and prosecute in the name and on behalf of the trustee in bankruptcy such action or actions as they may be advised are necessary and proper and as may be approved by the trustee to enforce the application of the surplus of the bankrupt's income under the two wills: (1) To the payment of the costs and expenses of such action or actions, including such counsel fee as may be allowed therein. (2) Any residue remaining to be turned over to the trustee in bankruptcy for distribution among the creditors whose claims have been duly proved and allowed or may be hereafter proved and allowed within such time as may be fixed by the court. (3) The bankrupt estate, in the event of nonsuccess not to be called upon

to defray in whole or in part costs and expenses. We think these orders are entirely proper; in view of the attitude of the majority of the creditors, it was a wise course for the trustee to take. Certainly no creditor can complain of his doing so; nor should the bankrupt, the trustee is entitled to his day in court to have the question determined whether he can take the surplus, if there be any, under the amendment of 1910.

[3] Further objection is made to one of these orders because it contains a provision that such order shall be without prejudice to any rights of the creditors, who brought suit before bankruptcy, under certain assignment. It seems that before bankruptcy Buchanan had assigned to them certain specified portions of his income from one of the testamentary trusts. The objection is without merit. If, as bankrupt contends, the assignment be void, invalid, or inoperative, the provision in the order becomes of no effect. If, however, the assignment did give these creditors rights superior to those of the trustee, it would be unfair to prejudice those rights by this order, to which these creditors assented for the convenience of all parties.

[4, 5] The really important question presented here—by appeal—is whether the court erred in denying bankrupt his discharge. The specification of objections sets forth these grounds of objection:

(1) Making a false oath and rendering a false account (section 14, subd. b (1) of the Bankruptcy Act) because he failed to set forth in his sworn schedules the income during his life derived from these trust funds.

(2) Concealing and failing to turn over to the trustee on demand, his interest or property right in and to the income from these trust funds.

As to the first of these objections, there is nothing as yet to show what the amount of the alleged surplus is, or indeed that there is any surplus. Moreover, as stated above, it is still an open question whether or not such surplus, if there be one, passed to the trustee. Presumably the bankrupt was advised by his counsel that it did not so pass, and a majority of the creditors in number and amount, also presumably advised by counsel, have reached the conclusion that the chance of an affirmative answer to the question was too uncertain to risk spending the funds of the estate in securing a judicial answer to it. Under these circumstances, it would be a very harsh construction of the Bankruptcy Act to refuse discharge because the bankrupt did not include this trust income in his schedules.

As to the second objection: If the surplus passes to the trustee, under the amendment, an assignment by the bankrupt to the trustee is wholly unnecessary. If, however, the amendment has not the effect contended for, and the bankrupt makes an assignment, he probably thereby seriously prejudices the rights which the law gives him. To coerce an assignment, under these circumstances, through refusal of discharge, seems to us grossly unfair and we find the objection wholly without merit.

Out of the income accrued under one of these trusts there is an accumulation of $3,460.38 due him at the date of adjudication. The writer is inclined to consider this as if it were money in bank, subject

to the bankrupt's draft, and that it should have been scheduled and turned over. The majority of the court, however, are satisfied that it is not distinguishable from the income generally; the will expressly providing that no part of the income shall be liable "prior to the actual receipt thereof by the beneficiary." From this conclusion I shall not dissent.

The order denying the discharge is reversed; on the application for discharge, there may be a new hearing.

PEARSON v. ROCKY MOUNTAIN FUEL CO.†

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4241.

1. MASTER AND SERVANT ⊂⊃217—DEATH OF SERVANT—MINING—ASSUMED RISK.

A servant assumed the risk of the fall of a portion of the roof of the main entry of a mine, if, after having been warned of the danger and his attention directly called to the defect, he deliberately passed under it and was killed, though it was the master's duty to make the place safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. ⊂⊃217.]

2. JURY ⊂⊃132—QUALIFICATION OF JUROR—IMPLIED BIAS.

Evidence adduced on the examination of a juror on his voir dire, on which the court denied plaintiff's challenge for implied bias, *held* not to show an abuse of discretion.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 583–585; Dec. Dig. ⊂⊃132.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Matilda Pearson against the Rocky Mountain Fuel Company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. J. Stark, of Denver, Colo. (Harry B. Tedrow, of Boulder, Colo., on the brief), for plaintiff in error.

Harry S. Silverstein, of Denver Colo. (J. V. Sickman, of Denver, Colo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. [1] This is an action to recover damages for the death of Joseph Pearson, alleged to have been caused by the negligence of defendant in error. A verdict and judgment was rendered against the plaintiff in error. The only errors relied on in the brief are: (1) The refusal of the court to allow a challenge for cause to the juror John R. Morey; (2) the giving by the court of the following charge to the jury:

"One who continues to change the condition of a place in which he works assumes the risk of the changes which were brought about by himself. If the

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 19, 1915.

rock fell from the place which he himself by his own work rendered dangerous, his widow cannot recover, and that would be so regardless of whether he knew at the time that it was dangerous.

"The defendant, in addition to introducing evidence to show that the rock fell from the roof in the place where the deceased was working, also offered evidence to show that his attention had been directed to this particular rock. He was told it was dangerous; it was liable to fall—by more than one witness who testified. That he ignored that warning. If you believe that to be true, then the plaintiff cannot recover, even though you may find that the rock fell out of the roof of the entry, because in that event he had been warned of this hanging rock and told that it might fall at any time. His attention was directly attracted to it; then he thereby assumed the risk of going under it, whether it was in the place which he was working or whether it was in the main entry. If, however, the rock fell from the roof of the main entry, a place which the law required the defendant to make safe for those passing through it, and the deceased had no knowledge of its unsafe condition and had not been warned of any danger at that point, then the defendant was negligent, and if that negligence in failing to so maintain the passageway in a safe condition was the cause of the death of Joseph Pearson, then the plaintiff has made out a case, and she is entitled to a verdict at your hands for such damages as you believe she has suffered, not exceeding $5,000."

The only exception to the charge of the court appearing in the record was taken in the following manner: At the close of the court's charge, counsel for plaintiff in error addressing the court said:

"We desire to note our exceptions to the court's instruction with reference to those portions which stated, if the jury should believe the testimony of two witnesses that the rock fell from the entryway, the plaintiff could not recover for the reason that that is contrary to the law and is also not supported by the testimony of the witnesses."

The court said, "I don't get your point." There was further discussion between the court and counsel which closed by counsel saying, "We reserve our exceptions." We do not think the exception, when taken in connection with the above excerpt from the charge to which the exception is claimed to have been aimed, could have been understood by the court as referring to this portion of the charge. Conceding, however, that it did, we see no error in the charge complained of after carefully reading the evidence in the case.

[2] At the trial, John R. Morey was called as a juror, and, being sworn and examined as to his qualifications, testified as follows:

"By Mr. Tedrow:

"Q. You heard what I said about the case, did you? A. Yes.

"Q. You live in Denver? A. Yes, sir; wholesale grocer.

"Q. You have lived here a long time, have you not? A. Yes, sir.

"Q. You know the defendant in this case, the Rocky Mountain Fuel Company? A. Yes, sir.

"Q. Do you know Mr. Silverstein and Mr. Sickman? A. I know Mr. Silverstein.

"Q. You don't know the plaintiff in this case, Mrs. Pearson? A. No.

"Q. Did you ever hear about this accident? A. No, I don't think so.

"Q. Have you business connections with the Rocky Mountain Fuel Company? A. Yes, sir.

"Q. Of what nature have they been? A. Well, bought considerable coal from them—from the company itself, and had a great deal of business with the subsidiary business of the Rocky Mountain Stores Company.

"Q. Have you any direct connection with either of them? A. No, sir.

"Q. Are you now having business relations with either of these companies? A. Yes, sir.

"Q. You sell them stuff, do you, goods? A. Yes.

"Q. A great deal of goods? A. Yes, sir.

"Q. Do you buy coal of them? A. Yes, sir.

"Q. Do you know of any reason why you could not sit here in this case and determine it upon the facts? A. Not unless that business relations with the company would be a reason, sir.

"Q. Do you think that would be a reason? A. I will try not to allow it to be, sir. Our relations have been very friendly with the company; always have been.

"Q. Do you think that that would be sufficient to affect your judgment in this case against the plaintiff? A. Why, no and yes. I would try not to allow it, sir—

"Q. You feel— A. I feel very friendly toward the company.

"Q. And you feel you might be inclined a little toward the company in a case in which it was involved? A. If there was a question probably my leaning would be on their side, if it was an even break.

"Q. Would this relationship that exists between you, and your friendly relations, create any element of prejudice in favor of the defendant the Rocky Mountain Fuel Company, do you think? A. Not if the evidence showed that it was against them; no, sir.

"Q. You think that you could arrive at a fair and impartial verdict in this case, based upon the evidence, irrespective of your personal connections and friendship for the company, do you? A. I think so; yes, sir.

"Q. Over how long a period, Mr. Morey, has this relationship with the company extended? A. For several years, sir. I couldn't say; ever since they formed the Rocky Mountain Stores Company.

"Q. How long have you been in business yourself? A. About 14 years, sir.

"Q. And you have been selling goods to them for about four years, ever since the organization of the Rocky Mountain Stores Company? A. Yes.

"Q. You are brought into direct contact in that with the officers or principal agents of the company, are you not? A. The principal agent of the Rocky Mountain Stores Company; yes, sir.

"Q. You have never had any accident similar to this in your business, Mr. Morey? A. No, sir. No one has ever been killed. We have had accidents, but not seriously.

"Q. You never had any litigation growing out of an action of this sort? A. Not since my recollection, sir.

"Q. Have you ever sat upon a jury that had this particular subject pointed out before? A. No, sir; I have not.

"Q. Do you have any opinion in your mind with regard to the subject in general of accidents and against companies growing out of damage suits? A. Well, I feel that a corporation should take every precaution possible.

"Q. Do you feel that they should be held liable for accidents that occur when they have not taken proper precautions? A. Depends entirely on the circumstances.

"Q. Do you think as a general proposition that they should be liable for negligence on their part? A. Absolute negligence; yes, sir.

"Q. You feel that in this particular instance that you could be unprejudiced in this case, do you, Mr. Morey? A. Why, as far as I know; yes, sir.

"Q. And that, as stated before, the relationship which existed between you would not affect you in any wise? A. No, except, as I say, if there was a case of reasonable doubt my leaning would naturally be towards the defendant.

"Q. But if it wasn't a case of reasonable doubt, but a case of the preponderance of the evidence, would that make any difference? A. I would be guided by the evidence.

"Q. You would feel it was necessary for the plaintiff in this case to make out a case beyond a reasonable doubt?

"Mr. Tedrow: We challenge the juror.

"Mr. Silverstein: We resist the challenge.

"Cross-Examination.

"By Mr. Silverstein:

"Q. In your relations with either side or in any transactions that have taken place, would that prevent you from following the expression of the court as to what the law is? A. Certainly not.

"Q. And if taken as a juror to do that, you will do so? A. Yes, sir.

"Q. And try the case wholly upon the law and the evidence? A. Yes, sir.

"Q. You can do that and will do that? A. Yes, sir."

Counsel for plaintiff in error at the close of the examination challenged the juror for cause, and the challenge was disallowed. At the time of this ruling the plaintiff had exhausted all of her peremptory challenges. We are of the opinion that the juror could have been properly excused, and that there would have been no error in so doing; but the question presented to us is not the same as the one presented to the trial judge. In Reynolds v. United States, 98 U. S. 145–156 (25 L. Ed. 244), the Supreme Court said:

"It is clear therefore that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

Under this rule we do not think that we would be justified in reversing the case for the action of the court in disallowing the challenge. We cannot say there was nothing left to the conscience or discretion of the trial court. The trial judge may have had personal knowledge of the character of the juror and other information that we do not have.

It seems to be the settled rule in Colorado that the finding of the trial court in determining as matter of fact whether the juror is competent is conclusive except in case of gross abuse of discretion. Imboden v. People, 40 Colo. 142, 172, 90 Pac. 608; Minich v. People, 8 Colo. 447, 9 Pac. 4; Babcock v. People, 13 Colo. 515, 22 Pac. 817; Thompson v. People, 26 Colo. 496, 59 Pac. 51.

The assignments of error being without merit, the judgment below must be affirmed. And it is so ordered.

BRIGMAN v. COVINGTON.

In re BRIGMAN et al.

(Circuit Court of Appeals, Fourth Circuit. January 13, 1915.)

No. 1281.

BANKRUPTCY ⊂=166—"PREFERENCE"—CHATTEL MORTGAGE—REGISTRATION.

Under Revisal N. C. 1905, § 982, providing that no mortgage of real or personal property shall be valid against creditors or purchasers but from the registration thereof, and Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562) § 60b, as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 799, § 13) and 1910 (Act June 25, 1910, c. 412, 36 Stat. 842, § 11 [Comp. St. 1913, § 9644]), providing that if a bankrupt shall have transferred his property, and if at the time of the transfer, or of the registering thereof, if such registering is required by law, and being within four months before the filing of the petition in bankruptcy, the bankrupt be insolvent and the transfer operated as a preference, the transfer shall be voidable, a chattel mortgage given by a bankrupt, but not registered until some time after its execution and within four months of the filing of the petition, is a "preference," if on the date of its registration the mortgagee knew that the mortgagors were insolvent and that the mortgage would constitute a preference, though the mortgagors were solvent at the date of the execution of the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⊂=166.

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

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Raleigh, in Bankruptcy; H. G. Connor, Judge.

Suit by Leake S. Covington, trustee in bankruptcy of the estate of E. L. Brigman and B. T. Dawson, copartners, trading as Eagle Pharmacy, bankrupt, against J. W. Brigman. From a decree for the plaintiff in the District Court (210 Fed. 499), the defendant appeals. Affirmed.

H. F. Seawell, of Carthage, N. C., for appellant.

Chas. W. Tillett, of Charlotte, N. C. (Cansler & Cansler, of Charlotte, N. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The material facts appear to be these: On January 16, 1911, the above-named appellant (defendant below and hereinafter so called) sold to his son, E. L. Brigman, and one B. T. Dawson, a clerk in his employ, the drug business which he was then conducting at Rockingham, N. C., under the name of the Eagle Pharmacy. The price agreed to be paid for the stock of goods, etc., was $3,500, and the purchasers also assumed an outstanding indebtedness of about $2,700. They were without means of their own and gave notes for the entire amount which were secured by a chattel mortgage on the purchased property. They failed to make a success of the business, though the indebtedness assumed was nearly or quite

discharged and the sum of about $700 paid on the purchase price. On August 3, 1911, one or more of the notes being due and unpaid, the appellant had his mortgage recorded, and in November following foreclosed the same and took possession of the property. On a petition filed December 2, 1911, the mortgagors were adjudicated bankrupt, and later the trustee brought this suit to have the mortgage declared void as an unlawful preference under the bankruptcy act. Subsequently the stock of merchandise, etc., was sold by the trustee for $3,000, under an agreement that the proceeds should be held subject to the final determination of the rights of the parties. It appears that between January 16 and August 3, 1911, goods were bought to the amount of $394.85, and between August 3 and December 2, 1911, to the amount of $864.14, and that the remainder, $1,741.01, was of the merchandise sold to the bankrupts in January, and constituted part of the property covered by the mortgage then given to the defendant.

Whatever may be said of the financial condition of the purchasers when the business was acquired, it is not disputed that they were badly insolvent in the following August when the defendant put his mortgage upon record; and the court below found, in an opinion which reviews and analyzes the testimony at length, that the defendant then knew, or certainly had reason to believe, that they were unable to pay their debts. A careful examination of the record convinces us that this conclusion was amply sustained by the proofs, and with that fact established it remains only to consider whether this mortgage, dated January 16, 1911, but withheld from registration until the 3d of the following August, because "there would be no use telling people about it," was a voidable preference under the provisions of the bankruptcy act.

In the first place, it is not doubted that the mortgage in question until recorded was wholly void as against creditors under section 982 of the Revisal of North Carolina, which appears to have been the statute law of that state since 1829. This statute has been repeatedly construed and applied by the North Carolina courts and always, so far as we are aware, to the effect just stated. Thus, in Robinson v. Willoughby, 70 N. C. 363, it was said that:

"The decisions have been uniform that deeds in trust and mortgages are of no validity whatever as against purchasers for value and creditors unless they are registered; and that they take effect only from and after registration, just as if they had been executed then and there."

Again, in Hooker v. Nichols, 116 N. C. 160, 21 S. E. 208, in which Robinson v. Willoughby is cited with approval, the court says that this act "was intended to uproot all secret liens, trusts, unregistered mortgages, etc., and under its force it has been held that no notice, however full and formal, will supply the place of registration."

And this court, in a careful opinion by Judge Pritchard (United States v. Hiawassee Lumber Co., 202 Fed. 35, 43, 120 C. C. A. 289, 297), uses the following language:

"In considering this act it should be constantly borne in mind that the general rule incorporated therein is that no deed shall be valid as against creditors and purchasers for value, except from the date of registration."

In view of what is said in these and other cases it must be regarded as the settled law of North Carolina that a mortgage like the one in question is not valid as against creditors until it is recorded. This being so, it follows that the legal effect of the transaction under review is the same as though the mortgage to appellant had been executed on the 3d of August to secure an indebtedness to him which was incurred on the 16th of January preceding. And it also follows, as we think, that the security was voidable at the suit of the trustee under the original bankruptcy act, because the transfer, regarded as made on the 3d of August, was within four months before the filing of the petition in bankruptcy and operated then as a preference to the mortgagee.

This was the construction of the bankruptcy act before the amendments of 1903 and 1910 by the Circuit Court of Appeals of the Eighth Circuit; Bank v. Connett, 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, construing a recording statute of Missouri which is certainly quite as favorable to the appellant's contention as the statute of North Carolina. In the able opinion in that case, Judge Hook says:

"If, therefore, under the Missouri law, a chattel mortgage first comes into existence, as a mortgage, as to general creditors, when it is recorded, it then first comes into existence as to the trustee in bankruptcy. As to voidable preferences the trustee is in effect a judgment creditor of the bankrupt (Dudley v. Easton, 104 U. S. 99, 103 [26 L. Ed. 668]), whose rights as such are made by the act of 1898 to cover the period of four months prior to the institution of the proceedings in bankruptcy. If within that period a mortgage is given by the bankrupt under circumstances which make it a voidable preference, the trustee may defeat it. If one is given before but is recorded within that period, and under the local law the fiction of relation back to the date of execution is not indulged in, but, on the contrary, the instrument is deemed to have first come into existence as a mortgage when recorded, the trustee may likewise defeat it if the conditions of a voidable preference appear. * * * The clear letter and policy of the Missouri statute have often been referred to by the courts of that state. The withholding of a chattel mortgage from record assists the debtor to practice a false pretense. It enables him to maintain a financial standing to which he is not honestly entitled. That is generally the actuating purpose, and it is invariably the result. It induces prior creditors to forbear and other persons to extend credit. A plain and inexpensive method is prescribed by which a mortgagee may secure a priority of lien, and the evil results that may follow from ignoring it are obvious. The fiction of relation is generally used to prevent wrong or injustice, but we find no warrant in the decisions of the courts of Missouri for its employment to defeat the evident and wholesome policy of the law. There, possession of the property not being taken, a chattel mortgage seems to speak as of the day it is recorded."

In the second place, we are of opinion that the amendments of 1903 and 1910 were framed expressly to cover such a case as is here presented. Section 60b of the bankruptcy act now reads as follows:

"If a bankrupt shall have * * * made a transfer of any of his property, and if at the time of the transfer * * * or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy, * * * the bankrupt be insolvent and the * * * transfer then operated as a preference, and the person receiving it, or to be benefited thereby, * * * shall then have reasonable cause to believe that the

enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

This language seems to us so plain as not to require the aid of construction, and we deem it unnecessary to add anything to the convincing discussion of the question by the learned District Judge from whose decision this appeal is taken. Whatever may be held in regard to similar transactions in states whose recording statutes are materially different as respects the rights of creditors, we deem it scarcely debatable that under the law of North Carolina, which declares every mortgage or deed of trust to be invalid as against creditors until its registration, a trustee in bankruptcy may avoid and set aside a mortgage which, although given before and for a consideration passing at the time of its execution, was not recorded until within four months prior to the beginning of bankruptcy proceedings, and which operated at the date of its registration to give the mortgagee a preference over other creditors. We believe this is what the Congress intended, and with the more confidence because it tends to enforce that open dealing which is the essential basis of commercial morality.

The case was correctly decided in the court below, and the decree appealed from will be affirmed.

FIRST STATE BANK OF MILLIKEN v. SPENCER.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4112.

1. BANKRUPTCY ⟸209—PREFERENCES—RECOVERY—NATURE OF REMEDY.
   Where, in a suit by a bankrupt's trustee to recover an alleged preference, the only relief demanded was the recovery of money claimed to have been paid to defendant by the bankrupt under circumstances alleged to constitute a voidable preference, there was a plain, adequate, and complete remedy at law; and hence a bill in equity was not maintainable under Judicial Code, § 267 (Act March 3, 1911, c. 231, 36 Stat. 1163 [Comp. St. 1913, § 1244]), providing that suits in equity shall not be sustained in courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 318; Dec. Dig. ⟸209.]

2. EQUITY ⟸352—BILL—INTERROGATORIES—PERSONS SUBJECT.
   A mere witness not a party to a suit cannot be compelled to answer interrogatories attached to the bill.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 736; Dec. Dig. ⟸352.]

3. DISCOVERY ⟸19—BILL—EQUITIES.
   Where a bill has no equity, it cannot be maintained as a bill for discovery, especially as against persons not parties to the action.
   [Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20–26; Dec. Dig. ⟸19.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by Fermor J. Spencer, as trustee in bankruptcy of the estate of Mrs. H. Townsend & Co., against the First State Bank of Milliken, a corporation, to recover an alleged preference. Decree for complainant, and defendant appeals. Reversed and remanded, with instructions.

G. Dexter Blount, of Denver, Colo. (J. Howard Dana, of Denver, Colo., and Harry E. Churchill, of Greeley, Colo., on the brief), for appellant.

William R. Kelly, of Greeley, Colo. (Leo. G. Mann, of Greeley, Colo., on the brief), for appellee.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. Appellee, as trustee in bankruptcy of the estate of Mrs. H. Townsend & Co., brought this action against the appellant to recover the sum of $1,100 in money, claimed to have been paid to it by the bankrupt under such circumstances as to constitute a voidable preference. On final hearing the trial court found that the payment of $1,067 on May 17, 1911, to appellant out of assets which belonged to the estate of the bankrupt, was an unlawful preference and rendered judgment for said sum and interest, amounting in all to $1,200.75, against appellant. The case had not a single element of equitable jurisdiction, unless all actions to recover a voidable preference are necessarily equitable actions. The suit was commenced by the filing of a bill and the issuance of a subpœna. Appellant was the only defendant. Nevertheless, there were attached to the bill 13 interrogatories to be answered by R. M. Benton and Lossie R. Wheaton, the cashier and assistant cashier respectively of appellant, and Mrs. Anna A. Townsend, who was in no way a party to the action but simply a witness. The appellant not only demurred to the bill, but the persons to whom the interrogatories were directed also demurred. The second ground of demurrer contained in each demurrer, was as follows:

"That the bill of complaint on its face shows no grounds of equitable relief, and the equity side of this court has no jurisdiction of the matters complained of in the bill, and if plaintiff has any right of action in this court, it is purely of legal cognizance."

[1] The demurrers were each overruled, and the so-called respondents, including the appellant, Benton, Wheaton, and Townsend, were ordered to answer the bill of complaint, and Benton, Wheaton, and Townsend were ordered to answer the interrogatories attached to the bill, and in default of such answer it was further ordered that an attachment issue against them and each of them. Exceptions were taken to these orders, and, reserving these exceptions, the so-called respondents answered the bill and the interrogatories. From the commencement to the close of the action the appellant protested against being proceeded against on the equity side of the court. The several rulings of the trial court on the question of its jurisdiction to proceed as a court of equity are assigned as error. The question before us is not whether a court of equity could grant the relief prayed for, but wheth-

er the trial court erred in not following the command of section 267, Judicial Code, which reads as follows:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

No reason can be suggested why the remedy at law to recover the money in question was not plain, adequate, and complete. If this be so, then the appellant was not only deprived of a substantial right, including a trial by jury, but the plain command of the statute was not followed. It would seem from some of the decisions that courts have fallen into the habit of treating the requirement of the statute lightly where relief can be given in equity. If, in a particular case, the remedy at law is plain, adequate, and complete, then under the statute in such case there can be no concurrent jurisdiction between a court of equity and a court of law, if objection is seasonably made. The statute quoted declared no new principle, but the principle itself which has always ruled courts of equity was of such importance that Congress crystallized it by legislation and placed the matter beyond dispute. It would therefore seem to be the duty of courts to give force and effect to the statute whenever it is applicable. "This enactment certainly means something." New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205–214, 2 Sup. Ct. 279, 27 L. Ed. 484.

[2] The serious consequences which may result in a violation of the statute are illustrated in the present case. Granting that the suit was one of equitable jurisdiction, the cashier and the assistant cashier were persons to whom interrogatories might be properly directed, as they were officers of the defendant bank; but, so far as the witness Townsend is concerned, the appellee had no authority to direct interrogatories to her in the bill of complaint, yet, notwithstanding this, she was compelled under threat of attachment to answer the interrogatories. It is entirely irrelevant to say that this is a bankruptcy proceeding, and, as all bankruptcy proceedings are in the nature of equitable actions, therefore this suit is an equitable action. The truth is that it is simply a suit or proceeding arising out of bankruptcy, and whether it shall be prosecuted in equity or at law depends upon the nature of the case and the relief demanded. The language of Judge Severens in delivering the opinion of the Circuit Court of Appeals of the Sixth Circuit in Warmath v. O'Daniel, 159 Fed. 87, 86 C. C. A. 277, 16 L. R. A. (N. S.) 414, is so pertinent to the case at bar that we quote liberally from it:

"The question on this appeal which arises on the first two of the assignments of error is whether the court below was right in overruling the appellant's contention on his demurrer that the suit was not properly brought in equity for the reason that there was a plain, adequate, and complete remedy by an action at law. The objection was taken at the threshold, and the question is not embarrassed by the laches of the defendant in raising it.

"We think the court should have sustained the demurrer. The judgment sought was for a definite sum of money, precisely that which the court by its decree awarded to the complainants. And the whole sum was recoverable, if any of it was; for the assets of the estate would not come near the amount of the debts. There was no contingency in the liability, or apportionment of the burden among several defendants to be made by the judgment. The response of the court to the demand of the complainants was simply an al-

lowance or refusal of it. Nor was there any embarrassment in the procedure. The evidence produced would be, and was in this case, as completely available in an action at law as in a court of equity. No injunction was sought or required. The issue was one which a jury could readily understand and decide under proper instructions from the court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious, but unsubstantial, figment. No distinct or formal preliminary action was required or contemplated by the statute. If the defendant had obtained part of the estate which should have come to all the creditors, proof of that fact would entitle the trustees to recover it. Perhaps there may be cases where a declaration of the court may be necessary to completely fulfill all requirements, as where the transfer has been accomplished by a deed or other solemn instrument which may be made matter of record, or is a muniment of title the existence of which would indicate ownership and the right to sell and convey or mortgage, or do such other things with it as belong to ownership. But in the present case nothing is stated in the bill which makes such a proceeding necessary, nor indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon, and without more, the court gives judgment for the sum he is entitled to recover. And that was what occurred in the present instance. There was no preliminary declaration that this transfer be set aside. The suggestion made would be the adoption of a devise for evading the statute forbidding a resort to a court of equity. * * *

"It is also urged that courts of equity have jurisdiction in cases of fraud; which is true enough, but the doctrine has its limitation in that the fraud is not remediable by an action at law. A man may acquire another's property by fraudulent misrepresentation; but if the latter may obtain complete relief in an action at law, as by a judgment for damages or for the recovery of the property by an action of replevin, he cannot resort to a suit in equity."

The following cases are in line with the doctrine above announced: Garrison v. Markley, Fed. Cas. No. 5,256; Brock v. Olliver, 149 Ala. 93, 43 South. 141; McCormick v. Page, 96 Ill. App. 447; Stern v. Mayer, 99 App. Div. 427, 91 N. Y. Supp. 292; Merritt v. Halliday, 107 App. Div. 596, 95 N. Y. Supp. 331.

On the other hand, there are cases which seem to hold a contrary view; but, when the cases are examined, it will be found that very few, if any, of the cases have discussed the matter on principle. The case of Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, was decided by the Circuit Court of Appeals of the Seventh Circuit in 1905. An examination of the opinion in that case shows that one of the grounds for assuming jurisdiction in equity in that case was that the objection that the proceeding must be at law was not seasonably taken. Parker v. Black (D. C.) 143 Fed. 560, was a suit in equity for an accounting. The District Court said:

"Although lack of jurisdiction was suggested at the hearing, it is not pressed in the briefs submitted for the defendants."

This case was subsequently affirmed by the Circuit Court of Appeals of the Second Circuit. 151 Fed. 18, 80 C. C. A. 484. That court said:

"The point is taken, however, that there was a full, adequate, and complete remedy at law to recover the preferential transfer in controversy. * * * Upon this point we think we should follow the decisions made by two different Circuit Courts of Appeal upon a state of facts practically identical with those of the present case, notwithstanding we should have been of a different opinion if the question had been originally presented to us."

The decision of two different Circuit Courts of Appeals, referred to in the language above quoted, were the cases of Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408, and Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464, above mentioned. The case of Wall v. Cox was a bill filed by certain creditors of one W. H. Gilbert in the District Court of the United States for the Western District of North Carolina, alleging that Gilbert was insolvent, and on October 10, 1899, had transferred his stock of goods with intent to hinder, delay, and defraud his creditors by a bill of sale to John D. Wall and Thomas W. Huske. This was simply a creditors' bill, and of course equity had jurisdiction. The Supreme Court, in Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845, however, decided that the lower courts had no jurisdiction either at law or in equity. In Parker v. Sherman, 212 Fed. 918, 129 C. C. A. 437, the Circuit Court of Appeals of the Second Circuit followed Parker v. Black for the same reason expressed in the language above quoted. We are not persuaded that a court may set aside the expressed command of a statute for the sake of uniformity of decision. In Pond v. Bank (D. C.) 124 Fed. 992, Holt, District Judge, squarely passes upon the question, and in that case, which was a bill filed to recover $16,000 in money paid by the bankrupt under circumstances alleged to have constituted a preference, decided that a court of equity had jurisdiction. It was said that the suit was analogous to a creditor's suit to set aside a fraudulent conveyance. This question of fraud, however, is well disposed of in Warmath v. O'Daniel, supra. The question of fraud has no importance if there is a plain, adequate, and complete remedy at law. Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451.

[3] The claim that the bill in this case may be sustained as a bill for discovery needs no discussion. If there was no equity there could be no discovery, especially as against persons who are not parties to the action.

We are clearly of the opinion that the trial court erred in overruling the demurrer of appellant, and for this reason the case should be reversed and remanded, with instructions to transfer the case to the law docket, there to be proceeded with as law and justice may require.

WILLIAMS v. GERMAN-AMERICAN TRUST CO.

In re FORWARD LAUNDRY CO.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4166.

1. BANKRUPTCY ⟸159—VOIDABLE PREFERENCE—CHATTEL MORTGAGE—RECORD.

Where no attack was made on a chattel mortgage, except that it was a voidable preference, it was no answer to that attack to show that the mortgage was otherwise valid, whether on or off the record, or whether against third parties, or between the original parties thereto; the trustee being empowered to attack a transfer as a voidable preference conceded valid on all other grounds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268–281; Dec. Dig. ⟸159.]

---

2. BANKRUPTCY ⟸168—VOIDABLE PREFERENCE—STATE LAWS.

By the express provisions of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9585]), the trustee may attack any transfer alleged to be voidable as a preference if made within the period fixed by law; it being only when he attacks a transfer or mortgage on other grounds that state laws apply as to the validity of the transfer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. ⟸168.]

3. BANKRUPTCY ⟸161—PREFERENCES—CHATTEL MORTGAGE—RECORD—STATUTORY AFFIDAVIT—FAILURE TO FILE—FOUR-MONTH PERIOD.

A state law provided for the acknowledgment and record of chattel mortgages and declared that if such a mortgage is given to secure more than $2,500, there should be annually recorded on the records of the county wherein the mortgage is recorded a sworn statement of the mortgagee, or one of them, showing that the mortgage was given in good faith to secure the payment of money given with the amount due thereon. *Held*, that where a chattel mortgage securing $4,500 was executed September 18, 1911, and filed for record on September 22d following, but no sworn statement was ever filed, and the mortgagee on April 25, 1913, when the mortgagor was insolvent, took possession of all the property covered by the mortgage, the four months provided by the bankruptcy law in which the mortgage could be attacked as a preference began to run, not from the date the mortgage was recorded, but from the date the mortgagee took possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⟸161.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Bill by Richard H. Williams, as trustee in bankruptcy of the Forward Laundry Company, against the German-American Trust Company. Decree for defendant, and complainant appeals. Reversed and remanded, with directions.

John A. Gordon, of Denver, Colo. (Andrew H. Wood, of Denver Colo., on the brief), for appellant.

Fred W. Parks, of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. This action was commenced by bill in equity to recover of appellee the value of certain personal property alleged to have been transferred to it from the estate of the bankrupt, within four months prior to the filing of the petition in bankruptcy, under such circumstances as to constitute a voidable preference. Appellee moved to dismiss the bill for the reason that it did not state facts sufficient to constitute a cause of action. Equity Rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi). No objection was made that the action was brought in equity and not at law. The bill was dismissed, and appellant appeals.

The facts pleaded in the bill are substantially as follows: An involuntary petition in bankruptcy was filed against the Forward Laundry Company, May 20, 1913. June 13, 1913, the company was adjudged a bankrupt, and in due course thereafter appellant was appointed trustee of the estate of the bankrupt. September 18, 1911, the laundry

company executed and delivered to William F. Dieter its eight promissory notes, payable one every three months thereafter, and amounting in all to the principle sum of $4,500. To secure the payment of said notes on the same day, the laundry company executed and delivered to Dieter its chattel mortgage on certain personal property described in the bill of the alleged value of $6,000. The notes and chattel mortgage, although given to Dieter, were in fact the property of appellee, and Dieter subsequent to the execution of the notes and mortgage indorsed and transferred the same to it. The mortgage was filed for record September 22, 1911. That no sworn statement of the mortgagee or any one in its behalf that said mortgage was given in good faith to secure the payment of the sum of money mentioned therein, or that said sum of money was still unpaid, or how much thereof, if any, remained unpaid, was ever recorded on the records of the county of Denver where said chattel mortgage was recorded, nor was any such sworn statement ever filed or offered for record. That on April 25, 1913, the laundry company was insolvent, and the aggregate of its property at a fair valuation was not sufficient in amount to pay its debts, and the appellee at that time knew and had reason to believe and know that said laundry company was insolvent.. That on said April 25, 1913, appellee fraudulently took possession of all the goods and chattels mentioned in said chattel mortgage, and the said laundry company suffered and permitted the appellee to take such possession under said mortgage, and transferred the goods and chattels mentioned therein to appellee; that appellee foreclosed said chattel mortgage and appropriated the proceeds of the sale to its own use and benefit and to the payment in full of its debt against the laundry company. That the effect of the taking and selling of said goods and chattels and the appropriation of the proceeds thereof by appellee toward the payment of its debt enabled said appellee to obtain a greater percentage of its debt than any other of the creditors of the said laundry company of the same class. That the taking, selling, and appropriation of the goods and chattels described in the mortgage operated as a preference in favor of the appellee, and appellee at the time had reasonable cause to believe that the taking, selling, and appropriation of said goods and chattels under said mortgage toward the payment of its debt would effect a preference in its favor over other creditors of the laundry company. That the property sold under said mortgage had passed into the hands of innocent purchasers, and the specific property could not be recovered. It was prayed by the bill that the chattel mortgage be declared void, and that the transfer of the property to the possession of appellee be adjudged and decreed to be a voidable preference, and that appellant recover from appellee the value of said goods and chattels. For the purposes of this appeal, the above facts stand admitted.

[1] We think much confusion exists on the part of counsel for appellee as to the nature of the attack made upon the alleged transfer. No attack is made upon it, except that it constituted a voidable preference. Hence it does not answer this attack to show that the mortgage was otherwise valid whether on or off the record, or whether against third parties or between the original parties thereto. The trustee can attack a transfer as a voidable preference concededly valid on all other

grounds. The real question, so far as the record of the transfer is concerned, is, Did the four months in which it could be attacked commence to run from September 22, 1911, the date the mortgage was recorded, or April 25, 1913, the date that appellee took possession of the mortgaged property? If from the former date the bill was rightly, if from the latter date wrongly, dismissed.

[2] This statement of the case also does away with much apparent confusion as to the power of the trustee to attack the transfer. By the express authority of the bankruptcy law, the trustee can attack any transfer alleged to be voidable as a preference if made within the period fixed by law. It is only when the trustee attacks a transfer or mortgage on other grounds that state laws and decisions apply as to the validity of the transfer.

[3] It is the claim of counsel for appellant that the failure of appellee to file a sworn statement required by the law of Colorado, as alleged in the bill, rendered the recording of the chattel mortgage void to such an extent that the period of four months must be computed from the date that appellee actually took possession, namely, April 25, 1913. The appellant attacking the transfer as a preference, the only point in controversy is as to the date from which the four months must be computed. The law of Colorado provides for the acknowledgment and recording of chattel mortgages. It also provides that a chattel mortgage after it is recorded, if in good faith, shall be good and valid from the time of recording until the maturity of the last installment of the mortgage indebtedness, not exceeding five years where the indebtedness is more than $2,500, and not more than $20,000. The law then provides as follows:

"And provided further, that if such mortgage be given to secure a sum greater than twenty-five hundred (2,500) dollars, there shall be recorded annually on the records of the county wherein such mortgage shall have been recorded, a sworn statement of the mortgagee, or one of the mortgagees, if there be more than one, showing:

"First. That said mortgage was given in good faith to secure the payment of the sum of money mentioned therein.

"Second. That said sum of money is still unpaid; or if a portion thereof shall have been paid, then how much thereof, if any, remains unpaid."

It is conceded that appellee did not comply with this proviso. In the case of Burchinell v. Gorsline, 11 Colo. App. 22, 52 Pac. 413, the Court of Appeals of Colorado used the following language in reference to this proviso:

"But if the debt secured exceeds the sum of $2,500, its validity by virtue of its record continues only until the time when the record of the first sworn statement required by the statute is due. The record of that statement is by the terms of the statute a necessary condition of its further validity; and upon a failure to make such record, its virtue is exhausted. If the statement is duly recorded, the mortgage remains in force until the next statement is due; and so the effect of the record of each annual statement is to preserve the vitality of the mortgage until the time when, by the terms of the statute, the succeeding one should be recorded. * * * Its language is peremptory, and the recording of the sworn statement within the proper time is essential to the continued validity of the mortgage. Knowledge, on the part of a person acquiring an interest in the property, of the existence of a prior mortgage, the affidavit necessary to the preservation of which had not been record-

ed, could not prejudice his right in the property. It would amount only to knowledge of an instrument which had become void as to him."

It is true in the case cited, which was a contest between the sheriff and a mortgagee, the court thought a delay of 17 days after the expiration of one year from the filing of the mortgage did not invalidate the mortgage; the court seeming to be of the opinion that, as the statute did not fix any positive date upon which the sworn statement should be filed, a reasonable time might be allowed in which to comply with the law. Conceding that this is the true construction of the statute, it appears in the record before us that there was a delay of seven months after the expiration of one year from the time the mortgage was recorded. It was recorded September 22, 1911, and possession was not taken until April 25, 1913. There must be a limit to the time within which a mortgagee may comply with the statute, or else the statute itself becomes of no force or effect. If the mortgagee may neglect to file the sworn statement for seven months, why not for one year and why not for five years; where is the line to be drawn? On the other hand, if the mortgagee may record his mortgage and neglect to comply with the statute for five years, and then at the end of that time seize the mortgaged property at the time when the mortgagor has become insolvent, then the bankrupt law is defeated, if he can simply point to the date when the mortgage was recorded and show the trustee in bankruptcy that the four-month period has elapsed. We do not think any such reasoning ought to be adopted as would bring about either one of these results or both. We think the delay in the case at bar to file the sworn statement, as required by law, was so unreasonable that the court must declare, as matter of law, that the record of the mortgage ceased to have any force or validity. The taking possession of the mortgaged property by appellee was, under the Colorado statute, equivalent to the recording of the mortgage, but the prior record of the mortgage having been rendered invalid by the failure of the appellee to comply with the law, the period of four months within which the trustee could attack the transfer as a preference must be figured from the date of taking possession, April 25, 1913.

It was said by the Supreme Court of Colorado in Ferris v. Chambers, 51 Colo. 368, 117 Pac. 994, as follows:

"Provisions of a statute, rendering a chattel mortgage effective, even though the mortgagor retains possession of the property, are statutory, and if the statute prescribes that, in order to preserve the lien of a mortgage with the property in possession of the mortgagor, something shall be done, that thing must be done as prescribed by the statute."

An examination of the decisions in states having similar provisions in their statutes as to the filing for record of affidavits or statements, whether the purpose of the affidavit or statement is to preserve, renew, or extend the chattel mortgage, convinces that it is generally held that a failure to comply with such provisions renders the chattel mortgage void. Pleasonton v. Johnson, 91 Md. 673, 47 Atl. 1025; Milburn Mfg. Co. v. Johnson, 9 Mont. 537, 24 Pac. 17; Hanes v. Tiffany, 25 Ohio St. 549; Blandy v. Benedict, 42 Ohio St. 295; Benedict v. Peters, 58 Ohio St. 527, 51 N. E. 37; Lockwood & Co. v. Crawford, 29 Kan.

286; Swiggett v. Dodson, 38 Kan. 702, 17 Pac. 594; Porter v. Parmley, 52 N. Y. 185; and Marsden v. Cornell, 62 N. Y. 215.

We do not cite these cases for the purpose of showing that the chattel mortgage in this case was void outside of the question of preference, but simply to show that the record of the mortgage in question had ceased to be of validity for the purpose of fixing the date from which the four months provided by law must be computed. The bill otherwise stating a cause of action, it results that the judgment dismissing the same must be reversed and the case remanded, with directions to allow the appellee to answer the same, if it is so advised; and it is so ordered.

In re J. L. KESNER CO.

(Circuit Court of Appeals, Second Circuit. December 22, 1914.)

No. 64.

BANKRUPTCY ⊂=139—TRADE FIXTURES—JUDGMENT LIEN—"REAL PROPERTY"—CHATTELS REAL.

Code Civ. Proc. N. Y. § 1430, provides that the expression "real property" includes leaseholds where the lessee is possessed at the time of sale of at least five years unexpired term, etc., and section 1251 declares that, except as otherwise prescribed, a judgment binds, for 10 years after filing the judgment roll, the real property and chattels real, in the county in which it is docketed, which the judgment debtor has at the time of so docketing or which he may thereafter acquire. *Held*, that where, at the date of the bankruptcy, the bankrupt was occupying certain real property under leases each of which had more than 10 years to run, trade fixtures affixed to the floors by nails, bolts, screws, etc., and intended to be used as long as the business continued or until they wore out and were replaced, were chattels real as between the bankrupt and its creditors, and were therefore subject to the lien of judgments recovered against it more than four months before bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 198, 199, 210–219; Dec. Dig. ⊂=139.

For other definitions, see Words and Phrases, First and Second Series, Real Property.]

Lacombe, Circuit Judge, dissenting.

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

R. P. Levis, of New York City, for appellant.

J. M. Lesser, of New York City, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an appeal from and a petition to revise an order of the District Court confirming the report of the referee holding certain judgment creditors of the bankrupt entitled to a lien upon the proceeds of sale of fixtures belonging to the bankrupt and directing the judgments to be paid therefrom.

The bankrupts carried on a department store in buildings covering the entire front on the west side of Sixth avenue between Twenty-Second and Twenty-Third streets, with the exception of the Twenty-

Third street corner. They occupied under 12 separate leases, each of which had more than 10 years to run at the date of adjudication. In each department they had installed at their own expense fixtures appropriate to the business therein conducted which were affixed to the floors and walls by nails, bolts, screws, etc., and were intended to be used as long as the business continued or until they wore out and were replaced.

More than four months before the petition in bankruptcy was filed judgments were recovered against Kesner & Co. by Andrew F. Jessen as administrator and by Charles M. Lamb & Co., upon which no executions were ever issued because before stay of execution had expired receivers were appointed of Kesner & Co., in an equity suit in the District Court which was subsequently displaced by these proceedings in bankruptcy.

The question to be determined is whether the fixtures are realty, being a part of the leasehold estate, as the judgment creditors contend, or personal property, as the trustee contends.

The leaseholds were chattels real by virtue of section 1430 of chapter 13, tit. 2, art. 3, Code of Civil Procedure, entitled "Sale, redemption and conveyance of real property; rights and liabilities of persons interested"—which reads:

"Sec. 1430. To what leasehold property this article applies. The expression 'real property,' as used in this and the succeeding article, includes leasehold property, where the lessee or his assignee is possessed, at the time of the sale, of at least five years unexpired term of the lease, and also of the building or buildings, if any, erected thereupon."

We do not overlook the fact that under the Decedent Estate Law leases for years are personal property. Despard v. Churchill, 53 N. Y. 192.

And the leaseholds were subject to the lien of the judgments by virtue of section 1251 of chapter 11, tit. 1, of article 3 of the Code entitled "Docketing a judgment; effects thereof, as a lien upon real property; suspending and discharging the lien; satisfaction and assignment of a judgment"—the material part of which reads:

"Sec. 1251. Except as otherwise specially prescribed by law, and except also as in this section below provided, a judgment, hereafter rendered, which is docketed in a county clerk's office, as prescribed in this article, binds, and is a charge upon, for ten years after filing the judgment roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years."

It follows that, if the fixtures were a part of the leasehold estate, the judgments were liens upon them and are to be paid out of the proceeds of sale which have been kept as a separate fund in the hands of the trustee to await the determination of the court.

There can be no question that between Kesner & Co., and their landlords, in the absence of any agreement to the contrary, of which there is no evidence, these are trade fixtures removable as personalty by Kesner & Co. The rule, however, between landlord and tenant is an exception. Between grantor and grantee, mortgagor and mortgagee, and in condemnation proceedings the general rule applies that

annexations to the freehold are a part of the freehold. The question to be decided is whether, as between Kesner & Co. and their judgment creditors, these fixtures were a part of the leasehold or removable as personalty.

When the owner of land who has annexed fixtures to it, either sells or mortgages the land, the fixtures go with it, though not mentioned (Walker v. Sherman, 20 Wend. [N. Y.] 636, 655; Day v. Perkins, 2 Sandf. Ch. [N. Y.] 359); and in condemnation proceedings the rule is the same (Matter of the Mayor, 39 App. Div. 589, 595, 57 N. Y. Supp. 657; 19 Cyc. 1059). Cowen, J., in Walker v. Sherman, said, at page 655 of 20 Wend.:

"On the whole, I collect from the cases cited, and others, that, as a general rule, in order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm, or lot, etc., or in terms denoting a mill or factory, etc., nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building. I am not prepared to deny that a machine movable in itself would become a fixture from being connected in its operations by bands, or in any other way, with the permanent machinery, though it might be detached, and restored to its ordinary place, as easily as the chain in Farrar v. Stackpole [6 Greenl. (Me.) 154, 19 Am. Dec. 201]. I think it would be a fixture notwithstanding."

In Matter of The Mayor, Rumsey, J., said:

"But where the improvements were put upon the land by the owner, and it was evident that they were so placed there to enable him to better use his own land for the purposes for which he intended it, there could have been on his part no intention to remove these improvements, and justice did not require that the common-law rule should be limited for his protection. For that reason it has always been held that, so far as the owner is concerned, the law of fixtures would be rigorously limited, and that whatever had been put upon the premises under such circumstances that it would become a part of the freehold, or essential for the purposes for which the freehold was used, would be, so far as the owner was concerned, regarded as a fixture as between him and any person to whom he proposed to transfer the land.

"The same rule exists in proceedings to take land under the right of eminent domain, and the commissioners of estimate have no right to restrict the assessment to the simple value of the land, compelling the owner to retain the fixtures on the premises, and exempting the city from an obligation to take and pay for them as a part of the land. Schuchardt v. Mayor, 53 N. Y. 202, 208. Whatever has been put upon the land by the owner with the intention that it should remain upon the land and was essential to the use which he made of it is, generally speaking, as between himself and his vendee, a fixture, and goes with the land when he shall sell it."

A sale upon execution carries them exactly as a conveyance does, there being no difference in this regard between a voluntary sale by the grantor and a forced sale by the sheriff. Farrar v. Chauffetete, 5 Denio (N. Y.) 527, 529. Mr. Ewell in his work on Fixtures says (page 275):

"The general rule undoubtedly is that all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance or mortgage of the freehold, where there is nothing to indicate a contrary intention. And it makes no difference that the conveyance is by virtue of legal process as by

sale of land on execution, the rule in such a case being the same as in the case of a private sale. The rule is the same in the case of a conveyance or mortgage of a leasehold without mentioning the fixtures, which, though removable, as against the landlord, pass, unless a contrary intention appears."

When a lessee assigns or mortgages a leasehold, we think the same rule as to fixtures applies as in the case of the conveyance or mortgage of the freehold. On this subject Mr. Ewell says (page 278):

"In like manner, tenant's fixtures, though removable by the tenant as against the landlord, at the end of the term, pass as a part of the security by the deposit of a lease by way of equitable mortgage, although they are not mentioned in the memorandum of deposit. And it makes no difference that the fixtures are of a kind called 'trade fixtures'; that circumstance being of importance only in questions depending between landlord and tenant, and having no effect upon those arising between mortgagor and mortgagee. And the rule is the same in this respect, whether the mortgage be in fee, by way of lease for a term of years, or of a leasehold interest only."

The late Judge Charles P. Daly recognized this in a very learned opinion in Breese v. Bange, 2 E. D. Smith (N. Y.) 474, 490, 491. On the other hand, Globe Marble Mills Co. v. Quinn, 76 N. Y. 23, 32 Am. Rep. 259, reads at first sight to the contrary. In it the tenant puts in certain trade fixtures after which the landlord executed a mortgage upon the premises. Subsequently the tenant bought the premises and so merged his tenancy in the fee. The mortgage was then foreclosed, and the question was whether the mortgagee or the person originally the tenant was entitled to these trade fixtures. Judge Andrews said:

"The conversion of the machinery from personal to real property is claimed to have resulted from the purchase by and the conveyance to the plaintiff of the fee of the land, under the provisions of the lease, after the execution of the mortgage and prior to the foreclosure. The estate for years merged in the fee. As a consequence of the union of the two estates in the same person, the lesser estate was, by the technical but well-settled rule of the common law, extinguished. But the consequence claimed, that the machinery became eo instante by operation of law, a part of the realty, upon the acquisition by the plaintiff of the fee of the land to which the machinery was attached, does not, we think, follow.

"The estate which the plaintiff had as lessee merged in the estate in fee. But the ownership of the chattels, which was vested in the plaintiff before the conveyance of the land, was separate from and independent of its interest under the lease, and was not derived from the lessor. The chattels were not a part of the inheritance. This ownership was not merged, because it was not an interest carved out of the fee; and the doctrine of merger does not apply. If the plaintiff, after it acquired the fee, had mortgaged or conveyed the land, all that was comprehended within the designation of land would pass, and quite a different question would be presented. In this case, the express and presumed intention of the plaintiff, when the machinery was put into the mill, was that it should remain personal property. There is nothing to indicate a change of intention afterwards."

Mr. Dexter, the referee, thought that this was a qualification of the merger in order to prevent the inequitable result of subjecting the fixtures to the mortgage which were free of it during the tenancy. We think this explanation correct. Bispham on Equity, § 160. While there is little distinct authority in this state on the subject, there is some in other jurisdictions. Kile v. Giebner, 114 Pa. 381, 7 Atl. 154; First National Bank v. Adam, 138 Ill. 483, 498, 28 N. E. 955; McNally v.

Connolly, 70 Cal. 3, 11 Pac. 320; San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 Pac. 92; Southport Bank v. Thompson, L. R. 37 Chan. Div. 64; 19 Cyc. 1064; Ewell on Fixtures, p. 275.

In Southport Bank v. Thompson, Lopes, J., said at page 72:

"In a mortgage of freehold property all things which are annexed to the place are part of the mortgage security, and therefore the deed need contain no mention of the fixtures. That is so unless a contrary intention can be collected from the deed. That, no doubt, is the law with regard to freehold property. But it has been said that a different rule applies when the mortgaged property is not freehold but leasehold. In my opinion there is no such distinction."

Some fixtures are as a matter of law regarded by the courts of this state as personalty—for example, gas fixtures and carpets. But the appellant having argued the case on general lines without making any discrimination between the particular fixtures in question, we decide it in the same way. The order is affirmed.

LACOMBE, Circuit Judge (dissenting). I am unable to concur with my Associates.

The leases are not printed in the record. It might be inferred, from the stipulation at folio 63, that some of them made express provisions as to trade fixtures while others did not. The case may be more conveniently discussed by assuming that the whole land and buildings were covered by a single lease which says nothing about trade fixtures.

The following propositions seem to me to lead to the following conclusion:

I. Before these counters, shelving, chandeliers, etc., were placed in the buildings they were personal property; the land and building being of course real estate.

II. They were of such a character and so affixed that upon the termination of the lease either by expiration, or by cancellation, by mutual consent, or by failure to pay rent, the tenant could remove them (except as there might be some lien on them for unpaid rent). This is on the theory that, when such personal property is thus placed on leased premises to be used in that way, it is the intent of the parties, implied when not expressed (it not infrequently is expressed), that it shall remain the personal property of the lessee to be disposed of as he pleases.

III. Assuming that there is nothing in the lease forbidding or restricting its assignment, the lessee might dispose of it, his chattel real, a lease for years of real estate, by sale, or he might mortgage it. In this contract of sale, or mortgage, he might make such provision as he chose touching this personal property which he had placed there, under circumstances which did not change its character or qualify in any way his right to dispose of it. He might agree that all of it should go to the purchaser, or be covered by mortgage; or that part of it might thus pass or be incumbered and part not; or that none of it should pass or be incumbered. If the prospective purchaser or mortgagee did not assent to those provisions, he would not buy the property or lend his money. If he did assent and close the contract there would be expressed a mutual intent as to the disposition of these trade appliances, which would be controlling. To the extent to which they were reserved,

they would remain the lessee's personal property just as they were when he placed them on the premises.

IV. The lessee might sell or mortgage the lease without referring at all in the contract to these trade appliances. What would then happen to them? The petitioner-appellant contends that they would pass by the sale of the lease, or be incumbered by its mortgage. No opinion need be expressed as to this contention. Assume it is correct. Upon what theory does it rest? None that I can find, except the theory that such is the intent of the parties to the sale or mortgage—an intent which will be implied when the contract contains nothing to indicate a different intent, which it might have done, if the lessee had insisted on such provision. If the petitioner's theory be accepted, it will come to pass that the original status of the trade appliances, which after emplacement remained the personal property of the lessee to be disposed of at his pleasure, has been changed because he has himself taken some affirmative action from which the law implies an intent on his part that his title to them should pass to a third party or be incumbered with a special lien to such third party.

V. It seems the natural inference from these propositions that, until the lessee does something to indicate his intent to dispose in some way of this moveable property, it must be assumed that it remains just as it was before, his property removable by him when he chooses to do so; the unincumbered title being still in himself.

In this case the lessee has not sold the lease, nor mortgaged it. What act of his can be said to evidence an intent to change its status? There is no act of his shown, except his failure to pay an ordinary debt which he has contracted. I fail to see how that single act can warrant the inference that he has thereby changed the status of this particular property of his. No doubt, a judgment for his debt may be collected out of any of his property of every kind or sort; but it seems to be going very much further to hold that, the instant judgment is entered, the property which the moment before was his personal property has become real property.

I vote to reverse.

THE J. S. WARDEN.

(Circuit Court of Appeals, Third Circuit. December 26, 1914.)

No. 1852.

1. EVIDENCE ⊂=333—ADMISSIBILITY OF MEMORANDA—OFFICIAL REPORTS OF GOVERNMENT EMPLOYÉ.

A dredge, employed in dredging the channel of a river under contract with the United States, was on several occasions caused to break the spuds by which she was anchored by the swell from a passing steamer, resulting in expense of repair and loss of time. In a suit to recover the damages, a United States inspector of engineering, in charge of the work and stationed on the dredge, testified to the facts respecting the breaking of the spuds and the speed and nearness of the passing steamer, but was unable to testify as to the dates. In his employment he was required to file daily reports giving the progress of the work, and in such

reports he noted the delays caused by the breaking of the spuds and their replacement. *Held*, that it was not error to admit in evidence the entries of the dates on which such occurrences were noted, which the witness testified were in his own handwriting, made on the dates shown, and were correct, although he could not testify to the dates from present recollection, even when refreshed by reading his entries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1247–1257, 1259–1265; Dec. Dig. ⊂⇒333.]

2. WITNESSES ⊂⇒255—REFRESHING MEMORY—MEMORANDA MADE BY ANOTHER.

A witness may be permitted to refresh his memory by the use of a written memorandum, although it was not made by himself, if he saw it while the facts stated therein were fresh in his recollection, and if he knew that the memorandum as then made was correct.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874–890; Dec. Dig. ⊂⇒255.]

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

Suit in admiralty by the Newark Meadows Improvement Company against the steamship J. S. Warden; the Beebe Transportation Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

Chauncey I. Clark, of New York City, for appellant.

Edw. W. Norris, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. It is averred in the libel filed in this case that the libelant was the owner of a dredge, engaged under contract with the United States in deepening and widening the channel of the Passaic river in the state of New Jersey, and that upon six dates therein named, while the libelant's dredge was anchored in places of safety by means of spuds or long timbers, the steamship J. S. Warden passed the dredge, producing swells which caused the anchored dredge to surge at her spuds and to break them, for cause whereof negligence is charged in the navigation of the steamship: (1) In not keeping a sufficient distance from the dredge; (2) in passing close to the dredge at a high and dangerous rate of speed; and (3) in not slowing down or heeding warnings given from the dredge—and damages are sought for the cost of installing new spuds and the loss of time consequent thereupon.

Damages were claimed to have been sustained on six separate occasions, for each of which a separate claim was made. The first, second, and sixth claims were dismissed. This appeal relates only to the third, fourth, and fifth claims, upon which the court found for the libelant. The errors assigned, when classified, extend, first, to the sufficiency of the evidence upon which the court made its finding; and, second, to the admissibility of certain of the testimony. A condensed statement of the testimony will be sufficient to dispose of the first ground of error.

In proof of the negligence charged to the steamship J. S. Warden, the libelant produced testimony as follows: At the points of the river at which the spuds were broken, the channel was from 200 to 300

feet wide, at one side of which the dredge was anchored. The steamship J. S. Warden was an excursion boat plying up and down the Passaic river several times daily. While rigidly anchored at her stations, the dredge was passed by the steamship at different times within distances variously estimated from 10 feet to 200 feet, at her highest rate of speed, which was about 12 miles an hour, causing great swells to roll toward and break against the dredge, with the result that the dredge rose and fell with the inflow and outflow of the swells, and surged backward and forward against her spuds, and broke them. Before each occasion of damage to her spuds, warnings were given the steamship by whistle from the dredge, or by her captain calling from her deck. In addition, written complaints were forwarded to the captain and the owner of the steamship, in response to which no reply was made, nor attention given. That the spuds were broken when the dredge was rocked by the swells from the steamship J. S. Warden was well established by the evidence, as likewise was the cost in money and time expended in replacing them.

Opposed to this testimony, evidence for the steamship was produced, tending to prove that she passed the dredge at a rate of speed as low as 5 or 6 miles an hour; that upon occasions she slowed down, maintaining only steerageway; and that there was another steamship upon the river, namely, the Majestic, which was a faster boat, and which, upon its daily trips down the river, preceded the steamship Warden in passing the dredge only by a few minutes. It was maintained that the injury to the dredge might as readily have been occasioned by the swells from the Majestic as by those from the Warden, and that upon the libelant was the burden of affirmatively proving that the damage was caused by the swells from the Warden.

Without reviewing the testimony or reconciling its conflict in this opinion, it is sufficient to say that upon the testimony offered and received we are satisfied that the libelant sustained the burden of proving the negligence of the steamship J. S. Warden, and that in its finding the court below committed no error.

The remaining question is whether the court committed error in admitting certain testimony which must have had an important bearing upon the conclusions reached.

[1] While the libelant, in fixing negligence upon the steamship, had little difficulty in proving by eyewitnesses the proximity of the steamship to the dredge and her high rate of speed in passing, the refusal of her master to slow down and heed warnings, and the effect of her swells upon the dredge in causing her to surge and break her spuds, the libelant at first had considerable difficulty in fixing the precise dates upon which such acts of negligence occurred. The principal witnesses for the libelant as to acts of negligence were a United States inspector of engineering in charge of the work upon which the dredge was employed and the captain of the dredge. The former directed the work, and the latter operated the dredge; the former was responsible to the government, and the latter to the owner of the dredge. It was the duty of the inspector to make daily reports of the work to his chief, and especially to report and give the reasons for any suspension of the work. It was likewise the duty of the captain to make a similar report to the

owner of the dredge, indicating the yardage removed, and any delay in the operation of the work that occurred, and the cause thereof, in making which report he was assisted by the inspector, both being at all times upon the dredge. The reports of the inspector were made by him in his own handwriting and filed at the office of the government in the city of New York. The reports of the captain were prepared by the inspector in his handwriting, upon information supplied by the captain, and by him examined before being mailed and sent daily to the owner. Both witnesses testified readily to the conduct of the steamship; but, unaided, neither could connect his testimony with the dates upon which occurred the acts concerning which he testified.

Upon a rehearing the inspector produced his daily reports. Before testifying as to their contents, he stated that he had no present recollection of the dates upon which occurred the facts concerning which he was ready to testify; that the reports were made by him in the usual and regular course of his employment, and consisted of original entries made upon the dates there indicated; that such entries were made by him in his own handwriting, and were in truth correct, but that by reading the dates his memory as to them was neither refreshed nor his recollection restored.

The entries, however, embraced more than dates. They included a recital of what happened upon the dates, such as: "Starboard spud broken by steamer Warden, replaced at 11:40 a. m." The reports were neither offered nor admitted in evidence, but the witness was allowed to read the entries appearing on them. As they did not refresh his memory, the entries really constituted a record of his past recollection, to the truth of which he swore, and as such they were admitted in evidence.

It was not contended that an entry, "Starboard spud broken by steamer Warden," was admitted to prove the fact that the Warden broke the spud, for upon that fact, deduced from the conduct of the steamer and the behavior of the dredge, the witness was able to testify from his present recollection. But he was unable to testify from his recollection as to the date of the occurrence. The date in the reports, which he swore was correct, connected the time of the occurrence with the occurrence itself. But he could not testify to the date, either from recollection or from a memory refreshed, though at one time the date was within his mind. The entry of the date, therefore, must have been admitted in evidence, though not so stated by the court, as a record of a past recollection, to supplement the witness' present recollection of the facts, and thus together complete a communication of the witness' whole original impression of the facts concerning which he was called upon to testify.

The captain's situation was somewhat different. Like the inspector, the captain could testify to facts unaided, and could not testify to dates; but, unlike the inspector, he could testify to dates from his present recollection when refreshed by reading the cards containing his daily reports to his employer, which the inspector had made upon his information and under his supervision and inspection.

We think the testimony of the inspector was properly admitted under the rule recognized by this court as applied to the facts of the case

of Reyburn v. Queen City Savings Bank & Trust Co., 171 Fed. 609, 96 C. C. A. 373, affirming the decision of the Circuit Court, reported in 163 Fed. 597. In that case the books of a bank, regularly and fairly kept by one of its employés in the regular course of his employment, disclosing original entries of debits and credits, were held admissible in evidence to establish the time of a transaction therein recorded, under the general rule admitting in evidence books of original entries supported by the oath of the party, to prove the transaction therein contained. This rule was early recognized as a rule of convenience. While it existed at common law and is old in this country within the restricted uses for which it was first employed, the rule has gradually been expanded to meet the exigencies and complexities of modern business, until now the rule is recognized as a rule of necessity, without which the administration of justice in many matters would be difficult or impossible.

Entries such as made by a bank clerk, and as in this instance by the inspector of engineering, of the great number of transactions which in the regular course of their employment they were required to make in the books of their employers, the subject-matter of which under human limitations it would be impossible for them to remember, even with the aid of the recorded entries, constitute frequently the very best evidence of a fact that exists. The reasons for the rule and its development appear in the cases. Reyburn v. Queen City Savings Bank & Trust Co., 171 Fed. 609, 96 C. C. A. 373; West Branch Lumbermen's Exchange v. Insurance Co., 183 Pa. 366, 38 Atl. 1081; Remington Machine Co. v. Wilmington Candy Co., 6 Pennewill (Del.) 288, 66 Atl. 465; Owens v. State, 67 Md. 307, 10 Atl. 210, 302; Insurance Co. v. Weide, 14 Wall. 379, 20 L. Ed. 894; Acklen's Executors v. Hickman, 63 Ala. 498, 35 Am. Rep. 54; Bank v. Zorn, 14 S. C. 444, 37 Am. Rep. 733; Davis v. Field, 56 Vt. 426; State v. Brady, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560; Cunningham v. Ry. Co., 63 Hun, 439, 18 N. Y. Supp. 600; Shove v. Wiley, 18 Pick. (Mass.) 558; Manheimer v. Stern (Com. Pl.) 18 N. Y. Supp. 366; Haven v. Wendell, 11 N. H. 112; Howard v. McDonough, 77 N. Y. 592; Starkie on Evidence, 176; 1 Greenleaf on Evidence, § 439a; 1 Wigmore on Evidence, §§ 478, 725, 734, 737, 738.

We are of opinion that the court committed no error in permitting the inspector to read into evidence, for the purpose indicated, the entries made by him under the circumstances narrated.

[2] It is argued that the testimony of the captain of the dredge is inadmissible upon the ground that he gave his testimony with a memory refreshed from memoranda not made by himself. The fact that the memoranda from which the captain refreshed his memory as to dates were the original memoranda made under his direction, upon information supplied by him, and were thereafter inspected and examined by him and found to be correct, disposes of the contention and brings the evidence within the rule that a witness may be permitted to refresh his memory by the use of a written memorandum, although it was not made by himself, if he saw it while the facts therein stated were fresh in his recollection, and if he knew that the memorandum as then made was correct. Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 191, 36 C. C. A. 135; 1 Greenleaf, Ev. (15 Ed.) §§ 436, 437; Commonwealth v. Ford, 130 Mass. 64, 66, 39 Am. Rep.

426; Huff v. Bennett, 6 N. Y. 337, 339; Jones, Ev. § 80; Milling Co. v. Walsh, 108 Mo. 277, 284, 18 S. W. 904, 32 Am. St. Rep. 600; Clark v. Bank, 164 N. Y. 498, 58 N. E. 659; Green v. Caulk, 16 Md. 573; Paige v. Carter, 64 Cal. 489, 2 Pac. 260; McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; Union Central Life Ins. Co. v. Smith, 119 Mich. 171, 77 N. W. 706; Owens v. State, 67 Md. 307, 10 Atl. 210, 302; Pillsbury v. Locke, 33 N. H. 96, 66 Am. Dec. 711.

The decree is affirmed, with costs.

ANHEUSER-BUSCH BREWING ASS'N v. KLEMAN.

(Circuit Court of Appeals, Third Circuit. January 14, 1915.)

No. 1869.

TRIAL ⊂=170—DIRECTED VERDICT—GROUNDS OF RECOVERY NOT PLEADED.

Plaintiff, a Missouri corporation, made a loan to W., which was guaranteed by its agent and orally by defendant. Thereafter the agent and defendant entered into a written contract in which defendant recited that he was bound to pay the unpaid portion of W.'s debt and promised to pay to the agent whatever the agent was required to pay. Both the agent and defendant were citizens of Pennsylvania. The corporation brought an action upon the oral promise of defendant, relying upon the written contract with its agent only as memorandum to take the promise out of the statute of frauds. The only ground of federal jurisdiction was diversity of citizenship. The trial court directed a verdict for plaintiff on the ground that the written contract was a binding obligation upon the defendant. *Held*, that the ruling was erroneous, since that contract was not relied upon in the declaration as a ground of recovery, and created no obligation to the plaintiff, and could not be sued on by the agent for the use of the plaintiff in the federal courts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390–394; Dec. Dig. ⊂=170.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Wm. H. Hunt, Judge.

Assumpsit by the Anheuser-Busch Brewing Association against John P. Kleman. Judgment for the plaintiff upon a directed verdict, and defendant brings error. Reversed and remanded.

McKee, Mitchell & Alter and Griffith & Mitchell, all of Pittsburgh, Pa., for plaintiff in error.

Robb & Miller and W. S. Dalzell, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, the Anheuser-Busch Brewing Association, a corporate citizen of Missouri, hereinafter styled the "Anheuser Company," brought an action of assumpsit against John P. Kleman, a citizen of Pennsylvania, and recovered a verdict. On entry of judgment thereon, Kleman sued out this writ of error.

The facts, which are undisputed, show one Wiese kept a licensed hotel in the city of Pittsburgh on property leased from Kleman, the defendant. In July, 1906, Wiese borrowed from the Anheuser Company $15,000. At the time the loan was made one McMorris, who was the local agent of the company, became security to it for Wiese's loan. On December 24, 1907, $8,000 remained unpaid and in default, and, Wiese being on the verge of bankruptcy, the Anheuser Company entered judgment against him on his note for said sum. On the same day, Kleman and James F. McMorris entered into the following written contract, signed in duplicate:

"Articles of agreement made and concluded this 24th day of December, 1907, by and between John P. Kleman, of the city of Pittsburgh, county of Allegheny and state of Pennsylvania, party of the first part, and James F. McMorris, local representative of the Anheuser-Busch Brewing Association, of the same place, party of the second part, witnesseth:

"That whereas, on or about the 20th day of July, 1906, Robert E. Wiese, of the said city of Pittsburgh, secured a loan of fifteen thousand dollars ($15,000.00) from the Anheuser-Busch Brewing Ass'n, of St. Louis, Missouri, which said loan is also secured by the judgment note of the said Wiese, dated July 16, 1906, payable one day after date, which said loan was to be repaid to the Brewing Ass'n at the rate of $500.00 per month, said payment of $500.00 being also secured by the separate promissory notes of the said Wiese, falling due at intervals of one month, the first of said promissory notes falling due September 16th, 1906, and

"Whereas, the said Wiese has made default in the payment of said notes of $500 each, whereupon by the terms of a certain agreement of July 20, 1906, between the said Wiese and the said Brewing Ass'n, the entire amount of the said loan less actual payments has, at the option of the said Brewing Ass'n become due and payable, and whereas, the balance of said loan, namely eight thousand dollars ($8,000.00), has become due and owing by the said Wiese to the said Brewing Ass'n, the said Brewing Ass'n having exercised its said option, and whereas, the said party of the second part hereto, has become liable to the said Brewing Ass'n for the said balance by agreement between the said party of the second part and the said Brewing Ass'n, and whereas the said John P. Kleman, party of the first part hereto, at the time of the said loan to the said Wiese, guaranteed the repayment in full of said loan, except interest to the said Brewing Ass'n and undertook himself to pay so much thereof as should be due at the time of any default upon the part of the said Wiese, and that said Brewing Ass'n made said loan to the said Wiese upon the strength, faith, and credit of said guarantee:

"That therefore, for and in consideration of the premises and of the sum of one dollar to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the said John P. Kleman doth hereby covenant and agree to and with the said James F. McMorris, local representative as aforesaid, that he, the said Kleman will, subject to the conditions hereinafter mentioned, pay to the party of the second part, local representative as aforesaid, any balance of the said debt, without interest, which the said Anheuser-Busch Brewing Ass'n will be unable to collect from the estate of the said Wiese in bankruptcy, said payments to be made, however, in no event prior to May 1, 1908; provided, however, that this agreement shall be null and void and of no effect whatever unless the retail liquor license granted in the name of the said Wiese, for the premises located at the corner of Collins and Penn avenues, in said city, shall be granted to the said Kleman, or to some person satisfactory to him.

"In witness whereof, the parties hereto have hereunto set their hands and seals, the day and year first above written."

This contract, it will be noted, was between Kleman and McMorris, both of whom are, as recited, citizens of Pennsylvania, and both of

whom signed the same as individuals and under seal. While the latter describes himself as local representative of the Anheuser Company, yet that company was not a party to the same; no covenants being made by or to it thereby. The contract was evidently made with a view to protecting McMorris against his guaranty to the Anheuser Company of Wiese's loan.

On July 31, 1908, the Anheuser Company brought this suit against Kleman in the court below, its jurisdiction being invoked on the ground of diverse citizenship. In its statement of claim the plaintiff based its right of action on the two contracts recited in its two counts. The first count, referring to the loan recited above which was made by the Anheuser Company to Wiese in July, 1906, alleged:

"That before and at the time the plaintiff made the said loan to the said Wiese, John P. Kleman, the said defendant, undertook and agreed to and with the plaintiff that if at any time the said Wiese should become in default upon account of any of the payments to be made to the plaintiff on account of said loan in manner aforesaid, he, the said defendant, would pay the plaintiff the balance of said loan, without interest, then remaining due from the said Wiese to plaintiff. That the said John P. Kleman, the defendant, has duly signed a note or memorandum of said agreement in writing, as contained in a certain agreement between the said defendant and the said plaintiff, dated December 24, 1907, a true and correct copy of which, marked 'Exhibit A,' is hereto attached and made part hereof.

"That the plaintiff made said loan to the said Wiese upon the strength, faith, and credit of said promise of the defendant that he would pay the plaintiff upon default by the said Wiese any balance then remaining due without interest. That moreover there was a special benefit moving to the defendant in said transaction, inasmuch as the defendant had certain claims against the said Wiese amounting to about $10,000, and the said Wiese being then in financial straits would have in all probability become immediately a bankrupt had said loan of $15,000 not been made to him by the plaintiff."

The reference in this count to the writing of December 24, 1907, was not a declaration of a right of action on any promise made in such writing, but was manifestly done to show that Kleman had, in writing, made a note or memorandum of his promise to pay Wiese's debt, so as to avoid the inhibition of the Pennsylvania Statute of Frauds of 26th April 1855 (P. L. 308), which provides:

"No action shall be brought whereby to charge * * * the defendant, upon any special promise, to answer for the debt or default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person by him authorized."

The second count was, however, based on such written contract, supra, of December 24, 1907, between Kleman and McMorris, and alleged that:

"Upon the 24th day of December, 1907, the defendant entered into a contract with the plaintiff through the plaintiff's agent, James F. McMorris"—setting forth the same at length as above.

Subsequently the plaintiff amended such statement by striking out the second count, and placing of record this statement:

"That the purpose of this amendment is to confine the cause of action in the present case to the parol guaranty by the said defendant to the Anheuser-Busch Brewing Association, plaintiff, of the loan of $15,000 by the

said plaintiff to John P. Kleman, a written memorandum of which appears in Exhibit A attached to the plaintiff's statement of claim."

Without here entering upon the evidence adduced and the course of the trial, it suffices to say that the court at its termination gave binding instructions in favor of the plaintiff as follows:

"You have heard a very warmly contested controversy, which turns entirely upon a question of law, as I view it. And when, upon the trial of a case, the issue becomes entirely one of law, there is no fact to be submitted to the jury, and the court takes the responsibility, necessarily, of adjudicating the law.

"As I view this case, the instrument signed by Mr. John P. Kleman has obligated him, and he has shown no way by which he can be legally absolved from that obligation. Therefore the duty of the court is to direct a verdict in favor of the plaintiff and against the defendant, for the sum of $7,081.84, as a matter of law. So that becomes your verdict, under the instructions of the court."

Its action in giving these binding instructions for the plaintiff is here assigned for error. We are of opinion the instructions complained of did involve error. As already noted, the plaintiff declared on the alleged oral promise of Kleman made to the Anheuser-Busch Brewing Association in July, 1906, when the loan was made. The recital of Kleman later, in his contract of 1907, with McMorris, that such a promise had been made in 1906, to the Anheuser Company, was evidence tending to prove the prior promise, but was not an additional promise then made, nor did it create any liability on Kleman's part to that company. When, then, the court in its charge treated the case as enforcing an obligation of Kleman's created by the writing of 1907, and held, "the instrument signed by Mr. John P. Kleman has obligated him, and he has shown no way by which he can be legally absolved from that obligation," it fell into error: First, because under the first count, which alone remained, the promise declared on was the alleged original oral promise of 1906, made when the loan to Wiese was made by the Anheuser Company; secondly, because the agreement of 1907, between Kleman and McMorris, vested no right of action in the Anheuser Company; and, third, no action could be maintained in the court below by McMorris, for use of the Anheuser Company, against Kleman to enforce any obligation created by the agreement of 1907, because of such action the court below would have no jurisdiction, by reason of the legal plaintiff, McMorris, and the defendant, Kleman, both being citizens of Pennsylvania. The suit below being to enforce an alleged oral promise made by Kleman to the Anheuser Company when the loan was made by it to Wiese in 1906, it was error for the court to direct a verdict based, not on that liability, but on one alleged to have been created by Kleman when he signed the agreement of December 24, 1907.

The judgment below is therefore reversed, and the case remanded for further action.

MASON & HANGER CO. v. SHARON.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 86.

MASTER AND SERVANT ⊜252—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—NOTICE TO MASTER.

Under Labor Law N. Y. (Consol. Laws, c. 31) § 201, as amended by Laws N. Y. 1910, c. 352, requiring an injured employé who desires to recover under that act to serve a notice in writing upon his employer, in case of a corporation, by delivering or mailing it to the office or principal place of business of such corporation, a notice to an employer, which was a foreign corporation, and which had designated its principal place of business, which notice was mailed to a branch office of the corporation at a place other than its designated place of business, is not sufficient, though it was actually received by the corporation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. ⊜252.]

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

H. S. Hertwig, of New York City, for plaintiff in error.

S. A. Syme, of Mt. Vernon, N. Y., for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This was an action under the Employers' Liability Act of the state of New York to recover damages for personal injuries sustained by the plaintiff while in the employment of the defendant. The jury rendered a verdict for the plaintiff.

The only error we discover in the bill of exceptions is connected with the service of the notice prescribed by section 201 of chapter 31 of the Consolidated Laws, entitled Labor Law, as amended by chapter 352, Laws of 1910, which is as follows:

"201. Notice to be Served. No action for recovery of compensation for injury or death under this article shall be maintained unless notice of the time, place and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured or by some one in his behalf, but if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in this section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment, but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. If such notice does not apprise the employer of the time, place or cause of injury, he may, within eight days after service thereof, serve upon the sender a written demand and a further notice, which demand must specify the particular in which the first notice is claimed to be defective, and a failure by the employer to make such demand as herein provided shall be a waiver of all defects that the notice may contain. After service of such demand as herein provided, the sender of such notice may at any time within

eight days thereafter serve an amended notice which shall supersede such first notice and have the same effect as an original notice hereunder. The notice required by this section shall be served on the employer, or if there is more than one employer upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice or demand may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation."

It is to be observed in the first place that this article of the Labor Law, viz., article 14, entitled "Employers' Liability," increases the common-law liability of the master and that it makes conformity with its provisions a condition precedent of the servant's right of action.

Next it is to be noted that actual knowledge by the master of everything prescribed by the act is immaterial. The Legislature must, of course, have been aware that generally speaking the master knows all about such occurrences. Proof of this fact, or even proof that the fullest information had been given verbally, would amount to nothing. The notice must be given in writing. While the section provides that unintentional inaccuracies as to the time, place, or cause of the injury shall not invalidate the notice if the master has not been misled thereby, it allows no such latitude as to the method of service. We think the provision of the act must be strictly observed.

The defendant is a corporation of West Virginia, and before doing business in this state it was obliged under section 16 of the General Corporation Law to file in the office of the Secretary of State a statement setting forth among other things, "a place within the state which is to be its principal place of business." The defendant did make a statement as follows:

"Second. That the place within the state of New York which is to be its principal place of business is Cornwall, Orange county, N. Y."

Subdivision 9 of section 3 of the General Corporation Law provides:

"The term 'office of the corporation' means its principal office within the state or principal place of business within the state if it has no principal office therein."

We think the words "office or principal place of business" in section 201 of chapter 352, Laws of 1910, mean principal office or principal place of business. The plaintiff served the notice in this case by mailing it to a branch office of the defendant at Van Cortlandt Park.

The Court of Appeals of New York has construed this provision as to notice most strictly, holding that the notice is effective if it be mailed in accordance with the section, whether the master receive it or not. Hurley v. Olcott, 198 N. Y. 132, 91 N. E. 270, 28 L. R. A. (N. S.) 238. Similarly notice not mailed in accordance with the section, though received, is not notice within the meaning of the act.

Counsel urges upon us as controlling the fact that the notice was

actually received; but, as we have seen, actual notice is not the essential, while compliance with the requirements of the statute is. It is not for us to inquire why the Legislature saw fit to make these conditions precedent to the employé's right of action, nor why it required any notice at all, nor why, requiring notice, it prescribed that it should be in writing and given within 120 days after the injury, nor why it prescribed so carefully the method of service. The law is so written. We regret extremely to reverse this judgment, but feel that we should be rewriting the statute if we did otherwise.

Judgment reversed.

MIZELL v. ELMORE & HAMILTON CONTRACTING CO. et al.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 17.

CORPORATIONS ⊂=565—INSOLVENCY—RECEIVERS—CLAIMS—PROOF—BOOK ENTRIES.

A claim by the executrix of the president of an insolvent corporation in the hands of a receiver for salary from January 1, 1908, to May 10, 1910, the date of the president's death, proved only by entries in the books of the corporation, the first of which was dated January 31, 1910, reading, "a/c salary from Jan. 1, 1908, to Jan. 1, 1910, 24 months, at $500 per month, $12,000," and followed by five other entries at monthly intervals, "salary for month of January (or some other month), 1910, $500," was properly disallowed; such entries, unexplained and uncorroborated by other evidence, being insufficient to make out a prima facie case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. ⊂=565.]

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

This cause comes here upon appeal of Lydia H. Elmore, as executrix of the will of Mike Elmore, from an order of the District Court, Southern District of New York, disallowing her claim against the estate of the Elmore & Hamilton Company, now in the hands of a receiver appointed by said court.

H. Kohlmann, of New York City, for appellant.

F. L. Kohlman, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Mike Elmore was the president, a director, and stockholder of the company. He died May 10, 1910, before receiver was appointed. The claim is for salary alleged to be due him from January 1, 1908, to the day of his death. What were the services which this sum represents does not appear. The only proofs offered in support of the claim are certain unexplained entries in the books of the corporation. The first of these is dated January 31, 1910, and reads:

"Mike Elmore a/c salary from Jan. 1, 1908, to Jan. 1, 1910, 24 months, at $500 per month, $12,000."

Five other entries at monthly intervals read:

"Salary for month of January [or some other month], 1910, $500."

The special master disallowed the claim, and the court affirmed his action. Without now expressing any opinion as to the proposition advanced by the receiver that a corporation cannot agree to pay one of its officers for special services rendered, unless such agreement antedates the rendition of the services, we think the order should be affirmed, because there is not sufficient proof to support the claim. Whatever may be the effect of entries to the credit of an individual on the books of a corporation, when the controversy is between that individual (or his successor) and the corporation, we are satisfied that when a claim against the receiver of a corporation, who represents other creditors (as well as the corporation), is evidenced solely by such entries as these proved here—the first entry being of a most unusual, not to say suspicious, character—something more than the entries is required to make out a prima facie case.

The order is affirmed, with costs.

OBERMEIER v. KASS.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 115.

BANKRUPTCY ⊜164—PREFERENCES—PAYMENTS.

Defendant was a private banker and a creditor of a bankrupt. His son was the manager of the banking business, and also president of a realty company; but both testified positively that defendant had no connection with the realty company. The bankrupt, who was then insolvent to defendant's knowledge, executed a bond and mortgage to the realty company, receiving a check for the amount thereof on defendant's bank. This check he gave to K. in exchange for K.'s check on a different bank, and then gave K.'s check to a broker in exchange for the broker's check on his own bank. He delivered the broker's check to defendant in payment of the indebtedness. All of the checks were paid. *Held*, that the contention that there was no preferential transfer, because defendant received no money, except what he had just paid out, was unsound, as he received the amount of the broker's check, while the amount paid out by him was charged to the account of the realty company and reduced his indebtedness to it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⊜164.]

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill of complaint in a suit brought by the trustee to set aside as preferential a transfer or payment amounting to $3,500, made by the bankrupt to defendant on or about January 16, 1913. The facts will be found in this opinion.

Ralph Wolf, of New York City, for appellant.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Emil Reibstein, the bankrupt, was engaged in some business in the Southern district of New York; his son being in general charge of the office, managing his father's affairs. An involuntary petition in bankruptcy was duly filed against him on March 25, 1913. The defendant Abraham L. Kass conducts a private banking business; his son, David Kass, being manager of the business. David Kass is also a stockholder and the president of a corporation known as the Eastern & Southern Realty Company, hereinafter called the Realty Company. With this corporation Abraham L. Kass had no connection whatever. He was not an officer or stockholder, and had no pecuniary interest, in it.

For some time prior to January 15, 1913, the bankrupt had occasionally discounted notes made by him and indorsed by others at defendant's bank. On and prior to that day defendant was an unsecured creditor of the bankrupt in the sum of $3,500, represented by four such notes. One of these, for $1,000, was past due about a month, had been protested, and the bankrupt had been repeatedly requested to pay it. The other three notes would fall due January 30th, February 13th, and March 10th, respectively. The discounting of Reibstein's notes with Kass had usually been effected by one Wladover, a broker. The Realty Company kept a bank account, subject to check, with defendant. Its credit balance on January 16, 1913, was in excess of $6,000.

It was stipulated on the trial that on the 14th day of January bankrupt was insolvent. The question whether or not on that day, or rather on January 16th, defendant knew or had reasonable cause to believe the bankrupt to be insolvent, was an issue in the case, about which much testimony was taken. The District Judge, who saw all the witnesses, reached the conclusion that at the time of the occurrences next hereinafter referred to defendant had reasonable cause to believe that Reibstein was insolvent. From an examination of the testimony we have no hesitation in reaching the same conclusion. What took place on January 15th, and immediately subsequent, may be thus condensed:

Reibstein executed a bond for $4,000, and he and his wife executed a mortgage of real estate on the south side of Madison street, New York City, to the Realty Company. This bond and mortgage and notes of Reibstein to the amount of $4,000, indorsed by others, were turned over by him to the Realty Company, which in return delivered to him its check for $4,000 on defendant's bank. At the moment of transfer Mrs. Reibstein had not executed the mortgage, so the check was at once handed by bankrupt to Wladover, who also took the mortgage to obtain her signature. After she had signed the mortgage, and some lienors on the real estate had signed a subordination agreement, bond, mortgage, and notes were turned over to the Realty Company, and Reibstein and Wladover went to the saloon of a man named Kuflik. Kuflik sent the check of the Realty Com-

pany over to Kass' bank and had it certified. It had been indorsed by Reibstein. When it was certified, Kuflik kept it, and gave in exchange for it to Wladover $500 in cash and a check of A. & S. Kuflik on the Security Bank of New York for $3,500. Wladover says he was to have $500 for his services. He deposited the Kuflik check in his own bank, and drew his check on said bank for $3,500 to the order of Abraham L. Kass. This check he delivered to defendant on January 16th, and in exchange received from Kass the four notes of the bankrupt first above referred to, which notes were destroyed. In due course these three checks—the Realty Company check, the Kuflik check, and the Wladover check—were paid by the several banks on which they were drawn.

The District Judge dismissed the bill, on the theory that there had been no real transfer of cash by the bankrupt to defendant, and that, if the relief prayed for was granted, defendant would "be obliged to pay out $3,500 which he never really received, except as it had just come out of his own pocket." We are unable to concur in this conclusion. It seems to overlook the circumstance that the Realty Company had a substantial balance in Kass' bank. Defendant did pay $4,000 to Kuflik's bank, which presented the Realty Company check for that amount. But we do not see how it can be said that this $4,000 "came out of his (Kass') own pocket." It came out of the balance of $6,000 which the Realty Company had with defendant. After it was paid he owed that company $2,000, instead of $6,000. He was not out of pocket one penny by the payment of this check; he parted with nothing. On the other hand, he received Wladover's check, which was the same as cash, for Wladover's bank paid it on presentation. In return for this $3,500, defendant parted only with the four notes of Reibstein which he held. Instead of being an unsecured creditor of the bankrupt in the amount of $3,500, he was no longer a creditor at all, but he had in place of the notes $3,500. Moreover, this $3,500 came to Wladover from the bankrupt, being part of the proceeds of the check he received from the Realty Company in exchange for bond, notes, and a mortgage of his real estate executed by himself and his wife. Of course, if Kass and the Realty Company were in fact the same concern, masquerading under two different names, the situation would be different. But since Kass, the bankrupt, and his son, the president of the Realty Company, both testified most positively and repeatedly that defendant had no interest at all in the company, we do not see how it can be held that he and the company were one.

Moreover, the first paragraph of the answer admits that "on or about January 16, 1913, the bankrupt transferred and delivered to the defendant in payment of an indebtedness the sum of $3,500." The only issues joined by the answer are as to insolvency and defendant's knowledge or reasonable cause to believe that such insolvency existed. When the District Court found for the complainant on those issues, he was entitled to a decree.

Decree reversed, with costs.

UNITED STATES v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 21.

MASTER AND SERVANT ⊂⊃17—RAILROADS—REGULATION—HOURS OF SERVICE—UNAVOIDABLE ACCIDENT—QUESTION FOR JURY.

Where the casualties or unavoidable accidents relied on by a railroad company to exempt it from liability for violating the federal Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, § 8677]) were an unusually high wind while a train was going up a grade, a broken tail pin, and a hot box, and there was testimony as to the nature of the flaw in the tail pin, and also as to what had been done as to packing and inspecting the bearing that heated, the government was entitled to submission of the question whether the delay was due to unavoidable accident, or to causes which might have been avoided by proper foresight and inspection, to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ⊂⊃17.]

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

This cause comes here on writ of error to review a judgment of the District Court, Western District of New York, in favor of defendant in error, who was defendant below. The action was brought to recover statutory penalties for alleged violation of the federal Hours of Service Law. At the close of the testimony the trial judge directed a verdict in favor of defendant.

John Lord O'Brian, U. S. Atty., of Buffalo, N. Y.

L. M. Bass, of Buffalo, N. Y., for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. We have recently had occasion to consider this statute in two opinions which were filed in November, 1914—U. S. v. Del., L. & W. R. R., 218 Fed. 608, 134 C. C. A. 366, and U. S. v. N. Y. C. & H. R. R., 218 Fed. 611, 134 C. C. A. 369. It will not be necessary to repeat the citations from the statute nor the references to decisions which will be found in those opinions.

The casualties or unavoidable accidents which in the case at bar were relied on to bring it within the provisions of the third section of the statute were an unusually high wind while the train was going up a grade, a broken tail pin, and a hot box. The delays occasioned by a concurrence of all three caused the statutory hours of service to be exceeded. The breaking of parts of cars or engine and the heating of journals are matters of not infrequent occurrence, and are guarded against by inspection and carefulness in handling trains. Inspection and care will not wholly prevent breakage or heating, but they will make such accidents less frequent. In the New York Central Case, supra, where the case was sent to the jury, we approved the instruction given by the court that it—

"was not enough for the defendant to show that the delay was caused by a hot box or journal, but it must be shown to your satisfaction that the

cause of delay could not have been foreseen or prevented by the exercise of such care and diligence as the condition and situation required. The defendant must have on hand and ready for use proper and sufficient material for packing, must show that there was proper inspection before the train went on its run or during the course of its run, that reasonable care was exercised to prevent delays to the employés of the character specified in the statute. * * * Evidence was given in detail to show just what was done regarding inspection and the prevention of any delay, and it remains for you to determine as a question of fact whether reasonable care was taken to anticipate such an occurrence."

This was in accordance with the course approved by the Circuit Court of Appeals for the Eighth Circuit in U. S. v. Kansas City Southern Railroad, 202 Fed. 828, 121 C. C. A. 136, where delay arose because of leaky flues and a defective shaker-rod, and the court said that the—

"case should have been submitted to the jury, under appropriate instructions, to determine whether the defendant has taken proper precautions to see that its engine was in proper condition when it started, and whether the delays which occurred were the result of causes which could not have been foreseen by exercise of the necessary diligence and foresight."

In the Delaware-Lackawanna Case, supra, there was a break in the knuckle of a drawhead and the blowing out of a cylinder head. There was testimony as to what inspection there had been of these parts, and the court directed a verdict for defendant. We reversed, holding that, as all this testimony came from employés of defendant, the government was entitled to have the cause sent to the jury under appropriate instructions.

In the case at bar there was testimony as to the nature of the flaw in the tail pin, and also as to what had been done as to packing and inspection of the bearing which heated. In view of our two decisions above referred to, we think this testimony should have been submitted to the jury, as it was in the New York Central Case, under proper instructions.

The judgment is reversed.

LOVELL-McCONNELL MFG. CO. v. BINDRIM et al.

(Circuit Court of Appeals, Second Circuit. December 24, 1914.)

1. MANDAMUS ⟸39—SUBJECTS OF RELIEF—EXERCISE OF JUDICIAL POWERS.
In striking impertinent matter from a pleading as authorized by new equity rule 21 (198 Fed. xxiv, 115 C. C. A. xxiv), a District Court exercises its judicial functions on a question of law, and its action cannot be reviewed on application for a writ of mandamus to compel reinstatement of such matter, but only on appeal from the final decree.
[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 84; Dec. Dig. ⟸39.]

2. CERTIORARI ⟸5 — NATURE AND GROUNDS — AVAILABILITY OF RELIEF BY APPEAL.
Conceding the power of a Circuit Court of Appeals under Judicial Code, § 262 (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1913, § 1239]),

to issue a writ of certiorari to correct an error of law, such writ will not be issued in an appealable case.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. ⊂=5.]

Petition for Mandamus to the District Court of the United States for the Eastern District of New York.

C. A. L. Massie and Ralph L. Scott, both of New York City, for petitioner.

Irving M. Obrieght and George C. Dean, both of New York City, for respondent.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. In a suit for infringement of letters patent No. 1,094,403, the defendant pleaded in section 7 of its answer as a defense and in section 8 as a counterclaim $300,000 damages for unfair conduct of the complainant in respect to other patents; threatening of defendant's customers and a conspiracy in violation of the Sherman Law. This it claimed the right to do under new rule in equity 30 (201 Fed. v, 118 C. C. A. v), but Judge Veeder in the District Court, upon complainant's motion, struck these sections out of the answer. The defendant now petitions for a writ of mandamus directing the judges of the District Court to reinstate said sections, or in the alternative for a writ of certiorari to enable this court to determine whether the defendant has a right to plead the matters stricken out.

[1, 2] Old equity rule 26 allowed exceptions to be filed to pleadings for impertinence. New rule 21 (198 Fed. xxiv, 115 C. C. A. xxiv) abolishes exceptions, but authorizes the court, either upon motion or of its own initiative, to strike out impertinent matter. This was what the District Judge did. It is very important that allegations proposing impertinent issues should be stricken out. If they are not, proofs must be admitted under them and a mass of immaterial testimony taken. The court, in striking out these parts of the defendant's answer, was exercising its judicial functions upon a question of law. The cases cited show that new equity rule 30 has been differently construed by different judges. We are not authorized to construe it upon mandamus, and if Judge Veeder made a mistake of law it is to be corrected by appeal from the final decree. If we have a right to issue a writ of certiorari to correct error under section 262 of the Judicial Code, we certainly will not issue it in an appealable case.

The petition is denied.

CARL LAEMMLE MUSIC CO. et al. v. STERN et al.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 79.

COURTS ⊂=508—FEDERAL COURTS—JURISDICTION—GROUNDS—LAW OF UNITED STATES.

Defendant sued complainants in a state court for breach of contract to transfer a song of which one of the complainants was the author. Complainant corporation in the state court set up a copyright to the song, but on trial the corporation was enjoined from publishing it, after which complainants sued defendant at law for damages, and, while that action

was pending, complainants sued in the federal court to restrain the further prosecution of the action at law, basing their right to invoke federal jurisdiction on the ground that the suit involved a copyright and therefore presented a cause of action arising under a law of the United States. *Held*, that the copyright of complainant corporation was not directly in issue, and hence the federal court had no jurisdiction, under the rule that an action in which a law of the United States is only incidentally drawn in question does not arise under that law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1418–1423, 1425–1430; Dec. Dig. ⟸508.

Jurisdiction of federal courts of actions involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Mining Co., 35 C. C. A. 7; Earnhart v. Switzler, 105 C. C. A. 262.]

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

On appeal from a judgment of the District Court for the Southern District of New York dismissing the bill of complaint upon the grounds—First, that it does not state a cause of action. Second, that the District Court has no jurisdiction of such a suit. Third, that there is a misjoinder of causes of action. For opinion below, see 209 Fed. 129.

Waldo G. Morse and George N. Sage, both of New York City, for appellants.

Theodore B. Richter and Cohen, Creevey & Richter, all of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The complaint alleges that the Carl Laemmle Music Company is the owner of the copyright of a song entitled "I'll Change the Thorns to Roses." That in March, 1911, the defendants commenced an action in the Supreme Court of the State of New York against the Laemmle Company, alleging that they had acquired from the complainant Solman the right to all music which he should compose, including the music of the said song, and that these rights had been violated by the Laemmle Company. The complainant also alleges that the Laemmle Company answered in said action alleging that it had secured all the rights to said song and had copyrighted the same, to which answer the defendants herein interposed a demurrer. Whereupon the state court decided that the facts so pleaded constituted no defense against the claims of the plaintiffs in said action. Thereafter the Carl Laemmle Company pleaded over and the issue so joined was tried and resulted in favor of the plaintiffs in that action, the Carl Laemmle Company being enjoined from publishing the said song, "I'll Change the Thorns to Roses." The complaint herein also alleges that, upon the trial of said action in the state court, the Carl Laemmle Company claimed and proved a copyright for said song but notwithstanding this proof the court entered a decree for an injunction and an accounting against the Carl Laemmle Company which judgment was subsequently sustained on appeal. That thereafter an ac-

counting was ordered and is still pending. The complaint also alleges that under the state practice no appeal is allowed from an interlocutory judgment and before the said accounting is concluded and an appeal perfected from the final judgment irreparable damage and injury will be done to the Carl Laemmle Company. It is also alleged that on or about the 25th of February, 1913, the defendants herein, who were plaintiffs in the said action in the state court, commenced an action at law, upon the same facts appearing in the equity action, and demanded judgment in the sum of $10,000 against the defendants who are the plaintiffs in this action. It is also alleged that the time to answer the complaint in this action at law will expire within twenty days from the date of service. The complaint further alleges that by virtue of the copyright to the Carl Laemmle Company it is entitled to protection under the laws of the United States, and in the courts thereof, against the action of the defendants. Judgment is demanded that the complainants' right to the song in question be adjudicated and that the defendants be enjoined from making any claims or demands, in the courts of any state, adverse to the rights of the complainants in and to the said song and that they be further enjoined from prosecuting or continuing any action at law or in equity against the complainants in the said courts based upon their alleged ownership of the said song.

It seems entirely clear that this action is not one arising under the copyright law. It is alleged that the Carl Laemmle Company copyrighted the song in question, but this suit is not one based upon a copyright or arising under the copyright laws. The defendants do not claim any rights under a copyright. The title under which the action in the state court is prosecuted is based upon a contract with Alfred Solman. The copyright to the Laemmle Company is not directly in issue and the fact that it may be incidentally considered in the state court in no way deprives that court of jurisdiction. An action in which a law of the United States may be incidentally drawn in question does not arise under that law. That it was not the intent of Congress that the United States courts should interfere with the progress of litigation in the state courts, except in clearly defined cases, is made plain by an examination of section 720 of the Revised Statutes of the United States which provides that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In Excelsior W. P. Co. v. Pacific Bridge Co., 185 U. S. 282, the court at page 285, 22 Sup. Ct. 681, at page 682 (46 L. Ed. 910), says:

"The most important question is whether this is a suit under the patent laws of the United States within the meaning of Rev. Stat. § 629, subd. 9, which grants original jurisdiction to the Circuit Courts 'of all suits at law or in equity arising under the patent or copyright laws of the United States.' The rule is well settled that, if the suit be brought to enforce or set aside a contract, though such contract be connected with a patent, it is not a suit under the patent laws, and jurisdiction of the Circuit Court can only be maintained upon the ground of diversity of citizenship."

We think, however, that in order to avoid any complications in the future the decree should be amended as directed by the Supreme Court in Texas & Pacific R. Co. v. Interstate Trans. Co., 155 U. S. 585, 15 Sup. Ct. 228, 39 L. Ed. 271.

The District Court is therefore directed to amend the decree so that the same may be without prejudice generally and, as so amended, it is affirmed with costs.

In re BALLANCE et al.

In re RUBIN.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 9.

BANKRUPTCY ⊂=386—COMPOSITIONS—SETTING ASIDE—PROCEDURE.

On demurrer to a petition by a creditor of a bankrupt who was given no notice of composition proceedings to set aside compositions for fraud where the trial court found fraud, it was error for it to deny the petition on the bankrupt paying a specified part of the petitioner's claim, as he should have been given an opportunity to elect to accept such part or to take his chance of proving the allegations of his petition, while the bankrupt should have been given an election to pay such amount or to answer and endeavor to show that the facts were not as they were admitted to be by the demurrer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 606; Dec. Dig. ⊂=386.]

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

For opinion below, see 206 Fed. 505.

This cause comes here upon petition to revise an order of the District Court, Eastern District of New York. The petitioner was a judgment creditor of William A. Ballance at the time the latter turned over all his assets to the company. When Ballance and the company filed their petitions in bankruptcy, Rubin was scheduled as a secured creditor of the former; his name did not appear on the schedules of the company. Both bankruptcy proceedings resulted in a composition, approved by the court, by which Ballance's creditors were to be paid 2 per cent. and the company's creditors 20 per cent. and the property was turned back to Ballance and the company. Rubin's judgment was only secured in part. He was given no notice of the proceedings in bankruptcy or of the compositions. Hearing of them subsequently he brought this proceeding to set aside the compositions on the ground that they were obtained through fraud practiced not only on Rubin, but also upon the other creditors. All the other creditors had notice of these proceedings and failed to appear.

The cause came into the District Court on demurrer to the petition. The court held that the petitions should be denied upon Ballance and the company paying Rubin $244.91.

Nathan Ottinger, of New York City, for petitioner.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The District Judge has quite fully discussed the various questions arising on the demurrer. He found fraud on the part of Ballance in the conveyance of his property, and in the making up of the schedules. It is unnecessary to discuss this branch of the cause; we fully agree with Judge Chatfield's conclusions thereon. The ordinary result of such conclusions would be an overruling of the demurrer with leave to answer. Because of some delay on Rubin's part after he "had some hearsay information" as to the pendency of bankruptcy proceedings, the court further held that if he were placed on a par with the other creditors, and treated as he would have been if his name had appeared properly on the schedules, his petition should be denied.

To this disposition of the case there are several objections. In the first place Rubin's claim is $2,638.96 less $500 which had been paid him, viz., $2,138.96. The mortgage security which was given to him on appeal from the judgment has turned out to be worthless. Twenty-two per cent. of that sum is $470.57, instead of the $244.91, which the court allowed him. Secondly, the petition is demurrable or it is not. Evidently the District Court thought that it set forth a good cause of action and we have reached the same conclusion. That being so, petitioner should have been given his choice, whether he would take the 22 per cent. in satisfaction of his claim, or take the chances of proving the allegations of his petition, disposing of whatever averments an answer to his petition might present and obtaining what relief he might get on the trial of the issues. He must, however, make an election as to which relief he will accept. He may not take the $470.57 as his share of the composition and then treat it as a partial payment only, proceeding against Ballance or the company, or both to recover unpaid balance of his claim.

So, too, respondents should be given an election either to pay the $470.57, and thus end the matter, or to answer and endeavor on the trial of the issues to show the facts to be different from what the demurrer has conceded them to be.

If no settlement of the case, on basis suggested can be agreed to by both sides, the demurrer should be overruled with leave to answer and the cause take the usual course.

The order is reversed and cause remanded with instructions to dispose of the case in conformity with this opinion.

LEHIGH VALLEY R. CO. v. AMERICAN HAY CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 91.

1. COMMERCE ⊜87—DISCRIMINATION—INTERSTATE COMMERCE COMMISSION—JURISDICTION—COMPLAINT—AMENDMENT.

Where a complaint to the Interstate Commerce Commission was filed January 12, 1910, and dealt only with transactions prior to that date, the Commission had power to permit an amendment of the complaint so as to incorporate transactions occurring to the date of the hearing and to make findings and orders, including such transactions as fully as if a new complaint had been filed to cover the same.

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

2. COMMERCE ⊜86—DISCRIMINATION—INTERSTATE COMMERCE COMMISSION—FINDINGS.

The Interstate Commerce Commission is not required to make formal marked and numbered findings, but its findings may be contained in the colloquial statements of an opinion.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 140; Dec. Dig. ⊜86.]

3. CARRIERS ⊜201—INTERSTATE COMMERCE—DISCRIMINATION.

Where an interstate carrier permitted reconsignment of hay at a division point free of charge, provided such reconsignment was made within 24 hours after arrival of cars, and charged $2 per car for reconsignment of hay at another point, without reference to time, such facts sufficiently showed a prima facie case of discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. ⊜201.]

4. CARRIERS ⊜201—INTERSTATE COMMERCE—RECONSIGNMENT CHARGE—DISCRIMINATION—DAMAGES.

Though a carrier was guilty of discrimination in making a reconsignment charge of $2 at a point where plaintiff reconsigned hay in the course of its business over the carrier's railroad, while it permitted reconsignment free at another point, if made within 24 hours, did not necessarily entitle plaintiff to recover $2 per car reconsigned as damages, in the absence of proof that he in fact suffered the loss.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. ⊜201.]

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

This cause comes here upon writ of error by defendant below to review a judgment of the District Court, Southern District of New York, entered in favor of plaintiff below; verdict was rendered under direction of the court.

The action was brought by the American Hay Company under section 16 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [Comp. St. 1913, § 8584]) to recover damages for a discrimination by the railroad company in that certain tariff privileges were accorded at Sayre, Pa., a division terminal which were not accorded at Townley, N. J., where plaintiff had a hay shed at which trains stopped. The alleged discrimination consisted in this that there was accorded the right to reconsign hay at Sayre free of charge, provided such reconsignment was made within 24 hours after the

actual time of arrival of the cars, otherwise a charge of $2 per car was imposed, where, as at Townley, during the same period, plaintiff was charged $2 a car, whether or not such reconsignment was made within 24 hours. It was also charged before the Commission that the charge of $2 was excessive. The action was based on a report of the Interstate Commerce Commission.

S. C. Pratt, of New York City, for plaintiff in error.
H. Goldmark, of New York City, for defendant in error.
Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The defendant contends that the Commission had no authority to award damages because such award was on the Commission's own initiative; section 13 providing that, where it proceeds with an inquiry instituted on its own motion, it has no power to make or enforce any order for the payment of money.

The complaint to the Commission was filed January 12, 1910. Manifestly it dealt only with the transactions prior to that date—as to which the Commission found in favor of the railroad, holding that $2 was a reasonable charge, and that there had been no discrimination down to that date. The discrimination found against the railroad, and for which damages were assessed against it, was a discrimination between June, 1910, and December, 1910. If inquiry touching transactions in this period had been made by the Commission solely on its own motion, there might be some force in the point raised. But we see no ground for holding that it was not in the power of the Commission to allow a complaint to be amended or supplemented by incorporating transactions of a period later than its date of filing, especially when no objection to such amendment is interposed. There is no evidence that any such objection was raised; on the contrary, it is stated and not contradicted that both sides took testimony as to the later period. If that is so, the Commission might surely make findings and orders about the later period, as fully as if a new complaint had been filed to cover it.

[2] The next contention is that there are no findings of fact. No formal marked and numbered set of findings is required. Findings are findings just as well when imbedded in the colloquial statements of an opinion. From the opinion it is apparent that there is found:

(1) Since October 1, 1906, and until December 1, 1910, a tariff charge was made at Townley of $2 per car for inspection, grading and reconsignment.

(2) Since May 1, 1909, and until June 17, 1910, a tariff charge was made at Sayre of $2 for similar purposes, with proviso for no charge provided order for diverting cars should be filed immediately upon or prior to arrival.

(3) Since June 17, 1910, until decision (June, 1911), there was in force a change in the Sayre tariff which relieved of payment of the $2 when orders for reconsignment were given *within 24 hours after arrival.*

(4) Since December 1, 1910, a revised tariff has been in force which gave the same 24-hour privilege of free reconsignment at Townley, as at Sayre.

(5) By stipulation of both sides, there were within the period from June 17th to December 1st 731 cars reconsigned, upon which $2 each was paid. This amounts to $1,462.

The amount was subsequently corrected to $1,362, in consequence of some error in calculating Sundays and holidays.

The facts seem to us sufficiently found to comply with the requirements of the act.

[3] There is no question as to the amount, $1,362. Nor, as we understand it, is there any point raised that the Commission erred in finding that, while the one place had the privilege and the other had not, there was "an undue discrimination between complainant at Townley and its competitors at Sayre." Even if such point were taken, it would not avail on this record. If all the facts are the facts above recited (and they are all *we* have because the testimony taken before Commission is not here), we think that such discrimination was shown. It is quite conceivable that it might also be shown that the situation was such that there was no real discrimination—perhaps that there were no competitors at Sayre, or what not—but surely there must be something shown to do away with the effect of the significant fact that at one point there is a charge of $2 for services which elsewhere on the same railroad are freely rendered.

Finally it is contended that in an action under section 16 of the act there must be proof of damages sustained, and that such proof is lacking here.

[4] As a matter of first impression it would seem that when one shipper is made to pay to a railroad, through discrimination either in rebates or in charges for special services, a definitely ascertained larger sum than his competitors are charged for transportation of goods, he is damaged to that amount, or at at least there is a prima facie showing of damages sustained by himself. Two decisions of the Court of Appeals for the Third Circuit are to the contrary of this proposition (Lehigh Valley Railroad v. Clark, 207 Fed. 717, 125 C. C. A. 235; Lehigh Valley Railroad v. Meeker, 211 Fed. 785, 128 C. C. A. 311), and it seems to us that the decision of the Supreme Court in Pennsylvania Railroad v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, requires the same conclusion. In that case by means of rebates given to others and refused to itself the shipper had been charged for transportation a greater sum than was collected from its competitors. The amount of the excess was determined and the fact that it was paid to the railroad was proved. The court said:

"But the plaintiff may have sold at the usual profit all or part of its 40,000 tons at the regular market price; the purchaser, on his own account, paying freight to the point of delivery. In that event, not the shipper, but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates."

The facts in the case at bar seem to us indistinguishable from those in the case last cited. It is not enough to show that the American Hay Company paid the railroad these various items of $2; for aught that appears the persons to whom it sold may have themselves paid

all those charges, or some of them, or some part of each charge. Just how the initial payment of each $2 resulted in damages to the company, if it were damaged, is a matter wholly within the knowledge of the hay company, and not presumably within the knowledge of the railroad company. Proof that damages did result from the initial payment is part of the plaintiff's case, and, without affirmative proof to show such damages, it was not entitled to a verdict.

The judgment is reversed.

SAUVE v. FLESCHUTZ.†

In re PEWABIC CONSOLIDATED GOLD MINES CO.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4106.

1. BANKRUPTCY ⟸323—CLAIMS—BONDS GIVEN AS COLLATERAL.
   Where two officers of a corporation became sureties upon notes of the corporation for $7,000, which were also secured by $30,000 of the corporate bonds, and thereafter the officers paid the notes and received the bonds from the bank, they can claim against the bankrupt corporation upon the bonds only the amount paid by them with interest.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. ⟸323.]

2. BANKRUPTCY ⟸323—CLAIMS—BONDS GIVEN AS COLLATERAL—INTEREST.
   Having been allowed the interest on the notes paid by them, they cannot also claim against the bankrupt's estate the amount of bonds issued in payment of that interest.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. ⟸323.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Claim by Ida C. Fleschutz against David B. Sauve, trustee, in the matter of the Pewabic Consolidated Gold Mines Company, bankrupt. From an order of the District Court allowing the claim in part, the trustee appeals. Reversed and remanded, with directions.

Leroy J. Williams, of Denver, Colo., for appellant.

J. E. Robinson, of Denver, Colo., for appellee.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. John C. Fleschutz and Ida Fleschutz, his wife, were president and secretary, respectively, of the Pewabic Consolidated Gold Mines Company, which was adjudicated a bankrupt on its petition on the 23d day of December, 1912. Ida C. Fleschutz filed a claim for $53,285.49. The same was made up of the following items: First mortgage bonds of the bankrupt corporation amounting to $21,150, bonds to the amount of $30,000 deposited as collateral to secure the obligations of the corporation and which are alleged to have

---

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 19, 1915.

been afterwards transferred in full payment of those obligations, overdue interest on bonds, amounting to $2,139.49.

The claim was allowed by the referee to the amount of $52,470. On review the District Court made the following order:

"That the claim of the said Ida C. Fleschutz be, and the same hereby is, allowed at the sum of $52,470 as a secured claim against said estate, as presented, provided, however, that, as to $30,000 of said claim, dividends thereon shall be paid to said claimant only to the extent of $7,000, with interest thereon at the rate of 8 per centum per annum, from the 1st day of April, A. D. 1911, and that upon the payment of such dividends the said claim shall be considered satisfied to the extent of $30,000, and no more, and that as to the remainder of said claim, to wit, $22,470 thereof, dividends shall be paid thereon to which said remainder shall be entitled. And it is further ordered that, as to all other matters shown in and by the certificate of said referee, the action of the referee be, and the same hereby is, sustained and approved."

There are 25 assignments of error, in which the good faith of the debt is attacked, and the rulings of the court as to the exclusion or admission of evidence are challenged. We find no prejudicial error in any of the rulings. The findings of the court are sustained by the evidence except as to the item of interest on the $30,000 in bonds.

[1] In 1909 Fleschutz and wife became sureties on two notes of the corporation to the First National Bank of Central City, Colo., for $4,000 and $3,000 respectively. The $3,000 note was attacked by petitioning creditors as not being a bona fide debt of the corporation. The referee found, however, from competent testimony, that it was the debt of the corporation, and this finding was approved by the District Court.

The referee found that $30,000 of the bonds of the corporation included in the claim of Ida C. Fleschutz were transferred to her absolutely by the First National Bank of Central City, Colo. The District Court made no finding upon this point, but its judgment providing that the dividends on the $30,000 in bonds should be applied to the payment of the $7,000 notes, and that after the payment of such notes in full from such dividends such bonds should be regarded as liquidated, is inconsistent with the idea that the bonds were held by Ida C. Fleschutz other than as collateral for said notes for $7,000.

On the 1st of April, 1911, John C. Fleschutz and Ida C. Fleschutz took up the two notes of $4,000 and $3,000 and substituted their note therefor, secured by a mortgage on property belonging to Ida C. Fleschutz.

On the 25th of March, 1911, the board of directors of the bankrupt corporation authorized the transfer to the bank of $30,000 in bonds in full payment of the two notes. The referee found that this arrangement was actually made, and that the notes were canceled and surrendered. The testimony does not bear this out, and, while the District Court does not say so in terms, the logical conclusion is that the finding of the referee on that point was reversed. The conclusion to be drawn from the testimony of John C. Fleschutz, and of Lake, the cashier of the bank, is that the bonds were not, in fact, accepted in payment of the notes; that they were held as collateral upon the promise of Fleschutz to pay the notes and take up the bonds. Fleschutz insisted that he was about to make the sale of an issue of bonds authorized by the bankrupt corporation on the 1st day of October, 1909, but which sale was never

effected. Upon the failure of Fleschutz to make the sale and raise the money, the bank accepted the note of Fleschutz and wife for the amount of the two notes, which note was secured by mortgage, as heretofore stated. The bank turned over to them the bonds. Fleschutz and wife were then in the attitude of sureties, having paid the debt of their principal, and were therefore subrogated to the collateral held by the creditor. 37 Cyc. 414. This, evidently, was the view taken by the District Court. Regarded as sureties, entitled to subrogation, Fleschutz and wife, or either one of them, could obtain no more from the collateral originally delivered to the creditor than the creditor itself could have done.

[2] The testimony tends to show that bonds were issued to Ida C. Fleschutz in payment of the accrued interest on the $30,000 in bonds, and that these bonds, paid on such interest, are included in the claim allowed by the referee and approved by the District Court. The judgment of the court provides that interest be allowed on the $7,000 note from its date, April 1, 1911. By the allowance of so much of the bonds as constitute interest, and by the allowance of interest on the note from its date, the effect will be to pay interest on the note twice, and to allow, in addition, an amount as an independent debt that should be applied to the payment of the note.

Carrying out the idea of the District Court, which we think is correct, that the $30,000 in bonds were to be regarded as collateral to the $7,000 note, the order of the District Court should have gone farther and should have deducted, from the amount of the claim allowed, the amount of the bonds delivered to Ida C. Fleschutz as payment of interest on the $30,000 in bonds. Just what that amount is does not clearly appear in the record. The interest on the entire $30,000 should have been deducted.

Since it cannot be accurately determined from the record what amount of interest on the $30,000 was included in the claim allowed, the decision of the lower court should be reversed and remanded, with directions to ascertain that amount of interest and deduct it from the claim, and it is so ordered.

In re HOLLINS et al.

Appeal of EVERETT.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 63.

1. BANKRUPTCY ⟸140—OWNERSHIP OF PROPERTY—STOCK HELD BY BROKERS FOR CUSTOMERS.

Stockbrokers prior to bankruptcy purchased 280 shares of certain stock for various customers, a part of which they either hypothecated or loaned to other customers, leaving 100 shares in their possession when the petition in bankruptcy was filed. Thirty shares hypothecated with a bank were identified as those purchased for one of the customers. The stock in the brokers' possession could not be identified as that purchased for any particular customer. *Held*, that the customers were general creditors of the bankrupts and merely shared with all other general cred-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

itors in the assets available for such creditors, except so far as they might be able to trace and identify by reasonably specific proof their own individual property or its substitute or proceeds.

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

2. BANKRUPTCY ⊂⊃155—OWNERSHIP OF PROPERTY—STOCK HELD BY BROKERS FOR CUSTOMERS.

As there were claims to more than twice the number of shares in the bankrupt's possession even excluding the owner of the 30 shares hypothecated with the bank, the presumption, in the absence of proof to the contrary, that the brokers did their duty by buying other shares of like kind to replace customers' shares of which they had disposed, did not sufficiently identify the stock to justify an apportionment thereof among the customers in proportion to the stock purchased for them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃155.]

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

This cause comes here on appeal from and petition to revise an order of the District Court, Southern District of New York. Petition in bankruptcy was filed against H. B. Hollins & Co., stockbrokers, on November 13, 1913. Prior to this date they had made the following purchases for customers of Amalgamated Copper stock: On October 25, 1912, for Bamberger, 30 shares; on October 30, 1912, for Duel, 100 shares; on February 25, 1913, for a firm, referred to on the briefs as Wieners, 50 shares; on October 28, 1913, for Landau, 100 shares. On the day petition was filed Hollins & Co. had "in the box"—that is, in their possession—100 shares. Of the remaining 180 shares, 30 had been hypothecated with the National Bank of Commerce, 50 had been hypothecated with the Kings County Trust Company, and 100 had been used to make deliveries under "short" orders for another customer; that is, had been loaned to that customer. After bankruptcy Duel and Wieners offered to pay their indebtedness on account with the bankrupts, Landau and Bamberger did not do so.

Duel petitioned for the allotment to him of 100/280 of the 100 shares of Copper in the possession of the receiver and Wieners asked for 50/280 thereof. The District Court granted this motion, holding in effect that Landau would have been entitled to 100/280 and Bamberger to 30/280 had it not been for the fact that they could not recover unless they paid the amount of their debit balance to receiver, which they had not offered to do. From this decision the receiver and the bankrupts appeal.

See, also, 212 Fed. 317; 215 Fed. 41.

W. C. Armstrong, of New York City, for petitioner.

F. W. Longfellow and Stuart McNamara, both of New York City, for respondents.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Judge Hough apparently made this disposition of the matter, because he was satisfied that the decision of the Supreme Court in Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690,

57 L. Ed. 1047, required him to do so. He did not do so because the 100 shares in the box were identified by the testimony, for he says: "for which particular customer these 100 shares were held does not appear and cannot be ascertained." Applying what is called the "grain in a bin" theory, he reached the conclusion that all claimants to Copper stock were entitled to share ratably in these 100 shares. Examining the record, especially the book entries in Exhibit A, we find much force in the contention of appellants that at the time of the bankruptcy 50 of Landau's shares were hypothecated with the trust company, Duel's 100 shares had been used for delivery under a "short" order, i. e., loaned to the "short" customer, and 50 of Landau's shares and Wieners' 50 shares were in the box. But it is not necessary to decide that question; Landau is making no claim that this particular certificate for 100 shares is his property.

[1] It may be noted that all four claimants are general creditors of the bankrupts, and it has been repeatedly held that they merely share with all other general creditors in the assets available for such creditors, except so far as they may be able to trace and identify their own individual property or its substitute or proceeds. Unless reasonably specific proof of such identification is presented, equity would seem to require that the fund for general creditors should not be depleted on any theory which has not the sanction of controlling authority.

[2] The application of the theory followed in this case leads to this curious result. Bamberger was owing money to the bankrupts on his original purchase; his contract with them authorized them to pledge the stock bought for him. Shortly after purchase, a year before bankruptcy, the bankrupts borrowed money from the Bank of Commerce pledging his certificate for 30 shares as security. There it remained undisturbed till bankruptcy. The identity of this certificate as Bamberger's is conclusively proved; every one concedes that his 30 shares are represented by the certificate for that amount held by the bank. Nevertheless, under the theory now contended for, 30/280 of his 30 shares is also identified as a fractional part of another certificate for 100 shares; to that extent, 30/280, there would be a double identification.

We are not satisfied that the decision of the Supreme Court requires the adoption of a method of identification, which may lead to such results. The statement is made that the court held in the Gorman Case that:

> "No identification is necessary—the presumption of restitution plus the physical presence of some stock supplies the link in the absence of countervailing proof."

But the facts in that case differed in a very material particular from those here presented. The bankrupt brokers in the Gorman Case had bought for him 250 shares of Greene Cananea Copper, they had disposed of his original certificate, but other certificates had from time to time found their way into the box, so that when they failed they held 350 shares of that stock and were under obligations to no other customer to account for any such shares. Upon the presumption that the brokers, in the absence of proof to the contrary, did their duty, buying other shares of like kind to replace customer's shares which they

had sold, identification of 250 shares, which belong to Gorman, was made out—the bankrupts had 350 shares free from any claim, except Gorman's to 250 of them. The Supreme Court says:

"It is said, however, that the shares in this particular case are not so identified as to come under the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an *amount greater* than * * * should have been on hand for this customer, and the *significant fact* is shown that *no other customer claimed any* right in those shares of stock." (Italics ours.)

In the case at bar, however there are claimants—even leaving out Bamberger, whose certificate is conclusively identified—to more than twice the number of shares found in the box. The facts are much the same as In re McIntyre, Petition of William Grace, 181 Fed. 960, 104 C. C. A. 424, where we held identification had not been shown. Grace claimed 200 shares of Southern Pacific stock, the bankrupts had 107 shares of that stock on hand or hypothecated and owed their customers 1,651 shares of the same variety of stock. The theory now relied on was submitted with petition for certiorari in the McIntyre-Grace Case, but certiorari was refused. Grace v. Burlingham, 218 U. S. 672, 31 Sup. Ct. 221, 54 L. Ed. 1204. We are not persuaded that the decision in the Gorman Case requires a modification of the rule followed in the McIntyre-Grace Case. The rights of general creditors are likely to be seriously impaired if the theory of constructive identification based on presumptions of intent be carried to the extent here asked for.

The order is reversed.

MASON et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4142

1. APPEAL AND ERROR ⟸854—REVIEW—REASONS FOR DECISION.

Assignments of error must be based on the court's rulings, and not on its reasons therefor, as stated in a memorandum opinion filed by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. ⟸854.]

2. APPEAL AND ERROR ⟸671—RESERVATION OF GROUNDS OF REVIEW—FINDINGS OF FACT AND DECLARATIONS OF LAW.

Under Rev. St. U. S. § 700, providing that, when an issue of fact is tried without a jury, the court's rulings in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed upon a writ of error or appeal, and that when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment, where no ruling appeared in the record except the judgment, and no findings of fact or declarations of law were requested, the trial court's views regarding the law and the evidence could not be reviewed, as the judgment so far as it could be called a finding was equivalent to a verdict, and not the subject of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. ⟸671.]

In Error to the District Court of the United States for the Southern District of Iowa; Thomas C. Munger, Judge.

Action by the United States against Edward R. Mason and others. Judgment for plaintiff (211 Fed. 233), and defendants bring error. Affirmed.

Roy E. Cubbage, of Des Moines, Iowa (Read & Read, of Des Moines, Iowa, on the brief), for plaintiffs in error.

Sylvester R. Rush, of Omaha, Neb., for defendant in error.

Before CARLAND, Circuit Judge, and YOUMANS, District Judge.

CARLAND, Circuit Judge. This is an action at law to recover from Edward R. Mason, late clerk of the Circuit Court of the United States for the Southern District of Iowa, certain moneys claimed to be due from him to the United States. A jury was duly waived in writing and the case tried to the court. After hearing the evidence and giving the case due consideration, the following judgment was rendered:

"On this day this cause came on for further hearing, plaintiff appearing by Sylvester R. Rush, its attorney, and the defendants by Read & Read and Roy E. Cubbage, their attorneys, and it is thereupon ordered, adjudged, and decreed by the court that the United States of America have and recover of and from Edward R. Mason and the United States Fidelity & Guaranty Company of Baltimore, Md., the sum of $358.79, together with the costs of this action taxed at $———, to which finding, judgment, and entering thereof both the plaintiff and the defendants and each of them in open court and at the time except."

[1, 2] There were no requests for findings of fact, either general or special, by either party, nor any requests for declarations of law. The judgment above quoted is the only ruling of the court appearing in the record. The court filed a memorandum opinion which appears in the record, but it is what the trial court does, not its reasons therefor, which must form the basis of an assignment of error. It is stated in the record that in rendering the judgment herein the court refused to hold that the matters pleaded in counts 3, 4, and 5 of defendant's amended answer, constituted a good defense to the complaint of the plaintiff, and rendered judgment against the defendant for a sum which included the balance as shown by the evidence in the record not to have been disbursed by the defendant or turned over to or delivered by him to his successor in office, and that defendants excepted to this ruling. It is again stated that in rendering the judgment in this action the court included the balance testified to by the examiner as set out in certain equity cases and held that paragraph 3 of defendant's answer was not a good defense thereto, to which finding and holding the defendant excepted.

It plainly appears, however, that the only time the court ruled was when it entered the judgment, and, if when the court entered the judgment it did so by reason of certain views it had in regard to the law and evidence, it was too late after judgment to raise the question as to whether these views were correct or not, unless counsel had placed the court upon record before the end of the trial in regard to the same. In form there were no findings made by the court either general or special, unless we consider the judgment entered a general finding,

which seems to have been the view of the court and of counsel. Under the law this judgment, so far as it can be called a finding, was equivalent to the verdict of a jury and was not the subject of exception. Section 700, R. S. U. S., provides as to what rulings in a case tried to a court, without a jury, may be reviewed by this court. This court has, with what might seem to be tiresome repetition, established rules for the guidance of counsel as to how these questions may be preserved and reviewed. Experience teaches that it would serve no useful purpose to repeat these rulings. We content ourselves with again citing the cases. In the Supreme Court; Stanley v. Supervisors, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Santa Anna v. Frank, 113 U. S. 339, 5 Sup. Ct. 536, 28 L. Ed. 978; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Cooper v. Omohundro, 19 Wall. 65, 22 L. Ed. 47; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; Betts v. Mugridge, 154 U. S. 644, Append., 14 Sup. Ct. 1188, 25 L. Ed. 157; Insurance Co. v. Sea, 21 Wall. 158, 22 L. Ed. 511; Wilson v. Merchants' Loan & Trust Co. of Chicago, 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113. In this court: Mercantile Trust Co. v. Wood, 60 Fed. 346, 8 C. C. A. 658; United States Fidelity & G. Co. v. Board of Commissioners, 145 Fed. 144, 76 C. C. A. 114; National Surety Co. v. United States, etc., 200 Fed. 142, 118 C. C. A. 360; Seep v. Ferris-Haggarty Copper Mining Co., 201 Fed. 893, 120 C. C. A. 191; Eastern Oil Co. v. Holcomb, 212 Fed. 126, 128 C. C. A. 642.

The record presenting no question which we can review, the judgment is affirmed. And it is so ordered.

FRUTH et al. v. BENASSI.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4216.

1. TRIAL ⊜420—MOTION FOR DIRECTED VERDICT—WAIVER.
A motion to direct a verdict at the close of plaintiff's evidence was waived by defendant by introducing evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 983; Dec. Dig. ⊜420.]

2. APPEAL AND ERROR ⊜242—RESERVATION OF GROUNDS OF REVIEW—NECESSITY OF RULING AND EXCEPTION.
The sufficiency of the evidence to support the verdict was not reviewable, even though the statement of defendant's counsel at the close of all the evidence that he wished the record to show a formal renewal of a motion for a directed verdict was treated as renewing a motion made at the close of plaintiff's evidence and waived by introducing evidence, where the record showed no ruling by the court on the motion when so renewed or exception thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417–1425; Dec. Dig. ⊜242.]

3. APPEAL AND ERROR ⊜977—MATTERS REVIEWABLE—MOTION FOR A NEW TRIAL.

In the federal courts, the ruling on a motion for a new trial is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. ⊜977.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Cesira Benassi against George Fruth and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Jesse G. Northcutt, of Denver, Colo. (Charles Hayden, of Walsenburg, Colo., on the brief), for plaintiffs in error.

George Allan Smith and F. W. Sanborn, both of Denver, Colo., for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

CARLAND, Circuit Judge. This is an action to recover damages for the death of Luigi Benassi, alleged to have been caused by the negligence of plaintiffs in error. There was a judgment for defendant in error to reverse which the case has been removed here. The only points discussed in the brief of counsel for plaintiffs in error are:

1. There was no evidence introduced showing negligence on the part of plaintiffs in error.

2. The evidence showed that the defendant in error was guilty of contributory negligence.

3. The evidence showed that the death of Benassi was due to a risk which he had assumed.

4. That the verdict is contrary to the evidence.

[1, 2] An examination of the record, however, does not disclose any ruling made by the trial court reviewable here upon these questions. Counsel for plaintiffs in error at the close of the evidence for plaintiff below, moved for a directed verdict in his favor. This being denied, he introduced evidence, which was a waiver of the motion. At the close of all the evidence, counsel said: "I wish the record to show a formal renewal of our motion for a directed verdict." This is all the record shows on this point. If we shall in a spirit of fairness treat the record as showing the motion renewed, it does not carry us far, as there must have been a ruling and exception thereto in order to review the questions sought to be raised, and in the same spirit of fairness towards the court we cannot treat the record as showing a ruling which, so far as the record shows, was never made.

[3] The ruling on the motion for a new trial is not reviewable here, as we have had occasion to remark many times at each term of this court. In Liebing v. Matthews, 216 Fed. 1, 132 C. C. A. 245, Judge Smith, speaking for this court, said:

"Bearing this in mind, it has been so long settled that the ruling on a motion for a new trial cannot be reviewed in an appellate court as to scarcely require the citation of authorities."

The judge, of course, was speaking of a federal appellate court.

We might treat the errors assigned and not argued as abandoned, but we have considered them and find them without merit.

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

SOUTHERN ICE CO. v. MORRIS et al.†

(Circuit Court of Appeals, Fifth Circuit. January 19, 1915.)

No. 2629.

1. ESTOPPEL ⟸83—VALUE OF PROPERTY—REPRESENTATIONS.

A buyer who acquires property at the price asked, half of which is paid in cash and the other half in stock represented by him and accepted by the seller as the equivalent of cash, is estopped to claim that such price was other than the value of the property, or that the seller was not damaged as a result of the stock being of substantially less value than represented.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 218, 227–229; Dec. Dig. ⟸83.]

2. EVIDENCE ⟸265—ADMISSIONS.

Where defendant purchased an ice plant from plaintiffs at the price asked and fraudulently induced plaintiffs to accept certain corporate stock as a part of the price, the transaction involved an admission by defendant that the plant was worth the price, so that in plaintiffs' action for damages they were not required to prove the value of the plant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1029–1050; Dec. Dig. ⟸265.]

3. FRAUD ⟸59—DAMAGES—DIFFERENCE BETWEEN ACTUAL AND REPRESENTED VALUE.

Where plaintiffs were induced to accept certain stock in part payment for an ice plant and the stock was of much less value than represented, plaintiffs' measure of damage was the difference between the actual and represented value of the stock.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. ⟸59.]

In Error to the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Action by W. M. Morris and another against the Southern Ice Company. Judgment for plaintiffs (214 Fed. 168), and defendant brings error. Affirmed.

Clifford L. Anderson and Daniel W. Rountree, both of Atlanta, Ga., for plaintiff in error.

George Westmoreland and Churchill P. Goree, both of Atlanta, Ga., for defendants in error.

Before WALKER, Circuit Judge, and MAXEY and FOSTER, District Judges.

PER CURIAM. The contention that the petition or complaint was subject to the demurrer interposed to it is sought to be supported on the ground that, because of its failure to allege or show the value of the property acquired by the defendant from the plaintiffs, it is to

---

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 1, 1915.

be regarded as failing to show that any recoverable damages were sustained in consequence of the fraudulent misrepresentation or deceit counted on. In other words, the contention is that, though the plaintiffs were by the alleged fraudulent representation of the defendant induced to part with their property for a consideration greatly less in value than the one they were led to suppose they were receiving, yet they cannot recover anything without showing that what they parted with was worth more than what they received for it. The authorities principally relied on to support this position are the following: Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; Rockefeller v. Merritt, 76 Fed. 909, 22 C. C. A. 608, 35 L. R. A. 633; Stratton's Independence Limited v. Dines, 135 Fed. 449, 68 C. C. A. 161. It is only by leaving out of view a material feature of the case at bar that the rulings complained of can be regarded as not in harmony with those made in the cases just cited.

[1] The averments of the petition or complaint in this case and evidence offered in support of those averments show that in the transaction which resulted in the defendant's acquisition of the ice plant of the plaintiffs there was such an agreement on or acquiescence in the valuation and price put by the plaintiffs on that property as to estop the defendant from raising in this case the question of its actual value. Those averments and that evidence show that the plaintiffs priced and valued that property to the defendant at $100,000; that the defendant, without questioning that price or valuation, secured and exercised an option to buy that property for $50,000 in cash and $50,000 in specified corporate stock at par by representing to the plaintiffs that that stock was in fact worth par. The case is one of a sale of property at the price asked for it by the seller, who was induced to accept part of that price in other property by the purchaser's representation that such other property was worth the amount of the part of the price in payment of which it was given. A purchaser who so acquires property at the price asked for it, half of that price being paid in cash and the other half in what was represented by him and accepted by the seller as the equivalent of cash, thereby estops himself from claiming that such price was other than the value of the property, or that the seller was not damaged as a result of what he so accepted as the equivalent of cash turning out to be substantially less valuable than it was represented to be. In the opinion rendered in the case of Rockefeller v. Merritt, supra, it was recognized that this rule of estoppel is applicable in favor of a seller who dealt on the faith of the price he asked being paid in cash or its equivalent.

[2] As the transaction by which the ice plant was disposed of involved an admission by the defendant that it was worth $100,000, it was not incumbent on the plaintiff to aver and prove its value. Sun Printing & Publishing Association v. Moore, 183 U. S. 642, 674, 22 Sup. Ct. 240, 46 L. Ed. 366.

[3] We are not of opinion that the trial court was in error in its rulings to the effect that the sellers of the ice plant were entitled to be paid the price or admitted value at which it was sold, and that the

damages they sustained by the purchaser's misrepresentation of the value of the stock given and accepted as a part payment were to be measured by the difference between its actual and its represented value. Those rulings enabled the plaintiffs to recover, not damages for the loss of anticipated speculative profits from the corporate stock accepted at par, but only compensation for its not having the value it was represented to have and at which it was accepted as the equivalent of cash.

The judgment appealed from is affirmed.

GILLEN v. POWE.

(Circuit Court of Appeals, Fifth Circuit. January 11, 1915.)

No. 2613.

1. ESTOPPEL ⟸38—CONVEYANCE—WARRANTY—AFTER-ACQUIRED TITLE.
Where the owner of land, but not the timber thereon, conveyed the land by warranty deed to another, who knew that the grantor had no interest in the timber and understood that the timber was not included in the deed, although not expressly excepted therefrom, the warranty in the deed did not operate to pass to the grantee, or a subsequent grantee, the right to the timber thereafter acquired by the grantor, and the grantor can have the deed corrected so as to exclude the timber therefrom.
[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 99-107; Dec. Dig. ⟸38.]

2. REFORMATION OF INSTRUMENTS ⟸24—RIGHT OF ACTION—POSSESSION.
The grantor need not show that he is in possession of the timber to entitle him to the equitable relief reforming the instrument in such a case, since the only way he could take possession would be by cutting and removing the timber which he had a right to allow to remain standing.
[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 83; Dec. Dig. ⟸24.]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Action by William H. Gillen against Harry A. Powe. Decree for the defendant, and plaintiff appeals. Reversed and remanded.

T. M. Stevens, of Mobile, Ala., for appellant.

R. Percy Roach, of Mobile, Ala., for appellee.

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

WALKER, Circuit Judge. [1] The averments of the bill show that the appellee, Harry A. Powe, bought and paid for only the land described in the deed to him, and that it was not the intention of either of the parties to that instrument that it should convey or affect the timber on that land, which it was well understood then belonged to a third party. The deed to the appellee's grantors, as it was framed, had the effect of misdescribing the property which was intended to pass, in that the covenant of warranty which it contained on the face of it would operate to vest in the grantee, or in his subgrantee,

the title to the timber subsequently acquired by one of the grantors. A grantee in a deed is not entitled to make use of a covenant of warranty contained in it to get title to something which both parties to the conveyance understood was not covered by it. When the words of conveyance contained in a deed have the effect of vesting in the grantee the absolute title to all the property intended to pass by it, nothing else is left for the covenant of warranty to operate upon, and the presence of that covenant in the deed should not be allowed to have the effect of passing to the grantee title to property subsequently acquired by a grantor which all parties to the instrument understood was not covered or affected by it. According to the averments of the bill, the appellee acquired the land from Mary Powe with full knowledge that the deed to her was not intended or understood to convey the timber. The appellant, the plaintiff below, acquired whatever right Arthur R. Speer, one of the grantors in the deed to Mary Powe, had to the timber or to have it excluded from the operation of the deed to Mary Powe, and, unless he has an adequate remedy at law, is entitled to have the misdescription corrected, as the effect of such misdescription is to cast a cloud over his title. Greer et al. v. Watson, 170 Ala. 334, 54 South. 487; Jones v. McNealy et al., 139 Ala. 379, 35 South. 1022, 101 Am. St. Rep. 38; 34 Cyc. 951.

[2] Assuming, without conceding, that in any case the right of a grantor in a deed, or of his vendee, to resort to a court of equity to have it so reformed as to exclude from its operation property not intended to be affected by it, is dependent upon the party seeking relief being in possession of the property claimed to have been mistakenly included in the instrument sought to be reformed, yet it seems plain that such a rule cannot properly have application in such a case as the instant one. When one owns the timber on a tract of land and another owns the land itself, the former has no right of possession that can be exclusive of the latter's. The timber owner's right to take possession of the timber can be executed only by entering upon the land and severing it from the soil; and, until this is done, the actual possession of the timber, undelivered as yet, remains in the general owner in possession of the land, as the quasi bailee of the owner of the timber. Christopher et al. v. Curtis-Attalla Lumber Co., 175 Ala. 484, 57 South. 837. And the timber owner, in the absence of any restriction or limitation upon his ownership, has as much right to refrain from cutting his timber as he has to cut and remove it. To say that he must enforce his right to the only kind of possession to which he is entitled, namely, that of entering on the land and severing the timber from the soil, amounts to saying that he must do something that his ownership of the timber entitles him to refrain from doing. Even if, while the deed to Mary Powe is outstanding and unreformed, the appellant could maintain an action at law based on his right to the timber, his right to resort to a court of equity should not be conditioned upon his abandonment of a material part of the property interest which he seeks to have protected.

In such a situation as the one disclosed by the averments of the bill in the instant case, the right of a grantor in a deed, or of one en-

titled through him to timber on the land conveyed, to have a covenant of warranty contained in the deed deprived of the effect of making the grantee the apparent owner of timber which was acquired by the grantor after the deed was executed, could not be fully protected if, in order for the party seeking such relief to be entitled to it, he must first have successfully asserted the only right to the possession of the timber which could be enforced at law. For the plaintiff to have a standing in a court of equity, he is not required to show that he has enforced a legal remedy, the constrained enforcement of which by him would curtail the very right he is entitled to have protected. What has been said, we think, sufficiently answers the suggestion that the bill was deprived of equity by its failure to show that the plaintiff was in the possession of either the land or the timber on it to which alone he was entitled. We are aware of no legal remedy by a resort to which the plaintiff could have secured adequate protection against the appearance of ownership of the timber with which, in the situation developed by subsequent events, the deed to the defendant, as it was framed, clothed him. The plaintiff's property right, as disclosed by his bill, is of such a nature as required his resort to a court of equity for its protection against the claim recently set up by the defendant. The conclusion is that the plaintiff had no adequate remedy at law, and that the facts stated in his bill entitle him to a decree declaring that the deed to the defendant is without effect upon plaintiff's title to the timber right acquired by the latter.

The decree appealed from is reversed, and the cause is remanded for further proceedings not inconsistent with the conclusions above stated.

In re MERRITT CONST. CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 88.

1. BANKRUPTCY ⊂⊃126—TRUSTEE—APPROVAL.

Under Bankruptcy Act July 1, 1898, c. 541, § 45, 30 Stat. 557 (Comp. St. 1913, § 9629), providing that trustees may be individuals who are respectively competent to perform the duties of the office, and General Order 13 (89 Fed. vii, 32 C. C. A. xvii), providing that the appointment of a trustee by the creditor shall be subject to the approval or disapproval of the district judge, the approval of the trustee selected by the creditors by either the referee or district judge is a matter of discretion, but the choice of the creditors should not be overruled except for substantial reasons.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊂⊃126.]

2. BANKRUPTCY ⊂⊃446—REVISION—APPROVAL OF TRUSTEE.

Where a trustee selected by the creditor has been approved by the district judge, the appointment will not be disturbed by the Circuit Court of Appeals on petition to revise, unless an abuse of discretion appears.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂⊃446.]

---

3. BANKRUPTCY ⊂⊃126—APPOINTMENT OF TRUSTEE—APPROVAL—HEARING.
While ordinarily a request by a creditor to present evidence of the unfitness of the trustee selected by the majority of the creditors should be allowed, it is not an abuse of the district judge's discretion to refuse such request, where the circumstances of the trustee's unfitness were fully brought out at the creditors' meeting and the objecting creditors did not indicate that they had any new objection to present.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. ⊂⊃126.]

4. BANKRUPTCY ⊂⊃120—TRUSTEE—OFFICER OF CORPORATION.
A stockholder or officer of a bankrupt corporation is not, ipso facto, incompetent to act as its trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 185; Dec. Dig. ⊂⊃120.]

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

A. R. Campbell, of New York City, for petitioners.
I. J. Beaudrias, of Yonkers, N. Y., for respondent.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of the District Court approving the election of one Hayes as trustee. The bankrupt was a corporation engaged in the construction of roads. Its capital was practically owned by two persons, viz., one Merritt, the president, who was in charge of the office and finances, and Hayes, who was the outside man in charge of construction work.

October 20, 1913, Merritt, who had also been for many years supervisor of the town of Eastchester, disappeared, leaving a large shortage in his accounts. November 11th Hayes was appointed receiver in dissolution proceedings in the state court. December 4th an involuntary petition in bankruptcy was filed. December 17th the corporation was adjudicated a bankrupt. On the same day Hayes circularized the creditors to the effect that he desired to finish an outstanding contract of the corporation on which he had been engaged, and asking them to vote for him as trustee. January 21, 1914, the first meeting of creditors was held and Hayes was examined by counsel for minority creditors as to his connection with the corporation and as to various circumstances thought to render him incompetent to act as trustee. Thereafter Hayes and one Baird were nominated, and Hayes was appointed trustee by a large majority of the creditors in number and amount. The attorney for the minority creditors asked the referee to disapprove the appointment and to permit him to present evidence on the subject which the referee denied, and confirmed the appointment. Upon a petition to review, the District Judge confirmed the order of the referee.

[1, 2] Section 45 of the Bankruptcy Act provides that trustees may be individuals who are respectively competent to perform the duties of the office and reside in or have an office in the judicial district in which they are appointed. General Order xiii (89 Fed. vii, 32 C. C. A. xvii) provides that the appointment of a trustee by the creditors shall be subject to the approval or disapproval of the District Judge. The ap-

proval by the referee and District Judge of the appointment of a trustee by the creditors is a matter of discretion, depending upon the circumstances of each case. The choice of the creditors should not be overruled by the referee or District Judge except for substantial reasons, and the confirmation by the District Judge of such appointment should not be disturbed by this court unless an abuse of discretion appear.

[3] Ordinarily a request for leave to present evidence within a reasonable time, as to the fitness of the trustee appointed by the creditors, should be allowed. In this case, however, the circumstances tending to show the propriety or impropriety of the choice of Hayes were very fully brought out at the first meeting of creditors. Counsel for the minority creditors in asking to take further proof did not indicate any objections not already made. We see no abuse of discretion in refusing the request.

[4] As to the confirmation of the appointment by the referee and District Judge, we attach but little importance to the objections made. We do not assent to the proposition that a stockholder or officer of a corporation is, ipso facto, not competent to act as trustee in bankruptcy of such corporation. As it is asserted in the brief and not denied that the affairs of the bankrupt have been practically wound up, and its contracts, as far as possible, have been completed, it is not worth while, in the absence of any charges of bad faith or mismanagement on the part of the trustee, to discuss other objections made.

The order is affirmed.

LEWIS BLIND STITCH MACH. CO. v. ARBETTER FELLING MACH. CO.

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

No. 2088.

PATENTS ⊂=328—INFRINGEMENT—SEWING MACHINE.

The Lewis patent, No. 862,830, for a sewing machine for blind stitching, *held* not infringed by the machine of the Arbetter patent, No. 690,385, over which priority of invention is claimed for the Lewis patent; the mechanical means employed in the Arbetter machine having not only been independently conceived, but differing in principle of operation.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by the Lewis Blind Stitch Machine Company against the Arbetter Felling Machine Company. Decree for defendant, and complainant appeals. Affirmed.

The appellant is complainant in a bill filed in the District Court, charging infringement of its patent No. 862,830, issued August 6, 1907, upon application filed August 2, 1902, for a sewing machine, and this appeal is from a decree on final hearing dismissing the bill for want of equity—the opinion of the trial court thereupon being reported in 208 Fed. 992.

The specification of the patent in suit states: "My invention relates to sewing machines, and more particularly to blind stitch sewing machines; that is, machines making stitches which enter and leave the same side of the

goods, and which are locked or enchained upon the said side. The object of my invention is to simplify the construction of blind stitch sewing machines, and to provide mechanism whereby stitches can be made which are invisible on the opposite side of the goods to that on which the stitches are made, but which are locked or enchained upon the side or face of the goods upon which the needle enters, and which can be also concealed or nearly so on the side of the goods in which the stitches are made."

The specifications and drawings are elaborate in description of the machine and its various parts, which are in their nature somewhat complicated, but are largely of the familiar type of domestic sewing machines with their foot mechanism, needle control, and hook and bobbin devices; and the machine is of the lock stitch type for making blind stitching, in many respects of an old and familiar type in an old art. The patent contains 79 claims, but only 10 of these claims are involved in the charge of infringement; and the claims so involved are classified in the appellant's brief into three groups, namely:

I. The first group comprises the main subject-matter of controversy, and consists of two claims, 72 and 76, reading as follows:

"72. In a sewing machine for blind stitching, the combination with stitch-forming mechanism of means for presenting the goods to the needle with the edge adjacent to the needle inclined to the path of reciprocation of said needle."

"76. In a sewing machine for blind stitching, the combination with stitch-forming mechanism of means for presenting the goods to the needle with the edge adjacent to the needle inclined to the path of reciprocation of said needle, and an edge guide for the goods."

II. The second group is referred to as the "inclined hook" claims, also consisting of two claims, and numbered 42 and 71, reading as follows:

"42. In a sewing machine, the combination with a reciprocating needle of a rotary hook containing a bobbin and inclined to the path of reciprocation of said needle, the rear face of said hook co-operating with said needle to take the loop."

"71. In a sewing machine for blind stitching, the combination with a needle of a rotary hook inclined to the path of reciprocation of said needle, said hook having an inclined cast-off surface, and an offset for guiding the thread onto said cast-off surface.

III. The third group is referred to as the "needle deflection" claims, numbered 45, 46, 48, 50, 51, and 53, reading as follows:

"45. In a sewing machine for blind stitching, the combination with a guide of stitch-forming mechanism, including a needle, and means for holding said needle under tension and in alignment while passing said guide.

"46. In a sewing machine for blind stitching, the combination with stitch-forming mechanism, including a needle arranged with its axis at an angle to the path of reciprocation, of a guide for the goods, and a needle guide for deflecting said needle."

"48. In a sewing machine for blind stitching, the combination with stitch-forming mechanism, including a needle having its point substantially in line with its side, of a guide for the goods, and a needle guide for deflecting said needle before it enters the material."

"50. In a sewing machine for blind stitching, the combination with stitch-forming mechanism, including a needle having its point substantially in line with one of its sides and having its axis inclined to the path of reciprocation, of a back guide and a needle guide for deflecting said needle.

"51. In a sewing machine for blind stitching, the combination with stitch-forming mechanism, including a needle having its point substantially in line with one of its sides and having its axis inclined to the path of reciprocation, of a reciprocating back guide, a needle guide, and means for positively limiting the movement of said back guide toward said needle."

"53. In a sewing machine for blind stitching, the combination with stitch-forming mechanism of a rigid needle guide for deflecting the needle before it enters the material, a movably mounted back guide, and means for positively limiting the movement of said back guide toward said needle."

The alleged infringing machine of the appellee purports to be made under patent No. 690,385, issued to W. Arbetter, January 7, 1902, on application filed August 13, 1901, for "sewing machine for felling," together with subsequent Arbetter patents. While this patent was granted prior to the above-mentioned grant to Lewis and upon an application filed nearly a year prior to the Lewis application, it is contended on behalf of the appellant that the proof establishes priority of invention in favor of Lewis, both through proceedings in the Patent Office and through proof in the present record. Such priority is controverted, however, on behalf of the appellee and forms one of the issues in the case.

The defenses set up are invalidity of the claims in suit, and noninfringement of any of the claims, if any thereof are valid. The ruling of the District Court sustains the defense of noninfringement.

George T. May, Jr., and Edward Rector, both of Chicago, Ill., for appellant.

Frederick P. Fish and Nathan Heard, both of Boston, Mass., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The complainant, Lewis Blind Stitch Machine Company, appeals from a decree which dismisses its bill charging the defendant, Arbetter Felling Machine Company, with infringement of its Lewis patent, No. 862,830, for "sewing machine," issued August 6, 1907, on application filed August 2, 1902. Its patent claims in controversy are 10 in number (out of 79 claims allowed in the grant), which are classified in three groups throughout both briefs, and thus described in complainant appellant's brief: (1) Claims 72 and 76, relating to "a combination of stitch-forming mechanism and work-presenting mechanism" for "novel and advantageous results"; (2) claims 42 and 71, being the "inclined hook" claims; and (3) claims 45, 46, 48, 50, 51, and 53 as "needle deflection" claims. In the specifications the invention is described as relating "particularly to blind stitch sewing machines; that is, machines making stitches which enter and leave the same side of the goods, and which are locked or enchained upon the said side."

As the defendant's alleged infringing mechanism is made under Arbetter patents, whereof No. 690,385 (for a "sewing machine for felling") is the fundamental grant, on an application filed August 13, 1901 —a year prior to the Lewis application—for which patent issued January 7, 1902, and is substantially followed by the defendant's machine, the complainant has rightly been burdened with the unusual requirement to prove actual priority of the Lewis machine as patented over that of Arbetter, as well as proving infringement of the Lewis claims; and the adequacy of proof upon this issue of priority in respect of the main claims (72 and 76) is one of the serious controversies in the arguments. Validity of the claims in suit under other prior patents in evidence is challenged, and a considerable portion of the argument is directed to that issue. The rulings of the trial court, however, sustain the defense of noninfringement of all these claims, as the ground for dismissal of the bill, and the opinion expresses the view that priority over Arbetter's machine is established and assumes the validity of the several claims. Nevertheless, counsel for the defendant ap-

pellee urges three propositions for decision on this appeal (beside the contentions of noninfringement in any view of the claims), in substance: First, that the defendant's machine is an independent development, borrowing nothing from Lewis, and has neither "obtained substantially the same result," nor "obtained its result in substantially the same way," or by the same means; second, that if the Lewis claims read in any sense upon the defendant's machine, they are invalid as mere claims for a result and met in the prior art; third, that Arbetter's invention was prior, and any Lewis claims reading thereon are invalid for that cause. We believe the issue of infringement as presented in this record may rightly be treated as the primary one for determination under the several claims involved, and that, if the decree is sustainable for noninfringement, neither issue of priority over Arbetter nor of validity of the Lewis claims requires consideration, although the foregoing first and second propositions may enter into consideration on the inquiry of infringement.

The opinion of Judge Sanborn, as the trial judge, is reported in 208 Fed. 992, and its excellent and ample preliminary statement of the matters of fact involved in the controversy may be consulted for understanding thereof without repetition here. Its descriptions of the mechanisms respectively of Lewis and Arbetter, their operations and distinctions, and the problems met and solved by each, leave little to be stated additionally; and its summary of the extended proceedings in the Patent Office, disclosed by the Lewis file wrapper—upon which claims were ultimately allowed, over reference to Arbetter's prior patent (on ex parte affidavit of priority of Lewis) and other references,—and as well the summary of proceedings on interference between rival applications of Lewis and Arbetter, referred to as the "seam application record," may become both pertinent and instructive for interpretation of the claims in suit. The evidence leaves no room for doubt that Arbetter's conception of the entire mechanism embraced in his patent No. 690,385, was an independent one, not derived from the Lewis conception in any respect; but it is assumed for the purpose of the present inquiry—without so deciding, as hereinafter explained—that Lewis proves priority in his conception and reduction to practice of such inventions as his later application sets forth, and in that view it is unquestionable that the scope thereof, as clearly disclosed and allowed, cannot be narrowed because of this independence of the Arbetter conception or priority of application thereupon. It is equally plain, however, that its scope cannot be enlarged beyond the original conception and disclosure of Lewis (as carried out in changes made in his old machine in evidence) to embrace the Arbetter disclosure of means and function, through the subsequent amendments introduced by Lewis in the long course of his proceedings in the Patent Office.

Neither of these patentees claims a pioneer invention in sewing machines for blind stitching, as many prior machines had accomplished such work; but the appellant contends that the Lewis invention is entitled to rank as a pioneer in producing "a machine for doing blind-stitch concealed-effect felling," and the opinion below states that the Lewis machine "was the first successful machine to do such felling."

The nature of this invention remains to be considered, under the above-mentioned assumption of priority in machine felling; but this distinction between the two patents in reference thereto may well be borne in mind: While Arbetter's patent is both entitled and specified as a "sewing machine for felling," for which a patent issued several months prior to the filing of the Lewis application, and the ensuing specifications of Lewis refer to his stitching as "concealed, or nearly so, on the side of the goods in which the stitches are made," they do not mention the well-known and important work in the manufacture of clothing classified as felling, but do specify work which requires another familiar class of stitching called "overseaming" or "cross-seaming," which does not require the "concealed effect" of felling Nor do we understand the testimony introduced in support of priority therein (aside from Lewis' personal testimony) to establish clearly that the commercial use of this Lewis original machine in evidence extended to actual felling work as above defined. In the arguments of counsel much discussion is directed for and against this proposition, stated in an opinion of the Court of Appeals for the District of Columbia (Arbetter v. Lewis, 34 App. D. C. 491), on the seam-application interference proceedings between Lewis and Arbetter, in reference to the Lewis conception and structure, namely, that "concealment of either thread was as foreign to his original design as it is impossible of accomplishment in his seam." We are of opinion, however, that decision of that issue is not needful herein, so that consideration thereof may rightly be reserved for hearing in the seam-application case, mentioned in the briefs as pending in the District Court.

Both Lewis and Arbetter necessarily used in common for their machines the general means and features of the old sewing machine art, and both inventions were limited to the special means devised for its new method of machine stitching. Referring to the descriptions of each of their particular means and its operation presented in the opinion below, we believe it to be plain that each proceeded upon and carried out a different scheme of means to accomplish his purpose. As correctly stated in the brief for appellant:

> "The essential mechanism of any lock stitch machine consists of (a) the goods-handling mechanism and (b) the stitch-forming mechanism. The goods-handling mechanism properly positions the goods to receive the needle and feeds the goods along between needle reciprocations. The stitch-forming mechanism handles the thread. It consists essentially of the thread-carrying needle, the co-operating shuttle or hook mechanism and the thread-control devices, such as take-up, tension, etc."

These definitions, however, may well have the further explanation that the goods-handling means of the prior art generally concurred in feeding the goods "in a straight line fore and aft of the machine," with other means to permit turning and shifting to follow the desired line of stitching. The Lewis machine departs from this usual method, and provides for feeding and holding the goods in a direction diagonal to the needle, so that, when the goods are bent around the edge of the back guide (table edge), the "needle-to-edge relation" is obtained for the stitch-making, "with the edge adjacent to the needle inclined to the path of reciprocation of said needle." We understand the stitch-

forming mechanism to be of the old art in its "vertically reciprocating needle," carried in a needle bar and "shogged" laterally to form two rows of stitches, wherein the only features of novelty claimed are the two elements referred to as the "inclined hook" and the "needle deflection" means, each of which is to be considered later in reference to the particular claims and charges of infringement. The above mentioned needle-to-edge relation reiterated in the appellant's argument as the conception of Lewis on which his invention hinges, is the normal relation in hand work for felling and overseaming. Undoubtedly this relation was dominant in the mind of Lewis (and of Arbetter likewise) as a result sought and in some measure attained by the means devised, but we do not understand it to be the conception in the sense of the patent law for which monopoly is authorized. It was equally open (as well as obvious) to subsequent inventors of other means for like object. From the Lewis specifications and claims, and all consistent testimony as well, it plainly appears, as we believe, that his entire conception of means was the above-stated departure from the normal goods-presenting means and methods in his new provisions, together with the normal stitch-forming means merely adapted to such diagonal and edgewise arrangement of the goods.

The Arbetter conception and device, however, clearly differs from that of Lewis both in his approach to the solution and in his device of means, namely: Following out the normal method of feeding and presenting the goods for stitching, his attention and device were entirely directed to the stitch-forming means for obtaining the necessary needle-to-edge relation. That Arbetter succeeded therein in providing stitch-forming mechanism which is commercially effective for machine felling, extensively required in the manufacture of clothing, is established by the testimony; and we believe it to be likewise established, not only that his device is more effective than that of Lewis for such work, but that such efficiency is unmistakably due to his stitch-forming means and methods. Therefore, if such mechanism is not within the scope of invention in means allowable to Lewis, the defendant appellee is entitled to affirmance of the decree.

1. The claims chiefly relied upon for the charge of infringement are claims 72 and 76. As stated in the appellant's brief:

> "The invention covered" thereby "is beyond doubt the factor of greatest importance in this patent, and claim 72 is the more important claim of the two. It covers the foundation invention."

Claim 72 reads:

> "In a sewing machine for blind stitching, the combination with stitch-forming mechanism of means for presenting the goods to the needle with the edge adjacent to the needle inclined to the path of reciprocation of said needle."

Claim 76 is identical therewith, except that it states in addition, "and an edge guide for the goods."

These propositions are undisputed (as indicated in our foregoing mention of the respective conceptions and devices): That the defendant's (Arbetter) machine contains neither (a) the stitch-forming mechanism,

(b) the goods presenting means, nor (c) the edge guide described in the specifications of the Lewis patent, and that it is entirely free, both from its independent origin and its distinctive co-operation of means, from imputation of colorable evasions thereof. The charge of infringement, therefore, is predicated solely on the contentions that the Lewis mechanism is entitled to the "broad view applicable to inventions of primary attainment"; that it "falls in the highest class," as a "pioneer in concealed-effect machine felling," so that these claims must "receive liberal interpretation and a wide range of equivalence," embracing the Arbetter mechanism for analogous work; and that this view arises mainly, if not wholly, through the "novelty of his needle-to-edge relation" in machine stitching. It is true, as before stated, that both machines have the needle-to-edge relation for stitching and that both are capable of doing felling with some measure of the desired concealment of stitches, although their difference in structure imposes well-defined difference in the extent of concealment in favor of the Arbetter machine. Whatever quality or rank may be assumed, however, for the Lewis invention, we believe these contentions for infringement to be untenable, when the distinction is observed (as heretofore noted) between the two inventions, both in the inventor's conception of the problem and in the means devised for its accomplishment.

Under the elementary law of patents no doubt is entertainable that Lewis could not obtain monopoly to exclude other inventors, either from use of the needle-to-edge relation in a sewing machine or from machine stitching to do felling work, and it follows necessarily that the doctrine of equivalents cannot be extended to create such monopoly of function by judicial interpretation. Without overthrowing the settled rule in that regard, we believe equivalence of means cannot be attributed to the Arbetter machine.

The Lewis conception was a radical and novel change from the normal method of feeding the goods in a straight line, so that the path of reciprocation to the needle is at an inclination to the line of feed. This is the "means for presenting the goods to the needle" which is plainly the single feature and element of novelty set forth in these claims—the edge guide, mentioned as an additional element in claim 76, being an essential part thereof to preserve mechanical inclination throughout the operation—and such means for obtaining and preserving the desired relation of fabric and needle undoubtedly constitutes the essence of invention for which the patent was granted.

Arbetter, on the other hand, independently sought and obtained that relation through a stitch-forming mechanism, whereby the normal feeding arrangement was preserved without change. His conception (seemingly in the natural direction) involved more difficulty in its mechanism, but proved more effective than that of Lewis for concealment of stitches, and perhaps for commercial work. For the purposes of this inquiry, it is sufficient to quote from claim 4 of his patent for definition of his novel mechanism, namely:

"Means to turn the stitch-forming means about an axis vertical to the work support that the needle may enter the material parallel with and then at an angle to the line in which the material is fed."

This oscillation means enables one row of stitches to be inclined and the other row to be parallel, so that concealment of the base row is secured, while in the Lewis method both rows of stitches are inclined and like concealment of the base row cannot be accomplished. The "path of reciprocation of said needle" referred to in the Lewis claims is constantly in the same direction, while Arbetter obtains necessarily two paths of reciprocation at angles to each other.

We believe, therefore, that not only is identity of means and operation disproved, but that fundamental differences therein produce material differences in their felling work, and that the alleged infringement of claims 72 and 76 is without support under the facts in evidence. Neither review nor citation of the numerous authorities called to attention for such support seems needful, as none of them impresses us to bear in favor of the contention. The important case of Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co., 61 Fed. 958, 10 C. C. A. 194, in reference to liberality of interpretation for a meritorious patent, is greatly relied upon for application to these claims; but we do not understand the facts there involved, nor the notable opinion of Judge Putnam (speaking for the Circuit Court of Appeals for the First Circuit) to be applicable here. As stated in that opinion, the question involved was the defendant's contention that the patent in suit "can in no event cover a machine of which the frame is stationary and the plate moves," for the reason that it specifies that the frame of the device moves and the plate is fixed, and this despite the fact that "the defendant's machine accomplished the same result by mere reversal of this action." It further states that the defense rests on the proposition that the entire novelty "turns on the fact that the plate is fixed and the frame moves," but on review of the facts as to the actual invention this proposition was overruled, as destructive of "the entire value of this most important, useful, and hitherto profitable invention." The ultimate ruling against the narrow interpretation sought by the defense appears in these words:

> "The principle of his stitching mechanism is clearly such that the relative movements between it and the plate are essential, while the absolute movement—that is, whether the plate moves or the frame moves—are nonessentials."

For its basic distinction from the case at bar, as above reviewed, no additional comment is required.

2. The claims referred to as the "inclined hook claims" are numbers 42 and 71, wherein the only feature of novelty asserted is "the inclination of the rotary hook to the path of needle reciprocation," as it is conceded that "such a rotary air hook was not new with Lewis," and the advantage of its inclination, as specified, is that "more ready discharge is accomplished by bringing the beak of the hook further toward the outer or front face of the hook, thus having less distance to carry the thread forward." As otherwise stated by complainant's expert, it "facilitates the casting off of the loop of needle thread while still retaining the periphery of the hook close to the stitch-forming point." The need and benefit of this arrangement in the Lewis mechanism, for the required speed and accuracy of operation, is unquestionable. We shall

not undertake, however, to analyze the refinements of reasoning upon which experts and counsel on behalf of the appellant contend, both for invention in this arrangement over the conceded prior art showing inclination of hook to the path of needle reciprocation, and for infringement thereof by the defendant's different inclination of hook. It is deemed sufficient for affirmance of the ruling of noninfringement, that the evidence establishes these propositions: (1) That the two mechanisms in suit differ (a) in the type of hook used; (b) in the direction of inclination thereof; and (c) in the function of its inclination. (2) That the Lewis hook of the exhibit "Lewis Old Machine," of the type known as "parallel hook," was merely tilted for his improvement to the inclined arrangement of the patent for the above-mentioned "facility of casting off." (3) That the Arbetter hook is distinctively of the other type, known as "vertical hook," and its inclination is away from the vertical, so that its function cannot be identical with the Lewis inclination.

3. In reference to the six claims denominated the "needle deflecting claims," we adopt the conclusion stated in the opinion below for denial of infringement, namely:

"That the defendant does not use the Lewis needle guide, but merely the old form found in a number of earlier patents. If the defendant's needle is put under tension, it is a matter of accident, and does not result from the construction or hanging of the needle, nor from the way the guide is made or adjusted."

The suggestion in the brief of counsel for appellant that the old needles in evidence, taken from machines of the defendant, support "the likelihood of at least intermittent infringement," does not impress us to merit discussion.

The decree of the District Court is affirmed.

SEEGER REFRIGERATOR CO. v. AMERICAN CAR & FOUNDRY CO.

(Circuit Court of Appeals, Third Circuit. January 22, 1915.)

No. 1865.

1. PATENTS ⟸318—INFRINGEMENT—ACCOUNTING—BURDEN OF PROOF.
Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits, unless he sustains the burden of showing that a portion of them is the result of some other thing used by him.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⟸318.

Accounting by infringer for profits, see notes to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8; Clark v. Johnson, 120 C. C. A. 389.]

2. PATENTS ⟸318—INFRINGEMENT—ACCOUNTING—BURDEN OF PROOF.
Where an infringing invention is used in combination with noninfringing features, and each jointly but unequally contributes to the profits, as the infringed patent creates only a part of the profits, the patentee is entitled to recover only that part of the net gains, and must give evidence reliable and tangible, and not conjectural or speculative, tending to support or apportion the profits between the infringing and noninfringing features, or show by equally reliable and satisfactory evidence that the

entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⊂=318.]

3. PATENTS ⊂=318—INFRINGEMENT—ACCOUNTING—BURDEN OF PROOF.

The burden on a patentee of apportioning the commingled profits on an infringing article between the infringing and noninfringing elements is sustained by proof demonstrating that defendant has so inextricably commingled and confused the parts composing the article that the profits cannot be accurately or approximately apportioned.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⊂=318.]

4. PATENTS ⊂=319—INFRINGEMENT—ACCOUNTING—SUFFICIENCY OF EVIDENCE.

In an action for infringement of a patent for an improvement on a refrigerator partition by a manufacturer of refrigerator freight cars, evidence as to the relative cost of the partition, the car, and the body thereof, and as to the cost of installing such partition when furnished by defendant's customers, *held* to furnish a sufficient basis for the apportionment of profits between the infringing and noninfringing features of the car; and hence a judgment for nominal damages only was erroneous.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577–586; Dec. Dig. ⊂=319.]

Appeal from the District Court of the United States for the District of New Jersey; Edward J. Bradford, Judge.

Suit by the Seeger Refrigerator Company against the American Car & Foundry Company. From a decree (212 Fed. 742) for complainant for nominal damages only, it appeals. Reversed, with instructions.

Edmund Wetmore, of New York City, for appellant.

Frederick P. Fish, of Boston, Mass., and John G. Johnson, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This appeal is from a decree awarding to the appellant a nominal sum only on account of profits made by the appellee in the use of a device infringing three claims of the appellant's patent. The patent (while in form for a combination) is really for an improvement in one element only, and is specially intended to protect a particular form of opening or port in the partition of a refrigerator. The improvement is fully described by the late Judge Cross in an opinion sustaining the patent, reported in (C. C.) 171 Fed. at page 416, and in the affirming opinion of this court delivered by the late Judge Lanning, reported in 178 Fed. at page 278, 101 C. C. A. 542 (certiorari refused 216 U. S. 618, 30 Sup. Ct. 573, 54 L. Ed. 640).

One of the claims may be quoted, in order to indicate the scope of the patent:

"(1) In a combined refrigerator and freezer, a suitable outside case, a refrigerating room and an ice bunker therein separated by a partition, inverted V-shaped ports in said partition leading from the refrigerating or freezing room into said ice bunker, and ports leading through the bottom of

said ice bunker and thence into the bottom of the refrigerating room, substantially as and for the purposes set forth."

As will be observed, the "suitable outside case" is a widely inclusive phrase; in the present dispute it was applied to a refrigerator freight car equipped with a partition that was held to infringe. An accounting having been directed, the appellant made no claim for damages but asked for profits only, and the master awarded a sum of nearly $663,000. The appellee excepted, and the district court held the appellant's evidence to be deficient and entered a decree for a nominal amount. (D. C.) 212 Fed. 742.

The opinion below discusses very fully and with much care the general rules upon the subject of accounting for profits, and with much of it we are in accord. But we are unable to agree with the conclusion that sufficient evidence was not presented to justify a finding concerning the amount of profit fairly chargeable against the infringing device. The recent decision of the Supreme Court in Westinghouse Co. v. Wagner Co., 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, was evidently intended to furnish a new starting point in the developed law on the subject before us, and we need not consider any other of the numerous cases that have been cited. The importance of the subject may justify us in giving a somewhat detailed outline of that decision.

The device there in question improved an electrical transformer. When a current of low voltage is transformed into a current of high voltage, heat is generated, and heat deteriorates a transformer. The Westinghouse patent deals with this problem, and has proved to be of great value. The Wagner Company was obliged to account for the sale of transformers that infringed claim 4 of the patent. Before the master it was proved that the company had made many other electrical appliances as well as the infringing transformer, and that all its output was made in the same shop by the same workmen and under the same general superintendence. No separate account was kept of the cost of making the transformers, and the company's books did not show definitely what profit, if any, had been realized from their sale. But the books did show that the gross receipts from the sale of all appliances during the accounting period aggregated more than $2,300,000, and that a gross profit of 8 per cent. had been realized thereon. Evidence was also given, such as the growth of the plant and the extension of the business, to warrant a finding that 8 per cent. was not the true profit, but that the company's general policy was to charge prices that would net 25 per cent. From all the evidence the master found that the company had made an approximate profit of more than $132,000 from the sale of the infringing transformer; and he made this finding in spite of the company's insistence that the evidence was insufficient. The company then undertook to show that the infringing transformers contained certain valuable elements not covered by claim 4, and contended that the plaintiff must therefore apportion the profit and could only recover so much as was due solely to the infringement of that claim. The master disposed of this contention by holding that claim 4 was an entirety, whose elements gave the whole commercial

value to the infringing transformers. Upon this point the court below and the Court of Appeals disagreed with the master, holding the transformers to contain noninfringing and valuable improvements that contributed to the profits, and restricting the patentee to nominal damages on the ground that he had failed to offer evidence from which the profit could be apportioned among the various elements, infringing and noninfringing.

[1, 2] These were the facts, and the Supreme Court (after saying that there had been "much controversy upon the subject and a conflict in the decisions") evidently thought it desirable to clarify the situation and to summarize the rules that ought to govern this difficult and important matter. We quote the two rules that are specially relevant to the present dispute:

"(c) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits, 'unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him.'" Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000.

"(d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must therefore 'give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.'" Garretson v. Clark, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371.

[3] Recognizing the difficulty of applying rule (d) in cases where it is not possible to separate a single profit into its component parts, the court gives special attention to this subject. The opinion refers to the object of section 4921 of the Revised Statutes (Comp. St. 1913, § 9467), namely, to afford ample redress against an infringer, and points out the danger that this object may be nullified by the ingenuity of infringers, who may so smother a patent with improvements that the injured patentee cannot possibly separate the illegal gain into parts, thus producing the indefensible result that "the greater the wrong, the greater the immunity." It is then declared that while the patentee must prove his case, and must carry "the burden imposed by law upon every person seeking to recover money or property from another," this general rule has its limitations and must not be pressed so far as to override other rules equally important. Applying the rule with its limitations to the case then in hand, the court takes up the course of proceeding before the master, saying that when the patentee had proved his patent and the defendant's infringement, and had offered evidence tending to show that profit had been made, he had sustained the burden imposed upon him. Thereupon the burden shifted to the defendant, who had sustained it in turn by offering evidence to the ef-

fect that some part of the profit was due to the use of noninfringing and valuable improvements. The court assumed that the defendant had made out a prima facie case in this respect, and that the burden was again shifted—"the burden of apportionment was then logically on the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention."

Now, how did the plaintiff sustain this burden? The problem was admittedly difficult, for, although profits in general had been proved, the witnesses were unable to apportion them among the infringing and the noninfringing elements. Nevertheless, the court held that the plaintiff had done all that was required of it, and applied one of the limitations to the general rule:

"Having, by books and other data, proved to the satisfaction of the master the existence of profits, the plaintiff had carried the burden imposed by law, and established every element necessary to entitle it to a decree, except one. As to that, the act of the defendant had made it not merely difficult but impossible to carry the burden of apportionment. But plaintiff offered evidence tending to establish a legal equivalent. It had proved the existence of a fact which, whether treated as a rule of evidence or as a matter of substantive law, would entitle it to a decree for all the profits. The method was different from that mentioned in the second branch of the rule in the Garretson Case, 111 U. S. 120 [4 Sup. Ct. 291, 28 L. Ed. 371]; but the plaintiff had now presented proof to demonstrate its right to the whole of the fund, because of the fact that the defendant had inextricably commingled and confused the parts composing it. This result would not be in conflict with the principle which in the first instance imposed the burden of proof on the plaintiff, but merely gave legal effect to a new fact which as a matter of law entitles the patentee to a particular judgment. It presented a case where the court was called on to determine the liability of a trustee ex maleficio, who had confused his own gains with those which belonged to the plaintiff. One party or the other must suffer. The inseparable profit must be given to the patentee or infringer. The loss had to fall on the innocent or the guilty. In such an alternative the law places the loss on the wrongdoer."

The rest of the opinion is mainly taken up with stating and answering the supposed objections to applying the doctrine of confusion of goods to patent cases; the conclusion being that the doctrine ought to be applied, but only when the patentee has exhausted all available means of apportionment. If he has done this, if he has "resorted to the books and employés of the defendant, and by them or expert testimony (has) proved that it was impossible to make a separation of the profits," the doctrine of confusion of goods is then to be applied.

And the court added:

"It may be argued that, in its last analysis, this is but another way of saying that the burden of proof is on the defendant. And no doubt such, in the end, will be the practical result in many cases. But such burden is not imposed by law; nor is it so shifted until after the plaintiff has proved the existence of profits attributable to his invention and demonstrated that they are impossible of accurate or approximate apportionment. If, then, the burden of separation is cast on the defendant, it is one which justly should be borne by him, as he wrought the confusion."

[4] Let us apply these principles to the case in hand. The partition of the Quinn patent, with its peculiar openings, is only a small element in the refrigerator cars made by the defendant. These cars are made

up of running gears and body, but of course the gears are so entirely distinct and so easily separable that we may lay them aside without discussion. And, even when we confine ourselves to the body alone, it seems clear that the body is composed of numerous parts that have so little to do with the peculiar openings in the partition that it would be out of the question to regard the whole profit on the body as due to the use of the partition alone. The master, however, felt bound to take this view, deciding, in effect, that the body was a unitary structure, and held the defendant accountable for the whole profit on the body of each car, after deducting an allowance conceded by the plaintiff. We agree with the district judge that this basis of calculation was erroneous, and approve the reasoning to be found on pages 749 and 750 of 212 Fed., but (as already stated) we cannot agree that the evidence forbids the recovery of more than a nominal amount. We think neither the master himself nor the court below gave sufficient weight to the following portion of the report:

"Complainant's fourth request is, in part, a claim for apportioning the profits to the costs of the parts. This, it is found, is not mere 'makeshift' or only 'sufficiently accurate,' as characterized by counsel for complainant; nor is it thought to be, as defendant describes it, 'arbitrary, fanciful, and unsupported by evidence.' The price of the car not having been the sum of the prices of the component parts nor in proportion thereto, but only a single price for the whole—only what 'the traffic will bear'—the apportionment of the profits to the cost of the part is simply analytical, and should be applied to this accounting.

"This request raises also the question of the influence of the patented feature upon the sale of the car body. The usual two lines of cases in accountings for profits are arrayed against each other. For the defendant it is contended on the authority of Garretson v. Clark, 111 U. S. 120,[1] and many other cases, that complainant must separate and show by reliable evidence the profits due to the patented part, and that failure to do so in this case is fatal to any substantial recovery. Defendant's contention is that the proofs do not show the profits on any parts but only on the whole. Intrinsic values of parts in question are likely and, so far as appears, indeterminable.

"The testimony of Mr. Thompson, assistant general manager of defendant company, shows an average cost of the partitions of $45. The partition features of the combination protected by the sustained claims of the patent in suit characterize this partition. The car cost $914.38. The profit thereon was $171.74. Therefore the profit assignable to the partition is $^{45}/_{914.38}$ of $171.74, or $8.451. On the 4,097 of them furnished by defendant, the profit at same rate is $34,623.74. This rate, expressed decimally, is 18.78 per centum. That is to say, the profit assignable to any part of the cost of the car is 18.78 per centum of the cost. For the remaining 11,935 cars in question, the purchasers furnished the partitions and defendants installed them. Since there was no cost to defendant for these partitions themselves, defendant could not, for the reason stated, have made any profits on them. But there was expended the cost of labor in installing them, and on this cost there was a proportional profit. The basis suggested by complainant's counsel in their last brief for estimating this cost seems too uncertain for adoption. It rests finally on the fact that the plain partitions cost $10. From this it is thought likely that materials cost $6 and labor $4. It would cost, they suggest, about the same to install them as it would to install the kind in question. And the chance of approximation to correctness is increased, it is said, by nearness to the general percentage of labor. But it cannot be found that the percentage which all the labor is of all the cost is any criterion for the labor on any particular part. So far as is known, a part costing little may require proportionally a large amount of labor. While the

[1] 4 Sup. Ct. 291, 28 L. Ed. 371.

cost of this labor does not appear, the method adopted by defendant of getting at the cost of the cars and striking the average, and the purpose for which the computation was made, leave little doubt that this cost of labor was not overlooked. We know, from the drawings and specifications, the dimensions of the partition and the materials used—that its fitting all around must have been close enough to stop air pressure, except between the slats; that, the partitions being made by others and sent to defendant, this fitting was work of nicety and required time; that the weight and size must have required more than one man in the first stages of the installment. All this, it can scarcely be doubted, as matter of common knowledge, did not cost less, at ordinary carpenter wages, than $3 for each partition. Applying the said rate to this part of the cost we have $3 x .1878 equals $0.5634 profit on the labor of installing each partition and 11,935 x .5634 equals $6,724.17. It is found therefore, that profits due to the infringement of the sustained claims of the patent in suit were at least the said $34,623.74 on partitions and said $6,724.17 on labor, amounting to $41,347.91."

There is perhaps some room for criticism on the ground that the master should have taken the profit on the car body alone, and not on the whole car, as the basis of calculating the profit on the partitions in the 4,097 cars first referred to. But practically the result is precisely the same, for the profit on the body was $88.44, and the percentage of profit attributable to the infringing partition is 8.451, which produces the same figures as the other calculation—$34,623.74. As it seems to us, therefore, the finding of the master rests upon sufficient evidence and furnishes a satisfactory basis for a decree. The plaintiff has done all that can fairly be required of it; evidence was offered (mainly by stipulation) whereby the profit on the whole car can be divided between the running gears and the body, and whereby also the approximate cost of the partitions themselves and the profit on these can be calculated; and we think this meets the requirements of the situation. We see no reason why the master might not draw reasonable inferences from the evidence, as in other cases, or avail himself of well-known facts in daily life. The correctness of the calculation is not challenged (although the soundness of the theory is denied), and we think, therefore, the plaintiff has fully complied with the rules in the Westinghouse Case; proof has been furnished that the defendant made profit on a structure embodying the patented device, and (instead of showing that the profit could not possibly be apportioned) the plaintiff has gone further and has furnished evidence that satisfied the master (although he did not follow his own finding) that such an apportionment could fairly and reasonably be made.

We may note also that the Supreme Court has recently (January 11, 1915) decided the case of Dowagiac, etc., Co. v. Minnesota, etc., Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. ——, in which the subject of accounting for profits is again considered, but the opinion merely follows the rules laid down in the Westinghouse Case, and holds that the Dowagiac Company had not conformed to these rules.

"It neither submitted evidence calculated to effect an apportionment nor attempted to show that one was impossible; and this although the evidence upon the accounting went far towards showing that there was no real obstacle to a fair apportionment. Certainly no obstacle was interposed by the defendant. It well may be that mathematical exactness was not possible, but, as is shown in Westinghouse Co. v. Wagner Co., supra (225 U. S. 617, 620, 621, 622 [32 Sup. Ct. 691, 53 L. Ed. 1222, 41 L. R. A. (N. S.) 653]), that

degree of accuracy is not required but only reasonable approximation, which usually may be attained through the testimony of experts and persons informed by observation and experience. Testimony of this character is generally helpful and at times indispensable in the solution of such problems. Of course, the result to be accomplished is a rational separation of the net profits, so that neither party may have what rightfully belongs to the other, and it is important that the accounting be so conducted as to secure this result, if it be reasonably possible."

We repeat that in our opinion evidence does exist in the present case, from which the profits on the infringing device may be calculated with reasonable approximation. The decree is reversed, with costs in this court and in the court below, and with instructions to the district court to enter a decree in accordance with this opinion.

MERRELL-SOULE CO. v. NATURAL DRY MILK CO.

(District Court, N. D. New York. January 20, 1915.)

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—PROCESS OF DESICCATING MILK.

The Stauf patent, No. 666,711, for a method of desiccating milk, *held* not anticipated, valid, and infringed on motion to vacate order granting preliminary injunction.

In Equity. Suit by the Merrell-Soule Company against the Natural Dry Milk Company. On motion by defendant to vacate order granting preliminary injunction and for a supersedeas. Denied.

This court having granted a preliminary injunction and on motion having refused to vacate and set aside the order granting same (217 Fed. 578) after a full hearing and reargument on same papers and additional papers, and defendant having appealed from the order granting such preliminary injunction and the order refusing to vacate and set same aside, the defendant now, after such appeals, again moved to vacate the orders mentioned and also for a supersedeas or suspension of such injunction.

H. P. Denison, of Syracuse, N. Y., for complainant.
Frederick F. Church, of Rochester, N. Y., for defendant.

RAY, District Judge. This court went over the record before Judge Hazel and all papers submitted on the motion for a preliminary injunction, and again on the first motion to vacate, together with additional affidavits and papers, all before the appeals mentioned were taken.

In considering these motions made since that was done, I have gone over the whole matter for the third time and am compelled by my judgment to still agree with Judge Hazel as to the validity of the patent. As to the Williams patent as an anticipation, etc., I am of the opinion it is not a relevant reference in the prior art relating as it does to drying the water out of brine so as to leave the salt. Even

if relevant as a reference, I cannot see that it anticipates the invention of the patent in suit, or that, in view of it, the patent in suit is invalid.

This court always hesitates to grant a preliminary injunction; but if Judge Hazel is right, and I am correct as to the Williams patent, I see no escape from the charge of infringement. I delayed the issue of the injunction long enough to enable the defendant to secure an argument of the case on appeal from Judge Hazel; but, so far as appears, no effort was made to expedite that case.

Defendant tenders a bond of $3,000 on supersedeas, but this is insufficient in amount even if the orders were granted. However, I think the preliminary injunction should be in force.

Both motions should be denied.

SEABOARD AIR LINE RY. CO. v. CITY OF RALEIGH et al.

(District Court, E. D. North Carolina. December 11, 1914.)

No. 354.

1. INJUNCTION ⟸85—RESTRAINING ENFORCEMENT OF MUNICIPAL ORDINANCE.
The enforcement of a municipal ordinance, requiring a railroad corporation to remove its tracks from a street, and directing the commissioner of public works of the city to remove the tracks, if the company fails to do so, under which the city's officers will proceed summarily to remove the tracks, unless restrained, if invalid and in violation of the company's vested rights, will be enjoined, since while equity will not, except in exceptional cases, enjoin the enforcement of criminal laws or city ordinances imposing fines and penalties where rights of property are involved, and the enforcement of an ordinance will violate vested rights, injunctive relief will be awarded, especially where the enforcement will work an irreparable injury.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. ⟸85.]

2. INJUNCTION ⟸105—RESTRAINING ENFORCEMENT OF MUNICIPAL ORDINANCE.
The enforcement of a municipal ordinance will not be enjoined if it is enforceable only by indictment for a violation thereof, as the validity of the ordinance may be tested by way of defense to the indictment.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. ⟸105.]

3. MUNICIPAL CORPORATIONS ⟸682—GRANTING RIGHT TO USE STREET.
Under the Raleigh charter authorizing the city commissioners to keep streets, sidewalks, and alleys in good repair and clean, to establish their width, ascertain the location of those already provided, lay out and open others, and reduce the width of any of them, though a reasonable use of the streets may be granted to a public utility corporation, the commissioners had no power to grant an exclusive right in perpetuity to occupy the sidewalk with a railroad track, so as to prevent a subsequent city board from ordering the removal of such railroad track.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1467–1470; Dec. Dig. ⟸682.]

4. RAILROADS ⟸78—GRANTING OF RIGHT TO USE STREET.
The board of aldermen of a city adopted a resolution granting a railroad company "permission" to occupy the sidewalk on the side of a street for a city block with a railroad track. A cotton compress had recently

been constructed, and the company applied for permission to build its track to furnish proper facilities for the delivery of the cotton to the compress, though the track was also used for the purpose of loading and unloading freight. The cotton compress subsequently ceased to be used. The block in question, one of the sidewalks of which was exclusively appropriated for the purpose of such track, was within a short distance of the State Capitol and other public buildings. The city had increased greatly in population during the 30 years from the adoption of the ordinance. *Held*, that the terms of the resolution were appropriate to confer a temporary revocable license, and was inappropriate to vest by grant a perpetual and exclusive use of the sidewalk, raised a reasonable doubt as to the intention of the parties which should be resolved in favor of the public for its use of the property and the soil so held, and hence the resolution did not vest in the railroad company an irrevocable property right.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 194; Dec. Dig. ⊂⊃78.]

5. RAILROADS ⊂⊃76—CONSTRUCTION—USE OF STREETS.

Revisal N. C. 1905, § 2567, authorizing railroad companies to construct their tracks across, along, or upon any street which the route of their road shall intersect or touch, provided the company shall restore the street to its former state or to such state as not unnecessarily to impair its usefulness, did not authorize an exclusive appropriation of a street or sidewalk by a railroad company assuming that the further provision of that section, requiring the assent of the city in the case of railroads "not already located in, upon, or across any streets," did not apply, especially as a street could not be restored to its former state if the track occupied its entire width.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 195, 196, 199–201; Dec. Dig. ⊂⊃76.]

6. RAILROADS ⊂⊃75—USE OF STREETS BY RAILROAD—ESTOPPEL.

No estoppel against a city could arise from a railroad company's occupation of the street with the city's knowledge and acquiescence under a resolution of the board of aldermen granting it permission to use the street, if the permission granted amounted to a revocable license, or if, being irrevocable, the board had no power to grant it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 183–191; Dec. Dig. ⊂⊃75.]

7. RAILROADS ⊂⊃75—USE OF STREETS—PRESUMPTION OF GRANT.

A grant to a railroad company of the right to maintain a track on a street would not be presumed from lapse of time during which it had occupied the street, since limitations will not run as to streets and other property held by a city in trust for the public.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 183–191; Dec. Dig. ⊂⊃75.]

8. MUNICIPAL CORPORATIONS ⊂⊃63 — ORDINANCES — REASONABLENESS — REVIEW.

It was not ground for enjoining the enforcement of an ordinance, requiring the removal of a railroad track from a street, that the track did not unnecessarily impair the usefulness of the street, because there was sufficient space not occupied by the track, as the control of the streets was committed to the city board, and the wisdom or perpetuity of the ordinance could not be questioned in the courts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. ⊂⊃63.]

In Equity. Bill by the Seaboard Air Line Railroad Company against the City of Raleigh and others, for an injunction restraining

defendants from enforcing an ordinance requiring plaintiff to remove its track from a sidewalk being a part of Salisbury street, Raleigh, N. C. Bill dismissed.

James H. Pou and Murray Allen, both of Raleigh, N. C., for plaintiff.

John W. Hinsdale, Jr., Douglas & Douglas, and Charles U. Harris, all of Raleigh, N. C., for defendants.

CONNOR, District Judge. The cause was submitted upon the bill, answer, and statement of facts agreed upon by the parties. Plaintiff is a Virginia corporation and successor to the property, rights, and franchises of the Raleigh & Gaston Railroad Company, chartered by the General Assembly of North Carolina at its session of 1835 (Laws 1835–36, c. 25). The city of Raleigh was the southern terminus of said railroad. Pursuant to the provisions of the charter, the said company constructed a track from Gaston, N. C., to Raleigh, N. C., and constructed terminals and depots, in said city, for the receipt and delivery of freight and passengers, including a freight depot and a warehouse on Halifax street between Lane and North streets, extending from Halifax street to Salisbury street, extending its tracks from the main line of the Raleigh & Gaston Railroad across Salisbury street into said depot and warehouse. During the year 1881, a cotton compress was constructed on a lot in the city of Raleigh, bounded by Salisbury, Jones, Halifax, and Lane streets, and for the purpose of delivering to, and receiving cotton from, said warehouse, and to serve the patrons of the said railroad company, and to furnish the public facilities for the delivery of cotton in car load lots, and to better perform its functions as a common carrier, the Raleigh & Gaston Railroad Company made application to the board of aldermen of Raleigh for the grant of the right, privilege, or franchise to occupy the sidewalk on the east side of Salisbury street, between Jones and Lane streets, for the purpose of constructing a track thereon. Said board of aldermen on August 5, 1881, adopted the following resolution or ordinance:

"Upon application of John C. Winder, general superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury street, between Jones and Lane streets, for the purpose of running a track."

When the track was constructed, pursuant to the permission granted by said ordinance, it was used as a public track in connection with the cotton compress in the cotton season, and was used for the purpose of loading and unloading freight for the public, without additional compensation to the railroad for its use, and for any other purpose for which the railroad company desired to use it. Since the year 1906, the cotton compress has not been used. Since that date the said track has been used exclusively for loading and unloading freight and storing empty cars engaged in inter and intra state traffic. It has been and is now used by the merchants of the city of Raleigh and by the public and, on account of its location, is convenient for the said purpose. The right to maintain said track, as it is now placed and

used on Salisbury street, is of value to plaintiff, exceeding $3,000, exclusive of cost herein.

The track has been maintained and operated by the Raleigh & Gaston Railroad Company and the plaintiff, its successor, since 1881, with the knowledge and permission of the officers and representatives of the city of Raleigh. The plaintiff is the sole owner and occupant of the block of land in said city bounded on the west by Salisbury street, on the north by Lane street, on the east by Halifax street, and on the south by Jones street, and is the sole owner and occupant of the block in said city next adjacent to said block and to the north thereof, bounded on the west by Salisbury street, on the north by North street, on the east by Halifax street, and on the south by Lane street. The two blocks are used by the plaintiff for the purpose of conducting its business exclusively. Salisbury street is 43 feet wide between curbs at that point at which the track is located on the sidewalk, and, in addition thereto, there is located a sidewalk on the west side of the street 13 feet wide. The portion of the sidewalk on the east side of the street occupied by plaintiff's track is 10 feet wide. The street and the sidewalk on the west side thereof are available to and are used by the public. In constructing a new freight station two years ago, it was necessary for the Seaboard Air Line Railway Company to make an excavation at the corner of Jones and Salisbury streets of about 8 feet, extending northwards along Salisbury street. The tracks constructed in connection with said freight station are in this excavation, and the freight station is between these tracks and Halifax street. They cannot be used as team tracks, and the other team tracks of plaintiff are on Lane street, which is one block north of Jones street, a distance of 420 feet. The said track on Salisbury street extends from Jones street to Lane street. The southern end of the track on Salisbury street is one block north of the State Capitol, a distance of 420 feet. With the track as it is now laid and used, there is no sidewalk on the east side of Salisbury street, between Jones and Lane streets, for use by pedestrians. Within the two years last past plaintiff has built on the site upon which the compress stood, and immediately to the east of said track, a commodious freight warehouse, with an approach to the same by wagons from the east on the side of the building opposite said side track, with two tracks between said depot and the east line of the sidewalk in question, and, in addition thereto, has constructed several team tracks to the north of said warehouse.

At their meeting on June 10, 1913, the defendants commissioners of the city of Raleigh, after hearing the matter, and against the protest of plaintiff, adopted a resolution ordering the removal of the track constructed and maintained by plaintiff on the sidewalk on the east side of Salisbury street, between Jones and Lane streets, being the track described in the resolution or ordinance of August 5, 1881. By said resolution the commissioner of public works of the city of Raleigh was directed, if plaintiff failed to do so, to remove said track. Certain private laws are set out or referred to in the bill and are to be considered as in evidence. A preliminary injunction was issued and the cause heard upon the prayer for a permanent injunction re-

straining defendants from removing said track or otherwise enforcing said resolution or ordinance of June 10, 1913. It is conceded that the plaintiff is entitled, by succession, to such rights, privileges, and franchises as vested in the Raleigh & Gaston Railroad Company by virtue of its charter and amendments thereto and the ordinance of August 5, 1881, or which it may, upon the facts herein set out, have otherwise acquired.

[1, 2] While it is settled by abundant authority that courts of equity will not, save in exceptional cases, enjoin the enforcement or execution of the criminal law or of city ordinances imposing fines and penalties for their violation, it is also settled that where rights of property are involved, and the enforcement of such ordinances violates vested rights, injunctive relief will be awarded, especially where such enforcement will work irreparable injury. In Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. Ed. 1389, the court enjoined the enforcement of an ordinance revoking a grant of a franchise to occupy the streets of a city. The power of the court to enjoin the enforcement of an ordinance regarding railroad tracks in streets was recognized in A. C. L. R. R. Co. v. Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721. The refusal on the part of defendant to obey the ordinance subjects it to indictment for a misdemeanor. Rev. § 3702. If no other mode of enforcement was prescribed by the ordinance, the court would find no authority for interfering. The validity of the resolution or ordinance could be tested by way of defense to an indictment. It is conceded that defendant's officer, unless restrained, will proceed summarily to remove the track. If plaintiff's contention, upon the merits of the controversy, are sustained, it would seem that its right should be protected by injunction.

[3, 4] It is conceded that plaintiff is a public utility corporation, and such right as it has acquired to occupy the sidewalk is used in the prosecution of its business as a common carrier. The charter of the city of Raleigh, at the date of the ordinance, of August 5, 1881, and since that time, confers upon its commissioners power to keep clean and in good repair the streets, sidewalks, and alleys, to establish the width and ascertain the location of those already provided, and lay out and open others, and may reduce the width of all of them. It may be conceded that this language confers upon the governing board the usual powers granted to municipal authorities in regard to the use of the streets, including the power to grant to quasi public corporations, such as the plaintiff, the right to a reasonable use of the public streets not inconsistent with the right of the public. Griffin v. Railroad, 150 N. C. 312, 64 S. E. 16. It may be further conceded that when such right of user is granted, within the power of such authorities, and such grant is accepted and acted upon, a property right vests in the grantee of which it may not be deprived otherwise than by due process of law. Owensboro v. Cumberland Telephone Co., supra, where these propositions are decided and the authorities cited. Notwithstanding these concessions, two questions remain open for decision. Did the ordinance of 1881, construed in

the light of then existing conditions, and the reasons inducing its passage, grant to plaintiff's predecessor in title a right to be enjoyed in perpetuity to appropriate to its use, by locating and maintaining a track thereon, to the exclusion of all others, the sidewalk for any and all purposes, connected with the operation of its freight traffic, and, if so, was such grant within the power of the board of commissioners to make? Mr. Justice Lurton in the Cumberland Telephone Co. Case, supra, says:

"The 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."

The power to grant a reasonable use of the streets of Raleigh to a public utility corporation is sustained in Moore v. Power Co., 163 N. C. 300, 79 S. E. 596. The title to the soil in the streets of the city is in the state, but the power to subject them to the use of the municipality and its inhabitants is in its governing board, supra. It is a well-settled rule of construction, applied to grants of public property, which has been applied to grants of the use of streets, that:

"Where special street privileges and franchises are granted, which interfere with the authority of the municipality to control its streets and with the free use thereof by the public, the grant must be construed strictly in favor of the public and against the grantee." 27 Am. & Eng. Enc. 154.

The soundness, if not necessity, for this salutary rule is manifest. The resolution or ordinance does not use appropriate or usual words found in grants, as distinguished from a license. In the Cumberland Telephone Co. Case, supra, the right to erect and maintain poles and wires is "granted." So in Pikes Peak Power Co. v. Colorado Springs, 105 Fed. 1, 44 C. C. A. 333, the right to use the streets for the purpose of stringing wires was "granted" to the company. In construing the language of the ordinance of 1881, for the purpose of ascertaining the intention of the parties, the purpose for which the permission to occupy the sidewalk was given should be kept in view. A cotton compress had recently been erected on the Raleigh & Gaston Railroad Company. It is proper to take notice of the fact that, in moving bales of cotton either to or from the compress, the distance and physical conditions are of essential importance in regard to cost and convenience in operating the compress. Again, as is well known, the compress would ordinarily be operated only a portion—not exceeding one-third—of the year. The cost of laying a spur or side track for the distance required on the sidewalk was, as compared with its value, small. It is doubtful whether the considerations which induced the commissioners to give to the Raleigh & Gaston Railroad Company permission to occupy, by laying its track over, the sidewalk, for the purpose of enabling it to successfully operate the compress, would have been sufficient to move them to make a grant of a franchise to do so, for all purposes, in perpetuity. Certainly the terms used, so appropriate to confer a temporary, revocable

license, and so inappropriate to vest, by grant, a perpetual and exclusive use of the sidewalk, are sufficient to raise, in the mind, a reasonable doubt as to the intention of the parties which upon the principle uniformly applied in such cases, should be solved in favor of the public, for whose use the property in the soil was held. Minturn v. Larue, 23 How. 435, 16 L. Ed. 574. The principle is clearly stated by Mr. Justice Clifford in Holyoke Co. v. Lyman, 15 Wall. 500, 512 (21 L. Ed. 133):

"Wherever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms."

The language of the court in Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353, strongly states the principle and expressly applies it to city ordinances affecting the rights of the public in streets. Mr. Justice Harlan, after citing many cases, says:

"It is true that the cases to which we have referred involved, in the main, the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect to matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

It will be observed that in Owensboro v. Cumberland Telephone Co., supra, relied upon by plaintiff, the language of the ordinance, under which the corporation claimed the franchise, is free from ambiguity. The telephone company was "granted the right to erect and maintain its poles in the streets." It is also provided that "nothing in the ordinances should be construed as an exclusive right to said company to erect poles, etc.," and, by section 4 of the ordinance, certain duties and obligations are assumed by the corporation, constituting a valuable consideration, inuring to the benefit of the citizens of the city, for the grant of the franchise, thus giving to the ordinance a contractual character, within the power of the commissioner to make. It will be also noted that Judge Lurton, in sustaining the ordinance, says:

"Nor did it undertake to grant an exclusive right. Express power to grant an exclusive street franchise has generally been held essential."

He says that, as the grant was not exclusive, the court was not called upon to deal with that question.

If it be conceded that by the ordinance of August 5, 1881, the commissioners undertook to grant to the Raleigh & Gaston Railroad Company, and its successors, the exclusive right, in perpetuity, to occupy and maintain a track, for all such purposes as it or they deemed proper in the prosecution of their business as common carriers, over the sidewalk on the eastern side of Salisbury street, the question is presented whether they were vested by the charter of the city, which constituted the grant of legislative authority in that respect, with

the power to do so. Conceding that the power granted the commissioners, in regard to the use of the streets, includes the power to "regulate" such use, and giving to this language the interpretation given it in Cumberland Telephone Co. Case, supra, and in Moore v. Power Co., supra, the question is yet open whether the power claimed by plaintiff is conferred. In State v. Railroad, 141 N. C. 736, 53 S. E. 290, the Supreme Court of this state held:

"In the absence of an express power in the charter of a city to grant a permanent easement in a street, a license granted to a railroad company to lay tracks and operate trains in a street cannot be construed as a grant of a permanent easement."

After citing authorities, it is said:

"The general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions."

While the Supreme Court of this state has, in a number of cases, sustained the power of the commissioners or other governing body of municipalities to grant to public service corporations the right to place their tracks, poles, wires, pipes, etc., in, under, and along the public streets, no case has been found in which the power has been claimed to grant an exclusive and perpetual use of a street or sidewalk to such corporations. Griffin v. Railroad, 150 N. C. 312, 64 S. E. 16, relied on by plaintiff, falls far short of sustaining such power. There the commissioners granted the right to the defendant to lay its track along the street. There is no suggestion that the track occupied the entire street, to the exclusion of pedestrians, or persons passing in vehicles. The plaintiff, as an abutting owner, sought to enjoin the defendant from exercising the privilege granted. For manifest reasons, and upon well-settled principles, the court refused to grant the injunction. The grounds upon which that and the cases cited in the opinion of the Chief Justice are based are not applicable here. That the occupation of the sidewalk by plaintiff's track excludes all other persons from passing over the sidewalk otherwise than by walking over the track, when not appropriated by plaintiff's freight cars, is conceded. The extent of the claim asserted by plaintiff, for all practical purposes, vests in it the absolute and exclusive use of the sidewalk. This claim is based upon an ordinance adopted by the commissioners giving "permission" to its predecessor in title to occupy the sidewalk, without any limitation in respect to time, and without any valuable consideration to support a contract, or the use of any contractual language. The permission was given to meet a condition and promote a purpose, temporary in character, which has ceased to exist. If plaintiff's contention is sustained, the entire sidewalk, for 420 feet on one of the principal streets of the capital city of the state, in a short distance of the state house and other public buildings, extending from Jones to Lane streets, is appropriated to the exclusive use of the plaintiff. The claim is based upon the language of an ordinance adopted 30 years ago, to meet a temporary condition, during which time the city has increased very greatly in population. The

claim invites careful consideration, and its successful maintenance demands strong reasons or controlling authority. Giving to the numerous decided cases and the language used by the courts due weight, in the light of the facts upon which they are based, I am constrained to reach the conclusion that, by a fair construction, the ordinance of August 5, 1881, interpreted in the light of the condition under which it was used, and the purpose which the parties had in view, does not vest in the plaintiff the property right in the use of the sidewalk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the Legislature with power to make such exclusive, perpetual grant of the sidewalk to the Raleigh & Gaston Railroad Company, which prevents the present governing board, in which the power is vested and upon which the duty is imposed to control and regulate the use of the sidewalk for the benefit of the public, from making and enforcing the ordinance of June 10, 1913.

[5] Plaintiff relies upon the provisions of the state statute in force at the date of the ordinance of 1881, giving to all railroad companies the right to construct their tracks "across, along, or upon any * * * street * * * which the route" of their "road shall intersect or touch," provided the company shall restore the street "thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness." Rev. § 2567. Conceding, for the reasons assigned, pro hac vice, that the plaintiff has the rights and privileges conferred by this section, free from the limitation in regard to "the assent of the corporation," it is confronted with the duty imposed by the statute to restore "the * * * street * * * thus intersected or touched to its former state," etc. It is doubtful whether the language of the section can be construed to authorize the exclusive appropriation of the street. The sidewalk is a portion of the street appropriated to the use of pedestrians. To construe the grant of the right to construct its road "across, along, or upon" a street, always of much greater width than a railroad track, and the cross-ties, as a grant of the right to occupy the entire street or sidewalk, is not permissible in the light of the recognized rule of construction of such grants of power. How is it possible to restore the street to "its former state" if the track occupies its entire width? Statutes must be given a reasonable construction.

[6-8] Plaintiff further contends that by reason of the long time elapsing since the occupation of the sidewalk, with the knowledge and acquiescence of the defendants, they are estopped from asserting a claim to the use of the sidewalk, for the use of the public, and for this contention quotes the language of Judge Dillon:

"If the municipality has the power to grant such right or franchise, and a corporation, believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right or franchise, and has constructed, maintained, and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of the streets from asserting the invalidity of the grant of the franchise, at least so far as its failure to pass an ordinance or take the steps necessary to effectuate the grant." Mun. Corp. 1242.

The difficulty with which plaintiff is met in invoking the principle thus announced is found in the absence of the power in the corporation to grant the alleged right or franchise. If the power existed, the right is granted; if it did not exist, the plaintiff has, at all times, maintained a nuisance by an unlawful obstruction of the sidewalk, and it is clear that the municipality is never estopped from abating a public nuisance. Construing the ordinance of August 5, 1881, as a revocable license, the plaintiff lawfully occupied the sidewalk until such license was revoked, and of course no estoppel can accrue, under this view. Plaintiff, in another form, asserts the right to continue the occupation of the sidewalk by averring that, by reason of the lapse of time since the passing of the ordinance, a grant will be presumed. This, under our statutory system, by which title is acquired by lapse of time, is but a plea of the statute of limitations, and is met by the language of the court in Turner v. Com'rs, 127 N. C. 153, 37 S. E. 191:

"As to streets * * * and other property which a municipal corporation may hold in trust for the public use, without power to alternate, it is true that no statute of limitations can run." Moose v. Carson, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; Rev. § 389.

The occupation of the sidewalk, under the license, was not adverse until the passage of the ordinance of June 10, 1913. To the suggestion that the occupation of the sidewalk on the eastern side of Salisbury street does not unnecessarily impair the usefulness of the street, because there is a space of 43 feet between curbs and 13 feet sidewalk on the western sidewalk, it is sufficient to say that the control of the streets, in these respects, is committed to the board of commissioners of the city and not to the courts. If the board has the power to pass the ordinance of June 10, 1913, requiring the plaintiff to remove the track from the sidewalk, it is neither the province nor within the power of the court to question its wisdom or propriety. It may not be improper, however, to say that in the light of the facts agreed upon and physical conditions, of which it is impossible to be ignorant, and the contention seriously made and ably pressed by plaintiff, the wisdom of the action of the commissioners for the preservation of the rights of the public committed to their care is very manifest. The questions presented and argued are, in many respects, of first impression in this state, and their correct solution of much interest to the public and public service corporations, whose business requires the use of the public streets. I concur in the opinion of the Supreme Court that:

"The city clearly possesses the statutory right to assent to the use of the street by the railroad company. This is often a most essential power, necessary to be used for the benefit of the people of the city."

I am further of the opinion that in the absence of an express legislative grant, the terms of which are free from doubt or ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk to be enjoyed in perpetuity. Such power was

not granted to the board of commissioners of the city of Raleigh by the charter existing at the time the resolution or ordinance, giving permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on Salisbury street, was adopted, August 5, 1881.

The only relief sought being injunctive, the plaintiff's bill will be dismissed, and the defendants will recover their cost.

STATE BANK OF CHICAGO v. IDAHO-OREGON LIGHT & POWER CO. et al. (PRIEST et al., Interveners).

(District Court, D. Idaho, S. D. August 24, 1914.)

1. CORPORATIONS ⟸545—INSOLVENCY—ILLEGAL ISSUE OF BONDS—FRAUD OF DIRECTORS.

Practically all of the stock of a power company was acquired by another electric company, called the railway company, organized for the purpose, under a contract by which it agreed to buy $1,500,000 of second mortgage bonds of the power company. The railway company caused its own officers and directors to be elected officers and directors of the power company and from that time wholly controlled its affairs. The power company then had outstanding a part of an authorized issue of first mortgage bonds. Afterward, through a series of agreements between the boards of directors of the two companies, the power company released the railway company from its obligation to buy a part of the second mortgage bonds which had not yet been taken, and instead obtained a loan from that company which it secured by depositing as collateral twice the amount in its first mortgage bonds, and also agreed to exchange a large amount in such bonds for second mortgage bonds held by the railway company of the same par value. At that time both companies were insolvent and the second mortgage bonds of the power company were practically worthless. The power company was not and could not have been benefited by such transactions. *Held*, that in making such contracts the directors of the power company were chargeable with a breach of trust, their evident purpose being to secure for themselves and those associated with them in the railway company an illegal preference over other creditors of the power company; that the first mortgage bonds so obtained would not be permitted to participate with those of other holders in the assets of the power company beyond an amount sufficient to cover the money actually advanced to the power company under the contract, deducting therefrom the amount which the railway company was obligated by its prior contract to pay for second mortgage bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170–2175; Dec. Dig. ⟸545.]

2. CORPORATIONS ⟸473—INSOLVENCY—RIGHTS OF BONDHOLDERS.

The rights of bondholders of a corporation are not measured strictly by the terms of the bonds and mortgage after the corporation has become insolvent, but they are entitled to contest the validity of other bonds, issued after insolvency, which would otherwise share with them in the distribution of assets.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. ⟸473.]

In Equity. Suit by the State Bank of Chicago, trustee, against the Idaho-Oregon Light & Power Company, the Bankers' Trust Company, and F. N. B. Close, in which A. W. Priest and others intervene.

On petition of interveners contesting the right of certain bonds to participate in distribution of assets. Decision for interveners.

E. E. Prussing, of Chicago, Ill., and Sullivan & Sullivan, of Boise, Idaho, for plaintiff.

Cavanah, Blake & MacLane, of Boise, Idaho, for defendants Idaho-Oregon Light & Power Co. and Idaho Ry., Light & Power Co.

A. A. Fraser, of Boise, Idaho, for defendant Idaho Ry., Light & Power Co.

Perky & Crow, of Boise, Idaho, for defendants Bankers' Trust Co. and F. N. B. Close.

Joseph Cummins, of Chicago, Ill., and Richards & Haga, of Boise, Idaho, for interveners.

Eldon Bisbee, of New York City, amicus curiæ.

DIETRICH, District Judge. This suit was brought by the plaintiff, as trustee, to foreclose a trust deed given by the defendant Idaho-Oregon Light & Power Company, hereinafter called the "Power Company," upon all of its property, consisting chiefly of hydroelectric power plants and power and light distributing systems in Idaho and Oregon, to secure an issue of 7,000 bonds of the par value of $1,000 each, of which 3,319 have been certified and are apparently outstanding. The defendants Bankers' Trust Company and F. N. B. Close are the trustees named in a second trust deed given to secure a large issue of bonds referred to in the record as the second or consolidated bonds, of which about $1,800,000 are outstanding. A. W. Priest and his associate interveners are the several owners of first mortgage bonds, and constitute a bondholders' committee, controlling approximately 400 of the first mortgage bonds at the time of the intervention, and 2,000 at the time of the hearing. The present controversy involves the status of 825 of the remaining bonds of this issue, which are claimed by the Idaho Railway, Light & Power Company (hereinafter referred to as the "Railway Company"), and arises in this way: A short time before the decree was entered foreclosing the first mortgage, the Priest committee sought to intervene, with the object of preventing foreclosure, upon the ground that the Railway Company, which had control of the Power Company, was promoting the foreclosure as a means of wrecking the Power Company, greatly to the injury of the holders of first mortgage bonds who had no corresponding interest in the Railway Company. While the decree of foreclosure was not delayed, it was entered with certain reservations, in harmony with which the Priest committee was permitted to intervene for the purpose, among others, of opposing the recognition of the right of the bonds held by the Railway Company to share in the distribution of the proceeds of the sale of the property. For reasons which it is not necessary here to state, the foreclosure sale has been postponed from time to time, and, it being the desire of all parties that the rights of the Railway Company upon distribution be determined without further delay, a hearing was had upon the complaint in intervention and the answer thereto filed by the Railway Company. (In compliance with an order of the court, the Power Company has

also answered; but, in view of its insolvency and its subserviency to the Railway Company, its position in the controversy is without importance.) It thus appears that while in form the Priest committee has taken the initiative, the proceeding is in anticipation of the foreclosure sale and the distribution of the proceeds thereof; and, considering the substance only, the controversy is to be deemed to be one arising after the sale, with the Railway Company seeking an order distributing to it a proportionate share of the proceeds of the property, and the Priest committee, as bondholders, resisting, upon the grounds set forth in their complaint in intervention. It is upon the assumption that such is the real nature of the proceeding that, for the convenience of the parties, and in deference to their desire, the issue is determined at the present time. It should be added that all parties have assumed that a sale and reorganization are inevitable, and that it is wholly improbable that the proceeds will be sufficient to pay in full the first mortgage bonds outstanding, aside from those presently involved.

1. The only question now raised touching 107 of the bonds is whether their certification by the trustee and delivery to the Power Company were authorized under the terms of the trust deed; the point being that they were certified and delivered after default in the payment of an installment of interest due upon the bonds already sold, namely, all the other bonds now outstanding. There is nothing in the trust deed either expressly or by fair implication prohibiting such action, and I am unable to see how any principle of right or justice was violated. It was shown by the trustee, and is not now denied, that the Power Company had made the improvements and expenditures upon its property required by the trust deed, and that all other conditions precedent prescribed therein had been performed. The objection is therefore thought to be without substantial merit.

From the answer of the Power Company and some of the evidence it would appear that these bonds are held by the Railway Company only as collateral, but by agreement of the parties the question of the nature and extent of its right or title is excluded from consideration, and the order or judgment herein will be without prejudice to its determination in another proceeding.

[1] 2. We come now to the 718 bonds. Conceding that they were all properly certified and delivered to the Power Company, the interveners object that the Railway Company should be denied participation in the distribution by reason of the fact that, through its control of the Power Company, it could and did wrongfully and without consideration procure possession thereof. Two transactions are involved, one in September, 1912, by which the Railway Company got possession of 440 of the bonds, and the other in December of the same year, by which it procured the other 278. The inquiry having taken a wide range, the evidence is too voluminous to be reviewed in detail, and I shall content myself with stating only such facts as will make reasonably clear the conclusions I have reached. Prior to the fall of 1911 the Power Company was under independent management, and owned most of the properties of which it is now possessed. The principal source

from which it expected to procure its power was the Ox Bow plant on the Snake river, and this was still incomplete and unproductive, although, according to the books of the company, sums aggregating approximately $2,000,000 had been spent in promoting and developing it. It being impracticable under the terms of the first trust deed to issue more than $2,000,000 of the bonds for this purpose, a new instrument was executed, called the "consolidated mortgage," securing a large issue of bonds, $7,000,000 of which, or such part thereof as might be necessary, were to be used in refunding the first mortgage bonds, and $3,000,000 for the completion of the Ox Bow plant, and the construction of necessary transmission lines, and for other corporate purposes. At this time the Power Company was dominated by Mainland Bros., of Oshkosh, Wis., who, finding that the second bonds were not readily salable upon the market, succeeded in enlisting in an elaborate scheme of reorganization and enlargement, the co-operation of a group of capitalists in New York City, represented by the banking house of Kissel, Kinnicutt & Co., who entered into an agreement to purchase $1,500,000 of the consolidated mortgage bonds at 80, taking as a bonus a large proportion of the capital stock of the company, with certain other options and privileges, some of which will be referred to later. Thereupon, pursuant to the plan agreed upon, the Railway Company was organized, and to it were transferred the Swan Falls power plant and various electric railway lines and lighting systems, all new acquisitions, situated in southwestern Idaho within the general territory served by the Power Company. There were also transferred to it, in exchange for its stock and bonds, all the bonds and stock of the Power Company covered by the contract above referred to; and the Mainlands, as well as most of the other stockholders of the Power Company, exchanged their stock for stock in the Railway Company, thus giving to the Railway Company complete control of the Power Company. In due time the directors and officers of the Railway Company were elected directors and officers of the Power Company, and undoubtedly from that time on, namely, from about the 1st of January, 1912, the Power Company was completely dominated by the Railway Company.

By September, 1912, Kissel, Kinnicutt & Co., who it is apparent were acting upon behalf of and as the representative of the Railway Company, or, perhaps more accurately, of the syndicate controlling the Railway Company, had taken over 1,325 of the 1,500 bonds they had agreed to purchase; they were still under obligation to take the other 175, which, at the stipulated price, would amount to $140,000. At this time it is clear they had reached the conclusion that the Power Company was hopelessly insolvent, as was undoubtedly the case, and that their contract to purchase was ill advised, and their original plan could not be profitably carried out. Further reorganization of some character, and sacrifice in one quarter or another, was doubtless thought to be inevitable.

Such being the situation, on the 25th of September a meeting of the directors was held in New York City, at which the Railway Company claims the contract was authorized under which it later got pos-

session of the 440 bonds. Eight of the eleven directors were present. Aside from the consideration that the directors were all elected by the Railway Company, and the Railway Company was in actual fact dominated by the Kissel-Kinnicutt syndicate, it is extremely doubtful whether what was done at this meeting could in fact or in law be deemed to be a corporate act. But in view of the essential character of the action which purports to have been taken, and of the nature of substantially the only legal ground upon which the Railway Company contends the interveners must fail, a detailed discussion of this phase of the inquiry is thought to be unnecessary. In harmony with the apparent action taken at the meeting, a written agreement was immediately executed; the formal parties thereto being Kissel, Kinnicutt & Co., designated as the "Bankers," the Power Company, and the Mainlands. Referring to the original Kissel-Kinnicutt contract of September 19, 1911, the instrument recites that 1,325 of the bonds had been taken over, and that there were still 175 to be purchased; that Kissel, Kinnicutt & Co. were ready to complete their purchase, but were unwilling to take additional bonds under their option; that the Power Company would, in the course of six months, need $250,000; and that Kissel, Kinnicutt & Co. offered to procure for the Power Company a loan of this amount, in consideration of their being released from the obligation to take the other 175 bonds; and that the Power Company had accepted this offer. Thereupon follows an agreement to the effect that the "Bankers" would procure the Railway Company (which in reality was wholly insolvent) to make the loan of $250,000, at 6 per cent. interest, $100,000 to be furnished immediately and the balance at any time within six months upon demand of the Power Company, the loan to be secured by the first mortgage bonds of the Power Company, equal at their face value to twice the amount of the loan. The Power Company was to sign a note containing, among others, a provision that it might be declared due and payable at any time upon default of the payment of interest upon any of the outstanding bonds of the company, or upon the commencement of proceedings against it for the appointment of a receiver. The agreement contained the further extraordinary provision obligating the Power Company at any time upon demand of the Railway Company to exchange its first mortgage bonds, up to $500,000, for an equivalent amount of its second mortgage bonds held by the Railway Company.

That under the circumstances such an agreement was thought by any one to be in the interest of the Power Company is wholly incredible. I cannot believe that an independent board of directors would have given to it a moment's consideration. The company needed money, it is true; but, if it was going on with the Ox Bow development, the sum contracted for was wholly inadequate for any useful purpose, and, if the work at that point were not to be resumed, there was no urgent need for so large an amount. Those who participated in the transaction are unable to give any reasonable explanation of the purposes for which the $250,000 were to be used, and apparently there is none. The company had available on demand $140,000, due

upon the Kissel-Kinnicutt contract, and surely both upon the market and in fact its first mortgage bonds were worth in excess of 50 cents on the dollar, the basis upon which they were to be hypothecated to procure the loan. Under the conditions created by the agreement, the possibility that there ever would be a redemption was so remote as to be negligible. The transaction therefore practically amounted to a sale of between $200,000 and $500,000 face value of the first mortgage bonds for an equivalent amount of seconds, which it is apparent must have been wholly valueless if the firsts were worth less than their face, and the surrender, without any real consideration, of the obligation of the syndicate to take $175,000 face value of the seconds at 80. There is but one rational explanation of the agreement, and that is that the interests in control of the Railway Company, and, through it, of the Power Company, having concluded that the latter was hopelessly insolvent, and that a reorganization was inevitable and a receivership probable, resorted to this expedient for saving to themselves as much of the wreckage as possible. Putting aside for the moment all question of the rights of these interveners, it is plain that there was a breach of trust on the part of the officers of the Power Company and a disregard of the rights of the holders of approximately $166,000 face value of the consolidated bonds which had been sold upon the market and were held by the general public, who therefore would be prejudiced by the issuance of first bonds in exchange for the consolidated or seconds.

Upon behalf of the syndicate interests, it is suggested that they had put into the enterprise a large amount of money, through the purchase of the consolidated bonds, which were practically worthless, and for that reason they were entitled to a measure of protection at the hands of the Power Company. Assuming that they were entitled to sympathy, it does not follow that they were entitled to protection. Their misfortune in no wise enlarged their rights as parties to the contract, or abated their duty as trustees of the Power Company. As directors, they were bound to subserve the interests of the company, and to hold its property for the common benefit of its creditors, and they were not privileged to strip it of its meager remaining resources for the purpose of recouping their private losses. The adoption of any other view would necessarily be to recognize the rule of might, and to say to him to take who can. Moreover, were the consideration suggested deemed to be a material one, it is to be noted that the original contract of September 19th was not a simple contract for the purchase of a stated number of bonds; it embraces an ambitious scheme of great possible profit to the purchasers. They do not occupy the position of one who has bought worthless securities with no expectation of gain other than a fair interest return. They bargained for the chance of the profit of a speculative enterprise, and they must have contemplated the risk of loss as well as the chance of gain. To refer to only one feature of the agreement: They had the option to require the retirement of all the first mortgage bonds, which were to be called at a premium, and such were the conditions that by acquiring these bonds, as it was doubtless within their power to a great extent to do, they

could. at an actual outlay of probably not to exceed 60 per cent. of their face value, secure a large part of the consolidated bonds, which, upon the retirement of the firsts, would constitute a prior lien upon all the property of the company.

What followed the execution of the agreement is not made entirely clear, but apparently at different times money aggregating $220,000 was furnished to the Power Company, ostensibly by the Railway Company, and later bonds, in installments of various amounts, aggregating $440,000 face value, were turned over to the Railway Company as collateral. Notwithstanding the fact that under the agreement the Power Company was to exchange 500 firsts for seconds only in case firsts were available for that purpose, shortly after the hypothecation of the 440 firsts as collateral, they were exchanged for an equivalent number of seconds, which were substituted as collateral, and the firsts were deposited as collateral with the Railway Company's creditors or their trustee. It will be understood, of course, that in speaking of a transfer of possession between the two companies a constructive transfer only is meant, for both had the same secretary and treasurer, as well as other officers.

The facts touching the remaining 278 bonds may be more briefly stated. In the fall of 1912 the Power Company desired to make a settlement and terminate its relations with Bates & Rogers, a construction company having a contract for work on the Ox Bow plant. According to the records, the settlement was consummated at a meeting of the executive committee of the Power Company held in New York City on December 27th. What actually occurred at this meeting is open to serious doubt; but, assuming that what purports to be the record is genuine and speaks truly, an agreement was reached with Bates & Rogers by which, in part consideration to them for a complete settlement, they were to receive $25,000 face value of the Power Company's consolidated bonds, 50 shares of the preferred, and 100 shares of the common stock of the Railway Company, and its obligation (unsecured) to purchase from them within 60 days after the 29th of May, 1914, the $25,000 bonds at 80 and accrued interest. Thereupon, such is the record, the Power Company and the Railway Company proceeded to ratify this arrangement, and in consideration of the Railway Company's agreement to deliver to Bates & Rogers 100 shares of its common stock, which was worthless, and its obligation to buy the bonds, which, because of its insolvency, if for no other reason, was unenforceable and hence practically of no value, the Power Company was made to agree that it would, upon the demand of the Railway Company, deliver its first mortgage bonds up to $500,000 face value (the same to be in excess of those covered by the September contract) in exchange for consolidated bonds, which also were without substantial value. From the testimony and the surrounding circumstances, no doubt is left in my mind that the Power Company could have made settlement directly with Bates & Rogers with its first mortgage bonds at a comparatively small discount, and that the devious course was adopted not upon their demand or for the interest of the Power Company, or because of any necessity therefor, but for

the sole purpose of furnishing a pretext for getting the first mortgage bonds out of the treasury of the Power Company and into the hands of the Railway Company, and for the interest alone of those by whom the latter company was dominated.

[2] Relying upon the rule that the contract of a corporation with its directors, or touching a matter in which they are interested, is not absolutely void, but only voidable, the Railway Company urges with much apparent confidence that the interveners must fail because, as mere bondholders, they have no such right or interest as entitles them to attack the transactions in question. Its position is, that their rights are measured solely by the terms of the bonds and the trust deed securing the same, and that no provision of these instruments has been violated; that, such being the case, it is a matter of no legal concern to them how it procured the bonds, and they would have no standing to call into question a gift or even a theft thereof; that, if any wrong has been done, it can be remedied only upon the demand of the corporation, or, in case of its inaction, of its stockholders.

It may be conceded that as a general rule the creditor of a solvent corporation, be he secured or unsecured, has no legal right to complain of the improvident disposition of its property. But it must not be forgotten that here the corporation was insolvent, and those whose duty as trustees it was fairly and honestly to administer its affairs, undertook to prefer themselves. An insolvent corporation cannot rightfully give away its property in fraud of its creditors, neither can it legitimately prefer the claims of its officers and stockholders. In Jackson v. Ludeling, 88 U. S. (21 Wall.) 616, 22 L. Ed. 492, a suit in equity brought by bondholders against the directors of the debtor corporation, attacking the validity of a judicial sale of its property, at which the directors became the purchasers, the court said:

"They (the directors) had no right to enter into or participate in a combination, the object of which was to divest the company of its property and obtain it for themselves at a sacrifice, or at the lowest price possible. They had no right to seek their own profit at the expense of the company, its stockholders, or even its bondholders. Such a course was forbidden by their relation to the company. It was their duty, to the extent of their power, to secure for all those whose interests were in their charge the highest possible price for the property which could be obtained for it at the sheriff's sale. They could not rightfully place themselves in a position in which their interests became adverse to those of either the stockholders or bondholders. * * * The defendants can take nothing from such a sale, thus made. Were we to sustain it, we should sanction a great moral and legal wrong, giving encouragement to faithlessness to trusts, and confidence reposed, and countenance combinations to wrest by the forms of law from the uninformed and confiding their just rights."

In Wabash, St. L. & P. Ry. Co. v. Ham, 114 U. S. 587, 594, 5 Sup. Ct. 1081, 1084, 29 L. Ed. 235, it was said:

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that, when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance

of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

By Woods, J., it was said in Lippincott v. Shaw Carriage Co. (C. C.) 25 Fed. 577, 586, that:

"While it is generally conceded that a corporation, notwithstanding insolvency, continues possessed of a general power of management of its affairs, and like natural persons may give preferences by way of payment or security to one creditor or class of creditors over others; yet, in close analogy to the rule which forbids the giving of preferences by individual debtors for the purpose of securing, or in such manner as to secure, advantage or benefit to themselves, and in manifest accord with the tendency of judicial opinion as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations in such manner as to be of special benefit to the directors or managing agents, or any of them, will be set aside. This, as it seems to me, is the salutary rule, and the only rule which can be administered with uniformity and fairness."

And most pertinent is the language used by the same judge in Howe, Brown & Co. v. Sanford Fork & Tool Co. (C. C.) 44 Fed. 231, 233, where he said:

"It seems to me enough to say that a sound public policy and a sense of common fairness forbid that the directors or managing agents of a business corporation, when disaster has befallen or threatens the enterprise, shall be permitted to convert their powers of management and their intimate, and it may be exclusive, knowledge of the corporate affairs into means of self-protection to the harm of other creditors. They ought not to be competitors in a contest of which they must be the judges. The necessity for this limitation upon the right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times, but the growing importance and variety of modern corporate enterprises and interests I think will compel its recognition and adoption. The fact in this case that the stockholders authorized the making of the mortgage seems to be immaterial. That action was, it is averred, procured by the directors proposed to be benefited, they, themselves, being stockholders; and, even if this were not averred, the case would not, I think, be essentially different. Whether or not such preferences are fairly given is an impracticable inquiry, because there can be in ordinary cases no means of discovering the truth; and consequently the presumption to the contrary should in every case be conclusive. Concede that it is a question of proof, and that a preference in favor of a director will be deemed valid if fairly given, and it may as well be declared to be a part of the law of corporations that in cases of insolvency debts to directors and liabilities in which they have a special interest must be first discharged. That will be the practical effect, and the examples will multiply of individual enterprises prosecuted under the guise of corporate organization, for the purpose, not only of escaping the ordinary risks of business done in the owner's name, which may be legitimate enough, but of enabling the promoters and managers, when failure comes, to appropriate the remains of the wreck by declaring themselves favored creditors. Besides inconsistency with that equality which equity loves, such favors involve too many possibilities of dishonesty and successful fraud to be tolerated in an enlightened system of jurisprudence."

See, also, Sweeney v. Grape Sugar Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88, and Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516.

It is a mistake to assume that the interveners contracted only for certain security and that all their rightful demands were satisfied when

it was properly certified that the requisite expenditures and improvements had been made. They contracted for security, it is true, but primarily they contracted for payment, and the continuing obligation of the Power Company was to pay its bonds in accordance with their terms. The interveners were creditors of the company, not merely claimants of a share in a disputed fund. Upon entering into the contract they had the right to assume that the business of the company would be conducted, if not wisely, at least fairly and honestly. At the time these transactions took place, the Power Company was wholly insolvent, and for that reason its stockholders, even had they been free to act upon its behalf, had no incentive to exercise vigilance or to take any action for the protection of its interests. In short, the corporation had wholly lost the protection of its natural guardians. As was said by the Supreme Court of West Virginia in Sweeney v. Grape Sugar Co., supra:

"In the case of a corporation which is wholly insolvent and unable to continue its business, neither the corporation itself nor its stockholders have any beneficial interest in its property, and therefore they cannot be affected by the fraud. In such case the creditors alone can be affected, and they alone have any interest in avoiding the contracts."

It will not do to say that the bondholders represented by the interveners had no rights which they were entitled to have safeguarded. Their claims being inadequately secured, they would ultimately be compelled to look for payment in full to the general assets of their debtor. Moreover, they were entitled to have their mortgage securities maintained as well as created. From what fund the certified expenditures on account of capital were made does not appear, but that for the protection of their security they were interested in having these bonds honestly used for the benefit of the estate becomes apparent when the fact is noted that, as shown by the record here, preferential claims for labor and supplies for the maintenance and operation of the property, aggregating an amount relatively of great magnitude, are being pressed for allowance, in at least one of which the Railway Company itself is interested, and which, if established, will substantially reduce the value of the interveners' security. These and other considerations strongly persuade me to the view that, in response to the prayer of the interveners in a plenary suit, a court of equity could have properly interfered to prevent the illegal diversion of the bonds, or could now decree their restoration. But it is not necessary to go so far; we have here no plenary suit in which creditors are seeking affirmative relief for themselves or the restoration of property to the corporation. The Railway Company is in reality the actor. It is not content with what it was thus wrongfully able to acquire through its control of the Power Company. It is dependent upon, and is here invoking, the assistance of a court of equity to make actually available to it the fruits of its wrongdoing. Through the trustee, it seeks a foreclosure of the security of the bonds and an order distributing to it a proportionate share of the proceeds of the property. It is asking the court to aid it in enforcing contracts the possession of which it obtained in a manner violative of sound prin-

ciples of public policy and of good morals, and in that view it is quite unimportant whether the interveners would have any standing as plaintiffs in an independent suit. Regardless of who objects or whether any one objects, a court will not knowingly assist a party to reap the fruits of his wrongdoing, and under the rule the Railway Company must be denied the relief which it seeks.

Upon its behalf it is urged that even in this view it should be recognized as having an equity in the bonds corresponding to the consideration it has paid out, of which the Power Company received the benefit, and to this extent it is thought its contention should be sustained. The Power Company is entitled only to be protected against loss, and not to be enabled to reap a profit from the attempted wrong; in so far as may be possible, there should be a restoration of that which it has received. Upon this branch of the case, however, I am inclined to think the record is incomplete, and further evidence will have to be taken, unless the facts can be stipulated. To what extent the receiver will be able to return in specie the stocks and securities which presumably the Railway Company turned over in exchange for the bonds does not appear, nor is there such a statement of account between the Railway Company and the syndicate upon the one side and the Power Company on the other that I can intelligently ascertain the amount for which the Railway Company should be awarded an equitable lien upon the bonds. Nor is there any definite information touching the present status of the Bates & Rogers affair. While the 440 bonds acquired under the agreement of September 25th are apparently not held as collateral under the first provision of the contract, but by virtue of an exchange under a later provision, and, strictly speaking, are therefore technically subject to no other equity than the obligation to return the exchanged consolidated bonds, which are already in the possession of the Railway Company as collateral, I shall regard the substance rather than the form, and accordingly the moneys actually advanced to the Power Company under the contract of September 25th will be charged against the bonds, such advances to be first subject to a deduction of such amount, if any, as remains of the $140,000 due under the original contract of September 19, 1911, after satisfying therefrom any other claims for advances made to the Power Company properly chargeable against that obligation. It is not improbable that the accounting and other information required for such purpose will more or less directly relate to the issue of the Railway Company's interest in the 107 bonds, and both matters can proceed together. However that may be, it is my desire that the evidence upon both branches of the controversy be taken and submitted without unnecessary delay. Presumably the facts are largely within the knowledge of the Railway Company, and it will be required to take the affirmative in establishing such equities as it claims. The receiver is authorized to participate in so far as, upon the advice of counsel, he may deem it to be necessary for the protection of the estate.

STATE BANK OF CHICAGO v. IDAHO-OREGON LIGHT & POWER CO. et al.

(District Court, D. Idaho, S. D. November 12, 1914.)

1. CORPORATIONS ⟹480 — MORTGAGES — CONSTRUCTION AND OPERATION — AFTER-ACQUIRED PROPERTY CLAUSE.
A mortgagee of an electric light and power company, under an after-acquired property clause in its mortgage, has no greater right than the mortgagor in additional transmission lines constructed for it entirely at the cost of another company under an agreement that the material used should remain its property until full payment for the extensions was made, with the right to remove the same in case of default.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟹480; Mortgages, Cent. Dig. § 428.]

2. CORPORATIONS ⟹186—CONTRACTS—ENFORCEMENT—CONTRACT WITH MAJORITY STOCKHOLDER.
The fact that the company building the lines owned the majority of the stock of the power company does not debar it from enforcing its rights under the contract, where it was made in good faith and was fair.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695–701; Dec. Dig. ⟹186.]

3. ESTOPPEL ⟹91—EQUITABLE ESTOPPEL—ACQUIESENCE IN DECREE.
Practically all of the stock of an electric light and power company was owned by a railway company which entirely controlled its affairs. It also built for the power company certain extension lines at its own expense under an agreement that the material used should remain its property until full payment, with the right in case of default to remove the same and credit the power company on the contract with its scrap value. Subsequently, on the insolvency of the power company, a mortgage executed by it to secure bonds, and containing an after-acquired property clause, was foreclosed; the bill alleging, and the answer admitting, that the extensions in question were within the mortgage. The railway company claimed to be a large owner of the bonds, and, while not then a formal party, assisted in expediting the cause and in procuring an early decree for the sale of the property. It afterward became a party and consented to the appointment of a receiver and during all of that time asserted no right under its contract. *Held*, that it was estopped, or had waived its right, as against other bondholders, to enforce the contract by destroying the extension lines built thereunder, but that it might be allowed a preferred claim against the proceeds of the sale equal to the scrap value of the materials therein.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 257–259; Dec. Dig. ⟹91.]

In Equity. Suit by the State Bank of Chicago, trustee, against the Idaho-Oregon Light & Power Company and others. On petition of intervention of the Idaho Railway, Light & Power Company and O. G. F. Markhus, its receiver. Relief granted in part.

Cavanah, Blake & MacLane, of Boise, Idaho, for intervener.

E. E. Prussing, of Chicago, Ill., and Sullivan & Sullivan, of Boise, Idaho, for plaintiff.

Richards & Haga, of Boise, Idaho, for receiver of Idaho-Oregon Light & Power Co.

Joseph Cummins, of Chicago, Ill., for intervening bondholders.

DIETRICH, District Judge. The principal suit was commenced in July, 1913, by the plaintiff, as trustee, to foreclose a trust deed given by the defendant Idaho-Oregon Light & Power Company (hereinafter called the "Power Company") upon all of its property, consisting of hydroelectric power plants, transmission lines, and distributing systems in Southwestern Idaho, by which it generated and distributed electric current for light and power purposes. Decree of foreclosure was entered during the following month, and thereafter, an immediate sale appearing to be impracticable, a receiver was appointed to take charge of and operate the property. The receivership commenced on December 10th, and still continues. On December 23, 1913, O. G. F. Markhus was appointed receiver of the property of the Idaho Railway, Light & Power Company (hereinafter called the "Railway Company"). On April 16, 1914, the Railway Company and its receiver were permitted to file a bill in intervention herein for the purpose of establishing their title to and their right to the possession of certain property in the possession of W. J. Ferris, receiver of the Power Company. In due time answers were filed by the plaintiff and the receiver for the Power Company, and also by A. W. Priest and others, intervening bondholders. Most of the facts are made to appear by the pleadings and a stipulation.

Two different claims are set up, one of which, however, presents no real controversy. It is for specific property loaned to the Power Company, and to which it asserts no right. As to this claim, therefore, an order or decree will go in favor of the interveners, substantially as prayed for, covering the articles listed in Schedule C attached to the bill in intervention as modified by the stipulation of facts.

The other claim is based upon what is referred to as an equipment trust agreement, copy of which is attached to the bill. This agreement is dated April, 1913, and is signed by the Railway Company, through its vice president, H. F. Dicke, and the Power Company, through its general manager, O. G. F. Markhus. Its execution, however, was not authorized by either the executive committee or the board of directors of either company. In terms it recites that both companies were engaged in the generation and sale of electric current in southwestern Idaho, and that the Railway Company was under contract to furnish current to the Power Company; that for adequate service to certain communities it was necessary for the defendant to make certain extensions of its transmission and distributing lines, but that it was without the necessary funds, and that the Railway Company was willing to furnish the material and make the extensions thereof, title to the material so furnished to remain in it until full payment should be made by the Power Company. It is alleged that in accordance with this agreement the Railway Company furnished material and made the extensions, at an actual cost of $56,187.91, no part of which, either principal or interest, has ever been repaid. The materials were furnished and the work was done during the period from April to September, 1913. It further appears that all of the equipment, consisting of poles, conductors, transformers, insulators, and other appliances, is in the possession of the receiver of the Power Company, and is being used by him, and that the same is necessary to enable the Power Company to

discharge its duties and obligations to the public in the transmission and distribution of electrical current. In the agreement it is provided that, in case of the default of the Power Company, the Railway Company may, at its option, have recourse to any one of several remedies, one of which is that it may "take possession of and remove any and all poles, conductors, transformers, insulators, and other appliances included within and sold under the terms of this agreement, applying the scrap value thereof on the amount due thereon, and take such steps to collect the balance as it may be advised or are available." This remedy it has elected to pursue, and accordingly by this proceeding it seeks an order directing the receiver to deliver over to its receiver possession of the equipment. There is an understanding that the present submission is only of certain preliminary questions, and therefore the evidence does not go to the extent of identifying the particular items of property in controversy, or of disclosing their value.

Several objections are urged to the relief sought. The first of these is that the equipment-trust agreement does not purport to cover all the property to which title is claimed. Apparently the point is well taken, but the question is not for present consideration. Such property, if any, as the Railway Company is entitled to reclaim, must be identified and shown to be within the terms of the agreement.

[1] The next objection is that the execution of the agreement was not authorized by either the Power Company or the Railway Company, and therefore it is not binding upon them. It is sufficient to say that if the agreement is valid at all it is valid for all purposes, and if it is void it confers no right upon the Power Company; in either view it could not operate to transfer title. The mortgagee is in no better position than the mortgagor; there are no distinct elements of estoppel in its favor. Such rights as it has rest upon the "afterwards-acquired" clause of the mortgage, but under this clause (with certain exceptions to be considered later), the mortgage lien attaches only to that which the mortgagor actually acquires.

[2] It is further urged that, inasmuch as the Railway Company owned practically all of the stock of the Power Company and dominated it, it would be inequitable to permit it to assert this claim to its own advantage and to the impairment of the security of the mortgagee. But inasmuch as the transaction was in good faith, and was fair, the mere fact that the Railway Company owned the stock of and controlled the Power Company does not debar it from the remedies available to other creditors having similar contracts.

It is also urged that the Railway Company expressly contracted to protect the mortgaged estate from claims that would impair the security of the mortgage. While there is some evidence in a general way tending to connect the Railway Company with such an agreement or understanding, it is insufficient to support a finding that it undertook at its own expense to install the equipment in question or any part thereof.

In the next place, it is argued that, if it be assumed that the agreement was legally executed, the reservation of title was ineffective because, with the intervener's consent, the property became impressed

with a public use, and was so attached that it became a part of the realty covered by the mortgage, and is an integral and necessary part of the plant of the Power Company, and necessary to keep it a going concern, and cannot be detached without injury to the public interest, and that therefore the lien of the prior mortgage attaches despite the attempted reservation of title. It is admitted that as a general rule conditional sale agreements are valid in Idaho. Barton v. Groseclose, 11 Idaho, 227, 81 Pac. 623; Kester v. Schuldt, 11 Idaho, 663, 85 Pac. 974; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339. But it is argued that the authority of these cases extends only to "loose property susceptible of separate ownership and separate liens," and attention is drawn to Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210, where it is said that:

"It is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."

And to the same point the following cases are cited: Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; Phœnix Iron Works v. New York Security & Trust Co., 83 Fed. 757, 28 C. C. A. 76; Ryle v. Knowles Loom Works, 87 Fed. 976, 31 C. C. A. 340; Evans v. Kister, 92 Fed. 828, 35 C. C. A. 28; Guaranty Trust Co. v. City of Galveston, 107 Fed. 311, 46 C. C. A. 305; Gunderson v. Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867.

While in a general way these cases tend to support the proposition, they are to be read in the light of the recent decisions of the Supreme Court in Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, and Detroit Steel Cooperage Co. v. Sistersville Brewing Co., 233 U. S. 712, 34 Sup. Ct. 753, 58 L. Ed. 1166 (decision rendered May 25, 1914), by which, to say the least, the application of the principle relied upon is confined to very narrow limits. And the evidence here is not sufficiently detailed or specific to enable us to determine what part, if any, of the property in question falls within those limits.

[3] In the last place, it is urged that the Railway Company, with full knowledge of all the facts, participated in the main case, and having procured and acquiesced in the entry of the decree therein, and having thereafter, up until the filing of this petition, made no objection to the treatment of the property as a part of the mortgaged estate, it must be deemed to have waived any right to the specific property which it may have had, and to have consented to the passing of the title thereto to the Power Company; and that it is bound by the decree, which describes the property and directs that it be sold, together with other property belonging to the Power Company, to satisfy the mortgage indebtedness. The facts upon which this defense is based should be briefly stated. In the complaint in the main case the plaintiff alleged, and in the answer of the Power Company, signed by it through its president, it admitted, that this property was owned by it. The de-

cree describes the property together with others, and directs that it be sold to satisfy the mortgage indebtedness. It is further true that at all times herein referred to the Railway Company was in complete control of the Power Company, and dominated its affairs; it owned substantially all of its capital stock, and claimed to own a large portion of the bonds secured by the trust deed involved in the foreclosure. It and the interests by which it was controlled had a plan for the reorganization of the two companies, pursuant to which it was, through the foreclosure proceeding, to acquire all of the properties belonging to the Power Company. In some, if not in all, important particulars, the plaintiff deferred to its wishes and the wishes of those whose interests were allied with it touching the proceedings to be taken in the foreclosure suit. Over the objection of the intervening bondholders, it and those associated with it strenuously opposed delay in the entry of the decree, which, if not prepared by it, certainly had its approval. Shortly after the decree was entered, it formally came into the suit, and from time to time urged that all the property be sold. As a party to the suit it assented to the appointment of a receiver. At no time did it suggest its ownership, nor was any claim ever asserted by it or upon its behalf prior to the letter written by its receiver to the receiver of the Power Company on the 23d day of March, 1914. In opposing petitions of the intervening bondholders and others, it has uniformly insisted that the decree, having become final, cannot now be modified, and is binding upon all parties interested.

The first question is whether the facts are sufficient to constitute an estoppel of record. Doubtless there are conditions where one may be bound by a judgment, although he is not in name a party to the action. Tootle v. Coleman, 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120; James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476; Jefferson Electric Co. v. Westinghouse Electric Co., 139 Fed. 385, 71 C. C. A. 481; Litchfield v. Goodnow, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199. The Railway Company's relation to the formal parties and its participation in the proceedings have been such that it must, I think, be deemed to have been a party in fact and is bound by the decree which it has actively aided in securing and maintaining. If it be said that in foreclosure suits issues of title are not ordinarily involved, the answer is that the objection to their consideration does not go to the jurisdiction, and undoubtedly they may be entertained by consent of the parties, express or implied.

But if the view be adopted that, strictly speaking, estoppel of record is not established, there still remains for consideration the question whether the facts constitute an estoppel in pais, or charge the Railway Company with laches, or signify an intention upon its part to abandon its title and waive its right to retake the property. That in appointing a receiver and administering the estate the court acted upon the assumption of unconditional title in the Power Company is unquestioned, and apparently such was the belief of the mortgage trustee. It is not shown, and perhaps in the nature of things could not be shown, that the course of the trustee or the bondholders has been materially affected by such assumption, or that the policy of administration would have

been substantially different had the truth been known. The claim does, however, substantially affect the value of the mortgage security, and the question of the value of the insolvent estate has from time to time entered into the consideration of the time when, and the conditions upon which, a sale should be made. But if, for the reason that there is no direct proof of injury or prejudice to any party in interest, we reject the defense of strict estoppel, still should the claimant now be heard to assert a right to retake possession of the property? Its approval of and long acquiescence in the decree are not to be accounted for upon the theory of inadvertence or carelessness. The conclusion is unavoidable that it knowingly consented that this property should be included and sold as a part of the mortgaged estate; there is no other reasonable explanation of its conduct. Just what its purpose may have been we can only conjecture, but it must be borne in mind that, if its plan of reorganization had been consummated, as it doubtless expected would be the case, until a considerable length of time had elapsed after the entry of decree, the property would have come into its possession upon foreclosure sale, and there may have been reasons why it preferred to take title in that way.

I am reluctant to send the interveners away without any relief, and yet the question of what can properly be granted is a most perplexing one. As has been shown, there are objections both formal and substantial to awarding the Railway Company the title and possession of the property. Upon the other hand, for the Power Company to hold the property and pay nothing for it would seem to be harsh in the extreme. The contract price is doubtless greatly in excess of the present value of the property, and therefore to require the receiver of the Power Company to pay such price would be neither equitable to other creditors nor would it be warranted by well settled principles of law applicable to the administration of insolvent estates.

Upon the whole I have concluded the fairest solution of the problem would be to award the interveners, as a preference claim against the estate of the Power Company, the scrap value of the property. In so doing, the integrity of the decree will be preserved, the property will remain a part of the estate, in harmony with what was doubtless the purpose and intent of the Railway Company when the decree was entered, the amount which will thus be required of the estate of the Power Company will not be in excess of what in equity and good conscience it should pay, and the interveners will get in value substantially the relief which title and possession would now afford. As we have already seen, the contract provides that, in case the Railway Company retakes the property, it shall credit upon the contract price only the scrap value thereof. In a sense, therefore, this is the standard which the parties themselves have provided, and, while doubtless the scrap value is incommensurate with the purchase price, it is the full equivalent of what the interveners would have obtained had the receiver of the Power Company complied with their demand and turned over to them the property. For the difference between the scrap value and what is justly due upon the contract, the interveners will, of course, be recognized as having a general unpreferred claim against the estate of the Power Company.

In this view, it will be necessary to refer to a master the question what property falls within the equipment-trust agreement, and the further question of its scrap value. Possibly the several parties in interest can reach an agreement touching both these questions. An application will, however, be entertained at any time on the part of any one in interest for such reference and the appointment of a master.

THE JULIA LUCKENBACH.

THE INDRAKUALA.

(District Court, E. D. Virginia. December 15, 1914.)

No. 1823.

1. COLLISION ⟸100—STEAMSHIPS MEETING IN FOG—EXCESSIVE SPEED.
A collision occurred in Chesapeake Bay in a thick fog, which came up suddenly from the south, between the steamships Indrakuala, passing down, and Julia Luckenbach, going up. Before entering the fog the Indrakuala saw the Julia Luckenbach a mile or so ahead, the vessels then being on safe passing courses, and she also heard the Julia Luckenbach's fog signals later. The latter did not see the Indrakuala, and after the fog came on changed her course to port to reach a safe place of anchorage to the westward of the channel, and she was proceeding at an excessive speed on a flood tide, when she was struck by the other vessel and sunk. The Indrakuala was making a speed of about 10 knots, which she did not reduce until she entered the fog; and the evidence tended to show that she was going at excessive speed at the time of collision. *Held* that, knowing that the other vessel was ahead, she should have reduced speed before reaching the fog bank and navigated with the greatest care, and that both vessels were in fault.
[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213–215; Dec. Dig. ⟸100.]

2. COLLISION ⟸19—SUITS FOR DAMAGES—DEFENSES.
A vessel whose faults clearly contributed to a collision will not be relieved from liability because of faults on the part of the other vessel.
[Ed. Note.—For other cases, see Collision, Cent. Dig. § 17; Dec. Dig. ⟸19.]

In Admiralty. Proceeding by the Indra Line, Limited, owner of the steamship Indrakuala, for limitation of liability. On issue as to fault for collision with the steamship Julia Luckenbach. Finding against both vessels.

Convers & Kirlin, of New York City, and Edward R. Baird, Jr., of Norfolk, Va., for The Indrakuala.

Barry, Wainwright, Thacher & Symmers, of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for The Julia Luckenbach.

Brown & Purdy, of New York City, and Hughes & Vandeventer, of Norfolk, Va., for various personal injury and death claimants.

Blodgett, Jones & Burnham, of Boston, Mass., for cargo owner.

WADDILL, District Judge. This proceeding is now before the court upon the application of the Indra Line, Limited, as owner of the steamship Indrakuala, filed on the 19th day of March, 1913, to

secure limitation of liability, pursuant to the statutes of the United States in such cases provided, from losses arising out of a collision between the two steamships named, which occurred in the waters of Chesapeake Bay, on the morning of the 3d day of January, 1913, resulting in considerable damage to the Indrakuala, and the sinking and loss of the Julia Luckenbach, with her cargo, and of several lives.

The original libel was filed against the Indrakuala on behalf of the owners of the Luckenbach, her cargo, and the personal effects of members of her crew, and the damages claimed on account of the loss of the Luckenbach, including her freight money, was $156,452.22. Subsequently four additional libels in rem were filed to recover damages on account of personal injury and death claims, aggregating in all $238,000, and the institution of other suits was threatened. Whereupon this proceeding was commenced, and on the 1st of December, 1913, the return day of the monition issued herein, claims aggregating $173,477.95 were filed, exclusive of the claim of the Luckenbach aforesaid; the same not having been presented in the limited liability case.

[1] The Indrakuala is a British steamship, built in 1912; her general dimensions being 5,691 gross and 3,607 net tons, 430 feet long, 53 feet 7½ inches beam, and at the time of the collision was drawing forward 20 feet 4 inches of water and 22 feet aft. The Julia Luckenbach was an American steamship, built in 1882, 3,100 gross and 1,977 net tons, 313 feet 1 inch long, 36 feet 4 inches beam, and draft at the time of the collision, of 22 to 22½ feet of water, and was en route from Tampa, Fla., to Baltimore, Md., loaded with phosphate rock. The Indrakuala was bound down Chesapeake Bay from Baltimore to New York, and had discharged part of her cargo in Baltimore, which latter place she left on the afternoon of the 2d day of January, in charge of a Maryland pilot, to the Virginia Capes, and during that night, on account of fog, she anchored some 2½ miles to the northward of Smith's Point Light, where she remained until the morning of the 3d, when shortly after 6 o'clock, she resumed her passage down the bay; the weather at the time being clear, with a fresh southerly wind and flood tide.

The Julia Luckenbach anchored off Windmill Point on the night preceding the collision, because of fog, and got under way the morning of the 3d about 7 o'clock. The distance between the places of anchorage of the two vessels on the morning of the 3d, off Windmill Point and above Smith's Point Light, was about 14 miles. The distance from Smith's Point Light to Tangier Gas Buoy was approximately 6⅜ miles; from Tangier Buoy to the scene of the collision, approximately 3½ miles.

The Indrakuala navigated from Smith's Point Light S. 11° W. true to Tangier Buoy, and then S. true to the point of collision. The Luckenbach's course from her anchorage off Windmill Point was N. ½ E. magnetic, until some five minutes before the collision, when she changed her course to N. W. ½ W. The Indrakuala proceeded down the channel in the regular course for downgoing vessels, and the Luckenbach was on the proper course for ascending vessels, being to the

eastward of the channel. Between the Luckenbach's place of anchorage, off Windmill Point, and the scene of the accident, the Merchants' & Miners' Transportation Company's steamship Essex, also ascending the bay, passed the Luckenbach to the westward of her, that is, on her port side; and the Essex met and passed the Indrakuala above the scene of the collision to the eastward, that is, to the port side of that vessel.

The collision occurred at 7:36 of the Indrakuala's time, and 7:45 of the Luckenbach's time (there being a difference between the two ships of some 9 minutes in time), and after the passing of the two ships by the Essex as above indicated. The distance below Tangier Buoy, where it happened, is ascertained with reasonable certainty, namely, 3½ miles, though just where the fog set in, and where the Essex and Indrakuala passed each other below Tangier Buoy, as well as where the Indrakuala, on account of the fog, reduced her speed, is in dispute—the Indrakuala's contention being that when about three-fourths of a mile, or less, of the scene of the collision, at 7:30 she reduced her speed one-half, at 7:33 stopped and reversed full speed astern, and at 7:34 repeated the full speed astern order, and subsequently, after sighting the Luckenbach about two ship's lengths away, she signaled to stop and hardaported, and that at the time of the collision she was substantially stopped in the water, and had lost steerage way; whereas the Luckenbach contends that the Indrakuala was at least a mile and a quarter away when she should have reduced her speed, and that she was making undue speed before and at the time of the collision, and it would not have been possible for her to have done the things claimed by her to have been done regarding slowing down, reversing, etc., within six minutes. The two vessels came together by the stem of the Indrakuala striking the Luckenbach about 10 feet abaft of her stem, and scraping along about 30 feet on her starboard side, cutting into the Luckenbach some 7 feet, tearing off her iron sheeting for a distance of 30 feet, and cutting deeply into her main deck, causing her to sink.

Many faults are assigned by the vessels one against the other, an unusual number of witnesses have been examined at great length, and the case has been fully argued, orally and in writing, with much learning and ability; but in its last analysis it is reduced, in the view of the court, to a comparatively simple inquiry, namely, whether the Indrakuala, after the setting in of the fog, and at the time of the collision, was being prudently and properly navigated; that is to say, whether upon approaching the fog, and entering and becoming enveloped in the same, she exercised the degree of prudence and caution imposed upon her by the rules of navigation—it being in effect a concessum that the Luckenbach was proceeding at an undue rate of speed at the time of the occurrence.

In arriving at a correct conclusion in the premises, the court has had the advantage of certainly four sources of information: First, the testimony of certain of the officers and members of the crew of the Luckenbach, others of them, including the master, having been drowned; secondly, the testimony of those from the Indrakuala, in-

cluding the pilot; thirdly, the testimony of certain officers and members of the crew of the Essex; and, fourthly, the physical conditions, such as the evidence of the lick of the collision, the location of the sunken wreck, and the logs, including the engineer's slate of the Indrakuala, tendered in evidence; and the conclusion reached by the court is that it is evident from the whole testimony that at the time of the collision the vessels were each making considerable and undue headway through the water. The Luckenbach was confessedly so, and it is equally apparent from the angle of, and the effect of the blow of, the collision, if there was no other testimony in support thereof, that the Indrakuala must have been doing the same thing, though not to the same extent.

The court cannot accept the Indrakuala's statement as to the occurrence, namely, that it happened six minutes after she passed the Essex, some half a mile above the collision, as it is highly improbable that she could have done the things she says she did within six minutes, nor the statements of the ship's log, written up four days after the collision, from loose sheets of foolscap paper, and a memorandum book alleged to have been kept, nor the entries from the engineer's slate, the figures upon which bear evidence of having been tampered with; and it is also apparent, from a critical examination of the evidence of her officers and crew, that she was making excessive headway at the time of the collision, and that the injury under the forepeak of the Indrakuala, and to her shell plating below the main deck, was caused by that ship, while making considerable headway, coming into collision with the Luckenbach and in contact with her cargo of phosphate rock, while the latter ship was herself proceeding at undue speed.

The testimony, and especially that of disinterested witnesses from the Essex, is that that vessel and the Indrakuala passed each other approximately a mile and a quarter above the scene of the collision, and it was then that the Indrakuala entered the thick fog, and in order to have reached the scene of the collision in 6 minutes after passing the Essex, she must have traveled much of the time approximately 10 or 11 miles an hour; and the acceptance of this as the correct distance is not inconsistent with the statement of the Indrakuala as to what she attempted to do to check her speed shortly before, but at a time when it was too late to avert the disaster. Upon the Indrakuala's own statement of what she did, in covering the half mile, as she claims the distance to be, within 6 minutes, she should not be held free from fault. She confessedly ran into a thick fog at a speed of at least 10 knots an hour 6 minutes before the collision. She then reduced her speed to one-half, which took from 3½ to 4 minutes, according to her pilot's statement, who also testified that 2 minutes after giving the order to reduce his vessel was proceeding at about 7 knots an hour, thus bringing her to within 4 minutes of the collision at 7 knots an hour, in a dense fog, and to within 4½ knots up to 2 minutes before the collision, and that with knowledge of the presence of a vessel ahead of him in the fog.

The Indrakuala, knowing of the presence of the Luckenbach ahead

of her in the fog, should have proceeded with unusual caution, to have avoided the possibility of the dangers arising from such condition. It is true the Luckenbach, when she became hidden in the fog, was approaching on parallel lines, on a course that would have afforded sufficient margin for the two vessels to have passed each other in safety; but they were approximately a mile apart, and perhaps something more, when the Luckenbach was thus lost sight of, and it was at least hazardous for the Indrakuala to have proceeded upon the theory that the Luckenbach might not and most probably would not vary her course in the thick weather. She manifestly did change her course, and her excuse for so doing was that her purpose was to come to anchor, and considered the western side of the channel the proper place to anchor under the circumstances, because of the dangers on the eastern side of the channel incident to Tangier Buoy, and the undesirability, in her then position, of anchoring in the path of ascending vessels; the Luckenbach's contention being that she did not know of the presence of the Indrakuala ahead of her.

The Indrakuala says that her purpose was also to come to anchor. Both seem to have been engaged in a like undertaking in this respect, and the Indrakuala was charged with knowledge of the fact of the embarrassments incident to anchoring on the eastern side of the channel, and that the Luckenbach's movements were accelerated by the flood tide and the force of the strong breeze of some 25 miles an hour then prevailing, and her master cannot be held at fault for altering his course in the fog, if he did not know of the presence of the Indrakuala, and exercised his best judgment in directing his navigation to the westward side of the channel, as a matter of safety, however inexcusable he may have been in attempting to do so at undue speed.

[2] The Indrakuala should at least have slowed down upon approaching and entering the fog, if not have stopped her engines, and for her failure alike to have navigated in anticipation of the approaching fog, and to have reduced her speed, and reversed in time to have had her movements under control, after entering the same, until too late to avoid collision with the Luckenbach, which loomed up some two ship's length's away, and whose fog signals she had heard, she is in fault, and from the consequences of which she will not be relieved by suggesting the undue speed of the other vessel; the culpability of each in this respect having contributed to the accident. The Colorado, 91 U. S. 692, 703, 23 L. Ed. 379; The Nacoochee, 137 U. S. 330, 339, 11 Sup. Ct. 122, 34 L. Ed. 687; The Umbria, 166 U. S. 404, 413, 421, 17 Sup. Ct. 610, 41 L. Ed. 1053 (where will be found a full citation of the American and English cases bearing on the subject of speed of vessels in fog); The City of Alexandria (D. C.) 31 Fed. 428, 431; The Trave (D. C.) 55 Fed. 117 (the last two cases decisions of the late Judge Brown of the Southern District of New York, and the latter of which was approved by the Circuit Court of Appeals, 68 Fed. 390, 15 C. C. A. 485); The Michigan, 63 Fed. 280, 287, 11 C. C. A. 187 (an opinion by the late Judge Hughes, of this district, in the Circuit Court of Appeals of this circuit); The Charlotte (D. C.) 124 Fed. 989, 990.

The Indrakuala insists that she should not be held in fault because until within a few minutes prior to the collision, the weather was clear; that her navigators could see the course they were on, and that the same was not obstructed; and that it was not necessary for their vessel to slow down until she had actually entered the fog bank, after which time they did all that was necessary to be done.

The court cannot agree with these contentions under the circumstances attending this collision. It is true the fog came on quickly, and did not last long, not over half an hour, perhaps; but the Indrakuala was in full view of its approach, saw that her course took her directly into it, and, while at first it was naturally thinner on its outer edges, that in a very short time it must envelop her, as it did, and she should not have continued at full speed, certainly 10 knots an hour, until she ran into a dense fog, which was being rapidly driven by the wind across her pathway, but should have checked her speed in anticipation thereof, and this duty became the more apparent by the known presence of a vessel ahead of her in the fog, which might cross her course, and the fog signals of which vessel she had twice heard.

The Indrakuala further insists that she should not be held liable, because the negligence of the Luckenbach was the proximate cause of the collision, and sufficient within itself to account therefor, and that that vessel should not be relieved of responsibility for her acts, or have others share in her losses, by the suggestion of faults on their part. This doctrine is well established, but should not, in the judgment of the court, serve to relieve the Indrakuala from liability, under the circumstances here, and where her own negligence and want of due care contributed to the collision.

An unusually large number of authorities have been cited by counsel on the respective sides in this case, but it is not considered practical to undertake within a reasonable length of this opinion to go into any discussion of the same, further than to say that they have been fully considered, and are not believed to contain views inconsistent with those expressed here, having regard to the facts of this case.

A decree will be entered upon presentation, determining the faults as herein indicated.

In re HINDIN.

(District Court, S. D. California, S. D. December 11, 1914.)

No. 1288.

1. BANKRUPTCY ⊂⊃414—REFUSAL OF DISCHARGE—EVIDENCE.

On objections to a bankrupt's discharge, evidence *held* insufficient to support the finding of a special master that the bankrupt failed to keep books of account from which his financial condition might be ascertained with intent to conceal his financial condition, though the only account of certain loans to him was kept in a small pocketbook instead of in the books of his business.

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

---

2. BANKRUPTCY ⊜414—REFUSAL OF DISCHARGE—EVIDENCE.
A bankrupt's intent to conceal his financial condition by failing to keep books of account is an inferable, rather than a presumptive, intent; such intent can hardly ever be proved by direct evidence, and its existence can only be inferred or presumed from the proof of facts which clearly and almost irresistibly leads to such conclusion, especially as, notwithstanding Bankr. Act July 1, 1898, c. 541, 30 Stat. 545, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, under which an intent to conceal his financial condition is sufficient without any actual design to defraud, the required intent is one sounding in fraud.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720–722; Dec. Dig. ⊜414.]

3. BANKRUPTCY ⊜415—DISCHARGE—QUESTIONS OF FACT.
Where, on the trial before a special master of the issues raised by objections to a bankrupt's discharge, the evidence as to whether the bankrupt obtained property on credit upon a false statement in writing made for the purpose of obtaining such credit was conflicting, it was the peculiar province of the master to determine the credibility to be accorded to the witnesses.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. ⊜415.]

In Bankruptcy. In the matter of Theodore J. Hindin, bankrupt. On exceptions to the report of a special master on the issues raised by objections to the bankrupt's discharge. Exceptions overruled in part and allowed in part and discharge granted.

Collier & Clark and Denis & Loewenthal, all of Los Angeles, Cal., for bankrupt.

Norman A. Bailie, of Los Angeles, Cal., for receiver.

BLEDSOE, District Judge. Objection was made to the discharge of the bankrupt in this case upon two grounds; one, that with intent to conceal his financial condition he failed to keep books of account or records from which such condition might be ascertained, and the other that he obtained property on credit on a materially false statement in writing, made by him for the purpose of obtaining such credit. Upon a reference to a special master for the purpose of reporting the facts and his conclusions, with respect to the issues created by the aforesaid objections, a hearing was had, and thereafter the master reported advising against the discharge of the bankrupt, on the ground that the first objection had been sustained, and reporting that in his judgment the second objection had not been sustained. Exception has been taken by the bankrupt to the finding against him, and likewise by the trustee to the finding in his favor.

[1] After carefully considering the evidence adduced before the master, I can come to no other conclusion than that his finding that the bankrupt failed to keep proper books of account, from which his financial condition might be ascertained, with the intent to conceal his financial condition, is not sustained by the evidence.

The only charge against the bankrupt is that he kept memoranda of certain loans made to him by his banker and by his brother in a small pocketbook, instead of in the books of his business. It is the fact, however, that the bankrupt, though engaged in the jewelry busi-

ness, was engaged in it in a somewhat small way; that he was a foreigner and not overly endowed with erudition; that it had been his custom, up to a short time previous to the initiation of the bankruptcy proceedings, for him merely to keep a file of his bills or accounts for goods purchased by him, paying them if possible when they became due, and since for some time he had been conducting a losing business, it had also been his custom to borrow sums, from time to time, from his banker, who was kindly inclined towards him, and from prosperous relatives and friends. It is also shown that he did not begin the keeping of books of account, in any substantial sense at all, until a few months before the bankruptcy proceedings, and that this was done solely from the suggestion of an employé named Klein, who had learned a little about keeping books back in Hungary, when a young man, and who seemed disposed to desire to take advantage of that slight knowledge of the art in the course of his employment under the bankrupt. It is also made to appear very clearly that the bankrupt was at no time contemplating bankruptcy proceedings until, upon an attachment suit being brought, and against his own belief and judgment, he was persuaded by his attorney and his friends to submit to bankruptcy as the only means of escaping from the unexpected dilemma in which he found himself. It might also be said, in addition, that the bankrupt testified positively and without equivocation that, respecting his failure to cause to be incorporated into his books of account the fact that he had some private loans, he at no time intended thereby to conceal his financial condition. None of his creditors, or other persons for that matter, had ever asked to examine his books, he had obtained credit without any reference to or statement of his financial condition, as shown by his books, and he seems to have had no cause to expect that such an inspection or statement would be required of him.

[2] The learned special master, in his report, inter alia, said:

"A person who is indebted to his friends and relatives in divers amounts, and keeps their accounts upon a book or memorandum which is not open to general inspection, and the existence of which he does not disclose until after he has been vigorously interrogated, in reference to his books, is presumed, or it must therefrom be inferred, that he kept the accounts with his relatives and friends in this manner with intent to conceal those accounts from his creditors."

Aside from the fact that I find nothing in the evidence to justify the conclusion that the bankrupt refrained from disclosing the loans above referred to until after he had been "vigorously interrogated," I am constrained to hold the master gave too slight attention to the requirement that the intent referred to in the statute is ordinarily an inferable one, and not a presumptive one. It is closely analogous, indeed comparable, to the specific intent often met in criminal statutes, such as the intent to commit a felony, which must have been specifically in the mind of a party entering a building in order that the crime of burglary might be made out. Such specific intent is as substantial a part of the crime as the entering of the building itself, and in the absence of the proof of such specific intent the crime could not be made out. Of course it is obvious that the existence of such in-

tent can hardly ever be proven by direct evidence, but it is none the less the fact that such existence can only be inferred or presumed from the proof of facts which clearly and almost irresistibly lead to such conclusion.

Though the intent now under consideration is not the fraudulent intent which was required under the Bankruptcy Act previous to the amendment of 1903, yet even after that amendment, in my judgment, it is an intent sounding in fraud, because it would be of the essence of fraud for a debtor to destroy or conceal, or fail to keep, proper books of account, with the intent to conceal his financial condition. It would seem as if the purpose of the amendment was merely to relieve those objecting to the granting of a discharge from being required to prove that the intent with which a bankrupt was concealing his true financial condition was a fraudulent one, that is, accompanied by, or in pursuance of, a design actually to defraud; now, it is sufficient if he has the intent to conceal his financial condition from his creditors, because it would be presumed that the existence of such intent was with the design of perpetrating a fraud.

In Truett v. Onderdonk, 120 Cal. 581, page 588, 53 Pac. 26, page 29, Mr. Justice Van Fleet said, "The presumption is always against fraud—a presumption approximating in strength to that of innocence of crime." It must follow, then, of course, that the quantum of proof necessary to overcome the presumption against fraud must itself approximate that required to overcome the presumption of innocence.

There are various decisions, e. g., In re Alvord (D. C.) 135 Fed. 236, that sustain the legal conclusions of the master, but I am constrained to hold that they enunciate too strict a rule as against a bankrupt, and I prefer to follow others more just and humane, as I conceive them to be, in their effect. In Re Marcus (D. C.) 192 Fed. 743, on a similar proceeding, it was held:

"The intent to conceal one's financial condition is a separate fact from the keeping of the books. The reasonable consequences of keeping imperfect books may be a concealment of one's financial condition, if the occasion ever arises when they are scrutinized and that fact would be enough to charge one with responsibility for that result, if the law forbade keeping imperfect books. The general intent of the criminal law is of this kind; it only means that the actor must be aware of his acts and then charges him with such consequences as would naturally follow from them, regardless of whether he had those in mind or not. When, however, as is sometimes the case, the law attaches no responsibility to an act unless the actor does have in mind the specific consequences, it is necessary as an additional element to prove that state of mind. This is such a case. Moreover, since the intent to conceal is different from the intent to keep imperfect books, the objectors must go further than to show merely that the bankrupts intended to keep the kind of books they kept; they must show, also, that they intended those books to conceal from somebody—which must be their creditors—their financial condition. That involves not only knowledge of how the books were kept, but some anticipation that at a future time they might be examined by creditors and would then fail to enlighten them upon all the facts."

So, also, it was held in Re Brockman (D. C.) 168 Fed. 1015:

"The intent must be shown to the satisfaction of the court to bring the case within the statute, and it would be a harsh and unjust construction to say that the intent must, as a matter of law, be presumed from mere bad

bookkeeping or from a mere failure to keep books. If that were the law, probably nine out of every ten country people, and a very large proportion of plain people everywhere, would be refused discharge if applied for, inasmuch as few of them can keep books which are intelligible to anybody except themselves. It is a matter of common knowledge that a large proportion of the people do not keep books at all; for example, farmers, clerks, and mechanics, * * * but this is either because they see no need for it, or else cannot do it satisfactorily. The ways of the people of the country are very different from those of great business concerns in cities and towns of the larger size. At all events, bad intent must be made to appear to the satisfaction of the court, and the testimony in this case does not, in my judgment, meet this requirement. * * * While common sense and good judgment require a merchant to keep books, yet, if he does not do so and fails in business, he is not denied a discharge for merely being a poor, or even the poorest possible, bookkeeper. Nor would such a provision in law be wise, for the greatest rascals may sometimes have the most perfectly kept books, so far at least as their face appearance may indicate. Under the Bankruptcy Act, therefore, the intent with which bad bookkeeping is done is the material thing. If that intent exist, it is immaterial whether, superficially considered, the books are ill kept or well kept. The evil intent alone will destroy the claim to a discharge in a case coming within the act."

In Re Brown (D. C.) 199 Fed. 356, Ray, District Judge, held, in a similar proceeding, in accordance with the general rule in criminal cases in determining matter of intent and the like:

"When from certain acts or omissions two inferences may be drawn, the one pointing to a guilty or bad intent and the other perfectly consistent with honesty, * * * it is the duty of the court to find in favor of honesty of purpose and intent."

[3] With respect to the exception urged by the trustee, the special master finds that the bankrupt did not obtain property on credit from any person upon a false statement in writing to such person for the purpose of obtaining such property on credit. I concur in this finding and overrule the exception made thereto. The evidence was conflicting in this respect, and it was the peculiar province of the master to determine the credibility to be accorded to the witnesses. In addition, I am constrained to hold as to this phase of the case, from an examination of the record, that his conclusion is the same as I myself would have arrived at.

An appropriate order will be entered overruling the exception of the trustee and confirming the report of the special master in that behalf, and allowing the exception entered by the bankrupt, and disaffirming the report of the special master in that behalf.

The discharge of the bankrupt will be granted.

Ex parte HIDEKUNI IWATA.

(District Court, S. D. California, S. D. January 2, 1915.)

1. ALIENS ⟸18—DEPORTATION—DEPARTMENT OF LABOR—JURISDICTION.
The Department of Labor has been given full and complete authority to investigate and determine whether aliens have so violated the laws of the United States as, pursuant to such laws, to justify and require their deportation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 70–72; Dec. Dig. ⟸18.]

2. CONSTITUTIONAL LAW ⟸318—DEPORTATION—HEARING—"DUE PROCESS OF LAW."
In hearings in deportation proceedings held by officers of the Department of Labor, ordinary judicial procedure, with its consequent limitations, is not necessarily to be followed; "due process of law" being secured if the aliens are given substantial notice of the reasons urged why they should be deported, together with a fair and reasonable opportunity to present controverting evidence and a reasonable opportunity to secure counsel, and if the whole proceeding is in good faith and the determination finally arrived at is fair, and not arbitrary, or induced by a manifest disregard of the aliens' rights.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. ⟸318.
For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. ALIENS ⟸54—DEPORTATION—HEARING.
Where the procedure in a deportation proceeding followed the rules laid down by the Department of Labor, and a full and fair opportunity was given the alien to show cause, if any he had, why he should not be deported, and all the evidence used against him was exhibited to him, and he apparently made use of every means at his command to substantiate his innocence of the charges made, a deportation order was not reviewable on habeas corpus.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

4. ALIENS ⟸54—DEPORTATION PROCEEDINGS—EVIDENCE.
Under Immigration Rule 22, subd. 4, providing that in deportation proceedings counsel for the alien shall be permitted to offer evidence to meet any evidence "theretofore" or thereafter presented by the government, the word "theretofore" referred to evidence used in making the application for the warrant as well as that received subsequently, so that the evidence so used to obtain the warrant was admissible at the hearing.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

5. ALIENS ⟸54—DEPORTATION—GROUNDS—EVIDENCE.
Evidence *held* to justify deportation of an alien on the ground that, being domiciled within the United States, he had been found connected with the management of a house of prostitution, and assisting, protecting, and promising to protect prostitutes from arrest, and been found receiving, sharing in, and deriving benefit from their earnings.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. ⟸54.]

Habeas corpus to review a deportation order issued against Hidekuni Iwata. Writ dismissed, and alien remanded for deportation.

Albert Schoonover, U. S. Atty., of San Diego, Cal., and Harry R. Archbald, Asst. U. S. Atty., of Los Angeles, Cal.

Frank Pierce, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. This is a proceeding in habeas corpus intended to test the validity of an order of deportation issued against the petitioner by the Secretary of Labor, dated the 12th day of November, 1914, wherein the petitioner, a member of the Japanese race and a subject of Japan, is ordered deported to the country whence he came, because of the fact that, being domiciled within the United States, he has been found connected with the management of a house of prostitution, has been found assisting, protecting, or promising to protect from arrest a prostitute, and that he has been found receiving, sharing in, or deriving benefit from the earnings of prostitutes.

The claim is made in the petition for the writ that the facts giving cause for his deportation were insufficiently alleged in the original warrant of arrest, in that there was no statement therein as to the precise facts concerning the petitioner with respect to his being connected with a house of prostitution, nor were any of the circumstances detailed showing where or in what manner he had been found assisting, protecting, or promising to protect from arrest any prostitute or prostitutes, nor was it shown or alleged how it was claimed that he had been receiving, sharing in, or deriving benefit from the earnings from prostitutes. The further claim is made that he was not accorded the full and fair hearing to which he was entitled under the law, that evidence was improperly taken and received against him, and that the evidence, fairly considered, was legally insufficient to justify his deportation.

[1] Under the decisions, as I read them, of the United States Supreme Court, the powers of this court in a proceeding of this character are extremely limited. Congress has given to the Department of Labor, having control of all immigration matters of the government, fullest and completest authority to investigate and determine whether or not aliens residing within the limits of the United States have so violated the laws of the United States as, pursuant to the provisions of such laws, to justify and require their deportation to their native land.

[2] In the hearings to be held by the departmental officers the ordinary judicial procedure, with its consequent limitations, is not necessarily to be followed. "Due process of law" is secured, as to such aliens as may be brought before the immigration officers, if they are given substantial notice of the reasons urged why they should be deported from this country, if they are given a fair and reasonable opportunity to present evidence controverting any evidence adduced by the department and tending to exculpate them from the commission of the unlawful acts urged against them, if they are afforded at some stage of the hearing reasonably early therein, so as to be of some substantial advantage to them, the opportunity to secure and have the advice and assistance of counsel, and if it appears, upon the whole proceeding, that the department acted in good faith, and that its determi-

nation, as finally arrived at, was fair, and not an arbitrary one, or one induced by a manifest disregard of the alien's rights in the premises. The proceeding being of necessity essentially summary in its nature, over-refined niceties in the way of pleading are neither to be expected nor demanded. So, too, questions as to the weight of evidence and credibility of witnesses are peculiarly within the province of the departmental officers. In Fong Yue Ting v. United States, 149 U. S. 698, at page 707 et seq., 13 Sup. Ct. 1016, 1019 (37 L. Ed. 905), it was said:

"The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene. In Nishimura Ekiu's Case, it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer, and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. 142 U. S. 660 [12 Sup. Ct. 336, 35 L. Ed. 1146]. The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power. The power of Congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers."

So, also, the same court, in Japanese Immigrant Case, 189 U. S. 86, at page 101, 23 Sup. Ct. 611, 614 (47 L. Ed. 721), said, in holding that the fundamental principles constituting "due process of law" might not be disregarded by the executive officers of the government in deportation proceedings:

"One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act."

In a deportation case very similar to the one at bar, through Mr. Justice Day, the same court (Low Wah Suey v. Backus, 225 U. S. 460, at page 468, 32 Sup. Ct. 734, 735 [56 L. Ed. 1165]), said:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. 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. In other cases the order of the executive officers within the authority of the statute is final."

In the same opinion, at page 472 of 225 U. S., at page 737 of 33 Sup. Ct. (56 L. Ed. 1165), having under consideration the rules of the Department of Labor to be followed by its agents in deportation proceedings, the court said:

"Considering the summary character of the hearing provided by statute and the rights given to counsel in the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary, hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute."

The rules thus referred to are the ones substantially now in force and followed in the present case. Declarations of a similar character as to the power vested in the executive officers of the government and in the limitations placed upon the courts in attempting to review them, are made in Jem Yuen's Case (D. C.) 188 Fed. 350, and in Siniscalchi v. Thomas, 195 Fed. 701, 115 C. C. A. 501, which seem to accord with the general current of the authorities.

The power to refuse aliens admission to our country or to expel them, as is indicated in the opinion of Judge Dooling, in Re Rhagat Singh (D. C.) 209 Fed. 700, at page 702, is a "vast" one, and one which it might well, perhaps, be argued ought not to be lodged definitely and conclusively in an executive department of the government; but, on the other hand, though questions juridical in their nature are presented, yet in the last analysis the ultimate question, viz., that of denial of entrance or expulsion, is purely political, and as such, together with all the incidents thereof, is properly determinable by the legislative branch of the government under such rules and regulations and through such administrative agencies as it may prescribe.

[3] Applying the law as thus enunciated to the facts of the case at bar, I can come to no other conclusion than that this court has no power in this or any other proceeding to set aside the judgment and order of the Department of Labor made herein. The procedure followed, as indicated by the papers used herein, shows that the rules laid down by the department were substantially adhered to. Full and fair opportunity was given the alien to show cause, if any he had, why he should not be deported. All the evidence used against him was exhibited to him, and apparently he made use of every means at his command to substantiate his claim that he was innocent of the charges made. No request was made by him for a continuance, or for further opportunity to obtain evidence in refutation of that adduced against him, and no claim made at the hearing that there was any other evidence which ought to be considered, and which he could present if given additional opportunity.

[4] There is nothing in the claim on his part that the evidence taken previous to the issuance of the warrant of arrest might not be used or relied upon by the Secretary of Labor in arriving at his final determination with respect to the propriety of deporting the alien. On principle, there is no reason why such evidence so taken and exhibited to the alien during the course of the hearing might not be used and relied upon as against him; in addition, subdivision 4 of rule 22 of the Immigration Department provides that counsel for the alien shall

be permitted "to offer evidence to meet any evidence *theretofore* or thereafter presented by the government." The "theretofore" refers in my judgment to evidence used in making the application for the warrant as well as to evidence received subsequently.

[5] The last question, and one upon which counsel seemed to contend with most emphasis, is as to whether there is any evidence in the record from which the alien's guilt upon the charges made against him could be deduced. It is unnecessary in this opinion to go into this evidence and sift and weigh the same. The alien admits in his own testimony that he was the owner of certain property in Fresno, that that property constituted 12 "cribs," that it was inhabited by prostitutes, that the alien knew and for some years had known that it was so inhabited by prostitutes, and that they were plying their nefarious trade therein; that it was rented to them directly by him, they paying him directly the money therefor and he providing all the accommodations therein; that he had charge of the rooms constituting the aforesaid "cribs." It is also apparent that there was no other intermediary, or other person directly, or at all, in charge of the women, the "cribs," or the business which they were conducting. Such conduct on his part shows him to have been "connected with the management of a house of prostitution," and within itself justifies his deportation. It clearly demonstrates that there was a closer relation between him and the women than that of mere landlord and tenant, as claimed by his counsel herein. In addition, there was ample evidence and other circumstances introduced tending to prove the truth of all the charges made against him, and to prove that he is and was one of the very individuals against whom the statute was intended to operate.

The writ of habeas corpus heretofore issued herein is dismissed, and the said alien is remanded for deportation.

FIDELITY TITLE & TRUST CO. v. KANSAS NATURAL GAS CO. et al.

McKINNEY v. KANSAS NATURAL GAS CO.

(District Court, D. Kansas, First Division. July 24, 1913.)

No. 1351.

1. COURTS ⟹500 — FEDERAL COURTS — PROPERTY — RECEIVERS — PROTECTION AGAINST INTERFERENCE.

Judicial Code, § 65 (Act March 3, 1911, c. 231, 36 Stat. 1104 [Comp. St. 1913, § 1047]), providing that when in any cause pending in any court of the United States there shall be a receiver in possession of any property he shall manage and operate the property according to the requirements of the valid laws of the state in which the property is situated, does not restrict the powers of a federal court to preserve property in the custody of its receiver from external attack.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⟹500.]

2. GAS ⟹1—PIPE LINE COMPANIES—REGULATION.

Where a foreign corporation admitted to do business in a state and engaged in the business of obtaining supplies of natural gas, transporting it by pipe lines to various cities in such state and other states and

selling it to local public service corporations or manufacturing plants, though granted the right of eminent domain, was not by any specific contract or charter provision granted an exclusive right so as to imply a contract to supply the full needs of those depending on it, while, so far as it availed itself of the permission granted it by the state, its property was affected by a public interest, its use of the property was subject to valid state regulation, and it could not, with respect to property devoted to this quasi public service, abandon that service, it could not be compelled by the state public utilities commission to extend its lines to new gas fields so as to constantly furnish an adequate supply of gas.

[Ed. Note.—For other cases, see Gas, Dec. Dig. ⊂⊃1.]

3. COMMERCE ⊂⊃61—"INTERSTATE COMMERCE"—STATE REGULATION.

A state public utilities commission could not order a pipe line corporation to extend its lines to new gas fields, where the extensions directed were in another state, as the building of pipe lines and the transportation of gas from such other state into the state in question was "interstate commerce," and the order directly regulated such commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81–84, 89; Dec. Dig. ⊂⊃61.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

4. RECEIVERS ⊂⊃92—ADMINISTRATION OF PROPERTY—NEW ENTERPRISES.

While a court may authorize the receiver of a corporation appointed by it to undertake a new and extensive enterprise, it should do so with great caution and only under exceptional circumstances, especially where this must be done at the expense of the bondholders of an insolvent corporation against their protest.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. ⊂⊃92.]

5. RECEIVERS ⊂⊃92—ADMINISTRATION OF PROPERTY—NEW ENTERPRISES.

Where the receiver of a pipe line corporation could build a proposed extension of its pipe lines economically only by removing and relaying a pipe line which had become useless, and which, by an order from which an appeal was pending, the receiver had been directed to deliver to receivers appointed by a different court, the extension would not be authorized.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. ⊂⊃92.]

6. RECEIVERS ⊂⊃92—ADMINISTRATION OF PROPERTY—NEW ENTERPRISES.

Where the rates which a pipe line corporation was authorized to charge for gas by a state public utilities commission precluded the earning of interest on such corporation's bonds, a receiver of the corporation would not be authorized to expend money in his hands for the purpose of extending its pipe lines, thereby depriving the bondholders of the security of such money, though the property may have been bonded for a sum exceeding its value and cost so that the inability to earn interest did not establish that the rates were unreasonably low.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. ⊂⊃92.]

7. RECEIVERS ⊂⊃92—ADMINISTRATION OF PROPERTY—NEW ENTERPRISES.

The receiver of a pipe line corporation would not be authorized to build a proposed extension of its pipe lines, thereby incurring an indebtedness to be met out of future anticipated earnings, or out of the corpus of the estate, where the continuance of the property in the hands of the receiver could not be counted on so as to authorize expenditures based on future earnings.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. ⊂⊃92.]

In Equity. Suits by the Fidelity Title & Trust Company against the Kansas Natural Gas Company and another, and by John L. McKinney against the Kansas Natural Gas Company. On application by receivers heretofore appointed for the Gas Company for directions as to complying with an order of the Kansas Public Utilities Commission. Receivers ordered not to comply with such order.

See, also, 206 Fed. 772.

Chas. Blood Smith, of Topeka, Kan., for complainant Fidelity Title & Trust Co.

John J. Jones, of Chanute, Kan., and John F. Philips, of Kansas City, Mo., for defendants.

John H. Atwood, of Kansas City, Mo., Chester I. Long, of Wichita, Kan., O. P. Ergenbright and T. S. Salathiel, both of Independence, Kan., and John S. Dawson, Atty. Gen., for State of Kansas, intervening.

MARSHALL, District Judge. On July 10, 1913, the public utilities commission of Kansas made an order that the receivers heretofore appointed by this court of the property of the Kansas Natural Gas Company be directed to make certain extensions of the pipe lines of said company, which extensions were specified in the order, and to begin contracting for and the purchase of material to carry into effect the order on or before the 17th day of July, 1913. The work ordered to be done was estimated by the commission to cost from $285,000 to $300,000. The receivers have applied to the judge of this court for direction as to their duties with respect to this order. The validity of the order is a fundamental consideration. The Kansas Natural Gas Company is insolvent. Its property is in the hands of receivers in a suit to foreclose a first mortgage to secure bondholders. The receivers were, however, originally appointed in an administration suit. The order of the commission directs a large expenditure of money now in the hands of the receivers, the making of certain specific contracts, and the building of new pipe lines.

[1] It is evident that administration by the court through its receiver of an insolvent corporation will be rendered difficult, if not impracticable, if the receiver be subject to orders of distinct tribunals in the administration of this trust. This result is, however, claimed to ensue from section 65 of the Judicial Code, which in substance provides that a receiver appointed by a United States court shall manage the property in its possession "according to the requirements of the valid laws of the state in which such property shall be situated." But, as stated in Re Tyler, 149 U. S. 182, 13 Sup. Ct. 785, 37 L. Ed. 689, this provision does not restrict the powers of a federal court to preserve property in the custody of its receiver from external attack. In this case it is not necessary to decide this conflict of administrative power.

[2] The Kansas Natural Gas Company is a foreign corporation. It was duly admitted to do business in Kansas. The business it was authorized to do and was in fact engaged in was the obtaining of supplies of natural gas by purchase or by lease of wells and the transportation of this gas by pipe lines to various cities in Kansas and adjoining states,

where it was sold to local public service corporations or to manufacturing plants. It was not a common carrier, but it was granted the right of eminent domain, and its business was such as to give the public an interest in it. By reason of its entry into Kansas and the grant to it of the right of eminent domain, it entered into an obligation to the state to the extent of and with respect to its property devoted to this quasi-public service that prevented its abandonment of that service. The bondholders took their mortgage with notice of this fundamental obligation and subject to it. On foreclosure, the purchaser must buy the property subject to the same duty. The state, because of the public interest, has the power to prescribe reasonable rates for gas sold and to secure the efficiency of the service by reasonable regulations, and it is not to be doubted that a receiver of the property of the corporation must operate it in accordance with valid state laws in respect thereto. But what are the limits of the duty to the state or public? There was no specific contract or charter provision, no exclusive right granted so as to imply a contract to supply the full needs of those depending on the monopoly and for whose interest the grant was made. The action of the state was only permissive. The company was not obligated to build any pipe line or to furnish any gas. So far as it availed itself of this permission, its property used for the quasi-public service was affected by the public interest, and its use of the property in this business was subject to valid state regulation, but it did not become a mere agency of the state, and was under no obligation, contractual or other, to increase its investment or build new lines. It did not manufacture gas. It purchased wells and transported gas by pipe line. These wells were gradually exhausted. The lines were extended and more distant wells obtained until the system extended into several states. The security of the bondholders is constantly dissipated by the consumption of the property, and this method has led to the insolvency of the corporation. If by its entry into Kansas the company entered into an obligation to constantly buy new wells and extend its lines to new gas fields so as to constantly furnish to the cities of Kansas an adequate supply of gas, the security of the bondholders was, indeed, illusory. The undertaking was one necessarily ending in bankruptcy.

It is well settled that a railroad company chartered to build a particular line under a permissive charter is not liable to the state for a failure to build it, and that only so far as it does build is its property affected by the public interest. York, etc., Ry. v. Regina, 1 El. & Bl. 858, 864; Edinburgh, etc., Ry. Co. v. Philip, 2 Macqu. App. Cas. 526; State v. Southern Minn. R. R. Co., 18 Minn. 40 (Gil. 21); Weymouth v. Penobscot Log Driving Co., 71 Me. 29. And a fortiori, that such a company cannot be required to construct a new or branch line. I know of no reason why this well-settled principle is not applicable in this case.

[3] Considered apart from a contract right, the want of power is still clearer. The extensions directed are in Oklahoma; the receivers are ordered by the commission to go into Oklahoma and there build pipe lines, procure gas, and transport it into Kansas for sale. This is interstate commerce. The power to order it is an undoubted regulation of this commerce, direct in its nature, and thus beyond the scope of

state action. Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193.

[4] I am of the opinion that the order of the commission is without legal efficacy, but it is urged by counsel appearing for the commission, and for certain cities interested as gas users, that, even if the order of the commission exceeds its authority, yet this court, in the exercise of its discretion, should make an order to the same effect. The power of the court to so do must be admitted. The power to construct new lines and undertake a new and extensive enterprise by a court through the medium of a receiver is one to be exercised with great caution, and only under exceptional circumstances. It is rare indeed that it should be done at the expense of the bondholders of an insolvent corporation against their protest. In Kennedy v. Railroad Co., 5 Dill. 592, Fed. Cas. No. 7,707, Judge Dillon made the consent of the bondholders a condition, and his order is a precedent entitled to great respect.

[5] In the case we are now considering, the bondholders protest against such an order. But there are other insuperable objections:

1. The only proposed extension deemed reasonably practicable is the first alternative extension specified in the order, viz., the extension to the Cushing field. The cost of the entire extension is prohibitory. But it is said that the proposed vendors of the gas are willing to build a large part of the pipe line at an estimated cost to them of $500,000, so that the cost to the trust estate will be brought within the limit of the estimate of the commission. As a condition of this expenditure by the vendors and of the procuring of the gas, a valid contract is demanded obligating the receivers for a period of several years to purchase this gas and to pay therefor a relatively high price. To build that part of the line economically which is required of the receivers would necessitate removing from the state of Kansas of a pipe line of equal length now rendered useless and the relaying of it in Oklahoma. I have heretofore held that all of the property of the Kansas Natural Gas Company within the state of Kansas must be delivered to receivers heretofore appointed by the state court of Montgomery county, Kan. This order has been appealed from, and its effect superseded. When the appeal is decided, and if the order be affirmed, it must be complied with, and precludes the removal of the pipe line and the entering into any long term contract, such as the one demanded in this case.

[6] 2. The order made by the commission amounts to the taking of property for public use, and the question of just compensation at once arises. The commission, acting within its jurisdiction, has limited the rates to be charged for gas by the receivers of the court. It is claimed by those receivers that the rates as so limited produce no just return on the property involved, and are confiscatory. Certain it is that, considering the interest on the bonds of the company, each year's operation under the present rates involves a deficit, in addition to the exhaustion of the corpus of the property. Under the order of this court, experts selected by the receivers examined this property and reported in substance that the prescribed rates would not yield any fair return. On the other hand, the finding and order of the commission is entitled to respect, and, not having heard the evidence, I am unable to determine

that the rates prescribed by the commission are unreasonably low. It may be that the property affected with the public interest has been bonded for a sum exceeding its value and cost. If this be true, the fact that the limit of rates fixed precludes the earning of interest on the bonds does not determine the question. But the money now in the hands of the receivers, the result of the operations of the property, is subject to the payment of the costs of the operation, and the cost of the receivership, a security of the bondholders, and brought under the lien of their mortgage. I am not justified against their will in depriving them of it in any undertaking which does not secure to them an adequate return. I am not satisfied that the rates now prescribed will insure this return. Experience has demonstrated the contrary.

[7] 3. The larger part of the funds now in the hands of the receivers is claimed on account of rental by the Kansas City Pipe Line Company. This claim is now pending in this court. If it be valid, it will render it impossible to undertake the proposed extension without incurring an indebtedness to be met out of future anticipated earnings or out of the corpus of the estate. The continuance of the property in the hands of the receivers of the federal court cannot be counted on so as to authorize expenditure based on future earnings.

From these considerations, I have reached the opinion that I am not justified in ordering these extensions under present conditions, and the receivers are directed not to comply with the order of the commission with respect thereto.

DEMPSEY v. BALTIMORE & O. R. CO.

(District Court, E. D. Pennsylvania. January 27, 1915.)

No. 3174.

1. TRIAL ⟸33—RECEPTION OF EVIDENCE—DISCRETION OF COURT.
The admissibility of collateral facts is usually to be determined according to the sound discretion of the trial judge in finding the fact of relevancy.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 85, 86; Dec. Dig. ⟸33.]

2. DAMAGES ⟸64—ACTIONS FOR PERSONAL INJURIES—INSURANCE.
In an action for personal injuries, evidence that the injured person has received compensation for his injury in the form of payment of an accident insurance policy is incompetent.
[Ed. Note.—For other cases, see Damages, Cent. Dig. § 113; Dec. Dig. ⟸64.]

3. EVIDENCE ⟸99—RELEVANCY—EVIDENCE ADMISSIBLE IN PART.
A fact in issue can be proved, though it brings out with it other matters not in issue.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 123, 137–143; Dec. Dig. ⟸99.]

4. DAMAGES ⟸64—REDUCTION—INSURANCE—EVIDENCE—FORM OF QUESTION.
In an action for personal injuries, evidence that plaintiff, having an accident insurance policy for $2,000, settled the claim thereunder for the same injuries for $300, was properly excluded, since while if plaintiff had stated to the insurance company or any one else that his injuries were

less than he testified them to be at the trial, or if he thus contradicted himself by acts as well as words, such contradictory statements or acts might be proved, the fact of a settlement or the amount received in settlement had no probative value, unless such amount was reduced because of representations as to the fact, character, or extent of the injuries, and the questions asked and the offer of proof should have been directed to the feature having a bearing upon the case on trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 113; Dec. Dig. ⊂⊃64.]

5. WITNESSES ⊂⊃268—CROSS-EXAMINATION—SCOPE—DISCRETION OF COURT.
Cross-examination of plaintiff as to such settlement was properly excluded, in the discretion of the court, for the same reason.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. ⊂⊃268.]

6. NEW TRIAL ⊂⊃35—HARMLESS ERROR—EXCLUSION OF EVIDENCE.
The exclusion of such cross-examination did not require a new trial, even though the court, in its discretion, might properly have permitted it, where there was direct evidence as to the extent of plaintiff's injuries, the evidence properly called for a verdict for plaintiff, and a verdict for defendant or for plaintiff for an insufficient amount would have been set aside, unless some fact, other than the mere fact of settlement, had been disclosed by such examination.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 51–55; Dec. Dig. ⊂⊃35.]

At Law. Action by D. E. Dempsey against the Baltimore & Ohio Railroad Company. On motion for a new trial. Motion dismissed.

Roy M. Livingstone and Wm. M. Lewis, both of Philadelphia, Pa., for plaintiff.

Wm. B. Linn, of Philadephia, Pa., for defendant.

DICKINSON, District Judge. The motion for a new trial is based wholly upon an appellate question. This is involved in a ruling upon the exclusion of evidence. The action was for personal injuries. The plaintiff, it is to be presumed for the purposes of the ruling, held an accident policy under which he had a claim against an insurance company. It is to be further assumed that the policy was for $2,000, and that he settled the claim for $300. He was asked upon cross-examination whether this was not the fact. An objection was interposed and sustained. The defendant in its turn offered to make proof of the above facts. An objection to the offer was again sustained. The defendant now complains of these rulings as error. If the defendant, as a matter of legal right, was entitled to the benefit of these evidential facts, it should have a new trial.

[1-3] The question of the admissibility of collateral facts is often a question of some nicety. Such questions are necessarily usually to be determined according to the sound discretion of the trial judge in finding the fact of relevancy. Questions and offers of this character frequently involve, as a practical consequence, more than formally appears. It would be obvious error, for instance, to permit a defendant, in a personal injury case, to introduce evidence that the person injured had received compensation for his injury in the form of payment of an accident insurance policy. It would be manifest injustice to have such

evidence to go before the jury under the guise of a question which in form was framed to elicit another fact, but which in effect would elicit that fact alone. If the fact which the question was framed to elicit was a fact which was in issue between the parties, it could be brought out, notwithstanding that it brought out with it other matters which were not in issue. The specific fact in issue in this branch of the case on trial was the fact of injury and its extent. The fact of whether the plaintiff carried accident insurance, or how much he had recovered from the insurance company, was not in issue. He was claiming, however, for what it is within the limits of fair argument to characterize as total disability. He had offered himself as a witness, and in consequence both the integrity of his claim and his credibility as a witness were involved. The only bearing which the facts sought to be elicited could have upon the issue before the jury is best expressed interrogatively. If the plaintiff were injured to the extent to which he claims, why, having a claim under an insurance policy for $2,000, did he settle it for $300? This in substance and almost in form was the question finally asked.

"Q. And did you not settle that claim on June 29, 1914, for $300? A. What is that paper? I will have to see that. Mr. Lewis: I object to that. The Court: The objection is sustained. Mr. Linn: Will your honor hear the purpose? The Court: You are asking the amount for which he settled. Mr. Linn: Yes, sir; and I take it that this— The Court: Ask another question then. The trouble of it is that we are trenching on two things, a part of which is perfectly admissible and a part of which is clearly inadmissible. This is the clearly inadmissible part, and it is excluded.

"By Mr. Linn: Q. Will you explain to the court and jury why, if on the 9th of January you made a claim for total disability, claiming $2,000, you would settle it for less? Mr. Lewis: That is objected to. The Court: The objection is sustained. (Exception noted for defendant by direction of the court.)

"By Mr. Linn: What did you settle that claim for? Mr. Lewis: That is objected to. The Court: The objection is sustained. (Exception noted for defendant by direction of the court.)

"Defendant offered in its turn to prove that the claim against the Accident Insurance Company had in fact been settled for $300, and this testimony was also excluded. Mr. Linn (page 78): The purpose of the offer is in connection with what the plaintiff himself said as to making a claim for $2,000, which he settles for $300. I think it is entitled to go to the jury as to the bona fides of the character of the claim made here. The Court: The trouble about that is that we do not know why. The company may have been no good. Mr. Linn: He can explain that. The Court: It must be shown to be relevant. The objection is sustained, and an exception granted to the defendant. (Exception noted for defendant by direction of the court.)"

[4, 5] This form of question and offer of proof ignores the distinction intended to be indicated to counsel. It is the distinction upon which was grounded the rulings in McSparran v. Insurance Co., 193 Pa. 184, 44 Atl. 317, and Hollinger v. Railway Co., 225 Pa. 419, 74 Atl. 344, 17 Ann. Cas. 571. If the plaintiff had stated to any one (insurance company or not) that his injuries were less than at the trial he had testified them to be, he could properly be confronted with the contradictory statements. This contradiction need not have been in verbal form. An act might have indicated it as well as a word. On the other hand, it is just as clear that the fact of a money payment by an insurance company is neither a relevant nor a proper fact to be brought out

in the trial of a negligence case. The fact that a claim against an insurance company was settled is of no probative value in such a case as the present. The amount received in settlement is of no value to us, unless it appear that it was inflamed or reduced because of representations made as to the fact, character, or extent of the injuries. The relevancy of the proffered evidence must appear before it becomes admissible. There was nothing to indicate, either in the questions propounded on cross-examination or in the offer of proof, the relevancy of the fact to be elicited. The bearing of the testimony and its strength is urged to lie in this: We cannot know what the answer to the question would have been. If he had admitted that he had settled because he had deemed his injuries to have been less than the extent to which he testified at the trial, the answer would have had a pertinent bearing upon the issue. The weakness of this position lies in the circumstance that it can be so easily turned. If the reply developed no relevant fact, something not in issue has been injected and may divert attention from the real issue. It is no answer to say that the fact of payment and plaintiff's explanation both go to the jury. The question and the offer of proof should have been directed to the feature having a bearing upon the case on trial. This feature was excluded from both questions proposed to be asked and from the offer. The question not asked would have gone directly to the credibility of the witness, as evidence of contradictory or conflicting statements always do. The questions asked had no such direct bearing and have not been shown to have had any bearing. Even when evidence goes to credibility, if it is otherwise irrelevant it is not always admissible.

It is often a matter of some difficulty to determine just where to draw the line. Frequently it is broadly drawn between cross-examination and direct evidence. A witness is asked a question to elicit a fact which is not in issue, but which does, however, go to the credibility of the witness. Whether a fact is to go in evidence depends primarily upon its probative force in the sense of its relevancy to the question to be decided. It may be relevant, however, and meet this test of admissibility and yet it may be excluded because of some other reason. This excluding reason may be some controlling principle of the law based upon some general policy of the law, as, for instance, confidential communications which the law excludes on the ground of policy, notwithstanding the clearest and most direct relevancy. The excluding reason may be found in some rule of practical necessity, such as the introduction of a collateral issue, and this reason for exclusion may be sufficient to overcome admissibility based upon mere relevancy. Out of the effort to adjust a balance between these conflicting reasons for admission and exclusion has sprung the practice to permit questions upon cross-examination, answers to which would be excluded if asked in chief. This usually, if not exclusively, bears upon the question of credibility. Evidence that the plaintiff, in a negligence case, had presented a false claim for damages at another time against some other defendant would clearly be outside the issue before the jury and might properly be excluded. A trial judge, however, who directed a plaintiff witness on cross-examination to answer such a question, would not be convicted

of trial error, nor, on the other hand, would it be error to exclude the defendant's offer to prove the fact. Were this reason for a new trial confined to the offer of the defendant to prove the fact, proof of which was rejected, this would not afford a reason for disturbing this verdict. The question is, however, whether the claimed right to ask the question on cross-examination should not have been upheld.

Whether a new trial should be granted, therefore, resolves itself into these two questions: (1) Was it error to disallow the question, or was it a matter within the discretion of the trial judge? (2) If it was a matter of discretion, did the exercise of that discretion result in such an injury to the defendant as entitles it to have the case tried over again?

[6] To answer the last question first, there is this to be said: Although there was no formal admission of the liability of the defendant, and consequently the question before the jury wholly one of the amount of damages to be awarded, there was a virtual concession of this fact. This brought the whole case, it is true, to the one point upon which the answer to the question was expected by the defendant to bear. In this sense the ruling touched the defendant in a vital spot.

The real question before the jury, however, was the extent of plaintiff's injuries. Upon this the jury had direct evidence. The fact excluded could have borne upon it only inferentially and more or less remotely. If the case were to be retried and the question required to be answered, and the answer elicited no fact which had a proper bearing upon the amount of damages or the integrity of the claim, but elicited only the fact that the plaintiff had received compensation for these injuries from the insurance company, the consequence of which was a verdict for the defendant or the assessment of inadequate damages in favor of the plaintiff, we would then feel constrained to direct a third trial of the case.

Our conclusion, therefore, is that, in any view of the question, the discretion of the trial judge was properly exercised. Questions of discretion may well be subjected to the test of results. Tested by the result in this case, we would not feel justified in granting a new trial, unless a legal right of the defendant had been denied to it. The case properly called for a verdict for plaintiff. The assessment of damages was not excessive.

This brings us to the final question of whether there was appellate error in the ruling. We have considered with care the very able and forceful presentation of the views of counsel for the defendant, but remain unconvinced of error. We think the offer of evidence was properly overruled because not shown to be relevant, and the restriction of cross-examination properly applied for the same reason and within the discretion of the trial judge.

The motion for a new trial is dismissed, and plaintiff has leave to move for judgment on the verdict.

THOMPSON v. PACK et al.

(District Court, S. D. California, S. D. December 10, 1914.)

No. B 46.

1. INJUNCTION ⟸140 — APPLICATION FOR TEMPORARY INJUNCTION — AFFIDAVITS.

An application for a temporary injunction must be based upon positive allegations, and allegations upon information and belief should not be considered.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 312; Dec. Dig. ⟸140.]

2. MINES AND MINERALS ⟸23—FORFEITURE—DEFAULT IN ASSESSMENT WORK.

Under Rev. St. § 2324 (Comp. St. 1913, § 4620), requiring $100 worth of labor to be performed or improvements made on mining claims each year, and providing that, upon the failure of one of several co-owners to contribute his proportion of the required expenditures, the co-owners who have performed the labor or made the improvements may give notice to the delinquent co-owner, and if he fails to contribute his proportion of the expenditure his interest shall become the property of his co-owners, a bill alleging that plaintiff, defendant P., and certain other parties located certain mining claims, that plaintiff was the owner of an undivided one-eighth interest therein, that defendants served upon plaintiff a notice of forfeiture, requiring payment of $700, in default of which plaintiff's interest would be forfeited to defendant H., that P. did not expend $5,600, of which the sum demanded was the one-eighth part, for the benefit of such claims, that at least $2,836 thereof was contributed by plaintiff and his colocators, that whatever interest H. had was held for the use and benefit of certain corporations, and that such corporations had forcibly prevented plaintiff and his colocators from completing the assessment work, and forcibly ejected and driven them from the claims, made a prima facie showing that defendants had no right to claim or exact forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51–59, 114; Dec. Dig. ⟸23.]

3. MINES AND MINERALS ⟸38—ASSESSMENT WORK—TEMPORARY INJUNCTION —RESTRAINING RECORDING OF "CLOUD ON TITLE."

Under Rev. St. § 2324, relative to the forfeiture of the interest of one of several co-owners in mining claims for failure to contribute his share of the required expenditures for improvements, and Civ. Code Cal. § 1426o, providing that the notice of forfeiture provided for in section 2324, with an affidavit of service, must be recorded with the county recorder in a suit involving the validity of an attempted forfeiture of a co-owner's interest, the recording of a notice of forfeiture would be enjoined pendente lite, as it would constitute a "cloud on the title," which arises when extrinsic evidence would be necessary to defeat a suit in ejectment, founded upon the instrument constituting the alleged cloud.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. ⟸38.

For other definitions, see Words and Phrases, First and Second Series, Cloud on Title.]

In Equity. Suit by C. Thompson against Thomas W. Pack and others. On application under an order to show cause for a temporary injunction. Temporary injunction granted.

H. L. Clayberg, of San Francisco, Cal., and A. V. Andrews, of Los Angeles, Cal., for complainant.

Charles W. Slack, of San Francisco, Cal., for defendants.

BLEDSOE, District Judge. This matter is before the court on an order to show cause why a temporary injunction, pendente lite, should not issue restraining the defendants from putting of record certain notices of forfeiture, with affidavits of service thereof; such notices being those provided for in section 2324, Revised Statutes of the United States, and section 1426*o* of the Civil Code of the state of California, with reference to the forfeiting of part interests of mining claims.

[1] The bill in equity as filed contains much matter that seems to be immaterial, much that is purely "epithetic," to use an expressive phrase, and a great deal averred upon information and belief, and not positively. With respect to this latter, the court feels that it should not, of course, consider it upon this order to show cause, because of the fact that under the law the complainant, to be entitled to positive relief at this juncture and in advance of a hearing, must base his request for such relief upon positive allegations.

[2] Laying out of consideration, however, the matters referred to above, it may be said that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing. Briefly summarized, they are: That the plaintiff, in the year 1910, in conjunction with the defendant Pack and certain other individuals mentioned, located and recorded 175 certain placer mining claims, situate in the county of San Bernardino, state of California; that plaintiff is now, and ever since the day of said location has been, the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that during the month of September, in the year 1914, the defendant herein caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the 175 described placer mining claims heretofore referred to; that said notice contained the appropriate statements that unless plaintiff, within 90 days after the service of the same upon him, paid to the defendants, or to the defendant Joseph K. Hutchinson for said defendants, the sum of $700, being one-eighth of the total amount of money claimed to have been expended by said defendant Pack upon said claims, as for assessment work, in the years 1911 and 1912, the interest of plaintiff in and to all of said claims would become forfeited to the said Joseph K. Hutchinson.

Plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own funds, during the years 1911 and 1912, or at any other time, the sum of $5,600, of which the said $700 was the one-eighth part, upon or for the benefit of said placer mining claims, or at all; that at least $2,836 was contributed by plaintiff and his colocators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned for the years 1911 and 1912.

Plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims was obtained and is held for the sole use and benefit of the Foreign Mines & Development Company and the American Trona Company and the California Trona

Company. It is also alleged that in the year 1912, while plaintiff and his colocators were engaged in the performance of the annual assessment work upon said claims, they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines & Development Company, the American Trona Company, and the California Trona Company.

If these facts thus alleged be true, and at this time the court must assume them to be true, because no affidavit or answer in opposition to or in explanation of them has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question. On such a state of facts I apprehend the court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the case as made by the facts to be taken as true, would, in its substantial aspects, be in favor of the plaintiff.

[3] The only question for determination, then, is whether or not the plaintiff should be protected in his rights, pending such final determination by the court, and whether or not the strong arm of the court should be employed at this time to enjoin the defendants from placing of record that which plaintiff claims would constitute a cloud upon his title, to wit, the notice of forfeiture, with the affidavit of service thereof. That it would constitute such a cloud is, I think, indisputably clear. It was held in Pixley v. Huggins, 15 Cal. 128, that the true test as to whether or not a certain instrument would cast a cloud upon the title of the plaintiff's property was this:

"Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed."

This decision has been cited frequently, and I apprehend states the law concisely. In this case it is apparent that the filing of the notice and affidavit of service would prima facie serve to divest plaintiff of his interest in the properties, and that it would require extrinsic evidence on his part to defeat a suit in ejectment, based upon the forfeiture apparently evidenced by the notice of labor done and his failure to contribute thereto.

For these reasons I am constrained to hold that plaintiff has presented a prima facie case, free from colorable doubt, and is therefore entitled to a temporary injunction pendente lite.

Plaintiff's counsel will draft an appropriate order.

In re VANDEWATER & CO., Limited.

(District Court, D. New Jersey. January 18, 1915.)

1. SALES ⟸456, 474—CONDITIONAL SALES—VALIDITY—RECORD.
P. L. N. J. 1898, p. 699 (2 Comp. St. 1910, p. 1561), and P. L. N. J. 1889, p. 421, as amended by P. L. N. J. 1895, p. 302, avoid contracts of conditional sale of personal property, if not recorded.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1327–1331, 1391–1402; Dec. Dig. ⟸456, 474.]

2. BANKRUPTCY ⟸184 — CONDITIONAL SALES — CONTRACT — CONSTRUCTION —LEASE OR CONDITIONAL SALE—RECORD.
Petitioner leased certain property to a bankrupt for nine months. The bankrupt agreed to pay in installments, during the term, the amount previously fixed in the agreement as the value of the property, and to execute, at the time of paying the first installment, a note for the unpaid balance, the same to be renewed on maturity of the second and third payments. The contract also provided, if the bankrupt should not make default in the payment of the "aforesaid rent," it might, at the end of the term, or sooner, at its option, purchase the goods by paying the valuation named in the contract, when the lessor would execute a bill of sale, in which case the rent previously paid should be deducted from the purchase price; it being understood that the bankrupt could acquire no title to the property until its value had been paid in full and as agreed. *Held*, that such instrument was a conditional sale, and not a lease, and was therefore void as to the bankrupt's judgment creditors and its trustee for want of record required by P. L. N. J. 1898, p. 699 (2 Comp. St. 1910, p. 1561) and P. L. N. J. 1889, p. 421, as amended by P. L. N. J. 1895, p. 302.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⟸184.]

In Bankruptcy. In the matter of bankruptcy proceedings of Vandewater & Co., Limited, on proceedings to review an order of the referee denying petition of the Prentiss Tool & Supply Company for reclamation of certain personal property. Affirmed.

Pierre F. Cook, of Jersey City, N. J., for petitioner.
William Harris, of Newark, N. J., for trustee.

HAIGHT, District Judge. [1] The only question to be decided in this matter is whether the agreement, upon which the petitioner bases his claim to the property in question, is within the provisions of either section 71 of the New Jersey act respecting conveyances (P. L. 1898, p. 699; 2 Comp. Stat. p. 1561), or an act passed by the New Jersey Legislature in 1889 (as amended in 1895), entitled "An act requiring contracts for the conditional sale of personal property to be recorded" (P. L. 1889, p. 421; P. L. 1895, p. 302). It was held by the New Jersey Supreme Court in Lauter Co. v. O'Toole, 77 N. J. Law, 29, 71 Atl. 288, and in Lauter Co. v. Isenreath, 77 N. J. Law, 323, 72 Atl. 56, that the act of 1889 was not repealed or affected by the act of 1898. The effect of each of these acts is to invalidate certain contracts for the conditional sale of goods and chattels and to constitute such sales absolute, as against judgment creditors of the person contracting to buy, when the goods and chattels are actually delivered, and there is an actual and continued change

of possession thereof, unless the contracts are recorded as provided in the acts.

[2] The only difference between the act of 1889 (as amended) and the act of 1898 is that under the provisions of the former the instruments mentioned are void as against *any* judgment creditor, whereas under the latter they are void only as against judgment creditors "not having notice thereof." It has recently been held by this court (In re O'Brien [D. C.] 215 Fed. 129) that any contract which would be void under the act of 1889 (as amended), as against a judgment creditor of a bankrupt is likewise void as against his trustee, if the property mentioned therein has come into the latter's possession. The referee has determined that the instrument in question comes within the provisions of the acts and is void as against the trustee.

Counsel for the petitioner has cited a number of cases in other jurisdictions in support of his contention that the referee's determination is erroneous; but these would be useful only in the event that the New Jersey courts had failed to decide whether agreements such as that in question are within the provisions of the New Jersey statutes. The Supreme Court of New Jersey has, in three cases, had occasion to determine whether certain contracts were invalidated by these acts, and the decisions necessarily involved a construction of the acts. Such decisions, if applicable, are therefore controlling here.

In Singer Mfg. Co. v. Wolff Co., 70 N. J. Law, 127, 56 Atl. 147, the contract made no provision whatever for the person, who was therein designated as a lessee, acquiring title to the property, but expressly provided that it should be returned at the expiration of the time for which it had been rented. It was held that such a contract was not within the acts. In Lauter Co. v. Isenreath, 77 N. J. Law, 323, 72 Atl. 56, the contract expressly provided that it was a "hiring contract" only, but there was a provision that, upon payment of monthly rentals for a period named, the Lauter Company would sell the property to Isenreath and give a receipted bill for the same. It was held that this constituted a conditional sale, within the meaning of the acts. In National Cash Register Co. v. Daly, 80 N. J. Law, 39, 76 Atl. 325, a cash register was leased for nine months for a certain sum, payable in nine monthly installments. A note was to be given as security, and a certain sum deposited in cash. At the end of the nine months the lessee was to surrender the property, and either get back the deposit or, at his option, purchase the property for the cash deposited. Justice Garrison, in construing the instrument, said:

"When the note was paid in cash there was in the hands of the vendor in cash the full price, viz., $150, and if the vendee chose to let it stay there he became the owner of the register. This is a conditional sale, the condition being the election of the vendee to let the vendor keep the agreed price of the goods."

[2] It thus appears that the New Jersey Supreme Court has determined that agreements by which personal property is leased, and which contain no provision for vesting title in the lessee or bailee, do not come within the provisions of the statutes, but that certain agreements which contain such a provision are within them, even

though title does not automatically vest upon the payment of the purchase price, and the exercise of an option on the part of the vendee is required. It remains to consider, therefore, whether the agreement in the case at bar is in any substantial respect different from those which the New Jersey courts have held to be invalid. The agreement recites the leasing of the property in question for the term of nine months, the lessee agreeing to pay in installments, during the term, the amount which was previously fixed, in the agreement, as the value of the property, and to execute, at the time of the payment of the first installment, a note for the unpaid balance, the same to be renewed upon the second and third payments. It was also provided that, if the bankrupt should not make default in the payment of the "aforesaid rent," it might, at the end of the term, or sooner, at its option, purchase the property by paying the valuation named in the contract therefor, and that the lessor would then execute and deliver a bill of sale, "in which case the rent theretofore paid shall be deducted from the purchase price." Then follows this provision, viz.:

"It is further understood and agreed that the said Vandewater & Co. acquire no title to said property until its value shall have been paid in full and as agreed."

The clear effect of this instrument is that, when the alleged bankrupt had paid, in installments, the valuation of the property as fixed in the agreement, a bill of sale for the same would be delivered (as in Lauter Co. v. Isenreath), if desired, but that no title was to be acquired by the bankrupt until it had paid the purchase price in full, in the manner set forth in the agreement, and exercised its option to purchase (as in the Daly Case). Title was to pass upon the performance of a condition, namely, that the installments should be paid as specified, and that the purchaser should elect to acquire title. It thus appears that there is no substantial difference between this agreement and those which were before the New Jersey Supreme Court in the last-cited cases. I therefore think the instrument in question was a contract for a conditional sale, within the meaning of the New Jersey statutes. It is manifestly different from that in Singer Mfg. Co. v. Wolff Co., supra, because there the lessee was not entitled to the machine, under any circumstances, at the expiration of the term provided for in the lease. The New Jersey statutes are very broad in their scope, and I do not think that the courts should indulge in any subtle distinctions which will defeat their manifest purposes.

My conclusion, therefore, is that the instrument in question is void as to the trustee in bankruptcy. The order of the referee will accordingly be affirmed.

In re McKENZIE et al.

(District Court, W. D. Washington, N. D. January 14, 1915.)

No. 5287.

BANKRUPTCY ⊜477—COSTS—DISMISSAL OF PETITION—RES JUDICATA.

Under Bankr. Act July 1, 1898, c. 541, § 3, subd. "e," 30 Stat. 546 (Comp. St. 1913, § 9587), providing that, when an application is made to take charge of and hold the property of an alleged bankrupt pending a hearing on the petition, the petitioner shall file a bond conditioned for the payment, in case the petition is dismissed, of all costs, expenses, and damages occasioned by such seizure, taking or detention of the property, and bankruptcy rule 34 (89 Fed. xiii, 32 C. C. A. xiii), providing that when the debtor resists an adjudication, and the court adjudges him a bankrupt, the petitioning creditor shall recover out of the estate the same costs allowed to the party recovering in a suit in equity, and that if the petition is dismissed the debtor shall recover like costs against the petitioner, where, on the dismissal of a petition, a judgment was entered taxing the bankrupt's costs and disbursements, consisting of witnesses' fees and docket fees upon jury trials, such judgment was not res judicata as to the costs, expenses, and damages by reason of the seizure and detaining of the property, and did not prevent an assessment of such damages thereafter, as section 3, subd. "e," does not refer to the costs provided by rule 34, nor to the costs taxable in equity cases under the federal statutes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 900; Dec. Dig. ⊜477.]

In Bankruptcy. In the matter of D. McKenzie and another, doing business as the McKenzie Wine House, alleged bankrupts. On motion to strike. Motion granted.

Louis A. Merrick, of Everett, Wash., for trustee.

Frank A. Steele and E. C. Snyder, both of Seattle, Wash., for petitioning creditors.

NETERER, District Judge. The Angeles Brewing Company, Continental Distributing Company, Levaggi Company, and National Surety Company, in their answer to the petition of the trustee in bankruptcy that the fees, costs, expenses, and damages accruing to the petitioner as trustee of the bankrupt by reason of the dismissal of the petition for adjudication and the dismissal of the temporary receiver and detention of the property of the said bankrupt by the receiver, be fixed and allowed by the court and ordered to be paid by the petitioning creditors and the surety, among other things, set forth the following:

"Further answering said petition, these respondents show to the court that on the 27th day of July, 1914, a final judgment was made and entered in the above-entitled matter by this court, wherein it was adjudged by the court as follows: 'That the petition be dismissed, and that the respondent go hence without day. It is further considered, determined, and decreed that the respondents do have and recover of the petitioning creditors herein and each of them their proper costs and disbursements in this behalf sustained, to be taxed as provided by law.'

"II. That on the 3d day of August, 1914, the said alleged bankrupts filed their bill of costs and disbursements in the office of the clerk of this court, and on the 12th day of August gave due notice of the taxing of said costs upon the 20th day of August, and upon the 20th day of August, the date for taxing said costs, filed their amended bill of costs and disbursements, which were then in due course and according to the practice of this court taxed at the sum of $91.50, and judgment entered therefor against these respondents, and thereupon these respondents paid the said bill of costs and disbursements so taxed in the sum of $91.50, and received from the said alleged bankrupts and their attorneys full receipt, release, and discharge from the said costs, expenses, and disbursements incurred by the alleged bankrupts in and about the proceedings alleged and set forth in their petition; and these respondents aver that all matters and things arising out of or connected with the said proceedings in bankruptcy, including all questions of costs and disbursements, expenses, or damages, have been fully adjudicated and determined, and are now res adjudicata."

The cost bill filed in this proceeding shows that the only costs taxed were for the attendance of witnesses and docket fee upon trials to jury, and no costs, damages, or expenses for the taking or detention of the property by the temporary receiver were included. Section 3, subd. "e," of the Bankruptcy Act requires:

That "whenever a petition is filed * * * for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, * * * prior to the adjudication and pending a hearing on the petition, the petitioner * * * shall file in the same court a bond with at least two good and sufficient sureties * * * conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt."

There is a marked distinction between the liability for costs occasioned in determining an issue of fact before the court raised by the denial of the allegations of a petition for bankruptcy, and the liability for costs, expenses, and damages under subdivision "e," supra. The petitioning creditors, upon failure to obtain an adjudication, would be liable upon the determination of that issue, under the federal statutes, for costs provided by such statute, which would be witness fees, marshal and clerk's fees, including docket fee, as well as under rule 34 (89 Fed. xiii, 32 C. C. A. xiii), which provides:

"In cases of involuntary bankruptcy, when the debtor resists an adjudication and the court, after hearing, adjudges the debtor a bankrupt, the petitioning creditor shall recover and be paid out of the estate the same costs that are allowed to the party recovering in a suit in equity and if the petition is dismissed, the debtor shall recover like costs against the petitioner."

Subdivision "e" of section 3, supra, cannot and does not refer to the costs provided by rule 34 or to the costs taxable in equity cases under the federal statutes. Section 3 has a peculiar function, and this function is to save harmless from all damages, costs and expenses a debtor against whom involuntary proceedings have been filed, and whose property is seized and detained, if it should prove upon final trial that the debtor was not bankrupt, and that his custody of the property should not have been disturbed. The contention that the entry of judgment for costs incurred upon the determination of the

issue of bankruptcy is res adjudicata of the issue raised by this petition to fix the costs, expenses, and damages by reason of the seizing and detaining of the property is not well taken.

I think the motion to strike should be granted. An order may be presented.

UNITED STATES v. CHICAGO, M. & P. S. RY. CO.

(District Court, D. Idaho, N. D. December 15, 1914.)

No. 443.

MASTER AND SERVANT ⊜13—HOURS OF SERVICE LAW—INTRASTATE COMMERCE.

Where an engineer who had previously been engaged in interstate commerce was assigned to duty on an engine hauling a work train engaged in filling a bridge on defendant's interstate line and he was wholly engaged in such service for 59 days, during which he was permitted to remain on duty continuously for more than 16 hours, the railway company was not thereby guilty of violating the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]), though he was subject to recall for interstate service during such period and at the end thereof was reassigned to interstate commerce.

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

At Law. Action by the United States against the Chicago, Milwaukee & Puget Sound Railway Company. Judgment for defendant. Dismissed.

James L. McClear, U. S. Atty., of Cœur d'Alene, Idaho, J. R. Smead, Asst. U. S. Atty., of Boise, Idaho, and Otis B. Kent, Sp. Asst. U. S. Atty., of Washington, D. C.

George W. Korte, of Seattle, Wash., for defendant.

DIETRICH, District Judge. In the opinion on demurrer filed herein on June 16, 1914 (218 Fed. 701), certain questions were disposed of; but the point made by the government that Crown, the locomotive engineer, came within the provisions of the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]), because, while temporarily employed in intrastate work, he was generally engaged in the movement of trains in interstate commerce, was passed with the suggestion that the facts were insufficient to warrant its consideration. Subsequently the complaint was amended to exhibit these facts, and the defendant answered, and thereupon a written stipulation of facts was filed. The cause is now submitted upon the pleadings and this stipulation.

Touching the point referred to, it is stipulated that:

Prior to September 12, 1912, Crown "was generally and regularly engaged in or connected with the movement of defendant's trains in the moving of interstate commerce; that on said date of September 12, 1912, the said J. H. Crown was assigned to regular work-train service, being in charge of defendant's locomotive engine No. 1416, pulling an extra work train of the defendant, known as 'work extra No. 1416,' said train being then and

there operated between Karnac in the state of Idaho and Pedee in said state, and being then and there engaged solely in the work of hauling dirt or earth to be used in filling of certain bridges on said defendant's line of railroad between said stations, which said line of railroad was then and there a part of the defendant's through highway of interstate commerce; that he thereafter continued exclusively in charge of said engine, hauling said work train exclusively engaged in hauling dirt as aforesaid, until November 10, 1912, a period of about 59 days continuous and uninterrupted service, when he was reassigned to the service of said defendant, wherein he was engaged in or connected with the movement of defendant's trains engaged in interstate commerce; that during said period of 59 days, and on each of said days, the said J. H. Crown was potentially subject to recall from work-train service to regular interstate service, or to any other service in which said defendant company might have had occasion to use the said J. H. Crown as a locomotive engineer."

It is further stipulated that during the 59-day period, namely, on October 31, 1912, Crown was permitted to remain on duty in such work-train service continuously for more than 16 hours.

As is not infrequently true of such stipulations, some of the phraseology here employed suggests a reluctance upon one side or the other to look upon the naked facts. Circumlocutions and euphemisms may obscure, but they do not alter, the realities, and after all it is the realities alone with which we are concerned. Now when analyzed, the stipulation means nothing more, as I understand it, than that at one time Crown was regularly employed by the defendant in moving interstate commerce; that thereafter for a period of 59 days he was regularly employed in operating a work train, wholly within the state of Idaho, for the purpose of filling (not repairing) a bridge upon a line of road which was a part of an interstate highway; that thereafter he again went back into interstate commerce service. The phrase that, "Crown was potentialy subject to recall," is without substance, meaning only that if at any time the defendant had need of and desired to use his services in moving interstate commerce, and if at such time he was willing to render such service, the defendant would so employ him. While perhaps not of great importance, there is no intimation even that at any time during the 59 days the defendant had any purpose or expectation of re-employing him, in, or assigning him to, the movement of interstate trains, or that he had any expectation or intention of going back into such service. He was "potentially subject" to be called into such service in the sense only that any other locomotive engineer, whether in the employ of the defendant or not, was subject to be called into its service. As expressly stated in the stipulation, he might be called into that service or he might be called into some other service for the defendant; or, presumably, he might be discharged from or quit the employment of the defendant entirely. Such being the situation, I have no hesitation in holding that the fact that he had been engaged in the movement of interstate commerce and subsequently resumed that kind of service is without legal significance.

Assuming a close analogy between the statute under consideration and the Safety Appliance Act, counsel for the government rely largely upon certain decisions construing the latter act. It is true that there is an analogy between the two acts in some respects and from certain viewpoints; but because in some of their features there is a similarity,

and therefore because decisions construing certain features of the one may be taken as authority for the construction to be placed upon corresponding and similar features of the other, it does not follow that decisions construing other provisions of the one are to be taken as authority touching the interpretation to be given to corresponding but wholly dissimilar features of the other. When, in United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136, the court spoke of the Safety Appliance Act as "a closely analogous statute," it was considering the general purpose of the act and the nature of an action brought to recover the penalty, and the pleadings and procedure in such action. So in United States v. St. Louis S. W. Ry. Co. (D. C.) 189 Fed. 954, the court was considering only the penal character of the action. In neither is there any intimation that the acts are analogous in respect to the subject we are here considering. It is pointed out in Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, that the Safety Appliance Act was 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 used in connection therewith." Perhaps Congress might have made the Hours of Service Act comprehend, but plainly it did not make it comprehend, all persons employed by a railroad company "engaged in interstate commerce." It expressly restricted its application to certain classes of persons, rendering certain specified services.

Counsel for the government quote from Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, as follows:

"Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so while waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

And to make the application of the passage to the present case, they paraphrase as follows:

"Confessedly this engineer was under the control of Congress while in the act of making his interstate journeys, and in our judgment he was equally so when waiting to be called for his next (interstate) trip. He was regularly engaged in interstate traffic, and so within the law."

But the difficulty about the paraphrase is that it is aside from the facts. Crown was not, on the 31st day of October, waiting to be called for an interstate trip. So far as appears, the defendant never expected to call him, and he never expected to be called, on an interstate trip. Whether he would ever go upon such a trip depended upon several contingencies. Suppose that in the Johnson Case the facts had been that the dining car in question had once been used in interstate commerce, but that it had been set aside for an indefinite period for intrastate service, and had been used exclusively for such service for several weeks, and was at the time its condition was called into question, being so used, and was waiting for an intrastate, not interstate, train to be made up, to which it was to be attached, and that there was no

present intention of withdrawing it from intrastate service. Surely both the reasoning and the conclusion must have been different.

This is not a case where there was a commingling of service, where the employé was one hour or one day operating in interstate and another hour or another day operating in intrastate commerce; nor is it a case where, though not in a literal sense actually engaged in moving an interstate train, the employé "stands and waits" to actually engage in such service. If the contention of the government is correct, an employé who has once rendered service such as is covered by the act must always be deemed to be within the provisions thereof, regardless of the time which has elapsed since he ceased to render such service, at least so long as he remains in the employ of the same company.

In view of these considerations, it is thought that no cause of action has been disclosed, and a judgment of dismissal will be entered.

In re EPSTEIN.

(District Court, E. D. Pennsylvania. January 23, 1915.)

No. 4165.

BANKRUPTCY ⇐224—REFEREES—JURISDICTION.

After an order of the referee in bankruptcy directing the bankrupt to deliver certain assets to the trustee had been affirmed by the District Court with some modification, and the District Court's order had been affirmed by the Circuit Court of Appeals, and a rule had been entered on the bankrupt to show cause why he should not be attached and held in contempt for failure to comply with such order, the referee had no authority or jurisdiction to make an order restraining the trustee from taking further proceedings for the bankrupt's commitment for failure to comply with such order until the further order of the court, and until a meeting of creditors had been called for a consideration of the matter, as it was for the court on the bankrupt's return to the rule, and not for the bankrupt or the creditors, to determine whether the bankrupt should be punished for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. ⇐224.]

In Bankruptcy. In the matter of A. Epstein, individually and trading as A. Epstein & Co., bankrupt. On certificate of referee surpeti tion of bankrupt to stay contempt proceedings against him. Referee's order vacated.

See, also, 206 Fed. 568.

Wessel & Aarons and George P. Rich, all of Philadelphia, Pa., for trustee.

Alexander J. Brian and Julius C. Levi, both of Philadelphia, Pa., for bankrupt.

THOMPSON, District Judge. There is nothing in the certificate of the referee properly presented for determination by the court in accordance with bankruptcy practice.

It appears from the certificate filed December 21, 1914, that upon a date not stated in March, 1914, upon petition of the bankrupt, the trustee was ordered by the referee to refrain from taking further proceedings for commitment of the bankrupt for failure to comply with an order of the court of February 4, 1914, for delivery to his trustee of certain property, "until further order of the court and until after a meeting of the creditors has been called for the consideration of the petition of the said bankrupt." The gist of the facts set out in the petition upon which this order of the referee was made is that the bankrupt is unable to comply with the order of the court, that he has made known to his creditors his inability, and that they have petitioned the court to relieve the bankrupt from any order for his commitment for contempt. The certificate contains a copy of an undated and unverified petition to the judges of the court purporting to be signed by creditors of the bankrupt submitting that, in their judgment, the bankrupt is unable to comply with the order of the court, and that, in their judgment, he has none of the property either in his possession or under his control, "and they crave that your honorable court will relieve the said bankrupt from any order praying for his commitment for contempt."

A petition of the Lehighton Lace Company, a creditor, is attached to the certificate objecting to the granting of the bankrupt's petition.

There is no petition accompanying the certificate of the referee for review of any order made by him, and the only order appearing in the certificate is the order above referred to restraining the trustee from taking further proceedings against the bankrupt for failure to comply with the order of this court made February 4, 1914. The order of the court was entered under the following circumstances:

Upon certificate by the referee for review of an order made by him upon the bankrupt directing him to deliver to the trustee certain assets, Judge McPherson, on July 14, 1913, affirmed the order with some modification. (D. C.) 206 Fed. 568. The bankrupt thereupon appealed to the Circuit Court of Appeals, with the result that the order of the District Court was affirmed. Epstein v. Steinfeld, 210 Fed. 236, 127 C. C. A. 54. Thereupon the mandate having come down, upon petition of the trustee, an order was entered requiring the bankrupt to deliver the merchandise to the trustee on or before February 14, 1914. On February 18, 1914, on petition of the trustee, a rule was entered on the bankrupt, returnable February 27, 1914, to show cause why he should not be attached and held in contempt for failure to comply with the order to deliver. On motion of the attorney for the bankrupt, the return day was subsequently extended to March 13, 1914. This rule is pending and undetermined in this court. The bankrupt has not filed an answer to the rule, and there has been no further prosecution thereon by the trustee in this court, presumably in obedience to the order of the referee.

The effect of the order of the referee therefore was to overrule and stay the contempt proceedings pending in this court for disobedience of an order made by the court in accordance with the mandate of the Circuit Court of Appeals by a restraining order upon the trustee. In the opinion of the court, this action of the referee was entirely without

authority or jurisdiction. The proceedings before the referee presented by the certificate seem to represent an attempt to substitute the judgment of the bankrupt and some of his creditors for that of the court in determining the question whether the bankrupt should be punished for his contempt. This is a question which will be determined by the court upon the return of the bankrupt to the rule entered upon him under which he has been in default since the return day, March 13, 1914.

The order of the referee directing the trustee to refrain from further proceeding under the rule pending in this court is vacated as unwarranted and beyond his authority and jurisdiction. An order will be entered upon the bankrupt requiring him to appear and answer to the rule for an attachment on or before February 22, 1915.

UNITED AUTOGRAPHIC REGISTER CO. v. EGRY REGISTER CO.

(District Court, N. D. Illinois, E. D. January 8, 1915.)

No. 30989.

1. JUDGMENT ⟸653—ON MOTION TO QUASH—RES JUDICATA.

In a suit for infringement of a patent, the denial of a motion to quash the summons, because of facts demonstrating that the person, upon whom the summons was served, was defendant's duly authorized agent, was not res judicata as to a plea in abatement, on the ground that no act of infringement had been committed within the jurisdiction of the court, as the fact that defendant had a regular and established place of business and a duly authorized agent in the district was not conclusive that an act of infringement had occurred therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1160; Dec. Dig. ⟸653.]

2. PATENTS ⟸288—PATENT INFRINGEMENT—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

Where, though defendant, having its office and factory in Ohio, had an agent within the Northern district of Illinois, no sale of an alleged infringing article had been made by him, except by taking orders and mailing them to the defendant to accept or reject, a suit for infringement could not be maintained in that district, as there were no sales or acts amounting to contributory infringement within the district.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460–466; Dec. Dig. ⟸288.]

In Equity. Suit by the United Autographic Register Company against the Egry Register Company. On plea in abatement attacking the jurisdiction of the court. Plea sustained, and bill dismissed.

Frank D. Thomason, of Chicago, Ill., for plaintiff.

H. A. Toulmin, of Dayton, Ohio, and Poole & Cromer, of Chicago Ill., for defendant.

CARPENTER, District Judge. Hearing on plea in abatement attacking the jurisdiction of the court.

Plaintiff is a citizen of Illinois, having its principal office in Chicago. Defendant is a citizen of Ohio, having its office and factory at Dayton.

[1] At an earlier hearing this court denied a motion to quash the summons based on the ground that the person upon whom it was served in the district was not the agent of defendant. The court was then of the opinion facts had been shown demonstrating that Summey, who was served, was the duly authorized agent of the defendant. Now the plaintiff pleads in abatement that it committed no act of infringement within the jurisdiction.

Plaintiff moves to dismiss the plea in abatement on the ground that the ruling on the former motion is res adjudicata. To this I do not agree, because on the former hearing the question of infringement within the district was not before the court; and granting that the defendant had a regular and established place of business in the district and that Summey was its duly authorized agent, it in no wise follows that an act of infringement of the patent in question took place within the jurisdiction of this court.

[2] From the stipulation of facts it appears that while Summey sold a great many things for the defendant company within the Northern District of Illinois, and a great many accessories to their main product, nevertheless no sale has been shown of the patented device, save by the taking of orders and mailing them to the defendant company to accept or reject. Westinghouse v. Stanley Co. (C. C.) 116 Fed. 641, approved in Chadeloid Chemical Co. v. Chicago Wood Finishing Co. (C. C.) 180 Fed. 770.

Inasmuch as the plaintiff's testimony fails to prove infringement within the district, the motion to dismiss the plea in abatement will be denied, and the plea in abatement sustained, and the bill dismissed for want of jurisdiction; and it is so ordered.

In re FISHER.

(District Court, E. D. Pennsylvania. January 27, 1915.)

No. 5323.

1. BANKRUPTCY ⟸59—ACTS OF BANKRUPTCY—PREFERENCES.
An act of bankruptcy consisting of suffering a creditor to obtain a preference by legal proceedings involves insolvency; suffering the creditor to obtain a preference; failure of the debtor to avoid the preference five days before sale; and a sale of the property affected by such preference.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. ⟸59.]

2. BANKRUPTCY ⟸59—ACTS OF BANKRUPTCY—PREFERENCE BY LEGAL PROCEEDINGS—PROPERTY AFFECTED BY PREFERENCE.
Where an alleged bankrupt, while insolvent owning real estate which was subject to a mortgage, confessed judgment to a preferred creditor and then permitted a sale of the land subject to the lien of such judgment to be made under proceedings to foreclose the mortgage, there was a sale of property affected by preference sought to be given by the judgment, and hence such sale constituted an act of bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 81, 82; Dec. Dig. ⟸59.]

In Bankruptcy. In the matter of bankruptcy proceedings against Goldie Fisher. On motion to dismiss amended petition. Denied.

Maurice G. Weinberg, Robert T. McCracken, and Owen J. Roberts, all of Philadelphia, Pa., for petitioners.

Lionel Teller Schlesinger, of Philadelphia, Pa., for alleged bankrupt.

DICKINSON, District Judge. An outline statement of the facts necessary to an understanding of the question involved in this case is this:

The petition in bankruptcy alleges insolvency, the confessing a judgment, the fixing of a time for the sale through mortgage foreclosure proceedings of property upon which this preferential judgment is a lien, and the failure of the defendant to vacate the preference within five days of the time fixed for the sale. The petitioners in bankruptcy maintain the affirmative of the proposition that this is "the suffering or permitting while insolvent a creditor to obtain a preference through legal proceedings and not vacating the preference five days before the time fixed for the sale of property affected by such preference," within the meaning of division 3 of clause "a" of section 3 of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 546 [Comp. St. 1913, § 9587]), the language of which we have paraphrased in the words above given between quotation marks.

The alleged bankrupt negatives this proposition by the assertion that the sale contemplated by the act of Congress is a sale having for its basis the preferred judgment, or which is in itself the act of the creditor to whom the preference is sought to be given, and which is not some other sale or a sale which is the result of the act of some one else. This, therefore, presents the question of whether it is an act of bankruptcy for an insolvent owning real estate, which is subject to a mortgage, to confess a judgment to a preferred creditor and then to permit a sale of the real estate subject to the lien of that judgment to be made under foreclosure proceedings on the mortgage.

[1] An analysis of that part of the Bankrupt Act under discussion will show it to present four essential elements: (1) Insolvency; (2) suffering a creditor to obtain preference through legal proceeding; (3) not avoiding the preference five days before the sale, where (4) the property to be sold is property affected by such preference. If any one of these elements be absent, the act is not an act of bankruptcy.

Counsel for the alleged bankrupt has referred us to cases which apply this principle, in that they have sustained demurrers to or have dismissed petitions in bankruptcy because some one or more of these essential elements were lacking. Instances are found of cases in which, although there was insolvency and there was the confession of a judgment which gave priority of lien and consequent preference, no execution had been issued and no fixing otherwise of a time for a sale. In other words, the sale element was lacking. Other instances are found in which there was the element of insolvency and the element of sale, but no preference sought to be given through legal proceedings. In this line of cases the element of unlawful preference was lacking.

It was stated by counsel at the argument that no case could be found

in which the four elements were present as they are here, including, as is also here, room for the distinction between a sale under an execution issued upon the judgment giving the unlawful preference and a sale under an execution issued upon another judgment having a priority of lien lawfully acquired.

[2] This distinction narrows the inquiry to one into the character of the sale contemplated. The inquiry is answered by the language of the act. It is a sale or other proceeding which works a "final disposition of any property affected by" the unlawful preference. The inquiry here is therefore again further narrowed to the one of whether this sale would be a "final disposition of any property affected by" the confessed judgment. Inasmuch as the judgment which potentially confers the unlawful preference is a lien upon the property proposed to be sold, the conclusion is unavoidable that it is a sale of "property affected by" the preference sought to be given by the judgment. This conclusion is supported by and implied in, if not directly declared by, the decision in Citizens' Bank v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, 32 Am. Bankr. Rep. 477.

We have considered the case as it should properly be considered as one either within or without the provisions of the Bankruptcy Act as written. Insolvency is not made an act of bankruptcy by this section. Insolvency and the giving of a potential preference together do not constitute an act of bankruptcy. Under this section, insolvency, preference, or a sale of property, or all three together, do not constitute an act of bankruptcy; but where there is added to these three things the further fact that the sale is a sale of property affecting the preference, the combination of these four things does constitute an act of bankruptcy. In other words, it is only when the conditions are such that the potential preference given is about to become a preference in fact through a sale which itself works out and makes effective the actual preference, then the court in bankruptcy may act.

The things done in this case bring it within the true spirit and meaning of the bankruptcy law, and, as the averments in the amended petition bring it also within the very letter of the language of the acts of Congress, the petition to dismiss must be disallowed.

It is, accordingly, so ordered.

ULMER v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2501.

1. BANKRUPTCY ⟸494—PERJURY—INDICTMENT.
Where, in a prosecution of a third person for perjury alleged to have been committed in a bankruptcy proceeding, the indictment charged that accused testified falsely that he had received $1,500 in currency for a check given to the bankrupts, etc., the indictment was not defective for failure to sufficiently state the antithetical facts necessary to make clear that the testimony was substantially false, by alleging positively that defendant did not receive $1,500 or any substantially similar sum.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. ⟸494.]

2. INDICTMENT AND INFORMATION ⟸71—AMBIGUITY.
Alleged uncertainty in an indictment is not fatal, where there is no failure to state facts constituting the crime, so as not to mislead accused or expose him to a second prosecution for the same offense.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⟸71.]

3. BANKRUPTCY ⟸486 — EXAMINATION OF THIRD PERSON — MATERIALITY — PERJURY.
The examination of a third person concerning the acts, conduct, and property of a bankrupt, provided for by Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 551 (Comp. St. 1913, § 9605), may be as broad in scope as the examination of the bankrupt himself, authorized by section 7 (section 9591), so that on an examination of accused to explain the consideration for a check for $1,500 given by him to the bankrupts on the day they began business, they having withdrawn a like sum on the same day by checks to various payees, the testimony of accused that he did not receive such checks, but received currency from the bankrupts for his check, was sufficiently material to be the proper subject of a prosecution for perjury.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 904; Dec. Dig. ⟸486.]

4. BANKRUPTCY ⟸495—OFFENSES—FALSE OATH—EVIDENCE—MOTIVE.
In a prosecution of accused for perjury in his examination concerning the affairs of bankrupts, evidence showing the close business and confidential relations between defendant and the bankrupts was admissible to show motive.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. ⟸495.]

5. CRIMINAL LAW ⟸1043—APPEAL—RULINGS ON EVIDENCE—OBJECTIONS.
A general objection to evidence, to wit, "I object," is insufficient to save any question for review.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. ⟸1043.]

6. CRIMINAL LAW ⟸1129—ASSIGNMENTS OF ERROR—SPECIFICNESS.
An assignment that the court's charge and the language thereof were prejudicial to the rights of the defendant was too general to constitute a compliance with Court of Appeals rule 11 (193 Fed. vii, 112 C. C. A. vii), and presented no question for review.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. ⟸1129.]

7. CRIMINAL LAW ⟸984—PERJURY—EXAMINATION OF THIRD PERSON—SEPARATE COUNTS—SINGLE OFFENSE—SENTENCE.

An indictment for perjury, alleged to have been committed by accused in his examination concerning the property of certain bankrupts, in violation of Bankr. Act, § 29b(2) (Comp. St. 1913, § 9613), charged in the first count that on November 13th defendant falsely testified that he received $1,500 in currency from the bankrupts in exchange for his check. The second count was based on the same statement made at another time on the same day, and the third count was based on defendant's testimony, given November 20th, that he did not receive checks from the bankrupts in exchange for his check. *Held*, that since one item of false testimony constituting a crime is not multiplied into several crimes, because an answer is repeated as many times as the question is asked, nor because the answer is varied in form, and it is not important that there was an intervening recess between the false statements, so long as the continuity of the testimony was not broken, the testimony, though false, constituted but a single offense, and hence, on conviction of accused on all three of the counts, he was not subject to sentence on each, to run successively.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2504–2509, 2541; Dec. Dig. ⟸984.]

In Error to the District Court of the United States for the Northern District of Ohio, Eastern Division; John M. Killits, Judge.

Dan Ulmer was convicted of perjury in testifying before a referee in bankruptcy, and he brings error. Reversed and remanded for resentence.

W. H. Boyd and F. J. Wing, both of Cleveland, Ohio, for plaintiff in error.

U. G. Denman, of Cleveland, Ohio, for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Ulmer was indicted for perjury in the giving of testimony before a referee in bankruptcy regarding a transaction between Ulmer and the bankrupt firm. Just as this firm was starting in business, Ulmer, who was their landlord and who had maintained various business relations with them, gave to them his check for $1,500. They deposited it in their bank account which they opened the same day, and it was duly paid. On the same day, they drew against such account three checks, to various payees, aggregating $1,500. The business was short-lived, and, in the bankruptcy proceedings a few months later, this transaction was investigated. Evidently, it was claimed that the transaction was merely colorable and was only an exchange of checks for the purpose of padding the bankrupts' bank deposit so that the book could be exhibited showing a deposit of $3,500 instead of the actual net deposit of $2,000. On the other hand, it was claimed that the bankrupts actually had $3,500 in cash or good checks; that they gave Ulmer $1,500 in cash in exchange for his check to meet his immediate need of currency; and that the smaller checks aggregating $1,500 were not given to Ulmer or for his benefit. As a witness before the referee, Ulmer testified that the consideration received by him for his check was cash, and that the transaction was not an exchange of checks. The jury found that this statement was false,

and convicted him of perjury, whereupon he brought this writ of error.

[1] The first claim is that the indictment was inadequate because it did not sufficiently state the antithetical facts necessary to make clear that the testimony was substantially false. This position is based upon a line of decisions of which U. S. v. Pettus (C. C.) 84 Fed. 791, is fairly typical. More specifically, it is pointed out that while the indictment charges that Ulmer testified he had received $1,500 in currency, and charges that the statement was untrue, yet that the assignment (the antithesis alleged) only says that it was "untrue in this: That the said Dan Ulmer did not * * * receive the amount of $1,500 in currency." The practical criticism is that it should have been positively alleged that he did not receive $1,500 or any substantially similar sum, so as to make clear that he did not receive (e. g.) $1,495. Again, it is pointed out that, while he testified to receiving $1,500 in cash, the assignment is that he did not receive $1,500 in exchange for or in connection with a check. The criticism is that the testimony and the assignment are not necessarily inconsistent, and that the recital of the testimony should have been more specific or the assignment should have been more general. Other similar imperfections are pointed out.

[2] It is sufficient to say of all these objections to the indictment that we regard them as overnice. As we said in Daniels v. U. S., 196 Fed. 459, 465, 116 C. C. A. 233, 239:

"In such ambiguity as exists, we fail to find any failure to state facts constituting a crime or any tendency to mislead the respondent or any danger that he will be exposed to a second prosecution on account of any of the subject-matter; and these are the tests which will, in most cases, determine the sufficiency of the description of the offense as found in an indictment." U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Bennett v. U. S. (C. C. A. 6) 194 Fed. 630, 114 C. C. A. 402, affirmed 227 U. S. 333, 33 Sup. Ct. 288, 57 L. Ed. 531.

See, also, G. R. & I. Ry. v. U. S. (C. C. A. 6) 212 Fed. 577, 583, 129 C. C. A. 113, upon the analogous question of variance.

Further, no demurrer was filed or motion to quash made or objection to the indictment effectively taken, until by motion in arrest after verdict. In such case, nothing less than substantial failure in substance in the indictment can avail defendant. Formal or artificial insufficiencies are waived. Dunbar v. U. S., 156 U. S. 185, 191, 192, 15 Sup. Ct. 325, 39 L. Ed. 390; Rosen v. U. S., 161 U. S. 29, 34, 35, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Tyomies Pub. Co. v. U. S. (C. C. A. 6) 211 Fed. 385, 389, 128 C. C. A. 47.

[3] The conviction is next attacked, because neither indictment nor proof sufficiently shows the materiality of the false testimony. This testimony was given in some proceeding before the referee. Doubtless, it appeared clearly enough in the court below just what this proceeding was; but the record brought to this court does not directly show. A specific issue had been framed before the referee between the trustees and Ulmer regarding the ownership of some fixtures, and it is suggested that the false testimony was given on the trial of this issue. If this was the proper inference, the materiality of the testimony would, perhaps, be uncertain. On the other hand, sections 21a and 38(2) of

the Bankruptcy Act (Comp. St. 1913, § 9622) authorize the court to require any person to appear before the referee "to be examined concerning the acts, conduct or property of a bankrupt." On November 13th the referee made an order that Ulmer appear before him on that day "to submit to an examination under the acts of Congress relating to bankruptcy." The testimony upon which the charge of perjury is predicated was given, part on the 13th of November and part at an adjourned session on the 20th of November. It is clear from the charge of the court that the judge supposed the testimony involved had been given in the course of a general examination under section 21. No objection was made or exception taken that counsel thought it had been given upon the issue of who owned the fixtures; and if, in view of this unchallenged assumption by the court, there remained doubt as to the nature of the proceeding, it would be removed by observing that the issue as to the fixtures was finally decided on November 16th, so that the testimony given on November 20th must have been in the general examination to which Ulmer submitted pursuant to the referee's order. As this testimony on the 20th was the same as on the 13th, the same inference applies to the earlier testimony.

The allegations of the indictment as to materiality we think sufficient; but the court charged the jury that, as matter of law, this testimony was material to the issue under examination, so that there was nothing for the jury to consider on that subject; and an exception was directed to this point. It therefore becomes necessary to determine what the issue was under the examination, and to see if the court could positively say that it would be material to this issue whether Ulmer, in exchange for his check given to the bankrupts, received $1,500 in cash or received the three checks which the bankrupts drew on that day. The right and power of the referee to make the order were not challenged, but Ulmer appeared and submitted to the examination. The purpose and scope of an examination under this section have not been much considered in cases where the permissible extent of such inquiry was necessary to be decided—perhaps because the generality of the language used has been thought all-sufficient. The Supreme Court said in Cameron v. U. S., 231 U. S. 710, 717, 34 Sup. Ct. 244, 246 (58 L. Ed. 448):

> "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."

This decision also observes that subdivision 9 of section 7 should be read in connection with section 21a; and it is difficult to see why the examination concerning "the acts, conduct and property of a bankrupt," provided by 21a, is less broad in its scope than the examination of the bankrupt himself, provided by section 7, concerning "all matters which may affect the administration and settlement of his estate."

In Re Carley (D. C.) 106 Fed. 862, 863, Judge Evans says that the object of this proceeding is "to secure information on those subjects for use in the administration of the bankrupt's estate. The statute was intended for beneficial purposes, and, in order to effect them, witnesses

should fully disclose all their knowledge relative either to the acts, the conduct, or the property of the bankrupt."

Speaking for the Circuit Court of Appeals of the Second Circuit in Re Horgan, 98 Fed. 414, 415, 39 C. C. A. 118, 119, Judge Wallace said that these provisions of the Bankruptcy Act "are intended to enable creditors to discover transactions which may affect the right of the bankrupt to obtain a discharge, and to enable the trustee to ascertain whether any assets exist which should be collected and applied toward the payment of the bankrupt's debts."

The same court, in an opinion by Judge Rogers (In re Samuels, 215 Fed. 845, 132 C. C. A. 187), speaking of this section, said:

"That section intended to and provides a searching and summary method for the discovery of hidden assets, not only by the examination of the bankrupt, but of other witnesses. The proceeding it authorizes is meant to assist the trustee in discovering and collecting the assets. * * * The person to be examined cannot object to being sworn and examined on the ground that no issue has been made up for determination; neither can he object that there is no fact in dispute. The simple object is to obtain information as to the bankrupt's property."

Of a similar examination, it was said by the Court of Appeals for the Third Circuit (People's Bank v. Brown, 112 Fed. 652, 653, 50 C. C. A. 411, 412):

"Its object was to determine whether the bankrupt did not have an interest in the property which should be applied to the payment of his debts, and the discovery sought would have been superfluous if, as a condition precedent to its requirement, it had been necessary to independently establish the existence of such interest."

These cases make clear enough, if indeed it is not obvious on the face of the statute, that upon such examination no specific issue is or can be made up, but any fact or circumstance is relevant and material which fairly tends to establish something which may become important in the administration of the estate. The existence of property rights or interests not scheduled, or rights to defend against apparent claims, or rights of creditors to reclaim property in the hands of the bankrupt, or rights of a bankrupt to discharge—all these are instances of matters properly subject to investigation on such a proceeding.

In the instant case, upon the truthfulness of Ulmer's alleged false testimony depends the fact whether the bankrupt firm actually began business with $3,500 capital or with $2,000 capital. Upon the answer to this depends the amount of property which the trustee should endeavor to find or to satisfy himself had been legitimately disposed of before the bankruptcy; and no inquiry could be more pertinent and no subject-matter could be more relevant than this. Also, if the bankrupts had fictitiously swelled by $1,500 the amount of their opening bank deposit, and so had fraudulently obtained credit, that would affect their right to discharge, and would affect the creditors' rights to reclaim. True, it did not appear that any one had actually given credit on the strength of such false appearance of capital, but it does appear that the bankrupts started at once for New York to buy goods, and that they immediately made to a commercial agency a statement showing that their capital was $4,500, made up of the items of $3,500 and $1,-

000. It cannot be necessary that on this examination, and in order to make a false answer perjury, evidence must be introduced of every link in the chain which will make the answer ultimately and certainly important in the administration of the estate. It is enough if it is apparent that the answer may be important. Any other rule would defeat the object of the examination and would make the existence of perjury in such examination dependent on the order of proof before the referee; whether false testimony was perjury would be contingent on whether by later testimony in that proceeding, or, indeed, at any time during the settlement of the estate, facts appeared showing that the matter inquired about turned out to be important. We cannot escape the conviction that to hold a witness on such examination not subject to punishment for false testimony, unless a distinct issue had been formulated, or unless the final value of the testimony had already been fixed by other proof, would be to give him, in the words of Chief Justice White in Glickstein v. United States, 222 U. S. 139, 143, 32 Sup. Ct. 71, 73, (56 L. Ed. 128), "a mere license to commit perjury." For these reasons we think the court below was right in holding that there was no question for the jury on the subject of materiality, if, indeed, that subject may ever be for the jury—a question we have not considered.

[4] Considerable evidence was introduced tending to show close business and confidential relations between Ulmer and the bankrupts. It is urged that this was inadmissible because having no bearing on the truth of the testimony in question; and complaint is made that the testimony is shaped as if Ulmer had been on trial for conspiracy with the bankrupts to defraud their creditors. The court below considered this evidence admissible on the theory that it tended to show motive. The formal thing in issue was whether Ulmer told the truth when he said that the transaction was not an exchange of checks; but this necessarily led the jury to consider, as the real question, whether he did in fact make the check exchange. Any testimony bearing on this, the real ultimate question, was clearly admissible. If he did make the exchange, it must have been with the purpose to aid the bankrupts in making a false showing of capital, whereby they might get credit to which they were not entitled, and so take the first step toward defrauding creditors. No other possible purpose is suggested. It thus appears that there can be no sharp line between testimony relevant to the charge of Ulmer's perjury and testimony relevant to the charge of Ulmer's participation in such a scheme to defraud; and, with this consideration in mind, evidence which was received "to show motive" was not so irrelevant as to make its reception reversible error. See Daniels v. United States, 196 Fed. 459, 461, 462, 116 C. C. A. 233.

[5] Of course, this resemblance between the issue here and what would have been the issue in a conspiracy trial did not justify receiving evidence competent only because of rules peculiar to trials for conspiracy; but the two or three instances in which it would seem this distinction may have been overlooked do not justify a reversal; and this is so both because no objection was made save the general one, "I object," which does not operate to save any question for review (Mitchell v. Marker, 62 Fed. 139, 141, 10 C. C. A. 306, 25 L. R. A. 33; Merchants Co. v. Buckner [C. C. A. 6] 110 Fed. 345, 346, 49 C. C. A.

80), and because the facts elicited were comparatively so trifling and unimportant that we cannot think they were seriously prejudicial.

[6] Complaint is made that Ulmer's rights on the trial were prejudiced because the judge publicly indicated his opinion that one of Ulmer's witnesses committed perjury on the trial. If there was error in this action, accompanied, as it was, by a caution that the jury should judge the facts, there is no assignment of error sufficient to present the question. The language complained of occurred during the course of a complete charge, and the only assignment of error which may bear upon it is "that the court's charge to the jury and the language thereof were prejudicial to the rights of the defendant." This is entirely too general, under the provisions of rule No. 11 (193 Fed. vii, 112 C. C. A. vii), and its settled construction by this court. The Myrtie M. Ross, 160 Fed. 19, 22, 87 C. C. A. 175; Garrett v. Pope Co., 168 Fed. 905, 94 C. C. A. 334.

[7] The only remaining question which we think important relates to the sentence. The first count charges, as the false testimony, Ulmer's statement on November 13th that he received $1,500 in currency in exchange for his check. The second count was based on the same statement on the same day; and the proof interprets these two counts as applying one to the statement and one to its repetition later in the examination. The third count is based upon Ulmer's testimony given on November 20th, that he did not receive checks in exchange for his check. He was convicted upon each count, and was sentenced to imprisonment for two years upon the first count, one year upon the second count, and two years upon the third count; the sentences being expressly made successive and not concurrent. These three counts charge one offense and one only—the making of substantially the same statement during the examination. Twice the statement is put in one form and once it is the same thing in converse form. One item of false testimony, constituting a crime, is not multiplied into several crimes because an answer is repeated as many times as the question is asked, nor because the answer is varied in form to meet the modified shape of the inquiry; nor can it be important whether an intervening recess is of a few minutes or a few days, so long as the continuity of the testimony is not broken. Although counsel have not found, nor do we, any rulings to the effect that such repetitions constitute only one crime, yet this conclusion seems to us inevitable, as one of practical necessity. The contrary one would lead to the unthinkable result that if a witness had testified twice on the same occasion to the same thing, and had been tried for perjury in the first statement and acquitted, he could still be tried and convicted upon the second statement.

If the indictment and sentence could rightfully be treated as under section 125 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. 1913, § 10295], formerly R. S. § 5392), the error inherent in three convictions and three sentences for one crime might be immaterial, because the three sentences would aggregate no greater period than might have been imposed on conviction on one count (Botsford v. U. S., 215 Fed. 510, 515, 132 C. C. A. 22); but the prosecution cannot be so considered. Not only does the indictment specify that it is founded on section 29 of the Bankruptcy Act (a consideration not

controlling—Williams v. U. S., 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509), but it is industriously drawn in the language of the Bankruptcy Act, § 29b(2), so as to charge that Ulmer "made a false oath in and in relation to a proceeding in bankruptcy." We approve and adopt the holding of the Second Circuit Court of Appeals in Wechsler v. U. S., 158 Fed. 579, 86 C. C. A. 37, which makes it necessary to regard this prosecution as one under the Bankruptcy Act only, and forbids going to section 125 of the Penal Code for support. From this view, and from the conclusion that only one offense was committed, it follows that imprisonment for more than the two years specified in section 29b was unauthorized.

This error goes only to the sentence, not to the verdict. It is impossible to allow the sentence to stand on one count and set aside the other two sentences, because we cannot tell how much imprisonmnt the district judge would have imposed if proceeding under the theory which we have thought the right one.

We therefore reverse and set aside the sentence and remand the case for new sentence upon the existing verdict. Williams v. U. S., supra, 168 U. S. at page 389, 18 Sup. Ct. 92, 42 L. Ed. 509; Wechsler v. U. S., supra, 158 Fed. at page 584, 86 C. C. A. 37; Johnson v. U. S. (C. C. A. 7) 215 Fed. 679, 684, 131 C. C. A. 613.

UNITED STATES v. BANK OF NEW YORK, NAT. BANKING ASS'N.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 84.

BILLS AND NOTES ⊂⊃434—DRAFTS—NAME OF DRAWER—FORGERY—PAYMENT—RIGHT TO RECOVER.

The Secretary of the Treasury is bound to know the signatures of those officers of the United States who are authorized to draw on him; and hence, having paid a draft purporting to have been drawn by the American consul in Argentine, but in fact bearing the consul's forged signature, the United States could not recover the money so paid, whether the draft was negotiable or not.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1268–1274; Dec. Dig. ⊂⊃434.]

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

This cause comes here upon writ of error to review a judgment of the District Court of the United States for the Southern District of New York entered on March 19, 1914, sustaining the demurrer to the complaint and dismissing the complaint on the merits.

H. Snowden Marshall, U. S. Atty., of New York City (Gordon Auchincloss, of New York City, of counsel), for the United States.

Satterlee, Canfield & Stone, of New York City (Karl T. Frederick and Huger W. Jervey, both of New York City, of counsel), for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action was brought by the United States to recover from defendant the amount of a draft paid by plaintiff to defendant on March 19, 1912, together with interest from date of payment.

The complaint alleges that defendant on or about March 14, 1912, presented to the Treasury Department at Washington, D. C., a draft dated Rosario (Argentine Republic), February 8, 1912, for $463.73, drawn on the Secretary of the Treasury, payable to the order of the British Bank of South America, Limited, and purporting to be signed by Robert T. Crane, American Consul, and bearing the indorsement of the British Bank of South America, Limited, followed by the indorsement of defendant as the last indorsement on the back thereof; that, without Crane's knowledge, Crane's signature to the draft had been forged; and that on March 19, 1912, the Secretary of the Treasury, under a mistake of fact and in ignorance that Crane's signature was a forgery, paid defendant the amount of the draft which sum defendant has refused to return to plaintiff, though requested so to do.

A copy of the instrument follows:

Consulate of the United States of America.

Rosario, February 8th, 1912. No. 5.

Fifteen days after sight (acceptance waived and indorsements by procuration, excepted) of this sole of exchange. $463.73

Pay to the order of the British Bank of South America, Limited, four hundred, sixty-three dollars, seventy-three cts., U. S. gold Dollars

Value received and charge the same to account for Relief of Seamen and balance of salary.

To the Secretary of Treasury.

[Seal]

Washington, D. C.

Robert T. Crane,
American Consul.

The indorsements upon the back of the instrument are not herein set forth as they are not involved.

It is true that in some cases where a person has been induced by fraud to make payment of a bill or note such payment may be recovered back. And in like manner under some circumstances one who has paid a bill under a mistake of fact is allowed to recover the amount thereof. So under some circumstances a party who has made a payment on a forged instrument may be permitted to recover it back from the party receiving it. Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24 (1877); Goddard v. Merchants' Bank, 4 N. Y. 147 (1850).

But if one accepts forged paper purporting to be his own and pays it to a holder for value, the Supreme Court has said that it is undoubtedly true as a general rule of commercial law that he cannot recall the payment. What he has done amounts to an adoption of the paper as genuine. He is presumed to know his own signature. Cooke v. United States, 91 U. S. 389, 396, 23 L. Ed. 237 (1875). So it is incumbent upon the drawee of a bill or check to be satisfied that the signature of the drawer is genuine. He must know, is conclusively presumed to know, whether the signature of the drawer is genuine.

The case of Price v. Neale, 3 Burrows, 1354, decided in 1762, established the principle that the drawee of a draft, having accepted or paid it, cannot compel repayment of the money upon discovering that his

drawer's name was forged. And for more than a century and a half it has been settled law that the drawee of a bill must be presumed to know as matter of law the handwriting of his correspondent the drawer of the bill, and that it is incumbent upon him to be satisfied of the genuineness of the drawer's signature. If he accepts or pays a bill to which the drawer's name has been forged, he is thereby estopped by his act and cannot thereafter repudiate his acceptance or recover back the money he has paid. The principle applies as well to the case of a bill paid upon presentment as to one accepted and afterwards paid. See National Park Bank v. Ninth National Bank, 46 N. Y. 77 (1871).

In Price v. Neale two bills of exchange had been paid by the drawee, the signature of the drawer having been forged. One bill was paid when it became due, without acceptance. The other was accepted and paid at maturity. When the forgery was discovered, an action was brought to recover back the money paid; it being admitted that both parties were equally innocent. The action was for money had and received, in which no recovery could be had unless it was against conscience for defendant to retain it. Lord Mansfield said that in such a case as the one then before him it could not be affirmed that it was unconscientious for defendant to retain the money he having paid a fair and valuable consideration for the bills. He continued:

"Here was no fraud, no wrong; it was incumbent upon the plaintiff to be satisfied, that the bill drawn upon him was the drawer's hand, before he accepted or paid it; but was not incumbent upon defendant to inquire into it. There was notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up; the other bill he actually accepts, after which the defendant, innocently and bona fide, discounts it; the plaintiff lies by for a considerable time after he has paid these bills and then found that they were forged. He made no objection to them at the time of paying them; whatever of neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man. But in this case if there was any fault or negligence in any one, it certainly was in the plaintiff and not in the defendant."

It is true that it has been held in one case at least that the doctrine of Price v. Neale should not be adhered to in cases where the holder of an unaccepted bill presents it to the drawee for acceptance or payment, and that in such cases the unrestricted indorsement and presentation of the draft to the drawee is a representation on the part of the holder and indorser that the signature of the drawer is genuine. Ford & Co. v. People's Bank of Orangeburg, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744 (1906). And in North Dakota the doctrine of Price v. Neale has been rejected in its entirety. First National Bank v. Bank of Wyndmere, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588 (1906). But the two cases last cited are without support in the decisions of the English courts and have little, if any, support in the American decisions.

Indeed, the principle established by Price v. Neale has been incorporated into the uniform Negotiable Instruments Act which has been adopted in the District of Columbia and was in force there at the time this payment was made. That act provides that the acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance and admits "the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the instrument." As payment is equivalent to acceptance, the United States under the act admitted the genuineness of the drawer's signature (Act Jan. 12, 1899, c. 47, 30 St. at L. p. 785, § 62), if the bill was negotiable.

As early as 1825, the Supreme Court applied the principle of Price v. Neale in United States Bank v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334. The Supreme Court, through Mr. Justice Story, in United States Bank v. Bank of Georgia, referred approvingly to Price v. Neale, saying:

"The case of Price v. Neale has never since been departed from; and in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority."

Price v. Neale goes upon the same theory as do those which hold that a bank is bound to know its customer's signature, and has no remedy where it has paid or certified a forged check to a bona fide holder for value. The presumption is that it has greater means and better opportunities to become familiar with the handwriting of depositors than are afforded the holder.

The courts have in a number of cases held that the rule that the drawee is presumed to know the signature of his drawer does not apply if the holder by his negligence has contributed to the success of the fraud practiced. Myers v. Southwestern National Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; Woods v. Colony Bank, 114 Ga. 683, 40 S. E. 720, 56 L. R. A. 929 (1902); Brennan v. Merchants', etc., Bank, 62 Mich. 343, 28 N. W. 881 (1886). But in this case the government makes no claim that defendant has been guilty of any negligence contributory to the fraud practiced. Counsel for the government comes into court with the statement that the Secretary of the Treasury of the United States is not presumed to know the signatures of such agents of the United States as are authorized to draw on him. It is argued that the United States is entitled to greater protection than an individual from the unauthorized and fraudulent acts of its agents. And it is said that to charge the government with knowledge of the genuineness of the signatures of those of its servants who may be entitled to draw upon it is to impose a liability on it which public policy demands should be borne by individuals dealing with it. We are informed that to hold the Treasury Department liable in a case such as the case at bar is not only not common sense, but is against the recognized principles of law. Attention is called to the recent case of United States v. National Exchange Bank (1909) 214 U. S. 302, 317, 29 Sup. Ct. 665, 670 (53 L. Ed. 1006, 16 Ann. Cas. 1184) where the present Chief Justice said:

"The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation. To apply the rule, however, to the government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties, and would also require that to be assumed which the obvious dictates of common sense make clear could not truthfully be assumed."

In that case the United States was held not chargeable with knowledge of the signatures of the vast number of persons entitled to receive pensions. The action was brought by the United States to recover the sum of payments made at the subtreasury in Boston upon 194 pension checks the signatures of the persons to whom the checks were payable having been forged. The Supreme Court held that the government had the right to recover. A similar ruling had been rendered in an earlier decision made by Judge Coxe in 1889 in United States v. Onondaga County Savings Bank (D. C.) 39 Fed. 259, which we affirmed in 64 Fed. 703, 12 C. C. A. 407.

The case of United States v. National Exchange Bank, supra, affords no support, however, for the principle which counsel for the government ask us to recognize in this case. The rule announced in that case is in entire harmony with Price v. Neale, supra, and with the cases which have followed it. In United States v. National Exchange Bank the forgery was not of the drawer's name, as in Price v. Neale, but of the payee's name on pension warrants. The forgery of a payee's name or of an indorser's name is very different from the forgery of a drawer's name. At common law there is no obligation upon the part of the drawee to know the genuineness of the signature of the payee or of an indorser. Price v. Neale has never been applied to such cases. In Bolognesi v. United States, 189 Fed. 335, 111 C. C. A. 67, 36 L. R. A. (N. S.) 143 (1911), the United States had brought an action against the defendants to recover moneys collected by them upon 128 money orders, amounting to $12,800, fraudulently issued by a clerk in charge of a substation post office, less the amount collected on the clerk's bond. The defendants claimed that they received the fraudulent orders in good faith and paid full value for them. The trial judge directed a verdict for the United States for the full amount claimed, and we sustained him in so doing. But that case was subject to a statute (Rev. St. § 4057; U. S. Comp. St. 1913, § 7606) which expressly provided that in all cases where money of the Post Office Department had been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster General should cause suit to be brought to recover such wrong or fraudulent payment or excess. And we held that the United States might recover the amount paid out, on money orders fraudulently issued, from the persons to whom it was paid, and that the good faith of such persons in acquiring the orders was immaterial. In the course of the opinion it was said that the case was determined upon principles other than those of the law merchant, and

the defenses which that law would afford a bona fide holder for value of commercial paper did not come up for consideration. We thought that the government in issuing money orders was exercising a governmental function.

The contention of the government that an exception should be made in its favor to the well-established rule of Price v. Neale must be disregarded. The number of persons who can have a right to draw bills upon the government is relatively small, and it should protect itself as do banks and other large corporations against imposition in such cases. The Supreme Court, in Cooke v. United States, 91 U. S. 389, 23 L. Ed. 237 (1875) said:

"When the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances."

And we find no warrant for saying that the United States is not bound by the same law as an individual when it enters into a transaction of this nature.

A bill is negotiable paper, except where the rule is changed by statute, only where it is made payable at all events and unconditionally. And this is expressly required under the Negotiable Instruments Law in the United States and under the Bills of Exchange Act in England. Counsel contend that the draft in this case was not negotiable because it was upon its face conditional. It is said that the words appearing on the draft, "and charge the same to account for relief of seamen and balance of salary," made the draft conditional, and that it was not to be paid at all unless Congress had appropriated and set aside a fund, which was not exhausted at the time the draft was presented, for the payment of salaries and for the relief of seamen. If no such fund existed for the relief of seamen, or if nothing remained unpaid in salary account, the draft would have been worthless as the holder was bound to know.

We do not, however, find it necessary to determine whether the claim that this bill is conditional, and therefore not negotiable, is sound or unsound. In our view of the matter it is unimportant whether it is conditional or unconditional, negotiable or nonnegotiable. And we are not called upon to say whether a bill can be drawn upon the Secretary of the Treasury which is unconditional, and whether every bill drawn upon him is inherently conditional. That question can be decided when it arises. But in our opinion the doctrine of Price v. Neale is as applicable to nonnegotiable bills as it is to negotiable ones. Price v. Neale went upon the theory that a drawee knows the signature of his drawer and that it is negligence in him if he accepts or pays without first satisfying himself respecting the genuineness of the signature. There seems to be as much reason for applying the principle to nonnegotiable paper as to paper which is negotiable, and we are unaware that any case has been decided in which a court has held the principle applicable to instruments which are negotiable under the law merchant. And sometimes it is said that without regard to the principle of negligence the drawee who pays the money should bear the loss, assuming that both himself and the holder who presented the bill for payment are equally innocent as he is the one whose act occasioned the loss.

But upon whichever of these two theories the doctrine of Price v. Neale may rest and the first of the two seems the better reason, they apply with as much force where the bill is nonnegotiable as where it is negotiable. The importance of the distinction between negotiable and nonnegotiable paper grows out of the principle that the bona fide holder of negotiable paper takes, free from equities while the holder of nonnegotiable paper takes subject to them. But that distinction does not affect the question now under consideration. The act of payment follows the acquisition of the title by the holder, and it is the effect of the act of payment alone which is to be determined, and, in determining it, it can make no difference whether or not the holder acquired the paper free from or subject to existing equities, and, if it is not unconscientious for the holder of a negotiable bill who is paid on a forged signature of the drawer to retain the money paid him by the negligence of the payee no more is it unconscientious in the holder of the nonnegotiable bill who has been paid in the same way to retain what he has been paid.

We are asked to hold, under the authority of Guaranty Trust Co. v. Grotrian, 114 Fed. 433, 52 C. C. A. 235, 57 L. R. A. 689, and of Hannay v. Guaranty Trust Co. (C. C.) 187 Fed. 686, that the money paid can be recovered back. In the first of these cases a draft directed the drawee to pay and charge the same to account of certain flax seed, forged duplicate bills of lading for which were attached to the draft. The acceptance was "Accepted against indorsed bills of lading" for flax seed. The draft was paid without knowledge that the bills of lading were forged and before the arrival of the steamship on which the flax seed should have been according to the bills of lading and without the knowledge that the flax seed was not there.

It was held in that case that the acceptance was conditioned on the delivery of genuine bills of lading, and that, as this condition was not waived by payment, the acceptor could recover the money paid. The same principle was involved in the second of these cases. But those cases are not in point as respects the question now before us. In the two cases cited, the forgery was not of the signature of the drawer, but of the bills of lading which purported to have been issued by the carrier. The drawee of the bill of exchange was not presumed to know the genuineness of the signatures to the bills of lading. The court holding the acceptance and payment to have been conditional on the genuineness of the bills of lading allowed the money to be recovered back as the condition had not been realized.

Judgment is affirmed.

In re HAYWOOD WAGON CO.

In re BEALS & CO. et al.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 76.

1. BANKRUPTCY ⟸269—ASSETS—SALE—OBJECTIONS.
While a single creditor, if actually wronged by a sale of the bankrupt's assets, may properly complain of an order confirming the sale, yet the fact that all the secured and most of the unsecured creditors were satisfied with the sale is some proof that the good faith of the trustee in making the sale should not be impugned.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. ⟸269.]

2. EXECUTION ⟸213—"EXECUTION SALE"—DISTINGUISHED FROM "JUDICIAL SALE."
An execution sale of property is not a "judicial sale," since the officer making an execution sale derives his authority from his writ and the statute, which sale does not need confirmation, while the authority to make a judicial sale is derived from the court, and such sale confers no right to the property sold until confirmed.
[Ed. Note.—For other cases, see Execution, Cent. Dig. § 600; Dec. Dig. ⟸213.
For other definitions, see Words and Phrases, First and Second Series, Execution Sale; Judicial Sale.]

3. JUDICIAL SALES ⟸7—MANNER OF SALE—ORDER OF COURT.
In cases not governed by a mandatory statute, the court has power to direct how a judicial sale shall be made and may order the property sold either in parcels or as a whole.
[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. ⟸7.]

4. BANKRUPTCY ⟸262—SALE OF ASSETS—SALE EN MASSE.
Where an order directing the sale of a bankrupt's assets provided that the real estate and property mentioned, situated at N., should be first put up for sale in one parcel, but should not be struck off at once, the highest bid therefor being recorded, and thereafter the real estate at B. should be sold in the same manner, but not struck off, and thereafter the real estate and property mentioned, situated at N. and at B., should be offered in one parcel, and, if the sum bid therefor should be greater than the sum bid for the two parcels previously offered separately, both parcels should be struck off to the highest bidder on the last sale, otherwise each parcel should be struck off to the highest bidder when the properties were first offered, a sale of the whole property en masse which brought the highest bid was proper.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 363-365; Dec. Dig. ⟸262.]

5. BANKRUPTCY ⟸178—MORTGAGE—VALIDITY—FRAUD.
A mortgage of a corporation's property to secure bonds expressly recited that it was the parties' intention, so far as lawful, to include all property and rights previously described, owned, or thereafter acquired by the corporation, but not to include merchandise, materials, property, or chattels which ordinarily were the subject of sale in the usual course of business of the corporation, or any cash, claims, book accounts, or bills receivable, so long as the corporation was not in default, and that though the mortgagor might alter, remove, sell, or dispose of any buildings, fixtures, machinery, or other appliances on the mortgaged premises, which could not be advantageously used in the judicious operation and manage-

ment of the business, it would, in the event of such alteration, removal, sale, or disposition, replace any buildings, fixtures, machinery, or other appliances removed, sold, or otherwise disposed of, by acquiring, subject to the mortgage, other real estate, or placing on the mortgaged property, subject to the mortgage, other buildings, fixtures, machinery, or other appliances equal in value to the property so removed, sold, etc. *Held*, that it was not fraudulent as against the corporation's creditors as permitting it to sell off for its own benefit the mortgaged chattels without accounting to the mortgagee therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. ⟸178.]

6. JUDICIAL SALES ⟸8—CONDITIONS—INCUMBRANCES.

Whether property should be sold at a judicial sale free from or subject to incumbrances is within the judicial discretion of the court ordering the sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 32; Dec. Dig. ⟸8.]

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

The Haywood Wagon Company was a stock corporation duly organized and existing under the laws of the state of New York. It was established in the village of Baldwinsville, Onondaga county, N. Y. It had an authorized capital stock of $130,000, and its business was the manufacture of dump wagons embodying certain patented features of acknowledged merit. In 1910 it removed its factory to Newark, Wayne county, N. Y. It owned a parcel of land at Newark comprising about 16 acres, the plant being erected on one-half of it. The Newark property is spoken of as two parcels, one used for manufacturing purposes, and the other not. After the removal to Newark, the company retained the Baldwinsville property. In August, 1909, and prior to the removal to Newark, it executed to Peter R. Sleight, as trustee, a mortgage for the purpose of securing an issue of its bonds in the amount of $50,000. On March 4, 1913, the company was adjudicated a bankrupt upon involuntary proceedings. On April 12, 1913, Peter R. Sleight was elected trustee. After an earnest and unsuccessful attempt to effect a reorganization of the bankrupt concern, an application was made for authority to sell the assets, and an order was made directing a sale on October 16, 1913, of the property subject to all liens and incumbrances. On October 15th, one of the creditors filed objections to the sale; one of the grounds being that no sale should take place until the scope or extent of certain alleged liens including the trust mortgage had been judicially determined. The sale nevertheless took place and later was confirmed by the referee notwithstanding objections to confirmation made by certain creditors. But the order confirming the sale was subsequently reversed by the District Court, and the sale was set aside. Thereafter, on motion for reargument, the matter was reopened, and the question of the confirmation of the sale was recommitted to the referee, for further consideration. A rehearing by the referee was had on March 12, 1914, and on March 26, 1914, the referee made an order confirming the sale except as to the wagons. Then followed a petition by certain creditors for a review of this order by the District Court, but

the court again confirmed the sale except as to the wagons, and an order to that effect was entered in the office of the clerk of the court on May 5, 1914. A petition to review and revise that order brings the matter to this court.

August Becker, of Buffalo, N. Y., for petitioners.
Joseph Gilbert, of Newark, N. Y., for trustee.
Harris, Beach, Harris & Matson, of Rochester, N. Y., for respondent bondholders.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). We are asked to set aside and annul an order entered in the court below confirming a sale of the bankrupt's property. The court had the subject of the confirmation of this sale before it twice and seems to have given the matter careful consideration. In his final decision of the question the District Judge declared he had "become satisfied that a resale of the property of the bankrupt company which is the subject of this controversy, or of any separate parcel thereof, free from mortgages, accrued interest, and taxes, would not be of substantial benefit to the unsecured creditors and would probably be detrimental to the secured creditors." He stated it as his opinion that the liens and incumbrances on the property were valid and that the existence of these liens and incumbrances accounted for the small amount realized at the sale. He also stated it as his conviction that a resale separately of the Baldwinsville property free from all liens might bring something more than the amount of the incumbrances thereon, but that the probability of its doing so was remote and would not in any event compensate for the additional costs and expenses which it would entail. And he concluded by saying that he thought that the sale subject to mortgages and liens was for the best interests of the secured and unsecured creditors of the bankrupt company, and he directed that an order be entered affirming the referee's confirmation of the sale.

[1] The objections to the confirmation are made by certain unsecured creditors. All the secured and some of the unsecured creditors favored confirmation. The unsecured creditors who approved the sale and asked for its confirmation filed claims which aggregated $47,113.73 or nearly two-thirds of the total of the unsecured claims. These included, it seems, practically all the unsecured creditors residing in Newark and Baldwinsville where the real estate involved is situated. Their judgment, whether this property was sold for all that could reasonably be expected, and whether the sale was conducted in good faith and for the best interest of all the creditors, shows what is thought by those who may be assumed to know the most about the actual conditions. The objecting creditors, at the time of the confirmation of the sale, represented claims approximating in amount one-seventh of the unsecured claims. This, of course, can have no decisive influence upon the question submitted. A single objecting creditor if actually wronged, no doubt has as good a right to complain as more would have, and it would be as much the duty of the

court to protect him against an invasion of his rights as to protect a greater number. But the fact that all the secured and most of the unsecured creditors are satisfied with what has been done in the sale of this property affords some indication that the good faith of the trustee ought not to be impugned.

At the sale all of the real estate together with the plant, fixtures, machinery, equipment, etc., was struck off subject to all incumbrances, including the trust mortgage, for $200. The value of this property as reported by the company to R. G. Dunn & Company, in February, 1912, was $160,000. At the time of the sale the incumbrances were as follows: The trust mortgage for $50,000; another mortgage of $5,000 on that part of the Newark property not used for manufacturing purposes; another mortgage for $1,400 upon the Baldwinsville property—the whole aggregating about $61,400.

The real estate at Newark was offered for sale separately—subject to liens—and the highest and only bid therefor was $50. The real estate at Baldwinsville—subject to liens—was then offered and the highest and only bid therefor was $75. Both parcels were then offered together upon the same terms, and there were three bids, $150, $175, and $200, and the property was struck off to Russell S. Johnson, of Camden, N. Y., for $200.

Then the personal property was offered for sale on exactly the same terms as the real estate—subject to liens and incumbrances.

The first parcel offered consisted of 52 unfinished wagons which were sold subject to a supposed lien of the Union Trust Company of Rochester, N. Y., to the amount of $8,814.91. The highest and only bid on the wagons was $1. Then other portions of the personal property were offered for sale, first in separate lots and then in one lot; the whole bringing between $3,500 and $4,000.

There is no doubt but that courts have held that sales of real property en masse are improper. In Woods v. Monell, 1 Johns. Ch. (N. Y.) 505 (1815), Chancellor Kent laid down the rule:

> "That where a tract of land is in parcels, distinctly marked for separate and distinct enjoyment, it is in general the duty of the officer to sell by parcels and not the whole tract in one entire sale."

In Williams v. Allison, 33 Iowa, 278 (1871), the court held that where the property sold was not contiguous—and in the case at bar it was not contiguous, a part being in Newark and a part in Baldwinsville—different tracts could not be sold together and that the illegality of such a sale could not be avoided by first offering the different tracts or lots separately. The court said that, if no bids were received when distinct parcels were offered separately, this fact could give no authority to sell en masse, and that, if a sale was made en masse, the sale could be set aside upon the principles of either the common law or the statute. And it added that such a sale could be avoided even as against a third person who was a bona fide holder for value, provided the application to avoid was made without laches. Where the property is contiguous, a different principle would be applied. And the same court has held, without expressly overruling its former decision, that if the entire tract or the different tracts, for any reason,

are more valuable when taken together and will in that way sell for a larger sum, they may be so sold. Connecticut Mutual Life Ins. Co. v. Brown, 81 Iowa, 42, 46 N. W. 749 (1890). Other cases might be cited to show that sales en masse have been condemned and set aside. But all these are cases of sales upon execution and they generally proceed upon the theory that a sale en masse embarrasses the right of redemption. The theory of such cases is that the execution debtor has an absolute right to redeem any one parcel separately to the exclusion of the rest and that by a sale in solido he is deprived of this privilege. And it would be a needless sacrifice of the debtor's property to sell en masse where property is susceptible of division and a smaller portion would have satisfied the debt. Smith v. Huntoon, 134 Ill. 24, 29, 24 N. E. 971, 23 Am. St. Rep. 646 (1890). We do not need to consider whether these cases accord with the weight of authority or whether they are sound in principle.

[2] An execution sale is not a "judicial sale." The officer makes an execution sale under the authority of his writ and of the statute. The proceeding before us is one of a very different nature. In a judicial sale, such as the one complained of, the court is the vendor and the sale is by the court even though made through the instrumentality of a referee. The sale, in such a case as this, confers no right to the property sold until it has been confirmed by the court. It is this confirmation that makes the sale the act of the court. In an execution sale there is no report made to the court and no confirmation of the sale made by the court. The principles applicable to the one class of sales are not necessarily applicable to the other.

[3, 4] In cases not governed by a mandatory statute, a court has the power to direct how a judicial sale shall be made and may order the property sold either in parcels or as a whole. The most usual method is to offer it in parcels; it being supposed that the highest price will be thus realized. But the state courts have held in a number of cases that a judicial sale may properly be made of the property as a whole where it appears that it is more advantageous to make it in that way. O'Kane v. Vinnedge, 108 Ky. 34, 55 S. W. 711; McMuller v. Gable, 47 Ill. 67; McCall's Succession, 28 La. Ann. 713; American Ins. Co. v. Oakley, 9 Paige (N. Y.) 259. And a like view of the matter has been taken in the federal courts. Johns v. Slack, Fed. Cas. No. 7,363. Sometimes the property is offered first in parcels and then as a whole and the highest offer obtained is accepted. Godchaux v. Morris, 121 Fed. 482, 57 C. C. A. 434; Vanmeter v. Vanmeter, 88 Ky. 448, 11 S. W. 80, 289. This course was pursued here, and, as the amount of the bid was greater for the whole than for the parcels sold separately, the bid for the property en masse was rightly accepted. It is sometimes even left to the discretion of the officer who conducts the sale to determine whether he will sell in gross or in parcels. But that was not the course which was pursued in this sale. The order directing the sale stated specifically the manner of sale and the trustee observed it to the letter. The order was as follows:

"The real estate and property above mentioned situate in Newark, shall first be put up for sale in one parcel but shall not be struck off at once, but

the highest bid therefor recorded; thereafter the real estate situate at Baldwinsville shall be sold in the same manner, but not struck off, but the highest bid therefor recorded; thereafter the real estate and property above mentioned situate at Newark and at Baldwinsville shall be offered for sale in one parcel and if the sum bid therefor in one parcel shall be greater than the sum bid for the two parcels theretofore offered separately, both parcels shall be struck off to the highest bidder upon this last sale. Otherwise each parcel shall be struck off to the highest bidder when the properties were first offered."

[5] The objecting creditors in the matter before us claim that the trust mortgage is fraudulent in law and void as against creditors for the reason that it permits the mortgagor to use and dispose of the mortgaged property, or portions thereof, for its own use and benefit and without requiring the proceeds to be applied in payment of the mortgage debt. No question is raised as to the mortgage having been authorized by the corporation or as to its having been regularly executed, delivered, and recorded. And it is not disputed that the $50,000 bonds, which it was issued to secure, were duly issued and constituted a valid obligation against the bankrupt corporation. The courts in New York have held that it is established law, in that jurisdiction, that a mortgage is fraudulent as a matter of law and void as against creditors which permits the mortgagor to carry on a retail business selling off for his own benefit mortgaged chattels the mortgagee retaining all the time a lien on the whole stock with a right on default to take possession of the remaining goods and sell them for the payment of his debt. Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. In the case of In re Marine Construction & Dry Dock Co., 144 Fed. 649, 75 C. C. A. 451 (1906), we followed somewhat reluctantly the rulings of the New York courts and held a New York mortgage fraudulent in law which permitted a mortgagor to go on and sell part of the materials covered by the mortgage and use the money therefor generally in its business and for its personal use. We would, no doubt, feel it our duty to adhere to the rule we then laid down if the mortgage assailed was such as to bring it within the principle enunciated. In following the decisions of the local courts upon such a question we are following the rule which the Supreme Court laid down in Etheridge v. Sperry, 139 U. S. 266, 277, 11 Sup. Ct. 565, 569 (35 L. Ed. 171) (1890), where it said:

"We are aware that there is great diversity in the rulings on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

The fact of the matter, however, is that the mortgage does not authorize the mortgagor to do what counsel insist the New York courts condemn as amounting to fraud in law. The parties to this mortgage took care to keep strictly within the law as expounded by the courts of the state. The mortgage states expressly that:

It is "the intention of the parties hereto, so far as lawful to include within the term and lien of this instrument all property and rights of the character hereinbefore described now owned or hereafter acquired by the company but

not to include hereunder any merchandise, materials, property or chattels which ordinarily are the subject of sale in the usual course of business of said company or any cash or any claims, book accounts or bills receivable, so long as said company is not in default hereunder."

The bondholders do not claim, and never have contended, that this mortgage was a lien on this excepted personalty. And at the sale the merchandise, materials, and stock in trade were sold separately from the bankrupt's plant and not as being subject to any lien of any description.

But counsel for the petitioners complain that the mortgage permitted the mortgagor "to alter, remove, sell or dispose of any buildings, fixtures, machinery or other appliances upon the mortgaged premises which cannot be advantageously used in judicious operation and management of the business of said company." The criticism passed upon this provision might be justified if that clause stood without qualification but the clause also declared that in the event of such alteration, removal, sale or disposition the company agreed that in such case it would replace "any buildings, fixtures, machinery or other appliances removed, sold or otherwise disposed of by acquiring subject to this mortgage, other real estate or placing upon the mortgaged property, subject to this mortgage, other buildings, fixtures, machinery or other appliances equal in value to the value of the property so removed, sold or otherwise disposed of or by paying to the trustee the appraised value of such property, etc." This court, however, in the case of In re Marine Construction & Dry Dock Co., supra, declared through Judge Lacombe that it was abundantly settled by authority that a mortgagee of materials could agree with the mortgagor that the latter should remain in possession of the goods and might sell them from time to time, provided that the proceeds of all goods thus sold were applied either to payment on the mortgage or to reducing the amount of some prior lien, or to the purchase of additional property, of not inferior value to take the place of what was sold. Applying to the clause in question the principle we then announced, we find nothing in the clause to invalidate the mortgage.

We fail therefore to find any invalidity in this mortgage and think the claim that it is fraudulent in law is without merit. And as the mortgage was a subsisting lien, we cannot see how creditors were prejudiced by a sale of the property subject to it.

The objectors assert that the trust mortgage does not cover the real property of the bankrupt situated at Baldwinsville or the southerly eight acres at Newark not covered by the factory, and that, as all the real estate was sold subject to this mortgage, it failed to bring as much as would have been realized if it had not been sold subject to this particular incumbrance. That it was not possible to obtain a fair price for the property as the question had not been determined whether the whole of the real estate was subject to the mortgage. Under some circumstances, there would be force in this objection; but under the circumstances of this case it is without merit, for the trust mortgage was not the only lien upon these properties. If the trust mortgage is valid and we have held it to be such, it is unquestionably

a lien on that part of the Newark property on which the factory stands. The remaining eight acres at Newark are subject to an undisputed mortgage to the Senecca Falls Savings Bank for $5,000 and interest, and there is evidence in the record which leads us to believe that these eight acres would not sell for more than enough to pay that mortgage and interest regardless of the question whether or not it is subject to the trust mortgage. As to the Baldwinsville property, the testimony satisfies us that the reasonable market value of that property does not exceed the amount of the undisputed liens against that property; the lien of the trust mortgage being excluded. This was the opinion of the District Court, and an examination of the testimony convinces us that the record affords ample justification for the conclusion which that court reached.

At the hearing before the referee when the subject of confirmation of the sale was under consideration and certain creditors were opposing confirmation, the referee at the close of the discussion inquired whether they or any of them would indemnify the bankrupt estate and guarantee it against loss upon a resale of the property sold if confirmation of the sale should be denied. To this inquiry none of the parties appearing made any response whatever. Notwithstanding this fact, attention is called in the argument before us to the small amount realized at the sale and we are asked to set the sale aside and order the property resold. Under the old English practice, before a sale had been confirmed courts would open the biddings and direct a resale of the property in case a person was ready to offer a larger price than the property brought at the first sale. But this practice in England was abolished by statute. St. 30 and 31 Vict. c. 48, § 7. And now in that country to entitle the parties to open the biddings it appears to be necessary to show either fraud or such misconduct as borders on fraud. Delves v. Delves, L. R. 20 Eq. 77. In the courts of this country there seems to be some difference of opinion whether before confirmation it is proper to open the biddings to obtain a greater bid, and the practice of doing so has been widely condemned in our courts as making judicial sales unstable and as tending to chill the bidding. In a number of cases it has been held that there must be some further reason arising out of the circumstances of the sale sufficient to cause a refusal of confirmation or the application to reopen the bids will be denied. 24 Cyc. 42; Files v. Brown, 124 Fed. 133, 59 C. C. A. 403. If courts are strongly inclined to decline to open biddings even in cases where the advanced bid is actually brought into court, or a bond or guarantee of a higher bid is furnished, a fortiori the biddings cannot be opened where no such bid is offered and no such guaranty is produced.

[6] The objecting creditors urge that the property should have been sold free from incumbrances. There certainly is no rule which makes it the duty of a court to see that in a judicial sale the property is sold free from incumbrances. At the best it can only be said that the terms and conditions of a judicial sale are within the discretion of the court. Undoubtedly most such sales are made, and probably should be made, subject to incumbrances, and to the extent that the

objection made to this particular sale is based, not upon a general principle, but upon the circumstances that one of the incumbrances was of doubtful validity and scope, it has already been considered and answered.

The order is affirmed.

WILLIAMS v. COBB.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 8.

1. BANKS AND BANKING ⟸248—NATIONAL BANKS—LIABILITY OF STOCKHOLDERS.

Though, under the rules and practice of the courts of Wisconsin and Laws Wis. 1903, c. 317, authorizing the investment of trust funds in certain securities, executors had no authority to invest a trust fund in shares of stock in a national bank, where they did transfer stock owned by the estate to themselves as trustees, caused the stock to be transferred on the books of the bank, and filed their final account showing such transfer more than a year before the bank failed, the transfer was voidable only and not void, and, so long as it was permitted to stand, neither the estate nor a legatee, made liable by statute for contingent claims becoming absolute after the distribution of the estate, were liable for an assessment against the stock by the comptroller of the currency.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913–915, 919–931; Dec. Dig. ⟸248.]

2. TRUSTS ⟸217—INVESTMENT OF TRUST FUNDS—DIRECTIONS OF WILL—"INTEREST-BEARING SECURITIES."

A will directing executors to invest a trust fund in "interest-bearing securities" did not authorize the investment thereof in the stock of a national bank, since, while shares of stock may be securities, they are not interest bearing.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 301–304, 306–309; Dec. Dig. ⟸217.]

3. EXECUTORS AND ADMINISTRATORS ⟸303—DISTRIBUTION OF ESTATE—EXECUTOR AS LEGATEE.

When an executor is also a legatee or distributee, no formal act is necessary to vest title to the legacy or distributive share in him as an individual, and any act on his part, showing an intention to retain assets in payment, is sufficient.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1229–1242, 1245; Dec. Dig. ⟸303.]

4. EXECUTORS AND ADMINISTRATORS ⟸158—SALE OF PERSONAL PROPERTY—AUTHORITY TO SELL.

In the absence of statute providing otherwise, an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit, and can pass a good title to the property without any order of court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 634, 635, 646½; Dec. Dig. ⟸158.]

5. EXECUTORS AND ADMINISTRATORS ⟸163—SALE OF PERSONAL PROPERTY—PURCHASE BY EXECUTOR.

When an executor sells stock owned by the estate to himself individually, he does that which he has no right to do, but which he has a ca-

pacity to do, and the transaction is not void but voidable only at the option of those interested.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 640; Dec. Dig. ⟸163.]

6. BANKS AND BANKING ⟸249—NATIONAL BANKS—LIABILITY OF STOCKHOLDERS.

Under Rev. St. § 5152 (Comp. St. 1913, § 9690), providing that persons holding stock as executors, administrators, guardians, or trustees shall not be personally liable as stockholders in national banks, but that the estate and funds in their hands shall be liable, where a trustee improperly invested the trust fund in the stock of a national bank, the beneficiary had the right, when the nature of the investment was brought to her attention, to accept or reject it, and if she accepted it, or lost her right to reject it by laches or acquiescence, she would be liable as a stockholder.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 916–918; Dec. Dig. ⟸249.]

7. APPEAL AND ERROR ⟸959—EQUITY ⟸267—AMENDMENT—DISCRETION OF COURT.

The allowance or refusal of leave to amend a pleading is a matter largely within the sound discretion of a trial court, and, in the absence of a clear abuse thereof, its action is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. ⟸959; Equity, Cent. Dig. §§ 545, 546; Dec. Dig. ⟸267.]

8. EQUITY ⟸267—AMENDMENT OF PLEADING—DISCRETION OF COURT.

In an action against an executor for the amount of an assessment against the stock of an insolvent national bank improperly brought against him individually on the theory that a transfer of stock owned by the estate to the executors as trustees was void, leaving title thereto in the estate, and that the executor was liable as legatee under a statute making legatees liable for contingent claims becoming absolute after the distribution of the estate, the court did not abuse its discretion in refusing to allow the bill to be amended to cure the defects.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 545, 546; Dec. Dig. ⟸267.]

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

This cause comes here upon appeal from a final decree dismissing the bill of complaint and entering final judgment for defendant entered in the United States District Court for the Southern District of New York on January 16, 1912.

Dichman & Heffernan, of New York City (John Francis Heffernan, John M. Nolan, and Joseph P. Nolan, all of New York City, of counsel), for appellant.

K. R. Babbitt, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The First National Bank of Mineral Point, Wis., was a national banking association duly organized and existing under and by virtue of the laws of the United States. And on October 11, 1909, it was found by the Comptroller of the Currency of the United States to be insolvent and unable to pay its debts. There-

upon the complainant was duly appointed receiver of all its property and assets and took possession of the same.

It appears that one Laura A. Cobb became the registered owner and holder of certain shares of the capital stock of the bank and retained the same at the time of her death on April 11, 1904. In her last will and testament she appointed John P. Cobb, the defendant herein, and one Calvert Spensley, her executors, and directed them to invest the sum of $2,000 of her estate in interest-bearing securities, and to pay the income thereof to one Catherine Monohan during the life of the said Catherine Monohan, and upon the latter's decease to pay the same over to certain persons designated in the will.

The will was duly admitted to probate in the county court of Iowa county in the state of Wisconsin, and Cobb and Spensley qualified as executors. The executors, instead of investing $2,000 in interest-bearing securities, as directed by the testatrix, caused and procured the transfer and registry, upon the books of the bank, of 20 shares of the capital stock of the bank to themselves as trustees for Catherine Monohan, and they remained so registered at the time when the Comptroller took possession of the bank, and they so remain at the present time. The stock so transferred was stock which, at the time of the death of the testatrix and at the time of the transfer, stood on the books of the bank in the name of the testatrix.

In order to pay the debts, the Comptroller of the Currency found it necessary to make an assessment upon the shareholders for $100,000, and such an assessment was made on November 3, 1909, to be paid by the shareholders ratably on or before November 17, 1909, and demand was made upon each and every one of the shareholders for $100 upon each and every share of the capital stock of the bank held or owned by them, respectively, at the time the bank was found to be insolvent. The receiver was directed to take all necessary proceedings to enforce the individual liability of the shareholders.

The suit was commenced against the defendant Cobb upon the theory that the estate of Laura A. Cobb was liable upon this assessment upon the 20 shares of the stock which the executors had transferred to themselves as trustees. The receiver contends that the executors had no authority, either under the terms of the will or the statutes of Wisconsin, to invest trust funds in the stock of a national bank, and that the transfer of the stock from themselves as executors to themselves as trustees was wrongful and did not constitute Catherine Monohan the beneficial owner of the stock, and that therefore she could not be compelled to pay the assessment. It is alleged in the bill, and upon the demurrer must be taken as true:

"That said Catherine Monohan had no knowledge of the fact that the defendant Cobb and said Spensley had caused the transfer and registry upon the books of said association to themselves as trustees for said Catherine Monohan of said twenty (20) shares of the capital stock of said association as aforesaid."

The court was therefore asked to adjudge and decree that the transfer of the stock made by the executors to themselves as trustees was unauthorized and void, and ineffective to divest the estate of the de-

cedent Laura A. Cobb of the ownership of the stock; and that notwithstanding the transfer the stock still remained as the property of the estate of Laura A. Cobb at the time the bank was found by the Comptroller to be insolvent and at the time of the assessment upon the shareholders.

It appears that, prior to the time when the Comptroller found the bank was insolvent, Cobb and Spensley had filed their final account as executors on July 28, 1908, and had at that time made oath that the estate of Laura A. Cobb had been wholly distributed, with the exception of the shares of stock held by them and registered in their names as trustees, and that no other property or assets of Laura A. Cobb remained in the hands of said executors as such.

It further appears that this suit has been brought against John P. Cobb individually because of a provision contained in a statute of Wisconsin, which provides that where a claim against the estate of any deceased person remains contingent until after the time limited for filing claims has expired, and then subsequently becomes absolute, and the assets of the estate have been paid to the distributees as legatees or next of kin, an action will lie in favor of the claimant against such legatees or next of kin to recover the full value of such assets or sufficient thereof to satisfy such claim; and that actions against the next of kin or legatees of any deceased person to recover the value of any assets that may have been paid to them by any executor or administrator may be brought against all of said next of kin jointly, or one or more of them, or against all of said legatees jointly, or one or more of them. The statute provides that any such next of kin, against whom such recovery shall be had, may maintain an action against the other relatives of the decedent, to whom assets may have been paid, for a just and equal contribution in such an amount as shall be in the same proportion to the whole sum collected of the plaintiff as the value of the assets delivered to such defendant in such action bore to the value of all the assets delivered to all the relatives of the deceased.

The defendant Cobb was, as we have said, one of the executors of Laura A. Cobb, whose son he was, and was also one of the distributees under the will, and as such received from the executors more than $12,000.

The court below sustained the demurrer to the bill and filed the following memorandum:

"It may be that under the law of Wisconsin the executors of Mrs. Cobb were not authorized in investing trust funds in shares of a national bank, nor in assigning to a trust fund created by Mrs. Cobb's will any part of her property consisting of shares of a national bank. But the only persons injured by such infraction of Wisconsin law are the cestuis que trustent and (perhaps) the state of Wisconsin. It is no concern at all of this receiver, who owns those shares, as long as they were actually owned by the persons pretending to own them. On the face of the bill it is to me plain that they were actually owned by Cobb and another as executors, but the suit is not against the executors. On complainant's own theory, if the assignment of these shares to a trust fund was a nullity, then they remained undistributed assets, for which the executors are responsible as executors, so that in any event the bill shows no cause of action against Cobb individually. The demurrer is sustained, with costs, and leave to amend is not granted. Final judgment will be entered for defendant."

[1] The law is well settled in England that, in the absence of a statute authorizing it, trustees cannot invest trust funds in the stock of a bank or of any private corporation, unless the author of the trust had conferred such authority upon the trustee. The English rule has been adopted in some of the states of this country, as in Illinois, New York, and Pennsylvania. Penn. v. Fogler, 182 Ill. 76, 55 N. E. 192 (1899); King v. Talbot, 40 N Y. 76 (1869); Worrell's Appeal, 23 Pa. 44 (1854). In others, as in Massachusetts and Maryland, such investments are allowed when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks. Green v. Crapo, 181 Mass. 55, 62 N. E. 956 (1902); Brown v. French, 125 Mass. 410, 28 Am. Rep. 254 (1878); McCoy v. Horwitz, 62 Md. 183 (1884).

In Wisconsin the courts appear to have followed the English rule. In Simmons v. Oliver, 74 Wis. 633, 636, 637, 43 N. W. 561, 562 (1889), the court, after calling attention to the English rule that trustees can only invest the trust fund in real estate or government securities says:

"We prefer to adhere to the well-established rule in relation to the investment of trust funds, and if a change is to be made let the Legislature make it."

See, also, Pabst v. Goodrich, 133 Wis. 43, 76, 113 N. W. 398, 14 Ann. Cas. 824 (1907).

In 1903 the Legislature of Wisconsin passed an act specifying the securities in which such funds may be invested and modified the English rule to some extent. It authorized the investment of trust funds in the mortgage bonds or preferred stock of railroad corporations, subject to certain restrictions, but it conferred no authority to invest in the stock of banks. Laws of Wisconsin 1903, c. 317.

[2] It is true that a creator of a trust may direct how investments shall be made, and that he may authorize investments other than those which the rules and practice of the courts sanction. In this case the author of the trust gave authority to invest "interest-bearing securities." It cannot be claimed, however, that the stock of a national bank is an interest-bearing security. Shares of stock may be "securities," but certainly they are not "interest bearing."

[3] The fact that the trustees had no right, under the rules and practice of the courts of Wisconsin, to invest in the stock of a national bank did not prevent title to the stock vesting in them as trustees when it was transferred to them as trustees on the books of the bank. When an executor is also a legatee or distributee, no formal act is necessary to vest title to the legacy or distributive share in him as an individual. Any act on his part, showing an intention to retain assets in payment, is sufficient. So, if the person named as an executor in the will is also named as a trustee, the rule in England and in many of the states of this country seems to be that if, as executor, he clearly sets apart and appropriates a particular fund to himself as trustee, he holds that fund as trustee and not as executor. See Perry on Trusts (6th Ed.) vol. 1, § 263; Ruffin v. Harrison, 81 N. C. 208 (1879).

The legal difference between the two relations of executor and trus-

tee is clearly defined and quite important, although it is sometimes difficult to determine in a particular case whether an executor has ceased to hold a fund as executor and assumed the attitude of a trustee. In the case before us there seems to be no difficulty of that kind, as the shares of stock were taken from the assets of the estate and transferred on the books of the company by the executors to themselves as trustees. In doing this the executors treated the stock as a separate trust fund, and they held themselves out to the world as trustees of the fund for the cestui que trust, Catherine Monohan. The stock then ceased to be a part of the assets of the testatrix, and the executors ceased to hold as executors, and from that time on have held as trustees.

[4, 5] It cannot be assumed that the transfer of the stock was void and without effect. Under the common-law rule and, in the absence of any statute providing otherwise, an executor or administrator has the absolute power to sell or dispose of the personal assets of the estate as he sees fit, and can pass a good title to the property, and it is not necessary to have any order of court for the purpose. Munteith v. Rahn, 14 Wis. 210; In re Gay, 5 Mass. 419; Leitch v. Wells, 48 N. Y. 585. If an executor sells the stocks of the estate to himself in his individual capacity, he does something which he has no right to do, but it is something which he has a capacity to do, and if he does it title passes. The transaction is not void but only voidable at the option of those interested. Grim's Appeal, 105 Pa. 375; Tate v. Dalton, 41 N. C. 562. And the courts have held that if the executor, having acquired title in his individual capacity, subsequently sells it to a third party, the purchaser acquires an absolute title. Cannon v. Jenkins, 16 N. C. 422. In the same way it follows that if executors, having title to stocks belonging to the estate upon which they are administering, transfer those stocks to themselves as trustees upon the books of the corporation, the transfer is not void but only voidable. If in the particular jurisdiction the trustees are entitled to invest trust funds in such stocks as those transferred, the transfer is valid. But if such an investment is unauthorized the transfer of title is simply voidable; and until it has been set aside the title is in the trustees as such and not in the executors. The common-law rule has been changed by statute in some states in which the executor is required to obtain an order from the court before he can sell the assets. Where this is the law, and a transfer of the assets is made by an executor who has not obtained an order of court authorizing it, the transfer in such a case would be void rather than voidable. Our attention, however, has not been called to any statute in Wisconsin making an order of sale necessary in such cases, and we assume that the law of that state remains as it was at common law.

Not only did the executors transfer the stock to themselves as trustees, but as executors of the estate they filed their final account in a proper court in Wisconsin on July 28, 1908—more than a year before the bank failed—and made oath that said estate had been wholly distributed prior to that date, with the exception of the 20 shares of stock registered in their names as trustees for Catherine Monohan, and that no other property or assets of the estate remained in their hands.

[6] As the trustees for Catherine Monohan hold an improper invest-

ment in stocks for her, she had the right, when the nature of the investment was brought to her attention, to accept or reject it. If she accepted it, or had lost her right by laches or acquiescence to reject it, she would no doubt be liable under the statutes of the United States as a stockholder. Section 5152 of the Revised Statutes provides that:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estate and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

If she rejected the investment or still has a right to reject it, about which no opinion is expressed, then it would seem that the trustees hold the stock in their individual right and would themselves be liable as such upon the stock.

If we understand the opinion of the court below, the shares of stock which the executors held as a part of the estate of Mrs. Cobb they continued to hold as executors, notwithstanding their transfer of the stock to themselves as trustees of Catherine Monohan. This conclusion is based on the theory that the transfer to themselves as trustees was a nullity, as trustees are not authorized in Wisconsin to invest trust funds in the stocks of a national bank. We have seen that such investments are unauthorized in Wisconsin, but it does not follow, as already stated, that the transfer of the stock by the executors to themselves as trustees was a void transaction. The trustees took the title; and so long as that transaction is permitted to stand, the estate in the hands of the executors is not liable to the receiver for any assessments made on the stock; and if the estate is not liable, then no legatee of the estate is liable under the provisions of the Wisconsin statute. We do not find it necessary to express any opinion concerning the liability of the defendant Cobb as a legatee of the estate under the Wisconsin statute in case the transaction is set aside. At the time he received his share of the estate of the testatrix, the bank was apparently amply solvent and continued to be solvent for many months afterwards. Whether the title he then took can be affected by what happened afterwards is a question which does not need to be determined so long as the title stands in the trustees.

[7, 8] The court below was clearly correct in its conclusion that the bill in its present form could not be maintained. The question remains whether the court was right in refusing the complainant the privilege of amending his bill in such manner as would cure it of its defects. The allowance or refusal of amendments is a matter which is largely within the sound discretion of a trial court, and in the absence of a clear abuse thereof its action is not reviewable on appeal. We cannot say that the court grossly abused its discretion in refusing to allow the bill to be amended. The fact that we might have permitted the bill to be amended, if we had been in the trial court's place, would not justify us in interfering with the exercise of that court's discretion, unless we were satisfied that its discretion had been grossly abused.

The decree dismissing the bill and entering judgment for defendant is affirmed.

COLLINS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1914. On Petition for Rehearing, January 11, 1915.)

No. 3981.

1. CRIMINAL LAW ⊜274—PLEA—WITHDRAWAL—PERMISSION—DISCRETION—DEMURRER TO INDICTMENT.
It was not an abuse of discretion to deny an application for leave to withdraw a plea of not guilty, that accused might demur to the indictment, because the court had previously sustained a demurrer to a similar indictment against another, which ruling was subsequently reversed, since accused could not be prejudiced or helped by such ruling, except as it might finally result in an authoritative declaration of some principle of law affecting every one.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633; Dec. Dig. ⊜274.]

2. COURTS ⊜90—TRIAL COURT—VIEWS OF LAW.
A trial court does not irrevocably commit itself to its views of the law, even in the case in which they are announced, when there is no invasion of some constitutional safeguard, like immunity from double jeopardy, nor prejudice to defendant in making his defense.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313–321, 351; Dec. Dig. ⊜90.]

On Petition for Rehearing.

3. CRIMINAL LAW ⊜1090—BILL OF EXCEPTIONS—NECESSITY.
Rulings during the trial of an action at law, not being inherently a part of the record to be reviewed on writ of error, must be embodied in a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2653, 2789, 2803–2822, 2825–2827, 2927, 2928, 2948, 3204; Dec. Dig. ⊜1090.]

4. CRIMINAL LAW ⊜1091—APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.
Where an alleged bill of exceptions contained no reference to rulings at the trial, and did not show whether any rulings were invoked, or whether the court made any, and it did not appear therefrom that an occasion for a ruling arose, or that the court ruled in fact, except as it might be inferred from the reason given by counsel for the exceptions, it was insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828–2833, 2843, 2931–2933, 2943; Dec. Dig. ⊜1091.]

5. CRIMINAL LAW ⊜1091—BILL OF EXCEPTIONS—TIME OF EXCEPTIONS.
Where a trial occurred in January, 1913, and an alleged bill of exceptions was served and allowed in March, reciting, "The defendant further excepts for the reason that the court erred" in doing thus and so, it was not thereby made to appear that the exceptions were taken at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828–2833, 2843, 2931–2933, 2943; Dec. Dig. ⊜1091.]

6. CRIMINAL LAW ⊜1091—BILL OF EXCEPTIONS—TAKING—TIME.
Though a bill of exceptions may be drawn and allowed after trial, it must show that the exceptions preserved were taken at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828–2833, 2843, 2931–2933, 2943; Dec. Dig. ⊜1091.]

7. CRIMINAL LAW ⊂⊃901—TRIAL—QUESTIONS OF LAW OR FACT—DEMURRER TO EVIDENCE—WAIVER.
Alleged error in overruling defendant's oral demurrer to the government's testimony is waived, where defendant thereupon introduces testimony in his own behalf.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. ⊂⊃901.]

8. CRIMINAL LAW ⊂⊃1121—ASSIGNMENTS OF ERROR—REVIEW.
An assignment that the court erred in denying defendant's request for a directed verdict was not reviewable, where there was nothing in the record showing when the request was made.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2938, 2939; Dec. Dig. ⊂⊃1121.]

9. CRIMINAL LAW ⊂⊃1129—APPEAL AND ERROR—ASSIGNMENTS OF ERROR.
An assignment that the court erred in entering judgment against the defendant, and in favor of the United States, was too general to present any question for review.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954–2964; Dec. Dig. ⊂⊃1129.]

10. CRIMINAL LAW ⊂⊃1091—BILL OF EXCEPTIONS—MOTION IN ARREST.
A motion in arrest of judgment is part of the record, and an exception to an order denying the same is saved in the order, and hence need not be incorporated in the bill of exceptions.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819, 2823, 2824, 2828–2833, 2843, 2931–2933, 2943; Dec. Dig. ⊂⊃1091.]

11. CRIMINAL LAW ⊂⊃1156—APPEAL—MOTION FOR NEW TRIAL.
A motion by accused for a new trial is addressed to the discretion of the court, and an order denying the same will not be reviewed.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⊂⊃1156.]

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

Jack Collins was convicted of introducing liquor into the Indian country, and he brings error. Affirmed.

W. J. Sullivan, of Muskogee, Okl., for plaintiff in error.

D. H. Linebaugh, U. S. Atty., and Frank Lee, Asst. U. S. Atty., both of Muskogee, Okl.

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

HOOK, Circuit Judge. Collins was indicted for introducing liquor into the Indian country. He waived arraignment and pleaded not guilty. When the case came on for trial, he asked leave to withdraw his plea, so that he could demur to the indictment. His motion was denied, and he was tried, convicted, and sentenced.

[1] It is admitted that granting or denying such a motion is a matter of discretion, but it is urged that the trial court abused its discretion, because it had then recently sustained a demurrer to a like indictment against one Wright, and that until reversed that ruling stood as the law of the land, to be obeyed by the court. The Supreme Court afterwards reversed the ruling in the Wright Case, 229 U. S. 226, 33

Sup. Ct. 630, 57 L. Ed. 1160; but it is contended that its decision does not relate back to cure a previous abuse of discretion by the trial court. The statement of the contention shows its unsoundness. There was no abuse of discretion. Collins was a stranger to the Wright Case, and he could be neither prejudiced nor helped by it, excepting as it might finally result in the authoritative declaration of some principle of law affecting everybody. He had no legal interest in a ruling at the trial of another case.

[2] A trial court does not irrevocably commit itself to its views of the law, even in the case in which they are announced, when there is no invasion of some constitutional safeguard, like immunity from double jeopardy, nor prejudice to the defendant in making his defense. Ordinarily a trial court may correct its misconceptions as it goes along. Certainly it is not required to carry those of one case over into another.

The sentence is affirmed.

On Petition for Rehearing.

W. J. Sullivan and R. Emmett Stewart, both of Muskogee, Okl., for petitioner.

HOOK, Circuit Judge. This is a petition by Collins for rehearing upon the ground that the court overlooked certain assignments of error. The rules of appellate procedure are for the most part so well settled that the constant repetition of them in opinions serves no useful purpose. To do much more than to discuss meritorious questions properly preserved and presented is a task beyond the capacity of the courts. However, as this case involves the liberty of a citizen, and the assignments referred to are not on their face without merit, we will give the reasons for their omission from the opinion, though in doing so we but say what has been said very many times before. The assignments are:

5. Because the court erred in overruling the defendant's oral demurrer at the conclusion of government's testimony, for the reason that no testimony was adduced wherein it was shown, or wherein it was attempted to be shown, or wherein it was proven, that the alleged introduction of intoxicating liquors, set out in the purported indictment, were introduced into Indian country from without said Indian country and from without the state of Oklahoma.

6. Because the court erred in refusing defendant's request to direct the jury in said cause to return a verdict of not guilty, for the reason that the proof adduced did not in any way show, nor did it even tend to show, the initial point of shipment, whether interstate or intrastate, and no proof was adduced to connect this defendant with its introduction into Indian country and from without the state of Oklahoma.

8. Because the court erred in this: That under the purported indictment and the proof introduced by the government, a conflict arose, for the reason of obscurity, uncertainty, and lack of knowledge of any point without the Indian country, or the state of Oklahoma, from whence it came.

10. Because the court erred in entering judgment herein against the defendant and in favor of the United States of America.

[3] Rulings during a trial of a cause at law, not being inherently a part of the record, must, to be reviewed in an appellate court, be

embodied in a bill of exceptions. The bill of exceptions in this case, aside from the formal parts, is composed of three instruments: (1) A statement, signed by counsel for Collins, the defendant; (2) a stipulation as to the testimony adduced, signed by counsel for both parties; (3) defendant's motion in arrest of judgment.

[4] Except in the first of these, no reference whatever is made to rulings at the trial; and even in the first, whether any rulings were invoked, or whether the court made any, is not affirmatively stated, but is left to inference or implication. For example, it is stated by defendant's counsel:

"The defendant further excepts for the reason that the court erred in refusing defendant's request to direct the jury in said cause to return a verdict of not guilty."

Here, and in each of the other instances set forth in the statement, it does not appear that an occasion for a ruling arose, or that the court ruled, except as it may be inferred from the reason given by counsel for the exception.

[5] But if we assume that by signing the bill of exceptions the trial court certified in effect that the reasons given by counsel for exceptions set forth actual rulings at the trial, there is still a fatal defect in the bill of exceptions. It does not appear that the exceptions were taken at the trial. On the contrary, it appears they were taken afterwards. Unlike bills of exceptions in some cases, no help is given by a progressive, chronological recital of the proceedings in the trial court from which the time of exceptions and of other occurrences might fairly be inferred. As already observed, the only exceptions mentioned in the bill are those recited in the statement signed by defendant's counsel. The trial was in January, 1913; the bill of exceptions was served and allowed in March, more than a month afterwards. The exceptions appear as presently taken to rulings in the past—as taken when the bill of exceptions was prepared. Each paragraph in the statement begins: "The defendant further excepts for the reason that the court erred" in doing so and so. One of them recited the ruling on the motion in arrest of judgment, which was obviously after the trial.

The office of a bill of exceptions has been misconceived. It is for recording exceptions that were taken to rulings of the court; it is not for the present taking of exceptions to rulings in a trial that has ended. In this particular the case at bar is similar to Pacific Express Co. v. Malin, 132 U. S. 531, 10 Sup. Ct. 166, 33 L. Ed. 450. There the verdict was rendered October 6th. On October 8th two bills of exceptions were tendered to the court and signed. Both related to the charge to the jury. One of them began: "Now comes the defendant and excepts," etc., and concluded: "And for said reasons defendant objects and excepts," etc. The beginning of the other was similar. The Supreme Court said:

"It may be further remarked that the alleged bills of exceptions do not show that the exceptions were taken on the trial. While exceptions may be reduced to form and signed after the trial, they must appear affirmatively to have been taken before the jury withdrew from the bar."

See, also, United States v. Carey, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67, where it was sought to take an exception to a ruling on evidence by a bill of exceptions tendered after the trial.

[6] That motions and objections are made and overruled is not sufficient without exceptions to bring them before an appellate court. Newport News, etc., Co. v. Place, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887. Though the bill of exceptions may be drawn and allowed afterwards, the exception itself must be taken at the trial. Phelps v. Mayer, 16 How. 160, 14 L. Ed. 643. In Insurance Co. v. Boon, 95 U. S. 117, 127 (24 L. Ed. 395), the court said:

"We hold now, as we have always holden, that when bills of exceptions are necessary to bring any matter upon record so that it can be reviewed in error, it must appear by the record that the exception was taken at the trial. A judge cannot afterwards allow one not taken in time."

[7-9] But, if the foregoing were not in the way, there would still be difficulties. The fifth assignment of error is directed to the overruling of defendant's oral demurrer to the Government's testimony. The defendant nevertheless introduced his testimony. See Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740. The sixth assignment is on a denial of defendant's request for a directed verdict. There is nothing in the record showing when the request was made; for aught that appears it may have been coupled with the oral demurrer. The eighth assignment is in two sentences, the first of which only is in the bill of exceptions. The first sentence, standing by itself, is too indefinite to indicate what was meant. The second sentence was designed to make it clear, but it first appeared in that connection in the assignment of error. See Missouri Pacific Railway v. Fitzgerald, 160 U. S. 556, 575, 16 Sup. Ct. 389, 40 L. Ed. 536. The tenth assignment is:

"Because the court erred in entering judgment herein against the defendant and in favor of the United States of America."

This is too general to present a question for review. See Scholey v. Rew, 23 Wall. 331, 345, 23 L. Ed. 99; Texas & Pacific R. Co. v. Archibald, 170 U. S. 665, 668, 18 Sup. Ct. 777, 42 L. Ed. 1188.

[10] The motion in arrest of judgment was unnecessarily incorporated in the bill of exceptions. The order overruling it properly appears in the record outside. An exception was saved in the order. No assignment of error was directed in terms to the overruling of the motion, but one of the grounds of the motion was that:

"The court erred at the close of government's case, to overrule defendant's demurrer to the testimony introduced, and refusing to direct a verdict of not guilty, said testimony entirely failing," etc.

If the fifth and sixth assignments of error are based upon the presence of these two matters in the motion, it would still have to be said that the sufficiency of the evidence to sustain the verdict and judgment cannot be tested by a motion in arrest. See Bond v. Dustin, 112 U. S. 604, 608, 5 Sup. Ct. 296, 28 L. Ed. 835.

[11] But if as to these matters the motion were treated as one for a new trial, we would get no further. A motion for a new trial is addressed to the discretion of the trial court. An order denying it

will not be reviewed. See Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725. It may be added that no assignment of error filed in the trial court, as distinguished from those set forth in the brief of counsel, directly or distinctly challenged the sufficiency of the indictment.

The foregoing rules are old in the law. Most of them have been announced very many times by the appellate courts of the United States. Some are essential to justice itself; all are important to the orderly and efficient conduct of judicial business. Compliance with them is no hardship. There are cases in which we will notice plain errors not assigned, and endeavor so far as we can to see that no grievous wrong results from the machinery of procedure. But the power is not without limitations; and it should be cautiously exercised—as, for example, where in the final analysis of the merits of a case we feel that an innocent man has been convicted.

The petition for rehearing is denied.

BELL et al. v. ARLEDGE et al.

In re LONG LEAF LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. December 16, 1914.)

No. 2653.

1. BANKRUPTCY ⊂=348—LABOR CLAIMS—RIGHT TO LIEN—SUBROGATION.
Where claimants, a mercantile firm, furnished supplies to a lumber company's employés, taking time checks therefor, passing by delivery without any assignment of the laborers' claims and relying entirely on the lumber company's credit to redeem the checks, there was no subrogation to the rights of the employés so as to entitle claimants to a lien on the lumber company's assets in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.]

2. APPEAL AND ERROR ⊂=1099—DECISION ON FORMER APPEAL—RES JUDICATA.
A decision on a former appeal to which claimants were parties that they were not entitled to subrogation to the liens of certain laborers by a transfer of time checks in consideration for supplies was res judicata, and ended the litigation so far as claimants' right to a lien was concerned.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. ⊂=1099.]

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

In the matter of bankruptcy proceedings of the Long Leaf Lumber Company, bankrupt. From a decree awarding to claimants Holland & Weisinger a lien on certain labor claims over objections of E. C. Arledge, trustee in bankruptcy, William A. Bell and others appeal. Reversed and remanded, with instructions to dismiss claimants' demand for lien.

N. C. Abbott, of Houston, Tex., for appellants.
W. L. Hill, of Huntsville, Tex., for appellees.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PARDEE, Circuit Judge. This is the second appeal in the above entitled cause contesting the claims of Holland & Weisinger, lienholders upon the estate of the bankrupt. On the first appeal this court, after reciting the facts and evidence, held and decided as follows:

"From the above and foregoing, it is apparent that Holland and Weisinger, in all matters involved in their account herein, whether in selling goods and merchandise, taking up scrip, paying checks, or accepting orders, were acting under their agreement with the Long Leaf Lumber Company, and for payment were relying upon the credit of that company, and that the claim of a lien under assignment from laborers was an afterthought. Certain it is that the evidence does not show any assignment of any laborers' claim or lien.

"Under the facts in this case, an assignment (to carry a lien) of scrip or duebills, passing by delivery and payable to bearer on or before 10 years, cannot well be presumed, and an assignment of laborers' claims, where neither the laborer nor the specific labor is proved, should not be presumed.

"The statute article 3339d, Texas Civil Statutes, subrogates assignees, but not every person who may come in possession of the claim. See Union Trust Co. v. Southern Sawmill, etc., 166 Fed. 193-202, 92 C. C. A. 101, and cases there cited.

"On the whole case, we conclude that the judgment appealed from should be affirmed as to appellees Watts and Stone, and reversed as to Holland & Weisinger; costs of this court to be divided, one-half to appellants and one-half to Holland & Weisinger. No docket fees. And it is so ordered." 192 Fed. 842, 843, 113 C. C. A. 161.

Two years after this decision and mandate duly entered in the lower court, Holland & Weisinger, assuming that the case was open for further contest as to their claimed lien, and apparently without leave, filed what was entitled "Plaintiffs' Amended Bill," generally and in detail setting forth their claims, and concluding with a prayer as follows:

"Premises considered, petitioners pray that upon a hearing hereof they have judgment against the said bankrupt, the Long Leaf Lumber Company, for the amount of their claim, with legal interest thereon from the date thereof, and that the same be declared to be secured by a valid lien upon the assets of the said Long Leaf Lumber Company, formerly in the hands of the referee in bankruptcy in this cause, and that they have judgment against the said W. A. Bell and L. B. Menefee for the amount of said account, interest, and costs of suit."

Without any answer to the same so far as the record shows, Holland was again examined as a witness, and on the material issue of assignment vel non he testified as follows:

"Q. In your petition filed in this case about a year ago, after the original claims were filed, the petition contained this allegation: 'That your petitioner entered into a contract and agreement with the bankrupt whereby it was arranged between the petitioner and the bankrupt that the management of said mill should issue checks, duebills, and statements of indebtedness due by said Long Leaf Lumber Company to said laborers, and that your petitioner would take up or cash said checks, duebills, or orders, and should be reimbursed by the said Long Leaf Lumber Company for the amount so paid.' That is a true statement, is it not, Mr. Holland? A. Yes, sir. Q. That is the exact situation as it existed at that time between you and the

company? A. Yes, sir. Q. You had no contract with the laborers at all? A. I had no contract with the laborers. Q. You had no contract with any of the laborers individually? A. We had a contract to furnish them goods for these checks, but you might say I did not have any special one, it was the laborers in general. Q. Is there any laborer that you had a contract with with reference to furnishing the money on these checks? A. No, sir; we had no contract with individuals. Q. Your contract was wholly between you and the Long Leaf Lumber Company? A. Between Holland & Weisinger and the president and Mr. Stone. Q. Mr. Stone was simply representing the Long Leaf Lumber Company? A. Yes, sir; as manager. Q. Now I will read you a part of the testimony given by Mr. Stone, as shown in the opinion of the Circuit Court of Appeals: 'The Long Leaf Lumber Company had an agreement with Holland & Weisinger to cash or pay off all these mill checks, duebills, and orders with the understanding that at stated times the Long Leaf Lumber Company would pay the said Holland & Weisinger the amount due them for such items, and from time to time Holland & Weisinger rendered statements of the amount so due them and surrendered the mill checks, duebills, and orders, and were paid in accordance with said agreement.' That was a truthful statement of the situation, was it not? A. Yes, sir. Q. Reading further from his testimony as given in the opinion of the court: 'At the time of the closing of the business of the Long Leaf Lumber Company it was indebted to the said Holland & Weisinger for mill checks, duebills, and orders held by them in the amount of $1,341.59.' That was correct? A. Yes, sir."

Re-examined by Mr. Hill:

"We bought these mill checks from the laborers; they were under no obligation to deliver them to us any more than to any other person; they could have retained them and had them paid by the Long Leaf Lumber Company, in fact a great number of the laborers did that very thing. In order to get these duebills or mill checks we had to buy it or pay him for it. We bought them in every instance represented in this account, and other people bought them the same as we did. We bought these duebills or mill checks as a result of an agreement between ourselves and the laborers that held it that we would take it and pay the money or give him goods for it, and he would surrender it to us. They were not orders issued by Holland & Weisinger. The check reads as follows: 'There is due.....dollars for labor.' In the duebills the names of the laborers were given, but the names were not on the checks. If I got a duebill it would just be, say, for instance, Bill Johnson has $10 worth of time due him by the Long Leaf Lumber Company. The mill check is an ordinary check or round piece of paper, and printed on them would be 'good for 5c,' or '10c,' or '25c,' as the case may be.

"The duebill is a written statement in substance to the effect: 'There is due.....dollars for labor.' We had a bunch of these mill checks at the trial before, and they were offered in evidence. I do not know where they now are. We made the agreement because we could buy the checks and buy them in a way that we could afford to pay the Long Leaf Lumber Company; we got the checks at a discount. It was the agreement that on paying them every 30 days we were to give them the discount. There was no agreement with the Long Leaf Lumber Company that we were to look alone to them for payment. The contract between us and Judge Ford, the president of the company, expressly stated that we would have a laborer's lien to secure these checks, and we bought the checks and duebills with that understanding and agreement."

Cross-examined by Mr. Abbott:

"Q. Did you have any agreement with any of these laborers that they would be responsible for the amount due on these checks, provided the Long Leaf Lumber Company did not pay them? A. I had no agreement with them. Q. You kept no account of the laborers from whom you bought the checks? A. Some of them are here. I think you will see in the account where the

name shows from whom we bought the checks; some of them don't; we did not keep all the names. Q. Speaking generally, you can name the people from whom you bought these checks? A. I could name some of them. Q. Just from memory? A. Yes, sir."

Redirect, examined by Mr. Hill:

"My recollections are that on the former trial we had mill checks amounting to $205.55, and the balance represented by duebills. The duebills show each laborer to whom it was issued, the mill checks do not."

Thereafter the case was again submitted to the court presumably on all the evidence, and judgment was rendered in favor of Holland & Weisinger as follows:

"On this 28th day of February, 1914, there came on to be heard the matter of the claim of Holland & Weisinger, and the court, having heard the evidence and argument of the counsel, is of the opinion that the petitioners Holland & Weisinger should recover of and from W. A. Bell and L. B. Menefee the amount of their proven claim of $1,342.59, less the sum of $205.55, to wit, the sum of $1,137.04; and it is therefore ordered, adjudged, and decreed by the court that the petitioners Holland & Weisinger do have and recover of and from W. A. Bell and L. B. Menefee the said sum of $1,137.04, with interest thereon at the rate of 6 per cent. per annum from the 3d day of March, 1908, and all costs in this behalf expended, for which let execution issue, to which finding and judgment W. A. Bell and L. B. Menefee except and in open court give notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, and 60 days from this date is given them to prepare and submit bills of exception, statement of facts, and record for appeal."

From this judgment this appeal is prosecuted.

[1] Assuming that under our former decision, adverse to the lien claimed by Holland & Weisinger, the case after mandate received and entered upon was open for addition and amendment of the pleadings and a new trial of the issue, we find that on such amendment as was made and such additional evidence taken the case stands no better for the allowance of the lien claimed; because the evidence still shows that neither by contract, transfer, assignment, nor subrogation is the lien claimed sufficiently proved.

[2] However this may be, our former decision was res adjudicata, and, so far as the claims of Holland & Weisinger for a lien on the property of the bankrupt was concerned, ended the litigation, and in the lower court there was nothing left to do in proceeding thereafter in accordance with the views expressed in our opinion than to dismiss the claim with costs. See Durant v. Essex Co., 101 U. S. 555, 25 L. Ed. 961; Kingsbury v. Buckner, 134 U. S. 671, 10 Sup. Ct. 638, 33 L. Ed. 1047; Tyler v. Magwire, 84 U. S. (17 Wall.) 283;[1] Gaines v. Rugg, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; In re Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414.

In Gaines v. Rugg, just cited (148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432), which as to reversal and mandate and after proceedings was very similar to the case in hand, it is said:

"It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the Circuit Court; that the Circuit Court had a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this court,' but also 'according to right and justice,' and that therefore it had authority to permit

[1] 21 L. Ed. 576.

the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands'; in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and it is not in accordance with the opinion and mandate of this court."

See pages 239, 240 of 148 U. S., page 615 of 13 Sup. Ct. [37 L. Ed. 432].

The decree appealed from is reversed, and the cause is remanded, with instructions to dismiss the claim and demand of Holland & Weisinger for a lien on the property of the Long Leaf Lumber Company and as against appellants herein, with costs.

NELSON v. HECKSCHER et al.

In re BLANTON.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1914.)

No. 1262.

BANKRUPTCY ⊂=359—DIVIDENDS—APPEAL—REVERSAL—REFUND.

After a bankruptcy adjudication, H. and others recovered a judgment against the bankrupt in a state court for $4,276.68. That court, however, disallowed an additional claim for $5,000. The bankruptcy court allowed as a claim against the estate the amount fixed in the state court judgment, and ordered that the claimant should not be prejudiced by filing his claim for such amount in any further proceeding taken in connection with the prosecution of an appeal from the order disallowing the additional sum, and that the declaration of dividends would be withheld, provided an appeal was perfected within 60 days; otherwise, the court would not delay its action, or take account of the probable outcome of such appeal, and the further prosecution of the suit. H. and others waited more than 60 days, and then prosecuted their appeal, in which the bankrupt assigned cross-errors, asking that the whole judgment against him be reversed. Pending the appeal, dividends were paid to H. and others on the claim as allowed, whereupon the state court reversed the judgment against the bankrupt in toto. *Held*, that the condition on which the opportunity to hold up the dividends pending the appeal depended was as binding on the claimants as on the bankrupt and the trustee, and, not having appealed in time, claimants waived the condition, and hence the bankrupt's trustee was entitled to recover the dividends paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 545, 546; Dec. Dig. ⊂=359.

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

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 bankruptcy proceedings against Joseph W. Blanton. A. Heckscher and others having been awarded dividends on a judgment recovered against the bankrupt in the state court, and such judgment having been reversed on appeal, Leon M. Nelson, trustee, applied to compel the repayment of the dividends, and petitions to su-

perintend and revise, in matter of law, an order of the District Court confirming a referee's order denying such application. Reversed.

S. S. P. Patteson and R. L. Montague, both of Richmond, Va., for petitioner.

A. L. Holladay and Hill Montague, both of Richmond, Va. (A. B. Dickinson, of Richmond, Va., on the brief), for respondents.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Proceedings instituted by Warner Moore & Co. and other creditors on September 12, 1907, resulted in Joseph W. Blanton being adjudged an involuntary bankrupt on October 7, 1907. At these dates an action by A. Heckscher and others against Blanton was pending in the law and equity court of the city of Richmond, and on November 11, 1907, after the adjudication in bankruptcy, a judgment was entered in favor of the plaintiffs for the aggregate sum of $4,276.68, with interest from September 15, 1899. In this litigation the state court disallowed an additional claim of $5,000 and interest set up by the plaintiffs. On May 27, 1907, under a petition filed by Heckscher and his associates, the referee in bankruptcy recommended the payment of dividends to them on the amounts recovered in the state court. As to this petition and report the court made this order on December 23, 1907:

"It is ordered that the petitioners above named may file their proof of debt against the bankrupt's estate before the referee in this case for the amount specified in the decree of the law and equity court of the city of Richmond of November 11, 1907, being one of the exhibits filed with their said petition, and by so doing, and the receiving of any dividend properly declared upon their said debt, they shall not be prejudiced in any further proceeding that they may take in connection with the prosecution of an appeal in the Supreme Court of Appeals of Virginia, or before the law and equity court of the city of Richmond, on account of the indebtedness claimed by them to exist against the bankrupt. The declaration of a dividend, however, upon said debt, is hereby withheld until the further order of the court herein. Petitioners having intimated in their said petition a desire to appeal from the order of the law and equity court of the city of Richmond fixing the amount of said indebtedness, as covered by the decree of 11th November, 1907, as well as determining that the same is a debt as to which the discharge in this case will be a bar, and counsel for the bankrupt and general creditors having likewise intimated a desire to appeal from said decree fixing any liability against the bankrupt aforesaid, the court doth order that said appeals be perfected within 60 days from this date; otherwise, this court will not delay its action herein or take further account of the probable outcome of such appeals and the further prosecution of said suit."

No appeal having been perfected within the 60 days, under an order made 17th of June, 1908, without objection from the trustee of the bankrupt, dividends were paid to Heckscher and his associates according to the decree of the state court; but after receiving the payments they perfected their appeal, seeking to have the Supreme Court of Appeals of Virginia modify the judgment of the law and equity court by allowing them their additional claim of $5,000 and interest which that court had rejected. The bankrupt, Blanton, in accordance with the state practice, assigned cross-error, asking the Supreme Court of Ap-

peals to hold that there should have been no recovery against him in favor of Heckscher and others. The Supreme Court of Appeals of Virginia decided all the issues in favor of the bankrupt, and reversed and overruled the judgment entered against him on the faith of which dividends had been paid out of his estate to Heckscher and the other plaintiffs in the action. Relying on the judgment of reversal, the trustee of the bankrupt estate, by petition filed March 3, 1911, asked the referee to reconsider and reject the claims of Heckscher and his associates, and require them to pay back to the trustee the amounts paid to them as dividends, with interest from the date of payment. The referee sustained a demurrer to this petition, and his action was confirmed by the District Court, on the ground that the order of the court above quoted, withholding the dividends, was on the express condition that the appeal should be perfected within 60 days from its date; "otherwise, this court will not delay its action herein or take further account of the probable outcome of such appeal and the prosecution of said suit."

The review of this action of the District Court involves a question of law only since the facts were admitted. The Bankruptcy Act provides that creditors may be required to refund dividends paid to them at any time before the estate is finally settled. Section 57, "c," "k," and "*l*"; Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. None of the parties questions the propriety of the action of the District Court in allowing the litigants to continue their contest in the state courts to a conclusion; and it cannot be doubted that the final judgment of the state court as to the amount and validity of the claim of Heckscher and his associates should be held binding on them as well as on the bankrupt. It follows that, when the trustee asked the District Court to require Heckscher and his associates to refund the money paid to them from the bankrupt estate, they appeared before the court as persons who had received a portion of the bankrupt estate without any legal right to it.

It is insisted, however, on the authority of Deposit Bank v. Board of Councilmen, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. Ed. 276, that the final adjudication by the Supreme Court of Appeals of Virginia could not affect the rights of the parties, since they had been already determined by the order of the District Court. That case cited does not apply, for the reason that in this case the District Court held up the matter on the merits and refused to adjudge in accordance with the judgment of the court of law and equity, but, on the contrary, allowed the parties opportunity to obtain the judgment of the Supreme Court.

The condition upon which that opportunity was allowed was as binding on the claimants as on the bankrupt and the trustee. The claimants, Heckscher and his associates, cannot be allowed to avail themselves of the benefits of the condition that the appeals should be perfected in 60 days without being bound by its restrictions. The order clearly imported the condition that both parties should perfect their appeals within 60 days. Had the claimants perfected their appeal within 60 days, the bankrupt could have objected to the payment of dividends to

them until he could come into the appeal by cross-error and have the entire issue which was before the lower court passed on by the Supreme Court of Appeals; and the federal court could not have hesitated to sustain the objection. The fact that the bankrupt made no objection to the payment of dividends after the expiration of the 60 days is nothing against him on the issue of requiring the dividends to be refunded after the decision of the Supreme Court of Appeals, for he might well have been content to let the matter rest as it was adjudged by the court of law and equity, rather than incur the expense of further litigation. But when the claimants, after receiving the dividends, disregarded the condition of 60 days and took their appeal, they by that act asserted to the bankrupt the invalidity of the condition, and their right to increase his debt to them by appeal, and to set up any increase they could obtain in the bankrupt court. This was a clear challenge to relitigate the matter, waiving the condition as to time prescribed by the federal court. Having thus waived the protection of the time condition and reopened the litigation, it does not lie in the mouths of Heckscher and his associates to say they will not abide the unfavorable result. They cannot be allowed, after they have asserted the invalidity of the 60 days condition as against themselves, to assert that the bankrupt was wholly cut off from having the judgment against him reversed by the Supreme Court of Appeals by reason of the validity of the 60 days condition; nor can they be allowed to hold the dividends paid to them on the faith of their own observance of the condition, after they have put the bankrupt to the expense and pains of meeting their appeal undertaken in disregard of the condition. They must abide the result of the appeal which they themselves instituted.

Reversed.

NELSON v. HECKSCHER et al.

In re BLANTON.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1914.)

No. 1279.

BANKRUPTCY ⊂=440—ORDER IN BANKRUPTCY PROCEEDINGS—REVIEW—APPEAL.

Where an order denying the petition of a bankrupt's trustee to recover dividends paid to certain claimants, involving questions of law only, it was reviewable on a petition to superintend and revise, and not by appeal.

[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.]

Appeal from 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 bankruptcy proceedings of Joseph W. Blanton. From an order denying the petition of Leon M. Nelson, trustee, to re-

cover certain dividends paid on claims of A. Heckscher and others, the trustee appeals. Dismissed.

S. S. P. Patteson and R. L. Montague, both of Richmond, Va., for appellant.

A. L. Holladay and Hill Montague, both of Richmond, Va. (A. B. Dickinson, of Richmond, Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This case was brought up for review, both by petition to superintend and revise and by appeal. As there are only questions of law involved, the case was decided upon the petition to superintend and revise. 219 Fed. 679, 135 C. C. A. 351.

For this reason, the appeal in this case will be dismissed, with costs, as having been improvidently taken.

Dismissed.

GRANTZ et al. v. LUCKENBACH et al.

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

No. 1286.

COLLISION ⊂⇒105—STEAMSHIPS IN HARBOR WATERS—MUTUAL FAULTS.

A decree finding that the steamships Sigmaringen and Jacob Luckenbach were both in fault for a collision in the Patapsco river in the daytime, when one, in swinging to enter the main channel from the anchorage grounds on its west side, passed into the Curtis Bay channel on the north, down which the other was approaching, *held* sustained by the evidence, on the ground that, although one was approaching from the starboard side of the other on a crossing course, neither obeyed the starboard hand rule, and that both proceeded at full speed without any signal agreement for crossing, and without proper reference to the movements of the other, although the danger of collision should have been apparent.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⊂⇒105.]

Cross-Appeals from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for collision by Herman Grantz, master of the steamship Sigmaringen, against the steamship Jacob Luckenbach, with cross-libel by Edgar F. Luckenbach and others, joint owners of the Luckenbach, against the Sigmaringen. Decree against each vessel for half damages, and both appeal. Affirmed.

For opinion below, see 206 Fed. 226.

R. E. Lee Marshall, of Baltimore, Md. (Charles W. Field, of Baltimore, Md., on the brief), for appellants and cross-appellees.

James K. Symmers, of New York City (Barry, Wainwright, Thacher & Symmers, of New York City, on the brief), for appellees and cross-appellants.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On April 28, 1913, at about 6:11 in the morning, the Jacob Luckenbach, an American steamship, and the Sig-

maringen, a German steamship, collided in the Patapsco river near the junction of the Curtis Bay and the Ft. McHenry channels. Both vessels were injured, and there was a libel by the Sigmaringen and a cross-libel by the Luckenbach; each alleging the other to be entirely at fault. The District Court found both vessels at fault and decreed accordingly, and both have appealed. The material issues may be disposed of without particular reference to the numerous assignments of error.

The Luckenbach, 300 feet long, with a full cargo of coal and drawing 24 feet of water, was proceeding from the Curtis Bay channel, which is 250 feet wide and 30 feet deep, with the intention of stopping temporarily in the anchorage basin before going to sea. Its maximum speed was 8 knots, and it was going at about 5 knots, an hour. The Sigmaringen, 394 feet long, in ballast and drawing about 26 feet of water, had anchored the night before in the anchorage basin, with the intention of proceeding the next morning to Baltimore. The anchorage basin, which is 300 feet wide and 35 feet deep, lies south of the Curtis Bay channel and west of the main Ft. McHenry channel, where the two channels come together almost at a right angle. There was some difference among the witnesses as to the precise point of the anchorage of the Sigmaringen; but we think the testimony well supports the conclusion of the District Judge that it was on the western side of the basin and about 1,000 feet from the White Spar buoy, which is located on the northwestern corner of the anchorage basin, where it makes off from the Curtis Bay channel.

Before the Sigmaringen moved, it was in a west wind of 6 miles an hour, and so headed west—whether exactly west, or a little north or south of west, is immaterial. The pilot on the Sigmaringen testified that from this position, in order to get into the Ft. McHenry channel, he gave the order, "Slow ahead, hard aport helm." When this starting order was given the Luckenbach was in full view, coming down the Curtis Bay channel about a half mile distant. The effect of the order was to start the engine at 6:07, and swing the ship to starboard with a slow movement forward. At 6:08, the engines were by order of the pilot, put at full speed ahead. The Sigmaringen, thus steaming diagonally across the anchorage grounds to the Ft. McHenry channel with the change to full speed, was headed to cross the course of the Luckenbach, coming down the Curtis Bay channel a very short distance away. On the other hand, the master of the Luckenbach could not fail to observe that the Sigmaringen was on his starboard; and he was therefore bound to know that if rule 19 applied his duty was to keep out of her way. It is not necessary to attempt to fix exact distances and locations, for in these narrow waters very careful navigation was due from two vessels in such close proximity.

It should have been evident to the pilot of the Sigmaringen, in this situation, that there would be some risk of the Luckenbach getting out of the channel, if she attempted to pass around the Spar buoy astern of the Sigmaringen. The risk would have been obviously greater if the Sigmaringen kept its slow speed, which she was bound to do under article 21 if she intended to depend on the Luckenbach's observing article 19 and keeping out of her way. The plain view of the Luckenbach going straight ahead was sufficient warning to the Sigmaringen that

the master of the Luckenbach did not agree that he was bound to keep out of the way or pass astern, and yet she proceeded and increased her speed in violation of the rule.

The warning to the master of the Luckenbach of the danger of collision was equally clear from the moment that he saw the Sigmaringen weigh anchor and commence to turn; for this was notice that she probably intended to leave the anchorage basin and go into one or the other of the channels. The Luckenbach was then about opposite the last buoy, which was very near the junction of the two channels, and intending to go into the anchorage basin, from which the Sigmaringen was moving.

This statement of the general course of the two vessels and their proximity, about which there seems to be no dispute, leaves no doubt that due care required that neither should proceed without an understanding between them as to the course each would take. We cannot resist the conclusion that both went stubbornly ahead without any understanding, each taking for granted, without response from the other, that in a doubtful situation the other had heard and would act on her signal. The Sigmaringen gave one blast as she straightened for the channel, and, though receiving no answer to indicate that the Luckenbach had heard and would keep clear of her starboard course, she not only continued, but increased her speed, and slightly changed her course. Reliance on the sight of escaping steam from the whistle of the Luckenbach without any sound, as indicating an assent to her signal, cannot excuse this negligence; for the failure of the whistle of the Luckenbach to sound should have been notice to the Sigmaringen that the Luckenbach might be unable to signal her course.

Under these conditions the duty of the Sigmaringen to slow down or reverse, rather than accelerate her speed, seems plain. The case of The Cygnus, 142 Fed. 85, 73 C. C. A. 309, relied on by counsel, was entirely different. There the Dimock, the privileged vessel, kept her speed, gave the signal of one blast, heard the signal given by the Cygnus, the burdened vessel, of two blasts, which indicated a proposal to waive the privilege; the Dimock refused to respond, thus indicating plainly her refusal to waive her privilege. The court therefore held that the Dimock was not in fault, and that the collision was due to the ignorance of the master of the Cygnus that it was his duty under the rule to keep out of the way of the Dimock unless she waived her privilege.

The utmost that can be said for the master of the Luckenbach is that he might have had reason to doubt, when the Sigmaringen first weighed anchor, whether she would take an opposite or a crossing course. But he had every reason to believe, from the movement of the Sigmaringen, that in leaving the anchorage basin she would steer into one of the channels with the risk of collision, unless the required precautions were taken. She was on his starboard, and his obligation was to keep out of her way, if she did that which he ought to have known she probably would do, namely, go into the main channel across his own course, which was to be into the anchorage basin. Indeed, he admits that, although he saw the Sigmaringen under hard aport helm, he took for granted she would move starboard to starboard, did not signal, and kept on his course, without slowing down, reversing, or taking any

other precaution. Contrary to the well-established rule, he expected to cross the bow of the Sigmaringen by a "close shave." His testimony shows that he thought of the duty of having an understanding with the Sigmaringen by signals, but did not give them promptly, for fear of confusing two other vessels. He later did signal with two blasts, and, though there was no response, did not reverse until it was too late. It seems obvious that when the master of a steamer sees that the circumstances require signaling the nearest vessel to avoid misunderstanding, and cannot give the signal for fear of confusing other vessels, his duty is to stop.

We see no ground to excuse either of the vessels under the rule that the privileged steamer will not be held in fault for maintaining her course and speed as long as it is possible for the other to avoid her by porting, in the absence of some distinct indication that the burdened vessel is about to fail in her duty. The Delaware, 161 U. S. 466, 16 Sup. Ct. 516, 40 L. Ed. 771; The Cygnus, 142 Fed. 85, 73 C. C. A. 309.

On the contrary, accepting with full faith the reasons given by the officers of each of the vessels for the course they took, both vessels were clearly in fault under the rule that if a steamer be approaching another which has disregarded her signals, or whose positions or movements are uncertain, she is bound to stop until the course of the other vessel be ascertained. The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

The judgment of the District Court is affirmed.

ATCHISON, T. & S. F. RY. CO. v. DE SEDILLO.†

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4158.

1. RAILROADS ⟸346—PERSONS ON TRACK—DEATH—PRESUMPTION OF DUE CARE.

   Where it was claimed that decedent was killed while endeavoring to cross defendant's railroad tracks at a point where a much-used path passed over the tracks, a presumption that, in the absence of direct evidence to the contrary, decedent was exercising due care to discover and avoid the cars, could not apply until it was shown that he undertook to cross at the point claimed.

   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1117–1123; Dec. Dig. ⟸346.]

2. RAILROADS ⟸348—PERSONS ON TRACK—DEATH—EVIDENCE.

   In an action for death of plaintiff's decedent on a railroad track, evidence *held* insufficient to warrant a finding that decedent was killed while attempting to cross the tracks at a point where a path led over them and where the railroad company would be required to exercise care to avoid injury to persons.

   [Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. ⟸348.]

3. EVIDENCE ⟸54—PRESUMPTIONS.

   In the great majority of cases, a presumption cannot be based on another presumption.

   [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 74; Dec. Dig. ⟸54.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 19, 1915.

In Error to the District Court of the United States for the District of New Mexico; Wm. H. Pope, Judge.

Action by Josefita G. De Sedillo against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for a new trial.

W. C. Reid, of Albuquerque, N. M., and Robert Dunlap, of Chicago, Ill. (Gardiner Lathrop, of Chicago, Ill., H. L. Waldo, of East Las Vegas, N. M., and R. E. Twitchell, of Santa Fé, N. M., on the brief), for plaintiff in error.

Marron & Wood, of Albuquerque, N. M., for defendant in error.

Before CARLAND, Circuit Judge, and THOMAS C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. Defendant in error recovered judgment against the railway company for the killing of her husband, Rafael L. De Sedillo, by the alleged negligent operation of an engine and cars at Albuquerque, N. M. The railway company denied negligence, and alleged that the death of De Sedillo was attributable to his own negligence, and that he was intoxicated at the time he was struck by the cars of the railway company.

Some time after midnight on the 24th of March, 1912, De Sedillo left a saloon in Albuquerque. His body was found about 4 o'clock in the morning of that day upon the track in the switchyard of the railway company about 500 feet distant from a point at which a path led up to the embankment on which were laid the railway tracks of plaintiff in error. It is alleged that De Sedillo was struck while in the act of crossing the tracks at this point, after having gone along this path, with the intention of going to his mother's house, which was situated on the other side of the tracks. His mother lived in the outskirts of Albuquerque, and adjacent to the yards of the railway company. In order to reach her house from the saloon it was necessary for De Sedillo to cross the railway tracks at some point. He could have crossed at a public crossing called the Baralas Crossing, on Trumbull avenue, not very far from his mother's house. The path referred to ran across a piece of acreage. By the path the distance to her house was shorter than by way of the Baralas Crossing. There were four parallel tracks between the point where this path struck the right of way of the railway company, and the house of the mother of De Sedillo. It had rained during the night. At 7 o'clock that morning heel marks or footprints were found on the path near the railway track, and between the rails of the first track. The mother of De Sedillo heard cries during the night. From a point on the railway track near the path, and extending to a point about 25 yards from where the body was found, two marks appeared on the ground. The switching crew switched cars in the yard that night and morning.

The extent to which reliance is placed on inference in this case is shown from an excerpt from the statement to the jury, immediately after it was impaneled, by the attorney for defendant in error. After narrating the facts, as above stated, he said:

"We will ask you to infer from this evidence as a matter of fact that the deceased was coming, from where he had been with his friends, along the path; that he went up there and hesitated before going on the tracks; that when he stepped upon the tracks he suddenly found himself confronted with these cars coming down on him out of the darkness. * * * He found these cars suddenly coming down there through the darkness. He attempted to throw himself back off the track when the cars hit him, threw him backwards in the way they were going. He seized something under the car, the brake or some other exposed place, grasped it with his hands, and began to call out for help, and no one in charge of the train hearing him, and they dragged him, hanging on this way, 500 feet or thereabouts, and went over to cross tracks, and then his heel ran into the frog and caught and pulled him loose and he was killed."

Under the allegations of the complaint it was necessary for the plaintiff to prove:

(1) That the point at which it was alleged De Sedillo was struck was such a crossing as imposed on the railway company at all times the exercise of ordinary care to guard against injury to persons crossing at that point.

(2) That De Sedillo was struck at that point while attempting to cross.

(3) That the railway company was negligent.

For the purposes of this decision it may be assumed that the first and third essentials above enumerated were shown by the testimony. To sustain the second essential there is no direct testimony except the fact of the finding of the body of De Sedillo on the track at a point 500 feet below the alleged crossing, and the circumstances connected therewith. One foot was severed from the body, and was held in a frog. Blood was found near the body. From these facts the inference is warranted that De Sedillo was run over and killed by defendant's cars.

To show that De Sedillo was struck at the alleged crossing, the following facts are relied upon:

(1) The heel marks or footprints on the path near the track, and on the first track between the rails.

(2) Two marks along the track extending from the point near the heel marks, or footprints, to a point about 25 yards above the place where the body was found.

From these two facts the following inferences are sought to be drawn:

(1) That the heel marks, or footprints, were made by De Sedillo.

(2) That he was walking along the path going to his mother's house.

(3) That he was struck by the cars, which were being backed by a switch engine.

(4) That he caught hold of some projection of a car and was dragged about 500 feet.

(5) That as he was dragged his heels, or feet, made the two marks along the track.

(6) That his foot caught in a frog, and his hold was broken.

(7) That he was then run over and killed.

[1] In further support of plaintiff's case, benefit is claimed, in the absence of direct evidence, of the presumption that the deceased was not negligent; that before he undertook to cross the track he used due

care to discover and avoid the cars. Upon a proper state of facts that presumption is permissible. Texas & Pacific Ry. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; Baltimore & Potomac R. R. Co. v. Langrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; No. Pac. R. Co. v. Spike, 121 Fed. 44, 57 C. C. A. 384.

[2, 3] But, before that presumption can have application it must appear from the evidence that deceased undertook to cross at the point alleged. There is nothing to show this except the heel marks, or footprints. There is an utter absence of testimony that the heel marks, or footprints, were made by De Sedillo. The testimony on behalf of defendant in error tended to show that the path was generally used for the purpose of crossing the tracks. The heel marks, or footprints, were not discovered until about 7 o'clock in the morning. Two or three hours had intervened between the discovery of the footprints and the finding of the body of De Sedillo. No reasonable inference can be drawn that the heel marks, or footprints, were made by De Sedillo. In order to connect De Sedillo with the two marks along the track it was necessary to infer that at the instant of being struck he seized some handhold or projection on the car, and was dragged 500 feet.

"The requirement that the logical inference styled a presumption of fact should be a strong, natural, and immediate one, brings as a corollary the rule that no inference can legitimately be based upon a fact the existence of which itself rests upon a prior inference. In other words, there can be, in the great majority of cases, no presumption upon a presumption. On the contrary, the fact used as the basis of the inference, the terminus a quo, so to speak, must be established in a clear manner, devoid of all uncertainty." Chamberlayne's Modern Law of Evidence, § 1029, p. 1228; United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; United States v. Pugh, 99 U. S. 265, 25 L. Ed. 322; Manning v. Ins. Co., 100 U. S. 693, 25 L. Ed. 761; Cunard S. S. Co. v. Kelley, 126 Fed. 610, 61 C. C. A. 532; Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121, 96 N. W. 718; Duncan v. Chicago, R. I. & Pac. R. Co., 82 Kan. 230, 108 Pac. 101.

In order to find for defendant in error, it was necessary for the jury to infer at least six successive facts, each one, after the first, dependent on all that preceded.

There was uncontradicted testimony showing that De Sedillo was in a saloon in Albuquerque as late as 1 o'clock that night, and that he was in an intoxicated condition. Thompson, an employé of the railway company, testified that he saw De Sedillo in the yards of the railway company about 4 o'clock in the morning, and that he was in an intoxicated condition at that time. Upon being directed by Thompson as to the way to cross the railroad tracks, De Sedillo replied that he intended to go in the direction in which he was going. A short time after this conversation between Thompson and De Sedillo, the body of the latter was found in the yards. There is nothing to contradict the testimony of Thompson. Therefore, in addition to indulging in the inferences above mentioned, the jury disregarded the testimony of the one witness who stated that he saw and talked with De Sedillo a few minutes before he was killed.

Juries are the sole judges of the credibility of witnesses. There may have been something about Thompson's manner of testifying that

led the jury to disbelieve him. It was not within the province of the jury, however, to go further and supply by successive interdependent inferences the testimony necessary to sustain a verdict.

The motion on behalf of plaintiff in error, at the close of the testimony, for a directed verdict in its favor, should have been granted. For the failure to grant that motion the case is reversed and remanded for a new trial.

In re MITCHELL et al.

Ex parte McGOVERN.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 55.

1. BANKRUPTCY ⟸81—BANKRUPTCY PETITION—JURISDICTION.
A bankruptcy petition must be addressed to the court authorized by law to take cognizance of the case, which jurisdiction is dependent on the residence of the debtor and cannot be waived by his voluntary appearance or otherwise.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. ⟸81.]

2. BANKRUPTCY ⟸15—COURTS—JURISDICTION—PARTNERSHIP.
Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9589]) § 5, subd. "c," provides that the court of bankruptcy, which has jurisdiction of one of the partners, may have jurisdiction of all, and of the administration of the partnership and individual property. *Held*, that a court, which has jurisdiction over one partner, can take jurisdiction over the firm, without reference to whether the firm is six months old, and whether there is any specific allegation as to the firm's principal place of business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 21; Dec. Dig. ⟸15.]

3. BANKRUPTCY ⟸81—COURTS—JURISDICTION—PETITION.
Bankr. Act 1898, § 2, gives courts of bankruptcy jurisdiction to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective jurisdictions for the preceding six months, or the greater portion thereof, and section 5, subd. "c," declares that such courts, which have jurisdiction of one of the partners, may have jurisdiction of all and of the administration of the partnership and individual property. *Held*, that a bankruptcy petition, alleging that the bankrupts M. G. and A. were and had been, for more than six months next preceding the date of the filing of the petition, engaged principally in the business of stockbrokers, and that their principal place of business during all of such period had been and was in the borough of Manhattan, city of New York, and Southern District of New York, sufficiently and properly alleged the residence of the individuals, and was sufficient to give the court jurisdiction of them and of the firm which they composed, without reference to the length of time the firm had existed, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. ⟸81.]

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

This matter comes here upon an appeal from and a petition to revise an order of the United States District Court for the Southern District of New York, filed therein on March 23, 1914 (211 Fed. 778), and which denied a motion made by Thomas B. McGovern for an order vacating the orders of adjudication of bankruptcy herein, opening his default, striking out the answer and appearance interposed on his behalf, or permitting him to file an answer raising the issues of fraud and the jurisdiction of the court.

On February 20, 1913, J. Murray Mitchell, Frederick B. Alexander, and Thomas B. McGovern executed articles of copartnership and formed the firm of Mitchell & Co. Just before the firm of Mitchell & Co. was organized Mr. Mitchell went to his father-in-law, Thomas B. McGovern, who up to that time had never been engaged in the stockbrokerage business and asked him to aid in the reorganization of the firm of Alexander & Co., of which firm Mr. Mitchell was at that time a partner and which was then in financial difficulty. Various representations were made by Mitchell to induce McGovern to form the firm of Mitchell & Co. and to assume the debts of that firm. It is claimed that among the fraudulent representations made by Mitchell to McGovern was that of exhibiting to the latter a statement of the assets and liabilities of Alexander & Co. which Mitchell stated to be correct and to have been taken from the books of the firm. The statement showed the firm of Alexander & Co. to be solvent and McGovern was assured by Mitchell that such was its condition. McGovern, relying on these false representations of Mitchell, executed the copartnership agreement heretofore mentioned. The agreement provided that it should be terminable at any time at the instance of any partner on ten days' notice. By this agreement the assets of Alexander & Co. were to be transferred to the firm of Mitchell & Co. and Mitchell & Co. assumed the debts of Alexander & Co. Substantially all of the debts of Mitchell & Co. consist of the debts of Alexander & Co. which had been assumed.

A petition in bankruptcy to declare J. Murray Mitchell, Thomas B. McGovern, and Frederick B. Alexander, individually and as partners composing the firm of Mitchell & Co. involuntary bankrupts, was filed on March 22, 1913, in the District Court for the Southern District of New York. But prior to the filing of the petition, and on March 18, 1913, the firm of Mitchell & Co. was dissolved by an agreement in writing which all the parties executed. The dissolution was occasioned by McGovern, who discovered that representations made to him were false and gave notice that he should withdraw.

The day the petition in bankruptcy was filed McGovern sailed for South America, in accordance with business engagements made long before and for the purpose of looking after his interests in the vicinity of Rio de Janerio. A short time before leaving on this trip he learned of the threatened bankruptcy proceedings against the firm of Mitchell & Co., consulted his lawyer, explaining the necessity of his departure, and arranging with his attorney to care for his interests during his absence.

McGovern was by his business engagements prevented from returning to the United States until December 6, 1913, and on arriving in this country learned for the first time that an adjudication in bankruptcy was entered on April 10, 1913, against the firm of Mitchell & Co. and against J. Murray Mitchell and Frederick B. Alexander individually; and that on June 25th a like decree was entered against himself. McGovern also discovered that his attorney had filed an answer for him individually but had defaulted in appearing before the Special Master, to whom the hearing on the issues raised by the answer had been referred.

McGovern thereupon petitioned the court to vacate its order adjudicating him a bankrupt, both as an individual and as a member of the firm of Mitchell & Co., and that he be permitted to file an answer. The petitioner claims he is not insolvent and relies upon other points as will appear in the opinion of this court.

Parker, Davis, Wagner & Walton, of New York City (Arnold L. Davis and Roy M. Robinson, both of New York City, of counsel), for appellant.

A. J. Keogh, of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question presented to us is whether an error was committed by the court below in declining to reopen the adjudication of bankruptcy entered against Mr. McGovern. Did the court below have jurisdiction to adjudicate the firm of Mitchell & Co. or any of the partners a bankrupt?

The Bankruptcy Act, § 2, gives courts of bankruptcy jurisdiction "to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof."

The allegation in the petition in bankruptcy upon the matter of residence or domicile was as follows:

"That J. Murray Mitchell, Thomas B. McGovern, and Frederick B. Alexander are and have been for more than six months next preceding the date of the filing of this petition, engaged principally in the business of stockbrokers, and that their principal place of business during all of said period has been and now is in the borough of Manhattan, city of New York, in said Southern District of New York."

The allegation thus made is somewhat indefinite. The appellant claims that the statement must be regarded as an allegation that the firm of Mitchell & Co. had their principal place of business in the Southern District of New York, and that there is no allegation that McGovern was a resident of New York, or that any of the individual members of the firm had a residence or domicile in New York. The contention is, therefore, that upon the allegations the court was without jurisdiction, as the partnership has not continued for more than three months. The petition, however, alleged, if we accept the appellant's construction of it, that Mitchell, McGovern, and Alexander had been partners for more than six months, and that during that period their place of business was in the borough of Manhattan, city of New York, in the Southern District of New York. Mitchell and Alexander put in no answer. McGovern appeared by attorney in fact and denied merely that he was insolvent and that a transfer had been made as the petition alleged with intent to prefer. The averments as to the partnership and the principal place of business were not put in issue. The averments of residence stood uncontested at the time the court entered its decree. And if the court below had jurisdiction of the subject-matter then the fact that McGovern appeared by his attorney and put in an answer without raising the objection as to residence might be urged to show that he had consented to the court's jurisdiction. But the law is that the residence or domicile of a bankrupt within the territorial jurisdiction of the court, or his having carried on business within the district for the greater portion of six months before the filing of a petition by or against him, is an essential jurisdictional fact, without the

existence of which the District Court is without authority to proceed to an adjudication of bankruptcy.

"And this essential fact must appear affirmatively and distinctly and not be left to presumption or conjecture. Nor can this requirement as to jurisdiction be waived by the bankrupt or the creditors. Neither consent nor failure to object can confer authority to proceed upon a court which would not have jurisdiction under the express language of the statute." Black on Bankruptcy, § 19.

In Fogarty v. Gerrity, 1 Sawyer, 233, Fed. Cas. No. 4,895 (1870), a petition had been filed against certain parties praying that they be adjudged bankrupts, and on the return day they appeared and with their own consent were so adjudged. Subsequently an attaching creditor appeared and moved upon affidavits to vacate all the proceedings on the ground that the court had no jurisdiction over the case, as the bankrupts had resided in the district some six weeks prior to the filing of the petition against them and not for six months required by the act. It was urged that the court had acquired jurisdiction by consent of the bankrupts. The court, however, held that the proceedings should be set aside and vacated as the court was without jurisdiction. Judge Hoffman said:

"But consent cannot give jurisdiction—and that the question is one of power and jurisdiction in the court is evident—nor can it make any difference whether the proceeding is voluntary or involuntary bankruptcy."

[1] The law requires the petition in bankruptcy to be addressed to the court authorized by law to take cognizance of the case. It cannot be addressed to any other. Collier on Bankruptcy, after stating that the requirements as to residence are jurisdictional and cannot be waived by the voluntary appearance of the debtor, goes on to say that:

"The court may of its own volition inquire into the facts as to these jurisdictional requirements so as to protect itself against fraud or imposition." Collier on Bankruptcy (10th Ed. 1914), p. 30.

[2] It is necessary, therefore, to determine whether this petitioner is correct in his interpretation of the meaning which is to be given as to the allegation in the petition of bankruptcy.

The allegation is somewhat obscure. It is not in express terms an averment that J. Murray Mitchell, Thomas B. McGovern, and Frederick B. Alexander, as partners composing the firm of Mitchell & Co., had the principal place of business of the firm in New York. The allegation contains no mention whatsoever of the partnership, and because of that fact the court is of the opinion that it should be construed, not as an allegation that the firm had its principal place of business in New York, but that it is to be treated as an allegation that the individuals named, and each of them, had his principal place of business in New York City for more than six months next preceding the date of the filing of the petition in bankruptcy. This court is unable, therefore, to agree with this petitioner in his contention that the petition in bankruptcy contains no allegation as to the place of business of any of the individual partners. That is in the opinion of this court just what it does contain. The fact that it does not allege is that the firm of Mitchell & Co. had its principal place of business in New York.

The Bankruptcy Act, § 5, subd. "c," provides that:

"The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

Under this section a court which has jurisdiction over one partner can take to itself jurisdiction over the firm of which he is a member without reference to whether the firm is six months old or three months old, and without there being any specific allegation as to the firm's principal place of business.

[3] The allegations of the petition in this case were sufficient under the statute to give the court jurisdiction; and as the petitioner appeared by attorney who filed an answer for him individually but defaulted in appearing before the Special Master, to whom the hearing on the issues raised by the answer had been referred, we are unable to see what standing he now has to come into this court upon an appeal or a petition to revise. The appeal and the petition to revise must both be dismissed because taken out long after the period allowed by the Bankruptcy Act in case of appeals and by our rule 38 (150 Fed. liv, 79 C. C. A. liv) in case of petitions to revise. The affairs of Mitchell & Co. have already been administered for the benefit of creditors, and all the partners have been found by the court below to be bankrupt and to have done business for more than three months in the district. The petitioner does not deny in his petition that he and his partners were residents of the district when the petition was filed, and he does not allege that he or either of his partners, or the firm, is solvent and able to pay his or its debts.

The order appealed from and sought to be revised is affirmed, with costs.

SULLIVAN et al. v. ELLIS.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4152.

1. LIMITATION OF ACTIONS ⟸66—ACCRUAL—DEMAND NOTE.

With reference to commercial paper payable on demand, limitations begin to run from the date of the paper; but the rule does not apply if there is anything in the paper, or the circumstances under which it was given, showing that it was not the intention that it should become due immediately.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353–375; Dec. Dig. ⟸66.]

2. LIMITATION OF ACTIONS ⟸66—CAUSE OF ACTION—ACCRUAL—DEMAND—COMMERCIAL PAPER.

A contract provided that the second party agreed to waive any forfeiture on account of nonpayment of interest on a note secured by a deed of trust on certain property belonging to G. until the note matured, and further released S. from liability for taking the mortgage from G. to the party of the first part; that in consideration of the release, the party of the third part guaranteed that if, at the maturity of the note executed by G., the second party should sell the property securing the note and the proceeds should be insufficient, the party of the third part would re-

imburse the second party for the balance. *Held*, that such contract was not commercial paper and required a demand on the party of the second part or her heirs to mature a cause of action and set the statute of limitations in motion.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353–375; Dec. Dig. ⊂=66.]

3. LIMITATION OF ACTIONS ⊂=66—RIGHT TO SUE—PERFECTION—DEMAND—ADMINISTRATION—"REASONABLE TIME."

Where a party's right to sue on a claim against the estate of a deceased debtor depended solely for its perfection on a demand, and there was no administrator, the creditor was entitled to a reasonable time to have an administrator appointed and to a reasonable time to make a demand on the administrator, which reasonable time would be a period coincident with that of the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353–375; Dec. Dig. ⊂=66.

For other definitions, see Words and Phrases, First and Second Series, Reasonable Time.]

4. LIMITATION OF ACTIONS ⊂=56 — STARTING OF LIMITATIONS — INDEMNITY CONTRACT.

Where decedent executed an indemnity contract binding herself to pay any deficiency on foreclosure of a deed of trust, claimant's remedy against decedent's heir was in equity only, and hence the rendition of a deficiency judgment in the foreclosure proceedings was insufficient to start limitations in favor of the heir.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 307–311; Dec. Dig. ⊂=56.]

5. COURTS ⊂=363—FEDERAL COURTS—LACHES—STATE STATUTES.

In equity cases, the federal courts are not bound by state statutes of limitations; but in such courts the question of laches is paramount, though they will act or refuse to act in analogy with the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. ⊂=363.]

6. DESCENT AND DISTRIBUTION ⊂=143—ACTION AGAINST HEIR—LACHES.

Where, in an action against an indemnitor's heir, it appeared that the original obligation was his own, and there had been no damage in the contract or in the parties in interest, such as would render relief prayed in the bill inequitable, a delay of 7 years, 9 months, and 16 days was not such laches as would bar complainant's right to relief; the application of the doctrine to the case being inequitable.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 503; Dec. Dig. ⊂=143.]

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by Eva Prince Ellis against A. B. Sullivan and others. Decree for complainant, and defendants appeal. Affirmed.

John F. Mail, of Denver, Colo. (John H. Chiles, of Denver, Colo., on the brief), for appellants.

Harry S. Silverstein, of Denver, Colo. (Dana & Blount, of Denver, Colo., on the brief), for appellee.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. This is an appeal from a decree of foreclosure of a mortgage given by Maria L. Russell, to secure the per-

formance of a certain contract entered into by her to indemnify Eva Prince, now Eva Prince Ellis, the appellee. The contract was that Eva Prince, in the settlement of a controversy between her and A. B. Sullivan, should foreclose a certain mortgage given her by Elizabeth M. Gibbons and Joseph Gibbons, and cause the property therein described to be sold, and if the proceeds of such sale did not amount to the full sum of money loaned by Eva Prince on the property mortgaged, with interest, Maria L. Russell would on demand pay Eva Prince the amount of the deficit. The original liability of Sullivan arose from the fact that, as agent for Eva Prince, he had taken a second mortgage for her when he had authority to take only a first mortgage.

The property was sold under decree of foreclosure, and the deficiency was ascertained and declared by the court.

Maria L. Russell died intestate on the 27th day of January, 1905, and the deficiency judgment was rendered on the 6th of February of the same year. No administrator of the estate of Maria L. Russell has ever been appointed. This suit was begun on the 22d day of November, 1912. A period of seven years, nine months, and sixteen days intervened between the date of the rendition of the deficiency judgment and the date of the bringing of this suit. The six years' statute of limitations of the state of Colorado has been pleaded as a bar to the action by one of the defendant appellants, the Julia L. Real Estate, Loan & Investment Company, a corporation which held the legal title to the property mortgaged by Maria L. Russell, under a deed from her after the execution of the mortgage.

A. B. Sullivan, whose obligation was secured by the mortgage given by Maria L. Russell, was her only child, and is her sole heir. Laches was not pleaded as a defense. It was expressly stated in the court below that laches was not relied on, and that statement has been repeated here. The record shows that upon the statement of counsel for appellants at the hearing that "laches had not been pleaded," and that defendants below "relied purely on the statutory limitations," the court replied "that the principle of laches was present." It thus appears that the court considered both laches and limitations, although no reference was made to either in the decree.

The only assignments of error urged here are those that relate to the refusal of the court to hold the action barred by the statute of limitations. It is contended that the amount of the deficit became due upon the rendition of the deficiency judgment, and that the statute of limitations at once began to run.

[1] The general rule with regard to commercial paper, payable on demand, is that it becomes due immediately, and that the statute of limitations begins to run from its date.

"This rule may not apply where there is something on the paper, or in the circumstances under which it is given, showing that it was not the intention that it should become due immediately." 7 Cyc. 848, 849.

[2] The contract in this case is not commercial paper. It contains the following provisions:

"The party of the second part hereby agrees to waive and forego any forfeiture on account of nonpayment of interest upon the promissory note se-

cured by the said trust deed upon the property hereinbefore described, belonging to Elizabeth Gibbons, and signed, made, executed, and delivered by her, until and at such time as said note falls due by expiration of the term limited therein; and, further, doth hereby release the said A. B. Sullivan of and from all actions and causes of action, of any kind and nature, for or on account of the taking of said mortgage from the said Elizabeth Gibbons, to the party of the first part.

"In consideration of the release hereinbefore given by the party of the second part to the party of the first part, the said Maria L. Russell, party of the third part, does hereby agree with the party of the second part, and guaranties unto the said party of the second part, that in case she, the party of the second part, will at the time of the maturity of said note executed by the said Elizabeth Gibbons, advertise and sell the property therein described in manner and form as in trust deed provided for; and if she, the party of the second part, shall not receive at said time and in said manner the full amount of money so loaned and advanced by her as aforesaid upon said property, and the interest and taxes and expenses attending said sale, then and in that case, whatever said amount may be, the party of the third part will, upon demand, reimburse her for the same and pay said amount to her."

We think the provisions above quoted contemplate a demand.

"The statute of limitations does not run against a cause of action until the cause has accrued, and, where a demand is necessary before the action can be commenced, the statute does not begin to run until after the demand." Bowes v. Cannon, 50 Colo. 262, 116 Pac. 336.

[3] Maria L. Russell died before the deficit was determined. At the time it was ascertained there was no one representing her estate upon whom demand could be made, nor has any one been appointed since. The argument is made that appellee could have caused an administrator to be appointed. If that is conceded, there must have been a reasonable time within which that appointment could have been made. There must also have been a reasonable time within which to make demand.

"Where a party's right to sue depends for its perfection solely upon the necessity of a demand by him to put his adversary in default, he cannot indefinitely and unnecessarily extend the bar of the statute by deferring such demand, but must make it within a reasonable time. Palmer v. Palmer, 36 Mich. 494 [24 Am. Rep. 605]; Hintrager v. Traut, 69 Iowa, 746, 27 N. W. 807; Steele's Adm'r v. Steele, 25 Pa. 154; Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43. What is deemed a reasonable time has been uniformly held to be a period coincident with that provided in the statute of limitations for barring the action. See cases above cited; Busw. Lim. § 159; Wood, Lim. § 125; Ang. Lim. § 96." Thomas v. Pacific Beach Co., 115 Cal. 136, 46 Pac. 899.

[4] The record discloses no facts which would start the statute of limitations in favor of a personal representative of the estate of Maria L. Russell, if there had been one. The rendition of the deficiency judgment would not have been sufficient to start the statute in his favor. It clearly was not sufficient to start it in favor of the Julia L. Real Estate, Loan & Investment Company, by which it was pleaded. In our view of the case, under the law of the state of Colorado, the plea of the statute of limitations was not available to any one of the appellants. So far as they were concerned, there was, as against them, no concurrent remedy in law and equity. Appellee's cause of action against them was in equity only.

In the case of Bowes v. Cannon, supra, the Supreme Court of Colorado held that, if a "cause be cognizable only in a court of equity, it cannot be affected by the statute."

[5] It is not necessary, in this case, to base a decision on that point. In equity cases the federal courts are not bound by the statute of limitations. In those courts the question of laches is paramount; though they will act, or refuse to act, in analogy to such statute. Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Boynton v. Haggart, 120 Fed. 821, 57 C. C. A. 301; Burgess v. Hillman, 200 Fed. 929, 119 C. C. A. 225; Davey v. Dodge, 213 Fed. 722, 130 C. C. A. 236; Schwartz v. Loftus, 216 Fed. 320, 132 C. C. A. 464.

In the case of Schwartz v. Loftus, above cited, Judge Carland, speaking for the court, said:

"The real questions for decision in this case, as in all others of like character, are: First, does the bill present a reasonable excuse for the delay in bringing the suit; second, would it be inequitable, so far as the defendants are concerned, if the relief prayed by the bill should be granted? We think a reasonable excuse has been presented, and we cannot conceive of any injustice which would result to the defendants in allowing the action to proceed. While the lapse of time is an element which courts consider in refusing or granting the defense of laches, time alone ordinarily is not sufficient to constitute the defense; but, in addition thereto, the situation of the parties must have so changed as to render the prosecution of the suit inequitable. These circumstances usually appear in the form of increased value of real estate, either in the rise of the price thereof or in the making of valuable improvements thereon, the death of witnesses, and any other circumstance which would make it inequitable to allow a suit to proceed."

[6] It clearly appears from the record in this case that A. B. Sullivan is the only heir at law of Maria L. Russell; that the obligation of the appellee was, in fact, his obligation; that the conveyance by Maria L. Russell to the Julia L. Real Estate, Loan & Investment Company was without consideration; that the said company did not, in fact, own the property conveyed to it, but simply held title for the real owner, who, since the death of Maria L. Russell, is A. B. Sullivan. The record further shows that the property was permitted to be sold for taxes, that John F. O'Connor acquired the tax title for the benefit of Sullivan, and that appellee brought suit to set aside the tax deed. It also shows that she endeavored to collect the amount of the deficiency judgment from Joseph Gibbons, one of the defendants in the suit in which that judgment was rendered. This was done with the knowledge of A. B. Sullivan, and in our opinion, based on the testimony, for his benefit.

There has been no change in the property, or in the parties in interest, such as would render the relief prayed in this case inequitable. There is testimony to the effect that in January, 1911, a suit was begun in the United States Circuit Court, in the district of Colorado, which suit was the same in its nature as the suit now before the court. What became of that suit the record does not disclose.

The doctrine of laches may be invoked for the purpose of doing equity. If it were held applicable in this case, a very inequitable result would follow. Wilson v. Plutus Min. Co., 174 Fed. 317, 98 C. C. A. 189; Sullivan v. Portland & Kennebec R. Co., 94 U. S. 806, 24 L. Ed.

324; Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

Therefore the decision of the lower court should be affirmed, and it is so ordered.

WELLS FARGO & CO. v. MAYOR, ETC., OF JERSEY CITY.

(Circuit Court of Appeals, Third Circuit. January 30, 1915.)

No. 1840.

MUNICIPAL CORPORATIONS ⊂=740—INJURIES TO PROPERTY—CITY'S LIABILITY —STATUTES—CONSTRUCTION—"PROPERTY."

New Jersey Act 1874 (Rev. St. p. 714; P. L. 1864, p. 237; Revision 1877, p. 978; 4 N. J. Comp. St. 1910, p. 4380; 3 Gen. St. 1895, p. 2782), is entitled "An act to prevent routs, riots, and tumultuous assemblies," and section 5 declares that, whenever any building or other real or personal "property" shall be destroyed or injured in consequence of any mob or riot, the city in which it shall occur shall be liable to an action by or on behalf of the owner. *Held*, that while the word "property," strictly speaking, in a thing, is different from the thing itself, and includes the right to use, enjoy, and control, which is neither visible nor tangible, and in that sense the word is often used as applied to the right to carry on business, the word as used in such act was not intended to include intangible property, so that a city under such act was only liable for damage to tangible, as distinguished from intangible, property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1558, 1559; Dec. Dig. ⊂=740.

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

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by Wells Fargo & Company against the Mayor and Aldermen of Jersey City. Judgment for plaintiff for less than the relief demanded (207 Fed. 871), and it brings error. Affirmed.

Gilbert Collins, of Jersey City, N. J., and Charles W. Stockton, of New York City, for plaintiff in error.

John Milton, of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. During the three weeks from October 25 to November 14, 1910, the express business of Wells Fargo & Co. and their tangible property in Jersey City suffered injury at the hands of a mob. The injury resulted from riots accompanying a strike that was directed at first against another express company. In January, 1911, the company sued the municipality to recover damages, claiming under a revised statute of New Jersey, approved in 1874 (Rev. St. p. 714; P. L. of 1864, p. 237; Revision of 1877, p. 978; 4 Comp. St. of N. J. 4380; 3 Gen. Stat. 2782). The verdict determines that the company fulfilled all the obligations laid upon it by the act, fixing the damage done to the company's tangible property at $300, and the dam-

age done to its business, its intangible property, at $43,000. The verdict was special, separating these sums and submitting to the court the question whether the city was legally liable for the larger amount. After further consideration, the trial judge decided this question in favor of the city, and entered judgment for $300 only. His opinion is reported in 207 Fed. at page 871, and is a careful and painstaking discussion of the subject. We agree with his conclusion, although we do not find it necessary to assent to the course of his argument throughout. The subject is important, and the precise question has apparently not been considered, or at all events has not been discussed, in any reported case.

We do not overlook Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605—a suit brought by the owner of a journal whose printing office had been wrecked by a mob—in which the court appears to hold:

"That if the plaintiff was entitled to recover anything, he should recover for the damage resulting from the interruption or destruction of the plaintiff's business, and for the injury to the good will of the paper, so far as such interruption and injury were the direct and natural results of the attack of the mob."

But, as no reasons are given for this ruling, and as the question arose under a peculiar procedure whose judicial effect we do not clearly understand, we feel justified in laying that case aside. Moreover, even if we allow it full value as an authority, it merely determines the scope of the New Hampshire statute, and therefore is not decisive on the meaning of different language in the statute now before the court.

And at this point we may add that the only question raised has to do with the city's liability for the item of $43,000, so that the general subject of municipal liability for injury done by a mob need not be considered. It is fully discussed in the cases cited in the notes to Prather v. Lexington, 56 Am. Dec. 589, Darlington v. New York, 88 Am. Dec. 266, and Gianfortone v. New Orleans, 24 L. R. A. 592. Later collections of authorities will be found in the notes to 28 Cyc. 1295f et seq.; and to 4 Dill. Mun. Corp. (5th Ed.) § 1636. The most recent decision to which our attention has been called is Chicago v. Sturges, 222 U. S. 313, 32 Sup. Ct. 92, 56 L. Ed. 215, Ann. Cas. 1913B, 1349. From all these citations it is certain that, while the common law may recognize the principle that a municipality should preserve social order at some risk of being punished for failure, the particular form of liability now before the court rests wholly upon statute. This being so, the extent of the liability must depend upon the meaning of the particular statute, and this brings us at once to the region and the rules of statutory construction.

The New Jersey Act of 1874 is entitled "An act to prevent routs, riots, and tumultuous assemblies." Apparently, it has never been construed by the Court of Errors and Appeals, and only once by the Supreme Court of the state. Clark Thread Co. v. Hudson County, 54 N. J. Law, 265, 23 Atl. 820. That case merely decides that the object of the act was to prevent mobs and riots, and that the title is broad enough to cover the provision for compensation contained in the fifth section. But we cannot suppose that the act had no other object than to prevent

riots, although this was no doubt its principal object. But subsidiary thereto and included therein, another object is certainly to be found, namely, the compensation of those injured thereby; so that we need not hesitate to say that in part at least the statute was intended to provide for such compensation. Section 5 enacts as follows:

"5. Compensation for Damage by Riot, etc.; Liability of City or County.—That whenever any buildings or other real or personal property shall be destroyed or injured, in consequence of any mob or riot, the city in which the same shall occur, or if not in a city, then the county in which such property was situated, shall be liable to an action, by or in behalf of the party whose property was thus destroyed or injured, for the damages sustained by reason thereof."

Now the question of immediate interest is: How far did the Legislature intend to go by this section? What "property" was in the legislative mind? In our opinion there is no antecedent presumption, one way or the other. The whole subject being within the legislative power, compensation might be total or partial, precisely as the lawmaking body might choose, and we see no need to search for the meaning of the act with a leaning toward a strict, or for that matter with a leaning toward a liberal, construction. Here, as in other cases of construing a statute, the vital question is: What does the language mean? And we must find the answer by such helps as may be at hand. One thing is apparent at first glance: The thought is not precise and the expression is awkward. And this is probably a sufficient warning that we will not find the content of the word "property" to be so all-inclusive and somewhat metaphysical as the plaintiff's brief contends. We agree with much of the argument. Strictly, and as a matter of abstract reasoning, "property" in a thing is different from the thing itself. It is a right to use, enjoy, and control, and therefore is neither visible nor tangible. In this sense, which is often properly applied, the right to carry on a business is property. But we are not able to agree that such a conception was present in the mind of the draftsman or of the New Jersey Legislature. If it had been, the word "property" alone would have been employed, for nothing more would have been needed. It seems plain, however, that a more limited conception of "property" was embodied in the statute, for the phrase, "buildings or other real or personal property," while it is awkward and incorrect, does convey the idea that the "property" thought of consists of things and not of intangible rights. And we find the same idea again in section 5 (and also in section 7, which we need not quote), where the property is twice referred to as existing physically in space—as "situated," or "situate," in a described municipality.

It may be doubted whether the rule of ejusdem generis can fairly be applied to the phrase just quoted; but we do think that the whole section should be construed in the light of another and a more valuable rule—that the language of a statute is to bear its usual and ordinary meaning unless sufficient indications exist to show that the language has been used in a special sense. It seems to us that section 5 is drawn in the loose and easy phraseology of common speech. The construction is anything but precise: One at least of the clauses is capable of more meanings than one; the grammar leaves something to be desired; but,

after every criticism has been made, the general sense emerges with sufficient clearness. The section contemplates that the injury may be done either in a county or in a smaller municipality, a city; and this means necessarily that there may be a mob or riot in either, where of course the duty of prevention or protection would fall upon the appropriate officers of the peace. And the section also has in mind such property only as can have a local habitation within a city or a county, and is therefore capable of receiving injury at some definite point in space. As we all know, language is an elusive instrument; it is often susceptible of several meanings, especially the meaning that we bring to it and desire it to bear; and therefore the task is sometimes perplexing to determine with confidence in what sense the words were really used. In such a situation, courts have been obliged to do their best with many difficulties, and in the course of prolonged experience they have evolved certain rules that work satisfactorily on the whole. The rule we have been considering is applied perhaps more often than any other, and we think it solves the problem now in hand. To us it seems plain that we cannot reach the conclusion desired by the plaintiff without giving an unusual meaning to the phrase in question—a meaning unknown to common speech—and this, in spite of the fact that no indication is to be found in the statute to suggest that such a meaning was intended. It has some weight, also, that no legislature has expressly given such compensation as is now asked for; and that no court (with the doubtful exception of Palmer v. Concord) has construed, or has apparently been asked to construe, the general language of any statute so as to embrace such compensation.

Without prolonging the discussion, we repeat our approval of the judgment below and direct its affirmance.

SOUTHERN RY. CO. v. KOGER.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2527.

1. RAILROADS ⊜389—INJURIES TO PERSONS ON TRACKS—STATUTORY DUTY TO SIGNAL—LIABILITY.

Under the Tennessee Railroad Precautions Act (Shannon's Code Tenn. § 1575), making railroads liable for damages to persons or property resulting "from any accident or collision that may occur," where provisions of the act regarding bell-ringing, whistle-blowing, etc., by locomotives while in cities or towns have not been observed, the liability is absolute, and proof need not be made that the accident was the proximate result of the railroad's failure to observe the statutory precautions.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1319–1323; Dec. Dig. ⊜389.]

2. RAILROADS ⊜387—INJURIES TO PERSONS ON TRACKS—STATUTORY DUTY TO SIGNAL—CONTRIBUTORY NEGLIGENCE.

Under the Tennessee Railroad Precautions Act (Shannon's Code Tenn. §§ 1574–1576), contributory negligence of the person injured is not a bar to recovery and may be considered only in mitigation of damages.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1296, 1314–1316; Dec. Dig. ⊜387.]

---

3. RAILROADS ⟸369—INJURIES TO PERSONS NEAR TRACKS—STATUTORY DUTY TO SIGNAL—POSITION OF INJURED PERSON.

Under the Tennessee Railroad Precautions Act (Shannon's Code Tenn. § 1574, subd. 3), establishing the liability of a railroad for personal injuries when it has failed to ring its locomotive's bell, etc., while approaching or passing through a town, it is not a requisite that the person injured should have been ahead of the train on the track before being struck.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1259-1262; Dec. Dig. ⟸369.]

4. RAILROADS ⟸401—INJURIES TO PERSONS ON OR NEAR TRACK—INSTRUCTIONS.

In an action for death of a child caused by failure of railroad to observe statutory precautions while its train was approaching a city or town, an instruction to find for the defendant if the boy lost his life while trying to "swing" the train, "unless he was of such age as not to apprehend the dangers of so doing," was sufficiently favorable to defendant, considering the absolute nature of the liability imposed for failing to comply with the act.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1382-1390; Dec. Dig. ⟸401.]

5. RAILROADS ⟸389—INJURIES TO PERSONS ON OR NEAR TRACKS—STATUTORY DUTY TO SIGNAL—PROXIMATE CAUSE.

A liability arises from failure to observe statutory precautions on part of railroad by ringing the locomotive bell, etc., while approaching a town, even if the jury finds that the observance of the precautions would not have prevented the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1319-1323; Dec. Dig. ⟸389.

Care required of railroads as to trespassers on or near tracks, see note to Louisville & N. R. Co. v. Womack, 97 C. C. A. 566.]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action at law by E. B. Koger, administrator of Thurston Koger, deceased, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Susong, of Greenville, Tenn., for plaintiff in error.

W. T. Kennerly, of Knoxville, Tenn., for defendant in error.

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

KNAPPEN, Circuit Judge. This writ of error is brought to review a judgment recovered by the administrator for the death of his infant son, caused by collision with defendant's freight train. The father's home was upon the south side of the railroad track, which was unfenced. He had a warehouse on the north side of the track, a little easterly of the house. His factory was further to the east, and on the same north side of the track. The entire premises were less than a mile east of Morristown, Tenn. Just before the accident the deceased, who was about seven years and two months old, was at the factory with his brother, who was two years older. The two boys started from the east end of the factory to run home (a distance of a few hundred feet), and between the factory and the warehouse began racing. The railroad

was in something of a cut; the embankment being about 2½ feet high and about 10 feet from the ends of the ties. When the boys reached the embankment the older one stopped. The younger boy apparently continued running, for he came into collision with one of the rear cars (probably the caboose) of defendant's freight train, going west—towards Morristown. The action was brought under the Tennessee Railroad Precautions Act (Shannon's Code, §§ 1574–1576); the important provisions of section 1574 being cited in the margin.[1]

[1, 2] By section 1575 failure to observe the statutory precautions makes the railroad liable for civil damages to persons or property resulting "from any accident or collision that may occur"; and by the following section a railroad observing such precautions is relieved from responsibility "for any damage done to persons or property on its road." The burden of proof that the precautions have been observed is upon the railroad company. The case was submitted under subdivision 3 of section 1574. There was substantial evidence that the precautions prescribed by that subdivision were not observed. It is the settled rule, declared by the Supreme Court of Tennessee and followed by this court, that the liability created by the statute is absolute, and not dependent upon proof that the injury resulted from failure to observe the statutory precautions; and that the liability resulting from such failure is not defeated by the contributory negligence of the person injured. Such contributory negligence may, however, be considered in mitigation of damages. Some of the decisions of the Supreme Court of Tennessee and of this court so construing this statute are cited in the margin.[2]

The statute has been held not to apply to injuries received in switching movements, to employés whose duty it is to yield the track, or to passengers injured by obstructions in the roadbed. Railway Co. v. Rutland (C. C. A. 6) 207 Fed. 287, 289, 125 C. C. A. 31, and cases cited; Railroad Co. v. Rush, 15 Lea (Tenn.) 145.

[1] "1574 (1166) 1298. * * * (2) On approaching every crossing so distinguished, the whistle or bell of the locomotive shall be sounded at the distance one-fourth of a mile from the crossing, and at short intervals until the train has passed the crossing.

"(3) On approaching a city or town, the bell or whistle shall be sounded when the train is at the distance of one mile, and at short intervals till it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts, and at intervals till it has left the corporate limits.

"(4) Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

[2] Railroad v. Walker, 11 Heisk. (Tenn.) 383; Railroad Co. v. Burke, 6 Cold. (Tenn.) 45; Railway Co. v. Howard, 90 Tenn. 144, 150, 19 S. W. 116; Railroad Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348; Byrne v. K. C., Ft. S. & M. R. Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; Felton v. Newport, 105 Fed. 332, 44 C. C. A. 530; Rogers v. C., N. O. & T. P. R. Co., 136 Fed. 573, 69 C. C. A. 321; L. & N. Ry. Co. v. Truett, 111 Fed. 876, 50 C. C. A. 442; Railroad Co. v. Sutton, 179 Fed. 471, 103 C. C. A. 51; Transit Co. v. Walton, 105 Tenn. 415, 426, 58 S. W. 737.

[3] Defendant insists, however, that subdivision 3 applies to the case only where the person collided with appears as an obstruction upon the track ahead of the train; in other words, to a striking by the front of the train. This question is important, for we scarcely think the evidence justified a finding that the decedent appeared as an obstruction on the track, or within striking distance, ahead of the train. We agree with the learned District Judge that the statute should not be so narrowly construed. It is true that the majority of the cases in which the statute has been applied have arisen either under subdivision 2 or subdivision 4; and quite naturally, under subdivision 2, the person struck has usually appeared as an obstruction upon the track or within striking distance, ahead of the train. But the construction contended for would require the interpolation in both subdivisions 2 and 3 of the clause (found in subdivision 4) "when any person, animal, or other obstruction appears upon the road." Such interpretation seems to us not to accord with the construction put upon the statute by the Supreme Court of Tennessee, although we do not find that that court has in terms decided the specific point we are considering.

In Railroad Co. v. Davis, 104 Tenn. 442, 450, 58 S. W. 296, 299, in a case arising under subdivision 3, it was said:

"The object of the statute was to give notice of the approach of this heavy and dangerous machinery, where it would be required to pass through centers of population a sufficient length of time to thoroughly advertise its coming."

True, in Railroad Co. v. Feathers, 78 Tenn. (10 Lea) 103, 105, the court, in refusing to apply subdivision 3 to an injury resulting from the fact that a horse, while being driven along the highway, was frightened by the sound of the train, said that the statutory regulations "do not apply in favor of parties not injured in crossing or attempting to cross a railroad, *but simply by reason of the fact that they are casually riding along near and parallel to the railroad* [italics ours] on a public road, with no purpose to cross it."

But in Railroad Co. v. Gardner, 1 Lea (Tenn.) 688, 691, which was in fact a case of injury at a crossing, the trial court held the requirements of subdivision 3 applicable. In replying to the insistence that the rule of absolute liability was limited to cases in which the "obstruction appears on the road," requiring a lookout, etc., the court said (speaking of the following section, 1167, now 1575):

"We can see nothing in the language of this section to limit its operation * * * to the section [meaning, of course, subdivision] immediately preceding it. If such had been the legislative intent, it would have been easy to have said so. We must give the language its natural signification, and this inevitably makes it include all the previous precautions in the statute, * * * none being excluded."

In Byrne v. Railroad Co., 61 Fed. 605, 612, 613, 9 C. C. A. 666, 24 L. R. A. 693, this court held subdivision 3 applicable to the case of a pedestrian stepping in front of the train so shortly before the collision occurred as to prevent the employment of the precautions prescribed by subdivision 4. The statute cannot be construed as limited to attempts to cross the track.

In Railroad Co. v. Sutton, supra, the plaintiff was walking on the track ahead of the train, but not trying to cross. He left the track just before the train reached him, and the question was whether he had gone beyond striking distance of the train, so as to relieve the railroad from the exercise of the precautions imposed by subdivision 4. It was there held that he was not "beyond striking distance" so long as he was "still so close to the track that, having due regard for the instinct of self-preservation and the involuntary movements of his body, there is still a reasonable probability or likelihood that he may fall or be thrown against the side of the engine or train as it passes him." In that case we held that the statute should not be so strictly construed as to defeat the obvious intent of the Legislature.

As indicating the liberal interpretation put upon the statute: In L. & N. Ry. Co. v. Truett, supra, recovery was permitted upon the theory that the deceased, when about to cross and seeing the approaching train, attempted to turn his horse back, but the latter became frightened and unmanageable, and crowded so close to the train that the deceased was struck by a passing car.

It can scarcely be doubted that one attempting in the darkness of the night to cross a railroad track, and so colliding with the side of an unseen moving train, would not be denied recovery from the mere fact that he had not appeared upon the track itself ahead of the train. We thus think subdivision 3 applies, although the boy did not appear as an obstruction in front of the train. We find nothing in the cases relied on by defendant which we think should lead to a contrary conclusion.

[4, 5] There was, however, evidence tending to show that the deceased boy saw the train before he started for home, and knew that it was coming. Defendant contends that evidence of such notice and knowledge is conclusive, and that the manner of the collision shows beyond question that the boy lost his life by attempting to "hop on" or "swing" the train. The court, however, refused to direct verdict for defendant, but instructed the jury that, if the boy lost his life by attempting to "swing" the train, he could not recover "unless he was of such age, capacity, and intelligence as not to apprehend the circumstances and appreciate the dangers of so doing." We think the court rightly refused to direct verdict, and that the charge was as favorable to defendant as it was entitled to, without regard to the conclusiveness of the evidence as to the deceased boy's knowledge of the train's approach, and even if he was attempting to "swing" the train, which is by no means certain, for we are disposed to agree with the District Judge that the statutory warnings in question were intended for the benefit also of those having the care of infants of tender age, and we think the evidence tended to show that, had the warnings been given, the mother might have been able to protect the boy. Moreover, failure to observe the statutory precautions is held to render a railroad company liable, even though the jury should find that their observance would not have prevented the accident. Railway Co. v. Walker, 11 Heisk. (Tenn.) 383, 385; Railway Co. v. Connor, 9 Heisk. (Tenn.) 19, 26; Railway Co. v. Burke, 6 Cold. (Tenn.) 45, 50, 51. In the latter case, it was said:

"The railroad company is responsible for the damages occasioned by or resulting from the accident or collision, unless it shows that the precautions

prescribed by these sections were performed, and although it may appear that the accident or collision would have occurred had the precaution been performed. Cases of hardship and absurdity may occur upon such construction of the clauses of the Code; but the language is explicit and certain, and the construction is inevitable."

True, in the Burke Case it was said that "a person injured by a collision or accident caused by his own willful act" cannot recover. That was a case of collision with an employé of the railroad who had lain down drunk on the track, the duty on which he was sent out being to tighten the joints of the rails and to help repair a switch; and the holding of the Burke Case as to the effect of a "willful act" was applied by this court in Byrne v. Railroad Co., supra, to the case of a pedestrian who stepped in front of an approaching engine, suggesting an apparent intention of thereby committing suicide. We think the court did not err in limiting the effect of the boy's action by reference to his intelligence and appreciation of danger. Were this a question of contributory negligence, such considerations plainly would control. What is said in Felton v. Aubrey (C. C. A. 6) 74 Fed. 350, 361, 20 C. C. A. 436, respecting the nonliability of a railroad company to keep a lookout for infants more than for adults, has reference to the negligence of the railroad company. Here defendant's negligence, or its equivalent, was made out when failure to observe the statutory precautions appeared. Without otherwise attempting to define the limitations of the defense of "willful injury," we think it clear, in view of the absolute nature of the statutory liability despite affirmative showing that compliance with the statute would not have prevented injury, that the defense in question is, at most, so far an exception as to justify, as applied to children of tender years, at least no harsher rule respecting intelligence and appreciation of danger than would be applied in common-law actions where contributory negligence is set up.

While we have not discussed all the errors argued, we have considered them all, and find no error.

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

KUYKENDALL v. TOD.

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4250.

1. JUDGMENT ⟸934—ACTIONS ON FOREIGN JUDGMENT—LIMITATIONS—REVIVOR.

Where a Wyoming judgment has been revived under the statute of that state, the Colorado statute of limitations against actions on foreign judgment (Rev. St. Colo. 1908, § 4076) begins to run from the date of the revivor of the judgment, whether the proceedings for revivor be considered as new proceedings or as a continuation of the old.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1764, 1766–1768; Dec. Dig. ⟸934.]

---

2. JUDGMENT ⊂⇒934—ACTIONS OF FOREIGN JUDGMENT—LIMITATIONS—CONSTITUTIONALITY.

The three-month limitation, imposed by Rev. St. Colo. 1908, § 4076, upon foreign judgments rendered upon a cause of action which accrued more then six years prior to the bringing of the action in a foreign state, is void as imposing an unreasonable limitation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1764, 1766–1768; Dec. Dig. ⊂⇒934.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by William Stewart Tod against John M. Kuykendall. Judgment for the plaintiff, and defendant brings error. Affirmed.

William V. Hodges, of Denver, Colo. (J. J. Laton, Mason A. Lewis, and James B. Grant, all of Denver, Colo., on the brief), for plaintiff in error.

Edmund J. Churchill, of Denver, Colo. (Charles W. Burdick, of Cheyenne, Wyo., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and T. C. MUNGER and YOUMANS, District Judges.

YOUMANS, District Judge. On August 19, 1895, defendant in error recovered a judgment against plaintiff in error in the district court of Laramie county, Wyo. On the 17th of April, 1912, pursuant to the statutory provisions of that state, a judgment of revivor of said original judgment was entered in the same court. On March 17, 1913, a suit on the judgment of revivor was brought in the District Court for the District of Colorado. Plaintiff in error demurred to the complaint and, upon the demurrer, claimed that the judgment of revivor did not interrupt the running of the statute of limitations against the original judgment, and that this action was barred by the following statute of limitations of Colorado:

"4076. Cause of Action Without the State—Six Years.—Sec. 16. It shall be lawful for any person against whom an action shall be commenced in any court of this state, wherein the cause of action accrued without this state, upon a contract or agreement expressed or implied, or upon a sealed instrument in writing, or upon a judgment or decree rendered in any court without this state, more then six years before the commencement of the action in this state, to plead the same in bar of the action in this state; provided, that if said judgment or decree rendered without this state be based upon a cause of action which had accrued more than six years prior to the commencement of the action on such judgment or decree in this state, and the said judgment or decree had been rendered without this state more than three months prior to the bringing of such action thereon in this state, it shall be lawful for any person against whom any action or such judgment or decree shall be brought, to plead the same in bar thereof."

The demurrer was overruled and, the plaintiff in error electing to stand on his demurrer, judgment was rendered against him. He assigns as error the action of the court in overruling the demurrer.

It is contended on his behalf that the statute of Wyoming, under which the judgment was revived, was adopted from the state of Ohio, and that it must be presumed that the construction placed upon that

statute by the courts of Ohio was also adopted. Maki v. Union Pacific Coal Co., 187 Fed. 389, 109 C. C. A. 221.

The case of Misner v. Misner, 41 Ohio St. 678, is cited as a decision rendered by the Supreme Court Commission of Ohio prior to the adoption of the statute by the state of Wyoming, and that it must be assumed that this decision was also adopted. An examination of that case discloses, however, that the effect of a judgment, or order of revivor, on the statute of limitations was not involved. The question raised there was whether the proceeding to revive should be instituted in the county in which the original judgment was rendered, or in the county in which the defendant resided. The original judgment in that case had been rendered in Jackson county, and the petition to revive was filed in that county. Summons was directed to the sheriff of Lawrence county and by him served upon the defendant in the latter county. It was held by the Supreme Court Commission of Ohio that:

"The petition and summons did not make a new action; they were additional proceedings in the original action. The defendant was entitled to notice thereof, and got it, as authorized by said amended section 417. Having jurisdiction of the original action, the court could issue summons to any other county in the state, in order to effect a revivor."

It is thus seen that the Misner Case did not hold that the judgment of revivor did not constitute a new point from which the statute of limitations began to run. Nor have counsel called our attention to any subsequent case from Ohio in which it is so held. Neither does it appear that there has been such a holding by the courts of Wyoming. Whether the proceeding to revive is denominated a new or an old action is immaterial.

The Supreme Court of Iowa, in the case of Meek v. Meek, 45 Iowa, 294, held that a judgment of revivor did not affect the running of the statute. In that case the court said:

"In support of his position, that the statute of limitations begins to run only from the date of the revivor, plaintiff cites Fagan v. Bentley, 32 Geo. 534. This case, as well as three or four Irish decisions to which we have been referred, hold that the judgment in scire facias, under statutes similar to our own and the Ohio statute, is to be regarded as a new judgment, and the statute of limitations must be regarded as beginning to run therefrom, and not from the date of the original judgment. They are in conflict with the decisions of this court, above cited, which we are required to follow rather than those of other courts. We think the rule of this court is based upon sound reason; we have therefore no disposition to disturb it."

We do not think the rule announced by the Supreme Court of Iowa is sustained by the weight of authority. Digges v. Eliason, 4 Cranch, C. C. 619, 7 Fed. Cas. 691, No. 3904; Lafayette v. Wonderly, 92 Fed. 313, 34 C. C. A. 360; Rogers v. Kimsey, 101 N. C. 559, 8 S. E. 159; Walsh v. Bosse, 16 Mo. App. 231.

In the Wonderly Case Judge Sanborn said:

"Its purpose is not to raise the issue of the validity of the original judgment, but to offer the debtor an opportunity to show, if he can, that the former judgment has been paid, satisfied, or released, and, if he cannot, to avoid the statute of limitations against the judgment and its lien, if it have one, and to give the creditor a new right of enforcement from the date of

the judgment of revival. Its effect, when it results in a new judgment, is to avoid the statute of limitations, to set it running again from the date of the judgment of revival, and to reinstate the old judgment. * * * One of the objects and effects of a revival is to avoid the statute of limitations, to give the creditor a new right to enforce his judgment from the date of the judgment of revival, and to set the statute of limitations to running from the date of the latter judgment. * * * Under the Statute of Westminster II, and under the statutes of Missouri, this proceeding by scire facias is a remedy for the avoidance of the statute of limitations, and independent of, but concurrent with, an action of debt upon the judgment." 92 Fed. 314, 316, 317, 34 C. C. A. 361, 364.

The same question was raised substantially in the same way it is raised here in the case of Digges v. Eliason, supra. That was a scire facias to revive a judgment. The defendant pleaded the Maryland statute of limitations. The plaintiff replied that the original judgment was revived by an award of execution thereupon on the first Monday of December, 1826, and that the period of limitations had not elapsed since such award. Chief Judge Cranch said:

"Whether the judgment on the scire facias is to be considered as a new judgment for the original debt is not material, as, according to the long-established practice in the English courts, before the passing of the Maryland Act of 1715, the revival by scire facias prevented the original judgments from being considered as standing, within the meaning of that word, in the expression, 'ten years' standing.' The opinion in the case of Hardisty v. Barny [2 Salk. 598], was given in 1695, and was a declaration of the then long-established practice of the court. The Maryland Act was passed 20 years after the case, and probably with full knowledge of that practice. The English authorities, also, generally consider and speak of an award of execution upon scire facias as reviving the original judgment, and such also has been the general understanding and language in this country. Upon these considerations, the court is of opinion that as 12 years had not elapsed between the revival of the judgment by scire facias in 1826 and the suing out of the present scire facias, the judgment is not barred by the statute."

[2] The three-month period of limitations contained in the section of the Colorado statute, above quoted, has been held by this court to be void as imposing an unreasonable limitation. Lamb v. Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558. In our view of the case the six-year statute had not run.

The decision of the lower court is therefore affirmed.

BRY BLOCK MERCANTILE CO. v. COLUMBIA PORTRAIT CO.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2540.

1. CONTRACTS ⇐94—RESCISSION—FRAUD.

Where plaintiff induced defendant to contract to purchase medallions and frames from it, to be used in the furtherance of an advertising scheme, plaintiff's false laudatory statements concerning the merits of the scheme, that plaintiff would furnish frames at cost, that defendant would be able to charge its customers a sufficient profit on the frames to repay it for the medallions and cost of operating the scheme, and that frames to fit the medallions were made only by one company, which was controlled

by plaintiff, the contract fixing no price for the frames, were not such as to justify a rescission.

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

2. CONTRACTS ⊂⊃94—RESCISSION—FRAUD.

A misrepresentation by plaintiff's agent, inducing defendant to contract with plaintiff for medallions and frames to be used in an advertising scheme, that the medallions had never been offered to the public in the city of Memphis, if relied on by defendant, was sufficient to justify rescission.

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

3. DAMAGES ⊂⊃175—CONTRACT—BREACH.

Where, in an action for defendant's breach of a contract to purchase medallions from plaintiff to be used in an advertising scheme, plaintiff was permitted to show by estimate how many medallions defendant would probably have purchased from it, if it had bought from plaintiff all its requirements as provided by the contract, defendant was then entitled to show how many medallions it had, during the contract, purchased from the substituted manufacturer.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 469–471; Dec. Dig. ⊂⊃175.]

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

Action by the Columbia Portrait Company against the Bry Block Mercantile Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Auvergne Williams, of Memphis, Tenn., for plaintiff in error.

Caruthers Ewing, of Memphis, Tenn., for defendant in error.

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

DENISON, Circuit Judge. In the court below, the Portrait Company, hereafter called the plaintiff, recovered a judgment against the Mercantile Company, hereafter called the defendant. The judgment was based on a contract whereby the defendant was to adopt an advertising scheme being exploited by the plaintiff. The scheme was that the defendant would issue to its customers, with each purchase, coupons or memoranda showing the amounts of purchases made, and, when these purchases amounted to $10, it would furnish to the customer, without charge, an artistic reproduction, called a medallion, of any photograph which the customer sent in for that purpose. These medallions were to be made by the plaintiff for defendant at a stated price, the defendant agreed to buy them from plaintiff only, and the contract was to continue for a year.

To the declaration alleging that after a short time the defendant had refused to carry out the contract, but had procured its similar medallions from another company, whereby the plaintiff was damaged in the amount of the profits it would have made on the medallions it would have furnished, the defendant pleaded that the contract had been procured by certain fraudulent representations. Plaintiff demurred, the demurrer was sustained, a judgment entered by default, dam-

ages assessed by a jury, and final judgment entered. Defendant alleges error in overruling the demurrer and in receiving evidence upon the assessment of damages.

[1] It seems that the demurrer to the plea was sustained because the fraudulent representations pleaded were thought to be of such a character, either that they were not legally material, or that defendant had no right to rely upon them. They undoubtedly did have the color of merely puffing or highly laudatory statements, which, when made with reference to the merits of an advertising scheme and made to an experienced and skillful merchant, could constitute no basis for a charge of fraud; and some of them have that character only.

It was part of the contract that the plaintiff would furnish also frames for the medallions, and the representation was that the defendant would be able to charge its customers profit enough on the frames to repay it for the medallions and for all the cost of operating the scheme. The first representation pleaded is that three other named dealers in other cities had operated the plan, and had found that the profits on frames were sufficient to pay all expenses. This representation is said to have been depended upon, and to have been false. Obviously, its truth could not be material, unless a great many conditions in other cities were so similar in these earlier cases to the Memphis conditions affecting defendant that this experience would be a useful guide; and whether that similarity did exist would be, in most respects, matter of opinion. Especially is this true as to the amount of effort and ability given and to be given by the respective merchants in order to make the scheme successful. While the question is not free from doubt, we think it beyond the safe limits of the established rule to allow a rescission for fraud to be predicated upon such representations made in the surroundings shown without dispute by this record.

The next representation pleaded is that the frames which would fit these medallions were made only by one company, and that this was controlled by the plaintiff. No reason is suggested why suitable frames could not be made by any frame maker; and the representation, even if false, was inconsequential.

The next representation is that the frames were sold by plaintiff to defendant at cost. Since the contract did not fix any prices, it is clear that this statement amounted, at best, only to a promise that the frames were to be sold at cost; and a breach of this promise would give no ground for rescission.

[2] In all respects so far considered, the court was right in sustaining the demurrer; but the plea continued:

"The agent of the plaintiff further represented that the medallions in question had never been offered to the public in the city of Memphis"

—and alleged the untruth of this statement, and that the defendant relied thereon. This seems to us a statement of a material fact. The success of the plan must largely depend on its novelty, and if, in fact, it was an old story to the Memphis purchasing public, and had been tried and abandoned or tried and worn out, the whole plan would have a very different aspect. If this representation, and material reliance thereon, and its substantial falsity, and prompt repudiation therefor,

had been established, we think the rescission would be justified; and this leads to the conclusion that it was error to overrule the demurrer.

It seems unnecessary to refer to authorities. The rules governing the subject are settled and familiar, the difficulty comes in the application to particular facts, and precedents are not likely to control a problem so specific.

Some of the evidence put in the case on the assessment of damages indicates that, after the defendant had broken its contract to buy all its medallions from the plaintiff, and was buying them elsewhere, and after it must have known, if it ever did, that the representation about former use in Memphis was false, it was continuing to take the benefits of part of the contract. The declaration contains, in the last paragraph, a statement which is now said to allege the state of facts just mentioned, and which is, therefore, said to amount to an anticipatory avoidance of the plea of fraud, since, if the defendant was continuing to take benefits under the contract, it could not repudiate the burdens. We think this language of the declaration will not bear this construction; and the waiver of any fraud there may have been is not otherwise presented, so as to make a question for decision.

[3] On the assessment of damages, plaintiff was permitted to show, by estimate, how many medallions defendant probably would have purchased from it if defendant had bought from that source all its requirements as the contract provides. The defendant then proved how many medallions it had, during the term of the contract, purchased from the substituted manufacturer. It then offered to prove that the medallions so substituted were the precise equivalent of those made by plaintiff, and that, throughout the period, it had operated its store and the advertising scheme generally with these substituted medallions exactly as contemplated by the contract with plaintiff. This offer was refused, and we think the refusal was error. The amount of purchases that would have been made, if a contract had been carried out, is always difficult to prove; but there can be no more highly persuasive evidence than that which shows that under precisely equivalent conditions a certain number of an article exactly equivalent were, in fact, purchased. Of course, the equivalency of the article and of the conditions is of the utmost importance as showing the value of the comparison. Such evidence, without proving such equivalency, is of little force; but, when the equivalency sufficiently appears, the evidence must be more convincing than any expert estimate can be. The amount of damages awarded by the jury is considerably higher than it would have been if the damages had been computed on the basis of that number of medallions which this evidence would have tended to establish; and so we cannot say this error was immaterial.

For the reasons stated, the judgment must be reversed, with costs, and a new trial awarded.

THE RICHMOND.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 99.

SALVAGE ⇐17—RIGHT TO COMPENSATION—INEFFECTIVE SERVICES.

A tug which, in response to an alarm signal, came to the aid of a steamship in port, on which there was a fire, and standing alongside threw a stream of water into a coal port, in which she persisted after being ordered to stop by the master of the steamship because her stream was doing no good but was interfering with others, *held* not entitled to a salvage award.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 30; Dec. Dig. ⇐17.]

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

This cause comes here on appeal from a decree of the District Court, Eastern District of New York, which awarded $250 as salvage to the tug Florence for services rendered in suppressing a fire which broke out in the steamship Richmond. The facts will be found stated in this opinion. The opinion of the District Judge will be found in 209 Fed. 488.

H. M. Hewitt, of New York City, for appellant.

J. A. Martin, of New York City, for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The Richmond, attended by two tugs, the Arrow and Starbuck, was lying at anchor in the East river near Twenty-Eighth street, New York, when fire was discovered in between decks of the engine room and in the cargo of lumber at a point just forward of the engine room bulkhead.

Her master at once sent the Arrow away to summon the municipal fire boat. The Arrow, instead of proceeding towards the berth of the fire boat, headed across the river for Newtown Creek, intending to telephone for the latter. Thereupon the Richmond and, by her orders or with her consent, her attendant tug the Starbuck, blew alarm signals, which they say were intended to recall the Arrow and summon the fire boat. These signals, however, were in fact a general alarm, to which many nearby tugs, including the Florence, responded. When the Florence arrived, hose from the Starbuck had been passed aboard the Richmond, through a coaling port in the port side of the ship, and thence led, by some of the ship's company, to a hatch a few feet forward of the port, through which water was discharged into a lower compartment to check the spreading of the fire in a part of the cargo. Two lines of hose of the Richmond herself had also been put in commission, one down the starboard hatch, the other down a hole chopped in the deck just over the fire, also the steam of a perforated pipe. The Florence came alongside near the Starbuck. She did not make fast to the Richmond, but held her stem against the steamship's side, while one of her crew stood on the stem holding the nozzle of her hose in

the same coaling port through which the Starbuck's hose led. She continued discharging water from this nozzle until the arrival of the fire boat, when she was ordered to desist by the fire chief, who took control of the situation. Her witnesses say that she continued playing her hose for about an hour. As to these facts there is no dispute. After the Florence had been throwing her stream through the coaling port for some time, the master of the Richmond discovered what she was doing. Apparently as he was moving along the alleyway into which the stream was playing, he was struck by it. He testifies that he at once hailed the Florence and told her to stop; that he did not want her stream; that it was doing no good and was interfering with the work of the Richmond's crew, who were fighting the fire; that the man who was holding the Florence's hose thereupon began to play on the side of the steamship, saying he would "keep the side cool," whereupon the captain told him to wait till it got hot; that the captain of the Richmond repeatedly told the Florence to desist and to take her stream away (that he did this at least four or five times); that on each occasion the Florence would cease playing into the coaling port for a brief time, only to resume doing so as soon as the master of the Richmond disappeared. The master of the Florence and her deck hand deny this, but we are inclined to believe the Richmond's story for these reasons:

First. Her master's story is fully corroborated by the engineer of the Richmond and the master of the Starbuck.

Second. The witnesses from the Florence endeavored in their testimony to create the impression that her hose was put on board the Richmond, as the Starbuck's was. Persistent cross-examination alone forced them to admit that the hose was never on board the Richmond, but that all that entered the port was the business end of the nozzle and the stream of water.

Third. Corroboration of the story of the captain of the Richmond that he did not want the Florence's stream and tried to have it removed is found in the circumstance that he also objected to the tug Reichert throwing a stream aboard and told her master to desist doing so. This the master of the Reichert himself admits. He desisted as soon as requested.

Fourth. It was quite natural for the master of the Richmond to ask the Florence to remove her stream, because it was doing more harm than good. From the coaling port through which it entered it merely played across an alleyway, struck against the bulkhead of the engine house, splashed and fell on the deck, some distance away from the hatch through which the Starbuck's hose was discharging. Most of the water went down the scuppers, some little perhaps down the hatch. Moreover, it interfered with the men who were working in the alley, wetting them, and sometimes knocking them about.

For services rendered in response to the alarm which she might fairly take as addressed to herself with others, the Florence might be entitled to salvage, for the fire was a serious one; but certainly she ought not to be awarded anything for continuing to play her hose either into the alleyway or against the side of the ship, after she had been told that her services were not wanted, and that her throwing a stream into the alleyway was interfering with the fire fighters on board.

Moreover, we are satisfied that because of her obstinate persistence in thrusting her services on the Richmond and continuing to interfere with the fighting of the fire by the Richmond's crew, after she was warned that she was so interfering and told to desist, she forfeited whatever small sum she might otherwise have claimed for services rendered in compliance with the alarm whistle, which she might fairly construe as addressed to herself. The District Judge reached a different conclusion on the theory that the captain of the Richmond "could have compelled the Florence to leave." She was not made fast to the Richmond, so that the cutting of a line would not have set her adrift, and we do not think the master of the Richmond, when he found his repeated requests and orders were unheeded, was under any obligation to abandon his occupation of fighting the fire aboard his own ship in order to board the Florence, overpower her master and crew, and enforce her withdrawal.

The decree is reversed, with costs.

CENTRAL R. CO. OF NEW JERSEY v. ANCHOR LINE, Limited.

NEW YORK CENT. & H. R. R. CO. v. SAME.

LEHIGH VALLEY R. CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

Nos. 38–40.

1. CARRIERS ⊂=23—INTERSTATE COMMERCE LAW—APPLICATION.

The interstate commerce law is not intended for the benefit of carriers but to protect passengers, shippers, and consignees against unreasonable rates of passage money and freight, and against unfair discrimination between passengers, shippers, and consignees.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 57–59; Dec. Dig. ⊂=23.]

2. CARRIERS ⊂=30 — INTERSTATE COMMERCE — SCHEDULES — EFFECT — DEMURRAGE.

Where interstate railroad carriers furnished lighters at tide water free to shippers to transfer freight to ocean carriers, and the shippers did not employ or control the lighters nor agree to furnish a berth, so that there was no lien on the cargo for demurrage, the railroads, by inserting a charge against the steamship companies in their published tariff for demurrage, could not make them liable therefor.

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

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

J. Parker Kirlin, of New York City, and Charles T. Cowenhoven, Jr., of New Brunswick, N. J., for appellants.

Burlingham, Montgomery & Beecher, of New York City (Norman B. Beecher and Ray Rood Allen, both of New York City, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The libelants are common carriers of goods from points in other states to the port of New York, there to be delivered to the respondent, to be carried by it to the port of Glasgow. Through bills of lading were issued in which the inland carrier and the ocean carrier contracted, not jointly, but severally, with separate conditions as to the service of each. The libelants furnished lighters to the goods owners free. In their tariffs, however, filed with the Interstate Commerce Commission as required by section 6 of Act Feb. 4, 1887, c. 104, 24 Stat. 380, as amended by Act June 29, 1906, c. 3591, 34 Stat. 586 (Comp. St. 1913, § 8569), they provided:

"Demurrage Charges on Lighters, Barges or Car Floats.

"18. When a car float, lighter or barge reports at its destination, the shipper, consignee or steamship company must provide a berth, and two days (48 hours) from the time the car float, lighter or barge reports (Sundays and holidays excepted) shall be deemed lay days, without charge, after which demurrage shall accrue against each shipper, consignee or steamship company, as the case may be, responsible for the delay, at the following rates a day (of 24 hours) or fraction thereof:

Car floats	$25.00
Steam hoisting barges	20.00
Other lighters or barges	10.00

"Delivery of the property, when covered by domestic bills of lading, will not be made until the demurrage charges have been paid."

When the lighters were ready to move, the respondent's agents delivered to the libelants a permit reading on the face:

"New York, ..., 19...
The Clerk of S. S....., for Glasgow,
will receive from .....;
on or before ..... viz.:
.....
.....
Steamer at:
"Pier ....."

And on the back:

"It is understood that any engagement of cargo is on the condition that such cargo can, in the judgment of the steamer's agents (having regard to weather and other circumstances), be put on board the steamer in proper time, before the advertised sailing date; otherwise the engagement shall not be binding upon the steam company, or its agents, in respect of any of the goods not shipped, and they shall be absolved from all consequences or claims should the steamer proceed to sea without the goods."

If the lighter did not arrive in time to deliver her cargo to the steamer, the libelants always refused to pay dead freight, while, if it were detained longer than 48 hours, respondent refused to pay demurrage. These actions were brought just before six years had elapsed from the time the alleged cause of action arose. The conduct of the parties as well as the conditions printed on the back of the permit shows that the respondent did not intend to assume any liability to the libelants for demurrage.

The libelants claim quite rightly that the tariffs, so far as required and authorized by the statute, have the force of law. The question to

be decided is whether these demurrage charges were authorized by the statute. Section 6 provides:

"* * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * * No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided, that wherever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.'"

[1] The interstate commerce law is not intended for the benefit of carriers, but to protect passengers, shippers, and consignees against unreasonable rates of passage money and of freight and against unfair discrimination between passengers, shippers, and consignees. If the shippers in this case were responsible for the demurrage, the tariff charge would apply and would have to be collected by the railroad company. But they were not.

[2] The libelants furnished the lighters free and were the only losers because of detention. The shippers did not employ or control the lighters nor agree to furnish a berth; and there being no liability on their part for these things, there is no lien for demurrage upon the cargo. The libelants, by inserting a charge against the steamship companies, could no more make them liable than they could make the shippers or consignees liable by naming them in the tariff. Indeed, as between the carriers, there is no public policy as to which of them should bear any particular charge. Such a case as Lehigh Valley R. R. Co. v. U. S., 188 Fed. 879, 110 C. C. A. 513, does not apply because in it the demurrage for the detention of cars was payable by the shipper and the company was held guilty of a misdemeanor for remitting the charge in case of one of the shippers. The foregoing makes it unnecessary to consider what, if any, delay of the lighters occurred and whether such delay was due to the fault of the respondent.

The decrees are affirmed.

HILL et al. v. EAGLE GLASS & MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. January 13, 1915.)

No. 1289.

1. APPEARANCE ⟸28—STRIKING OUT—INADVERTENT APPEARANCE.
Where the attorney for a defendant as to whom the bill was dismissed for lack of diverse citizenship made an uncontroverted showing to the court that he had no authority to represent other defendants, and that his appearance generally was by inadvertence, the court properly ordered his appearance as to such defendants struck out.
[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 164; Dec. Dig. ⟸28.]

2. TRADE UNIONS ⟸8—LIABILITIES OF MEMBERS AS TO THIRD PERSONS.
The members of a labor union, a voluntary association, were not responsible for a tort of other members, unless they authorized it, or participated in or aided it in some way after knowledge of the illegal purpose, or of facts from which such knowledge might be inferred.
[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 6; Dec. Dig. ⟸8.]

3. COURTS ⟸343 — PROCEDURE — PARTIES — SUING ON BEHALF OF PARTIES SIMILARLY SITUATED.
When the allegation of a general or common interest to many persons within equity rule 28 (198 Fed. xxix, 115 C. C. A. xxix), providing that, when a question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole, is denied, the court must determine whether the common or general interest exists before decreeing against those claimed to be in court by representation.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. ⟸343.]

4. INJUNCTION ⟸114—SUING ON BEHALF OF PARTIES SIMILARLY SITUATED.
Where, in a suit to enjoin the officers and members of a labor union from doing anything in furtherance of an alleged illegal scheme to unionize plaintiff's plant, it appeared that the members served with process did not authorize or participate in such scheme, there was no such common or general interest as authorized a temporary injunction against them, or as brought the defendants not served before the court by representation.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220; Dec. Dig. ⟸114.]

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

Suit by the Eagle Glass & Manufacturing Company against William J. Hill and others. From an order granting a temporary injunction, defendants appeal. Reversed.

John A. Howard, of Wheeling, W. Va., for appellants.

John C. Palmer, Jr., and Geo. R. E. Gilchrist, both of Wheeling, W. Va., for appellee.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. [1] In this suit for injunction by the Eagle Glass & Manufacturing Company against Thomas B. Rowe,

individually and as president, and a number of other officers of the American Flint Glass Workers' Union, individually and in their official capacity, all alleged to be residents of the state of Ohio, none of the defendants were served except Joseph Gillooly, a member of the executive board and one of the organizers of the union, who was found in the state of West Virginia. A temporary order was granted restraining the defendants from doing certain alleged illegal acts in furtherance of their alleged illegal scheme to unionize the plaintiff's plant. The fact that Gillooly was not a resident of the state of Ohio, but of the state of West Virginia, having been made to appear through his counsel, Mr. John A. Howard, the court dismissed the bill as to him and retained it as to the other defendants, on the ground that Mr. Howard had formally appeared for all the defendants. Mr. Howard having made a perfectly clear, uncontroverted showing to the court that he had no authority to represent the other defendants, and that he had appeared generally by inadvertence, when he intended to appear for Gillooly alone, the court upon the most obvious principles of right and common sense ordered the appearance as to the defendants other than Gillooly struck out.

In the meantime, however, on November 27, 1913, an order was made allowing the plaintiffs to amend the bill by making Peter J. Glasstetter and others, members at Steubenville, Ohio, of the American Flint Glass Workers' Union, defendants. The amended bill alleged that these members of the union were assisting the officers of the union named in the original bill "in the efforts to unionize plaintiff's employés and to force plaintiff to recognize said American Flint Glass Workers' Union." The new parties defendant submitted affidavits that they were only members, not officers, of a local union, that Rowe and others, who were the general officers of the union, were not authorized to represent them in their alleged illegal acts, and that they knew nothing of their efforts to unionize plaintiff's factory. There was no showing whatever to the contrary. Under these conditions the court issued a temporary injunction against all of the defendants named in the bill and the amended bill, except Gillooly, as to whom the bill had been dismissed.

[2-4] We think this was error. Rowe and others, general officers of the union, were not served, and therefore no relief could be given against them, unless it could be said they were brought before the court by representation when Glasstetter and others, mere members of the local union, were ordered to be made parties and appeared. This effect is asserted under equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix):

> "When the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The union is a voluntary association, and its members are not responsible for a tort of other members, unless they have authorized or participated in it, or have aided in some way in its perpetration after knowledge of the illegal purpose, or facts from which such knowledge

may be inferred. Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; Lawlor v. Loewe, 209 Fed. 721, 126 C. C. A. 445.

When the allegation of a general or common interest to many persons is denied, the duty devolves on the court to determine whether the common or general interest exists before decreeing against those who are alleged to be in court by representation. The plaintiff had no pretense of a case against Glasstetter and the other defendants, brought in by amendment for participating or aiding the defendants not served, in the alleged torts committed by them, and therefore there was no such common or general interest as authorized the court's decree against the defendants served, by virtue of the service and appearance of the defendants brought in by amendment.

All the questions involved in the merits of the appeal were decided adversely to the appellee by this court in Mitchell v. Hitchman Coal & Coke Co., 214 Fed. 685, 131 C. C. A. 425.

Reversed.

KNAUTH, NACHOD & KUHNE v. LATHAM & CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 18, 1915. Rehearing Denied February 22, 1915.)

No. 2651.

1. BANKRUPTCY ⊂⊃141—ADJUDICATION—EFFECT.

A bankruptcy adjudication brings to the court making it the property of the bankrupt, wherever situated, placing the property in custodia legis with full right of the court to administer the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 226, 227; Dec. Dig. ⊂⊃141.]

2. BANKRUPTCY ⊂⊃279—ANCILLARY SUIT—INTERVENTION.

Where an ancillary suit is brought in a different jurisdiction by a bankrupt's trustee to recover alleged assets of the bankrupt and transfer them to the proper court for administration, adverse claimants may not intervene and impress a trust in their favor on such alleged assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. ⊂⊃279.]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Bill by Latham & Co., continued in the name of William S. Lovell, trustee in bankruptcy of Knight, Yancey & Co., against Knauth, Nachod & Kuhne, to recover alleged assets of the bankrupt, in which defendants filed a cross-bill or bill of intervention. From a judgment dismissing the cross-bill (211 Fed. 374), defendants appeal. Affirmed.

Knight, Yancey & Co., large dealers in spot cotton in Decatur, Ala., having become seriously embarrassed, involuntary bankruptcy proceedings were filed against them in the Northern District of Alabama, and William S. Lovell and Clarence E. Frost were appointed temporary receivers. Alleging that Latham & Co., a cotton firm, domiciled and doing business in Havre, France, had, by delivery to them of a large amount of cotton, received an unfair preference from Knight, Yancey & Co., Frost and Lovell filed their bill in the Southern District of Alabama against that firm to recover about 4,200 bales of cotton then in process of shipment by Knight, Yancey & Co. to

Latham & Co., and at that time located on a steamship wharf in the city of Mobile. The receivers' bill was subsequently amended by adding an allegation, on information and belief, that there were other persons than Latham & Co. who claimed some right, title, and interest in the cotton in question, and praying that all persons, firms, or corporations who claimed any right, title, or interest in and to said 4,200 bales of cotton be made party defendants to the bill and be cited by publication to answer the bill.

After obtaining the leave of court to that effect, the appellants, presumably in pursuance of the invitation so extended, filed an answer and also what they denominated a cross-bill or bill of intervention. To this bill Latham & Co. and the American Surety Company filed demurrers, and William S. Lovell, who had been granted leave to prosecute the suit as trustee, filed a motion to strike from the files. Before hearing was had on these matters, the appellants filed an amended cross-bill, and thereafter the matter coming on to be heard on motion of William S. Lovell, trustee, to strike said amended cross-bill from the files, the District Court so ordered. Thereafter an appeal was taken by Knauth, Nachod & Kuhne to this court, and it was here held that the procedure adopted to secure the dismissal of the cross-bill was not the proper procedure. See opinion on former appeal, 200 Fed. 403, 118 C. C. A. 555. The opinion of the trial court will be found reported in Lovell v. Latham & Co. (D. C.) 211 Fed. 374, to which reference is made for more complete statement.

Stevens, McCorvey & Dean, of Mobile, Ala., and Briesen & Knauth and George T. Hogg, all of New York City, for appellants.

Walker B. Spencer, Charles Payne Fenner, Philip S. Gidiere, and Esmond Phelps, all of New Orleans, La., for defendants Latham & Co. and American Surety Co.

Percy, Benners & Burr, of Birmingham, Ala., and Rich & Hamilton, of Mobile, Ala., for trustee in bankruptcy.

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

MAXEY, District Judge (after stating the facts as above). The bill filed by the trustee in bankruptcy was merely to set aside an alleged preferential transfer of cotton made by the bankrupts, Knight, Yancey & Co., to Latham & Co. The suit was instituted in the Southern District of Alabama, and the original bankruptcy proceeding to have Knight, Yancey & Co. adjudged bankrupts was brought, and is now pending, in the Northern District of that state.

[1] The adjudication of bankruptcy in the latter court brought the property of the bankrupts, wherever situated, into custodia legis, and that court thus acquired the full right to administer the estate. Thus it was said by the Supreme Court in Lazarus v. Prentice, 234 U. S. at page 266, 34 Sup. Ct. 851, at page 852 (58 L. Ed. 1305):

"The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into custodia legis, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property; the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law. Mueller v. Nugent, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405]; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300 [32 Sup. Ct. 96, 56 L. Ed. 208.]"

[2] Hence the appellants had no place in the suit instituted by the trustee merely to set aside a preferential transfer. If, as claimed, they

may impress a trust in their favor upon any of the assets of the bankrupts in the hands of the trustee, no reason is perceived why they may not proceed in the court of original jurisdiction. In any event, they will not be permitted to intervene in an ancillary suit, brought by the trustee, the sole purpose of which is to collect assets of the bankrupt and transfer them to the proper court for administration.

Upon the hearing of the motion the trial court dismissed, without qualification, the cross-bill or petition of intervention filed by the appellants.

The order of dismissal should be so amended as to show that the bill or petition is dismissed without prejudice, and, as thus amended, it is affirmed.

HESS-BRIGHT MFG. CO. et al. v. FICHTEL et al.

(Circuit Court of Appeals, Third Circuit. October 7, 1914. On Petition for Rehearing, March 9, 1915.)

No. 1822.

1. PATENTS ⟸160—CONSTRUCTION—EFFECT OF PROCEEDINGS IN PATENT OFFICE.

The claims of a patent as allowed should receive the construction their language naturally imports. They are not necessarily narrowed by the fact that claims were rejected and others substituted in the Patent Office, nor by the substitution of a new specification; but where the alteration required was the elimination of extrinsic nonessential matter, which obscured the description of the essential feature of the invention, the result is a narrowing of the requirements and the consequent broadening of the claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 234, 235; Dec. Dig. ⟸160.]

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BALL BEARING.

The Conrad patent, No. 822,723, for a ball bearing, the essential feature of which is the unbroken continuity of the groove in which the balls run, insuring greater durability of the bearing, discloses novelty and utility, and is valid; also *held* infringed by the device of the Blin patent, No. 818,734.

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

Suit in equity by the Hess-Bright Manufacturing Company and others against Hedwig Fichtel and another. Decree for defendants, and complainants appeal. Reversed.

For opinion below, see 209 Fed. 867.

Rogers, Kennedy & Campbell, of New York City, for appellants.

William A. Redding and William B. Greeley, both of New York City, Frederick P. Fish, of Boston, Mass., and Julian C. Dowell, of Washington, D. C., for appellees.

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

BUFFINGTON, Circuit Judge. In this case the plaintiffs, the Hess-Bright Manufacturing Company and others, owners of patent

822,723, granted June 5, 1906, to Robert Conrad for a ball bearing, charge Fichtel & Sachs with infringing the eighth and ninth claims thereof. On final hearing the court below, in an opinion reported at 209 Fed. 867, dismissed the bill on the ground of noninfringement. Thereupon the plaintiffs took this appeal. By reference to such opinion and to that of Judge Holland in 177 Fed. 435, where the same patent was in issue in another case in this circuit, its subject-matter will be seen. It will be noted that Conrad's patent is for a finished ball bearing adapted for use, and not for a method of assembling. Thus, in his patent he says:

"I do not claim in the present application the described method of assembling the parts of my improved ball bearing, this method being claimed in a divisional application filed May 18, 1906."

And, as showing that his patent was for a finished ball bearing, adapted for use, he says:

"The principal advantage of the new bearing lies in the continuity of the sides of the groove, which insures the *regular running of the balls, and consequently great durability of the bearing.*"

Such being the avowed advantages claimed by the patentee, let us turn to the art and inquire whether Conrad's bearing was new, whether that novelty did lie in "the continuity of the sides of the groove," and whether it was this feature of the groove continuity that made the bearing durable. If those features of novelty and utility be established, and the advance thus made involved patentability, our next inquiry will be whether the patentee duly claimed and the defendant has appropriated this groove continuity. Turning first to the question of novelty, it is apparent, of course, that prior to Conrad's patent the mechanical construction known as a ball bearing, wherein an axle or ring was provided with an exterior groove and an enveloping ring with an interior groove, which two grooves overhung loose bearing balls, was old. So, also, we must assume the possible eccentric relation of these two rings was also theoretically well known. The then common mode of ball bearing construction, however, was to provide one of the rings with a removable section through which the balls were placed in the groove. After this such opening was closed to prevent ball escape. This device is shown in the patent No. 669,124, to Riebe, of 1901. The other method was to introduce the balls through a sidewise slot or channel in one of the rings cut as deep as the groove path. This device is shown in patent No. 796,871, of Sachs, of 1905. While these methods of construction made a reasonably satisfactory bearing under light strain, they proved unsatisfactory when the bearing was subjected to the high speeds and heavy wear due to the radial, lateral, and axial strain incident, for example, to automobile service. In this regard the practical ball bearing art as then practiced prior to Conrad's patent was well described by Judge Holland in 177 Fed. 436 in these words:

"Many patents have been issued for ball bearing devices, which have not been entirely satisfactory, for the reason that the tracks or ways were interrupted, and the balls consequently could not travel freely therein. It was old to have inner and outer rings with opposing grooves, but the sides of these

grooves were interrupted in one way or another to permit the introduction of the balls. In some cases filling openings were provided, and in some instances these were filled up or plugged after the balls had been introduced in order to prevent the escape; but these prior devices were defective, in that the raceways would crumble or wear at the interrupted parts of the raceway, and then the injured balls would cause undue wear to the remaining portions of the raceway, and thus the bearing suffered a rapid depreciation, and often an entire failure in a comparatively short time, and where the filling openings were plugged to prevent the escape of the balls the plugs could not be given precisely the same temper as the rings forming the remaining portion of the raceway, and unequal wear would ensue, which resulted in injury to the balls and raceway, and an undue shortening of the life of the bearings. These bearings could safely be subjected only to light loads, and were entirely unsatisfactory, and not fitted for use in heavily built, rapid moving vehicles."

The proofs show that such wear was sometimes caused by twisting, sliding, or uneven pressure of the balls upon the noncontinuous portions of the grooveway. When this wear once began, the bearing would disintegrate very suddenly, indeed, within a few hours' time. Without entering into detail, it suffices to say the proofs in that regard are:

"It was, therefore, impossible to use ball bearings for ordinary loads and speeds as found in ordinary machinery, prior to the Conrad bearing. The Conrad bearing was, therefore, the pioneer in being the first instance in the art of a ball bearing capable of withstanding or enduring the loads and speeds of ordinary machinery for a period of time as great as the life of such machinery. The quality of the Conrad bearing which enabled it to accomplish this new and pioneer result was its quality of substantial wearlessness. It must be understood that this wearlessness or substantial wearlessness has a different relation and significance than might be casually thought when such a quality was mentioned. It is not that wearlessness is desirable for its own sake, but that wearlessness is essential in a ball bearing, because the moment that any substantial wear has taken place the period of rapid disintegration arises and the life of the bearing is ended. * * * This makes an accuracy essential in the balls and races to a standard of about one ten-thousandth of an inch. Accordingly, if a bearing is not almost absolutely wearless, it will within a very short time wear more than one or even several ten-thousandths of an inch, so that, even if it were originally made with accuracy, its accuracy is terminated by this very slight wear. Just as soon as this accuracy is lost, the bearing commences to quickly disintegrate. Accordingly a ball bearing to be capable of successful general use must be almost absolutely wearless, because it cannot be allowed to wear even to the extent of a few ten-thousandths of an inch during its entire life. Hence the importance of an almost absolutely wearless bearing is not merely to provide a *long* life, but in order to provide practically *any life at all.* Thus all bearings prior to Conrad did not differ merely in degree to the extent of having merely a shorter life, but they did not have practically any life at all. It was only the quality of wearlessness produced in Conrad's bearing which gives the bearing its life equal to the life of the mechanism in which it may be used. * * * The Conrad bearing was the first wearless ball bearing, meaning, of course, practically or substantially wearless, under normal conditions. Of course, I do not mean to affirm that the Conrad bearing will not wear somewhat if subjected to overloads or conditions where grit is encountered, or acid in the oil. As bearings go into the custody of all sorts of persons, who use different machinery, a slight wear may occur even with the Conrad bearing; but eliminating this aspect of the matter, what I wish to affirm and make clear is that prior to the Conrad bearing all ball bearings showed rapid wear, no matter how carefully they were made or used, and that the Conrad bearing was the first instance of a ball bearing capable of enduring ordinary loads and speeds without substantial wear."

One cause of this disintegration was, as we have seen, the noncontinuity or break of the groove path to provide for ball admission. In that regard the proof is:

"An interruption in one form or another in one or both the races, to permit the insertion of the balls, always left a weak point, much less able to withstand loads than the other portions of the race not so weakened. Disintegration and crumbling of the bearing was likely to occur within a short time at the weak point of the race. As soon as this disintegration or crumbling commenced it proceeded rapidly to destroy the bearing. It is obvious that this result would occur, because even a slight injury to the race produces an injury to the balls, which causes further injury to the races, and in turn to the balls, and so on."

In this state of the art Conrad disclosed the device of the patent. It is exceedingly simple, and in the after-light of its simplicity it is remarkable that no one had suggested its earlier use. Narrowed to what it really is, Conrad simply brought into the art a metallically unbroken groove pathway for the balls. This pathway he kept unbroken by introducing the balls by eccentric displacement of the rings; the retention of the balls and the concentricity of the rings he effected by ball spreaders. The elements he used were individually all known. There was no originality in a spreader to keep rollers or balls from contracting with each other, as also there was none in placing two concentric rings in eccentric relation. Conrad's novelty and contribution to the art consisted in disclosing the actual use of a continuous or unbroken groove as a pathway for a ball bearing. As a practical means of putting his continuous pathway in use he suggested ball loading by eccentric displacement, and as a means of preventing unloading by eccentric displacement he showed the use of spreaders. This resulted in the production of a unitary, workable device, to wit, a ball bearing, for which his patent was granted.

A study of the patent shows groove continuity was the substantial disclosure of Conrad's specification. For example, it said:

"The invention provides a ball bearing having concentric grooved rings, *the sides of the grooves being uninterrupted throughout their circumference.*"

From this it will be seen that, while the rings themselves have concentric grooves, it is the grooves in the rings and the sides of those grooves that are unbroken or uninterrupted throughout their entire circumference. This feature of unbroken groove continuity is further emphasized. Thus Conrad says:

"The principal advantage of the new bearing lies in the continuity of the sides of the groove."

He also asserts that it is this continuous groove continuity that mechanically makes the ball bearing durably effective. Thus, speaking of "the continuity of the sides of the groove," he says it "insures the regular running of the balls, and consequently great durability of the bearing." That the unbroken groove continuity itself was the essential feature, and that such groove was differentiated from the face or ungrooved surface of the ring, is evidenced by the several claims. For example, in claim 1 we note, "A ball bearing including two concentric *rings* having opposing *grooves on their* adjacent *faces,* the sides of

said grooves being uninterrupted throughout their circumference;" in claim 2, "a ball bearing including two concentric *rings* having opposing *grooves on their* adjacent *faces,* the sides of said grooves engaging the balls to prevent substantial lateral movement, *said sides* being uninterrupted throughout their circumference;" in claim 8, "a bearing comprising two concentric *rings,* balls between *said rings,* each ring having a *groove,* both sides of which overhang said balls and are *continuous* and practically *integral throughout their circumference*"—terms also carried into claim 9. From these extracts it will be seen that the designated, effective, and claimed feature of Conrad's disclosure was the groove with unbroken, integral, continuous sides. In the old art it was the cut into the wearing side of the grooved pathway that had developed an exposed wearing weakness, and it was this groove incision or groove entry that Conrad eliminated and claimed. It was, of course, obvious that this device of an unbroken, side-wearing surface of his groove showed, in his method of applying his unbroken groove, that he also obviated a cut in the ring face beyond the groove edge, for he says:

"The sides of the grooves, *and in fact, all the parts of each ring* are continuous and practically integral throughout the entire length of the ring."

But a careful scrutiny of the patent makes it clear that this unbroken feature of the ring was merely a mechanical statement made in properly describing the unbroken character of the groove, and that nowhere in the specification or claims was any other reference made to the unbroken character of the ring face, or was any functional effect attributed to or claimed for an unbroken ring as such. Indeed, Conrad's sole reference to an unbroken ring is where the specification says:

"Each ring has a groove, the sides of which overhang the balls to a slight extent. The sides of the grooves, and, in fact, all the parts of each ring, are continuous and practically integral throughout the entire length of the ring."

[1] It is contended, however, that the proceedings in the Patent Office should in some way narrow the effect to be given the claims here involved. There is no doubt that where, pending allowance of a patent, an applicant is forced to narrow his claims, he will not be permitted to put an after construction on them which would make them include what he had been forced to avoid by narrowing. But that principle has no application here, for a critical examination of this file wrapper shows that Conrad came out of the Patent Office with broader claims than those originally made. In other words, the several amendments and the withdrawal and substitution of claims resulted in an elimination of extrinsic matter, in pointing out the essential feature of his disclosure, and in the grant of claims embodying that essential feature and eliminating from his claims such extrinsic, nonessential features. The specification as originally made, together with all the claims, were not satisfactory to the Office—a fact possibly due to the nonfamiliarity of the foreign applicant with American patent requirements—and in the subsequent proceedings each and every of the original claims were rejected. The entire original specification was then

withdrawn and another substituted. These facts are all important, for the contention of the defendant in effect is that the claims granted should be given the effect the claims originally made would have had. That the device itself for which Conrad received his final claims was the same one for which he sought his original claims there is no question. The eight figures of his drawing and their lettering remained unchanged. But, while Conrad had in view the broad, general character of the ball bearing he there disclosed and illustrated, we think his specification as originally drawn did not specifically and with exactness define wherein the precise inventive feature of his device lay, nor did he properly confine his claims to such inventive feature. As we have seen, the gist of the ball bearing disclosed by Conrad was the unbroken, continuous, unrecessed, and integral grooved ball-pathway. When, however, he came to make all three of his original claims they were each and all not for such grooves, but for rings "unrecessed and unbroken." While, of course, such an "unrecessed and unbroken" ring undoubtedly physically had on its face Conrad's "unrecessed and unbroken" groove, yet the unbroken face of the ring was a mere mechanical strengthening incident; for, no matter how much the ring face, as a face, was unbroken and unrecessed, the invention did not lie in the integrity of the ring face, but in the continuity of the sides of the groove. Such being the case, it is clear that the claim as originally made for rings "unrecessed and unbroken" needlessly embodied in the claim the narrowing limitation of necessitating the ring surface to be unbroken, when the real invention lay in requiring the groove side to be unbroken and unrecessed. And, anticipating what will later be apparent, we may here say that, if Conrad's claims had thus remained for "unrecessed and unbroken" rings, the defendant would have avoided infringement of this narrow claim by merely slotting its rings, though in doing so it had cut into and broken the continuity of the sides of the groove. Presumably attention must have been called to this fact by the Office, since in the new specification and the claims which met the Office's approval this oversight was remedied, and in the new specifications as earlier quoted herein it was shown that "the principal advantage of the new bearing lies in *the continuity of the sides of the groove,*" and new claims were made, not for rings "unbroken and unrecessed," as before, but for "opposing *grooves* on their adjacent faces, the *sides* of said grooves being *uninterrupted* through their circumference"—"each ring having a groove both sides of which overhang said balls and are continuous and practically integral throughout their circumference."

As originally made, the pathway secured by the claims would have been restricted to a pathway in a ring which was unbroken and unrecessed. As allowed, the requirement, but not the claim, was narrowed, the ring feature was eliminated, and the "unbroken and unrecessed" requirement was restricted to a groove. In such case the lessening of the requirement was a broadening of the claim. That the claims granted were broader in scope than the ones originally made is evidenced by the fact that to show infringement of the claims as originally made it would be necessary to show the infringer used rings—

"said rings being unrecessed and unbroken"; whereas, with the claims as granted, it is only necessary to show the use of "a groove both sides of which overhang said balls and are continuous and practically integral throughout their circumference." Such being the case, it follows that the claims granted should receive the construction their language naturally imports (Dodge Needle Co. v. Jones [C. C.] 153 Fed. 189, and 159 Fed. 715, 86 C. C. A. 191), and that no statement or action of the patentee in obtaining his patent estops him from claiming to the full extent what his claims on their face purport. We think the court below therefore failed to give proper construction to this patent when it held that "it must be confined to the rings, solid and unbroken throughout, upon which Conrad laid repeated and emphatic stress," for the fact is that in his specification as eventually accepted Conrad laid stress, not on his rings being solid and unbroken, but on the unbroken character of the grooves.

[2] The device of Conrad has proved meritorious and it has gone into exceptionally wide use. Its worth and the validity of his patent have met with wide commercial recognition in the licenses taken under it. We find nothing in the way of prior patenting or use that suffices to shear Conrad's device of patentable novelty; for, without entering into a discussion of the prior art, we may say that, while ball bearings were known and used, there was prior to Conrad no use of ball bearings in the high speeds and heavy loads which his device has made possible. No prior device left any impress on the ball bearing art to which his device applied. Indeed, as the proofs show, Conrad's device made practical the use of such bearings in the case of high speeds under heavy loads. We therefore hold the claims of his patent here involved are valid.

We next turn to the question of infringement. Stripped of all extrinsic matter, that question practically and mechanically turns on the effect and sufficiency as a ball confiner of a steel dam or barrier so slight in height that its gradual rise from the central line of the balls' grooved pathway ceases when $^{44}/_{10000}$ of an inch is reached. In other words, the defendant forms an unrecessed, continuous, integral grooved pathway for its balls until a level of $^{44}/_{10000}$ of an inch is reached, and from that point until the outer edge of its ring is reached, not the whole ring face, be it observed, but a channel less in diameter than the ball, is cut and recessed in a narrow cross-section of the ring face.

The defendants' device is made under the patent to Blin, No. 818,734, of April 24, 1906, for a ball bearing. Describing such device from the specification of that patent, we note that, according to Blin's invention:

"* * * The outer portion of the inner ring is provided with a notch or cut-away part, which starts from one of the sides of the rings and, *being of less depth than the groove containing the balls*, does not therefore extend to the bottom of that groove. In the same way on the inside of the outer ring is made another notch or recess, so that when the two rings are placed concentrically with their two notches facing each other the distance separating the two walls of the notches is smaller than the distance between the two track surfaces on which the balls roll.

"When a sufficient number of balls has been introduced into the bearing in order to keep the two rings concentric, a ball is introduced between the two

notches when they face each other, Fig. 1; but it cannot enter the ball track unless forced in. However, owing to the elasticity of the material, the ball can be driven in, where it remains. All the remaining balls will be introduced in the same manner. Thus the two rings by themselves constitute a complete ball bearing and ball retaining device without the use of auxiliary parts.

"In order to remove a ball, the two notches, *b*, *d*, are brought opposite each other, and the ball opposite the said notches is forced out from the other side between the two notches. The other balls can be removed in the same way until a sufficient number are removed to allow the bearing to fall apart. The result of this arrangement is that it is not necessary to close the notches in order to prevent the balls from escaping. *It will, moreover, be understood that in this construction the traveling path of the balls does not present any lack of continuity due to joints between various parts.*"

It is clear, therefore, that after all the balls are inserted all the parts co-operate precisely the same as if the channel did not exist for all the ball contacting pathway of the groove is unbroken and continuous throughout its entire circumference. In that regard the defendant, in describing its ball bearing in its prospectuses, says:

"F. & S. bearings are made with diagonal side entering slots slightly smaller than the sizes of the balls themselves. The balls are therefore sprung in under greater pressure than they ever receive in service, the races yielding sufficiently to let them enter. Once in, the balls *never again touch the side slots, which virtually then no longer exist.*"

Such device would appear to differ in three respects from Conrad's, viz.: Its ring face is channeled, notched, or recessed; a larger number of balls can be inserted through such channel than by Conrad's unchanneled ring method; no spreaders are required to maintain defendants' ring concentricity. As assembled ball bearings, however, both devices operate in the same way, and the unbroken grooves in which the pathway of the balls of both devices lie would seem equally effective in avoiding the evils of the noncontinuous groove of the prior art. Under such facts is infringement shown? The court below thought not, and, as we understand it, held that the claim element, "each ring having a groove both sides of which overhang said balls," was not found in defendants' structure, because a groove, the sides of which only rose $^{44}/_{10000}$ of an inch, did not overhang the ball. In that regard, it said:

"How such a minute fraction as $^{44}/_{10000}$ of an inch would 'overhang' is not perceptible," and "I do not understand how 'the sides' of the raceway can be continuous and practically integral if they are cut in half, or so nearly in half that $^{44}/_{10000}$ of an inch further would finish the job, and this is the conceded situation of the defendants' bearing."

Turning, then, to the question whether the defendants' groove does overhang its balls, we should note that, however slight the overhang is, it is sufficient to cause this result. Indeed, as we have seen, the defendants not only concede that fact, but positively assert it:

"Once in, the balls never again touch the side slots, which virtually then no longer exist."

At bar, counsel for complainant stated that if this defendant cut its channel entrance deeper by $^{44}/_{10000}$ of an inch all claim of infringement would be abandoned. Slight, therefore, as the difference is mechanically, it is evident its presence is a matter of functional substance.

That such minute exactness as a metallic cut of $^{1}/_{10000}$ of an inch can under modern machinery methods be made is well known. And in that connection it must not be overlooked that the slight rise in the indented plane of the thread of a screw, as afterwards shown, was the dam or barrier that prevented the Reiss telephone from transmitting human speech. It is the function of the barrier, not its size, that counts as a measure of invention. That the groove does "overhang" the ball is, we think, self-evident. In the nature of things the overhang or lesser diameter of the exterior of an inclosing groove than the diameter of the inclosed ball is the only agency that keeps the ball from escaping. Since, therefore, the balls of defendants' bearing in fact do not escape, since there is no other agency than the groove sides to prevent escape, and since the diameter of the balls is greater than the diameter at the edges of the groove, it is physically evident that the groove sides do overhang and prevent the escape of the balls. Moreover, it must not be overlooked that, while the end of the channel through the ring is but $^{44}/_{10000}$ of an inch higher than the bed of the groove at that particular point, the rest of the entire surface of the ring is solid at every other point and makes a much deeper sided groove at other points than the channel mouth, and, as noted above, "in order to remove a ball, the two notches are brought opposite each other, and the ball opposite the said notches is forced out from the other side between the two notches," manifestly this barrier, slight as it is, requires force to pass it.

It is therefore clear that the balls of defendants' structure when in operation do travel in a groove which overhangs such ball. It is equally clear that such pathway of the balls is a groove whose sides are "continuous and practically integral throughout their circumference." It would therefore seem that, so far as that feature of the claim infringement is shown, unless the defendants' structure does not answer the other calls of the claim, viz.:

"The number of balls being such that they can be inserted in the space between the rings when the latter are displaced from their normal positions," and "means for distributing the balls throughout the length of the groove, whereby the two rings are held together against axial displacement by the engagement of the balls with the overhanging walls of the grooves and the parts are held together so as to form a unitary device."

Now it is clear that defendants' two concentric rings are adapted to eccentric displacement, and by such eccentric displacement a ball bearing may be assembled which is accurately described by the foregoing element, viz.:

"The number of balls being such that they can be inserted in the space between the rings when the latter are displaced from their normal position."

Indeed, the proof shows that in actual practice the defendant so filled its rings, viz.:

"Both of the rings were eccentrically placed. Then as many balls as possible were introduced between them; then the rings were put concentrically, and the additional balls were put in through the filling notches."

The defendants' mechanism then being such as to eccentrically introduce in the same way as Conrad the number of balls Conrad requires, does the defendant, as it contends, relieve itself of infringement by fur-

ther providing a channel through which an additional ball or additional balls may be introduced? While Conrad did not show a slot for such additional ball charging, it is clear he did not restrict himself to the number of balls that could be introduced into his bearing, for he expressly says:

"The number of balls which can be introduced can be increased by effecting a slight elastic deformation or tilting, and at the same time pressing an additional ball between the others."

Indeed, the introduction of the additional balls by the defendant through the medium of its slotted channel is but the mechanical equivalent of the additional ball introduction by deformation which Conrad pointed out; for whether the size of an opening between two opposite surfaces be increased by chiseling or cutting the opening wider, or by forcing the sides apart, is, generally speaking, a matter of mere mechanical detail. By the slots the defendant may have increased the scope of ball introduction: but such improvement or advance, if improvement it be, is but an added or alternative means of getting the ball bearing into working shape. When that is done by any of the several methods of introduction, viz., by eccentric or slot introduction, or by deformation introduction, the results in the unitary structure of Conrad and the defendant are precisely alike, in that each ring of both then has "a groove both sides of which overhang said balls, and are continuous and practically integral throughout their circumference." And it is this unbroken groove, and the unbroken pathway the ball thereafter travels upon, and not the pathway by which the ball reached that channel, that is the gist and substance of this case. Conrad's was the real low grade roadway over which tonnage was carried; Blin's was but a switch to get additional tonnage on the main track. Moreover, it is to be borne in mind that in increasing over Conrad the number of balls introduced the defendant has utilized the same elements that Conrad had used to introduce a smaller number; in other words, the defendant has used rings adapted to eccentric introduction. Instead, however, of stopping with the Conrad ball number, the defendant goes a step further and introduces additional ones. In other words, the defendants' ball bearing has the number of balls that "can be inserted in the space between the rings when the latter are displaced from their normal position," thus measuring up to the claim, and it has also the further balls introduced through the channel slot. But advance beyond or even improvement upon a patented device does not cease to infringe, so long as the combination of the patented device is itself utilized in the advance.

So, also, in the other element quoted, viz.:

"Means for distributing the balls throughout the length of the groove, whereby the two rings are held together against axial displacement by the engagement of the balls with the overhanging walls of the grooves, and the parts are held together so as to form a unitary device."

It will be noted that it is the maintenance of a proper ball distribution which prevents recurrence of eccentricity. In Conrad's method the number of balls eccentrically introduced was such that, unless some means were provided to maintain the proper spacing or distribution of

such balls around entire ring circumference, the eccentrically charged balls were liable to be in the same way eccentrically discharged. This difficulty Conrad met with his spacers, saying:

"The edges of the rings, however, are spaced so far apart from each other that they may be displaced eccentrically relatively to each other in the manner shown in Fig. 3, leaving a crescent-shaped space of sufficient width to permit the introduction of a limited number of balls. The crescent-shaped space is marked *d*. The rings may be then restored to their concentric position and spreaders or distributing devices introduced into the spaces between the balls, so as to distribute them entirely around the raceway and to prevent their return to a position such as Fig. 3, which would permit the escape of the balls. * * * It will be seen that the spacers *f* hold the balls in the position of Fig. 1—that is to say, in the distributed position—preventing the balls from running together, and thus allowing one of the rings to fall down against the other and release the balls through the crescent-shaped space."

But this specific means of distribution was not carried into Conrad's claim as quoted above, but the generic term, "means for distributing the balls," etc., was used. It is contended, and indeed the court below found, that the defendants' bearings lack a ball-spacing device, which is not necessary for preventing the bearing from falling apart, and has no such function. That the defendant has no spacer such as Conrad showed is a fact, but that it has "means for distributing the balls"—that is, means for distributing the limited number of balls liable to eccentric discharge—is also a fact. That both Conrad and the defendants' devices do not eccentrically discharge, and that they are both, when charged with the eccentrically chargeable quota, liable to discharge, is clear. Why, then, when they are used as a ball bearing, do neither of them eccentrically discharge? In Conrad's device the reason is obvious. Conrad's spreader compels ball separation, and so prevents the balls from gathering in one part of the ring, and thus forming the objectionable "crescent-shaped space of sufficient width to permit the introduction"—and therefore the escape—"of a limited number of balls." And how does the defendant meet this difficulty? What means does it use to prevent the formation of this "crescent-shaped space of sufficient width to permit the discharge of balls"? Analysis shows that its means is the combined use of a slot and of the extra channel-introduced balls. In other words, the slot, or, more accurately, the additional or slot-introduced balls, are the defendant's means for distributing the other "balls throughout the length of the groove, whereby the two rings are held together against axial displacement." Conrad's device by spreaders prevents the eccentrically charged balls from gathering in a section of the ring where they would form a crescent of discharge. The defendant allows the same number of balls to gather in the same dangerous place, but by its additional channel-introduced balls, which cannot get into such space, prevents the crescent from opening and discharging. It is therefore clear that the slot-inserted, additional balls of defendant's device are the mechanical equivalents of Conrad's spreaders. For if we take Conrad's device we can dispense with his spreader by simply cutting a lateral channel of such depth as will permit slot introduction. And after all said and done this is simply what the defendant has done. In the self-confessing words of the defendant's prospectus quoted above, viz., "Once in, the balls never again

touch the side slots, which virtually then no longer exist," and in the statement of the Blin patent, "It will be understood that in this construction the traveling path of the balls does not present any lack of continuity due to joints between various points." It is clear that Blin and the defendant use the body and soul of Conrad's ungrooved pathway and to it add "a notch or cut-away part, which starts from one of the sides of the ring and, being of less depth than the groove containing the balls, does not therefore extend to the bottom of that groove." That the extra, slot-introduced ball or balls are so introduced simply as a preventive of eccentricity is, we think, conceded and rightfully conceded by Blin's patent. Thus he says:

"When a *sufficient* number of balls has been introduced into the bearing *in order to keep the two rings concentric*, a ball is introduced between the two notches when they face each other, Fig. 1; but it cannot enter the ball track unless forced in. However, owing to elasticity of the material the ball may be *driven* in, where it remains. All the remaining balls will be introduced in the same manner. Thus the two rings by themselves constitute a complete *ball bearing* and *ball retaining* device without the use of auxiliary parts."

The "sufficient" number of initial balls makes ring concentricity, and the slot-driven balls maintain such concentricity. And in that connection it should be borne in mind, as bearing on the question whether the minute rise of $^{44}/_{10000}$ formed a barrier which kept the ball in its path, it will be evident that if the height of Blin's notch or cutaway was sufficient, as he says it was, that a slot-introduced ball "cannot enter the ball track unless forced in," it is equally clear that the ball cannot leave the pathway unless it be forced out, and the only way in which that barrier can be overcome and the ball leave the trackway he points out:

"In order to remove a ball, the two notches are brought opposite each other, and the balls opposite the said notches *are forced out from the other side between the said two notches.*"

It goes without saying that if the ball has to be thus forced out when a double-sized opening is presented by the two cuts in the two aligned notches, that the half-sized presented by one notch and a solid opposite ring makes a doubly higher grooved pathway. Such being the case, we think it clear that the sides of defendant's groove do overhang the balls, and that its overhang, be it only $^{44}/_{10000}$, which in the practical application of the Blin patent the defendants use, is an effective barrier to hold the revolving balls to their orbit.

The decree dismissing the bill must therefore be reversed, and the case remanded, with directions to the court below to enter a decree holding the claims in issue valid and infringed and directing an injunction and accounting.

Petition for Rehearing.

PER CURIAM. The motion for rehearing has had our joint consideration. The defendant firm was formed but a short time before this suit was brought, and is only liable to account for the period subsequent to its formation. Bearing in mind the several prior cases against others in which the rights of the patent here involved were vigorously prosecuted, and the not undue time that elapsed between the

successful termination of such litigation and the commencement of this suit, we do not find any such delay as should preclude the plaintiff from the customary accounting. The defendant firm volunteered to enter the field of infringement, and accounting is a necessary consequence of its act. As to the other matters involved, we see no reason to depart from the conclusion reached and stated in the opinion heretofore filed.

The motions are therefore refused.

GRIER BROS. CO. v. BALDWIN et al.

(Circuit Court of Appeals, Third Circuit. January 22, 1915.)

No. 1891.

1. PATENTS ⊜141—VALIDITY OF REISSUE—BROADENING ORIGINAL CLAIMS.
A reissue patent cannot be allowed to broaden the original patent after the lapse of so long a time as seven years, and after the original patent had been limited by final adjudication.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206–213; Dec. Dig. ⊜141.]

2. PATENTS ⊜328—VALIDITY OF REISSUE—MINERS' LAMP.
The Baldwin reissue patent, No. 13,542 (original No. 821,580), for a miners' acetylene lamp, claim 4, *held* void as broader than the original patent.

3. TRADE-MARKS AND TRADE-NAMES ⊜70—UNFAIR COMPETITION—MINERS' LAMP.
A decree enjoining unfair competition by defendant in imitating complainant's miners' lamp, in form, appearance, and packages, considered and affirmed.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊜70.
Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlick Mfg. Co., 122 C. C. A. 447.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Frederick E. Baldwin and the John Simmons Company against the Grier Bros. Company. Decree for complainants, and defendant appeals. Modified.

For opinion below, see 215 Fed. 735.

Joseph M. Nesbit and Thomas S. Brown, both of Pittsburgh, Pa., for appellant.

James Q. Rice, of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The bill in this suit charges (1) infringement of reissued letters patent No. 13,542, and (2) unfair competition in the sale of the lamp covered thereby. It came first before the late Judge Young, who refused a preliminary injunction to restrain infringement, but granted it to restrain unfair competition. (D.

C.) 210 Fed. 560. Upon final hearing before Judge Orr, a final injunction was granted upon both grounds. (D. C.) 215 Fed. 735.

1. In order to understand the first branch of the controversy, the scope of the original letters patent must be determined. They are numbered 821,580 and were issued May 22, 1906, to Frederick E. Baldwin for improvements in acetylene gas lamps, "intended for use and adapted to use as bicycle, automobile, yacht, or miner's lamp, or for any other analogous purpose. * * *" The body of the lamp is a metallic or other container, and this is divided (horizontally by preference) into two chambers or compartments, the upper intended for water, and the lower for calcium carbid. The gas is generated in the lower chamber. The specification deals with two problems, but we are concerned with only one of them, namely, "The means for effecting and controlling the generation of gas." That problem arises out of the following situation: Finely divided carbid is placed in the gas-generating chamber and retained in position by a suitably adjusted spring or other suitable device. A tube leads from the water-chamber into the chamber below, and by this duct the water and the carbid are brought together. The gas is generated by the chemical reaction of these two substances, and the gradual feed of the water must be carefully maintained. The inventor goes on:

"Various means have been employed to regulate or control the normal rate of flow of water through a water-supply tube. For example, the bore of the tube has been made of small diameter; but this plan has not been found practical for various reasons. In the first place, the discharge outlet thereof is under pressure of several inches of water, and it is practically impossible to make the bore so minute that the water will issue in sufficiently small quantity. If the attempt is made to secure this small flow by making the tube very minute, it then becomes so easily clogged that the operation of the lamp is rendered extremely uncertain. The smallest particle of foreign matter in the water, or a bit of slaked carbid carried into the bore by back pressure of the gas, will stop the flow completely, and the lamp will go out. Such a tube is also difficult, in fact almost impossible, to clean. Another method which has been employed is to use a duct of comparatively large bore, and fill the same with a wick of more or less loose texture for the purpose of checking the supply. This for a time operates with some degree of success, though from the very nature of the material used the precise amount of the feed can never be exactly determined. A valve is generally necessary to regulate the supply. Furthermore, when the lamp has been used for a time, the wick, which, of course, must act as a strainer, becomes filled with solid matter—such as sand, dirt, and organic particles contained in the water—so that the feed is reduced. This necessitates frequent adjustment of the valve to restore the proper supply. In time the wick becomes completely choked, and the user, often unskillful in such matters, must tamper with the lamp and insert a new wick, which is at best a troublesome procedure. Again, if the lamp has not been used for some time, the wick dries out, and a very appreciable time is required to soak it up so that the water will again flow through."

These being the difficulties, the patentee turned to his means for overcoming them. His plan was to make the bore of the duct comparatively large, and then to obstruct or restrict it by placing a wire or rod therein, preferably in the center, thus leaving a channel of the proper size and shape. The advantages are thus described:

"This arrangement is simple; but in a long experience it has been found to be entirely successful. It is possible to secure the correct drop-by-drop

feed with a duct of considerable size, since the friction of the water on the large area of the tube-wall and wire reduces its flow. This retarding-friction may be regulated by varying the size of wire used. The duct does not become choked, since, if foreign particles are deposited therein, the water can take a zigzag course around (them) without the supply being appreciably affected. If it is at any time necessary to clean the tube, the wire is simply reciprocated and rotated a few times from the outside of the lamp without disturbing the position of other parts. This nice regulation of the flow enables me to entirely dispense with the troublesome adjustment of the valve. If a valve is used at all, it is employed to shut off the flow entirely and not to regulate it. The construction just described is shown," etc., etc.

As will be observed, the device thus described is intended to perform a certain part in effecting and controlling the generation of the gas; this part being the regulation of the water-supply, or the control of the flow. But the generation of the gas might also be effected and controlled in another way, and to this subject the inventor immediately passed on:

"In some cases, however, there is employed in connection with the means for introducing the water into the mass of carbid [that is, in connection with the duct and rod] a device in the nature of a stirrer, which, on proper manipulation, may be used to break up the mass of carbid surrounding the outlet of the water duct, and which, by having become slaked and caked by the action of water, prevents the proper percolation of the latter to the unslaked carbid in the receptacle *G*, Fig. 2. As such device I employ a stem or rod *N*, which extends down through the tube *L* and is *bent at substantially right angles to form an arm N'*. This rod may form a prolongation of the valve-stem *M'*, of Fig. 2, or, in case no valve is used, may extend from the top of the lamp down through the water-reservoir, as shown in Fig. 3.

"As calcium carbid possesses strongly absorptive properties, the introduction of water through the tube *L* will result in the gradual slaking of the material about its outlet; but the lime thus produced becomes gradually less permeable to the water, so that an insufficient quantity of gas is generated to maintain the proper flame. When this becomes noticeable, the rod *N* is turned, so as to cause *the arm N'* to break up to a greater or less extent the mass of lime, and in practice I have found that under ordinary conditions this is amply sufficient to insure a substantially uniform generation of gas until all the carbid in the receptacle *G* is exhausted.

"In the larger-sized lamps it is desirable to employ two or more water-tubes *L* and, if desired, stirring-rods *N*, extending down to different points in the carbid-receptacle. This is indicated in Fig. 4, which is an under plan view of the bottom *D* of the water-reservoir, showing three water-tubes *L* in section. It is, however, desirable, when a plurality of stirring rods are employed, that some means be provided for actuating all of them simultaneously. A device suitable for this purpose is shown in Fig. 6, in which *O* is a ring placed on top of the lamp, with which bent ends of all the rods *N* engage, so that a partial rotation of the ring will impart a corresponding movement to each rod."

In the original patent, therefore, the inventor described two devices by which the generation of gas might be effected and controlled: (1) A tube with a wire or rod therein; and (2) a bent arm on the end of the wire or rod, which could be used as a stirrer. And he claimed both these devices in each of the first 4 claims:

"(1) In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a tube extending from the former a considerable distance into the latter so as to be embedded in the mass of carbid contained in said receptacle, and a rod or stem extending through said tube into the carbid-receptacle and having its end formed as a stirrer

to break up the slaked carbid around the outlet of the water-tube, as set forth.

"(2) In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a tube extending from the former into the latter so as to be embedded in the mass of carbid contained in the receptacle, a rod extending from a point outside of the lamp through the tube and into the carbid-chamber and having its end bent to form a stirrer for breaking up the slaked carbid around the outlet of the water-tube, as set forth.

"(3) In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a plurality of tubes extending from the former into the latter so as to be embedded in the mass of carbid contained in the receptacle, a stirrer passing through each tube adapted to break up the slaked carbid around the end of the tube, and means for actuating all the stirrers simultaneously, as set forth.

"(4) In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a water-tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water-tube, and constituting a stirrer to break up slaked carbid around the outlet of the water tube, as set forth."

This, then, was the patent when it was originally issued in 1906. Three years later the patentee sued Jacob Bleser for infringing claims 1 and 4, as well as several claims of an earlier patent granted in 1900. The Bleser lamp closely resembled the Grier lamp now in question, particularly in the fact that it had no bent arm to act as a stirrer; the end of the rod within the duct being merely pointed. The Court of Appeals of the Seventh Circuit in Bleser v. Baldwin, 199 Fed. 133, 117 C. C. A. 615, decided that claims 1 and 4 of the patent now under consideration were not infringed by such a construction. The decision was rendered in April, 1912; and we can hardly doubt that the reissue was intended to meet the situation thus created, for it was applied for soon afterward—on February 5, 1913—although this was nearly seven years after the original grant. And the changes that mark the reissue are such as to indicate with much persuasiveness that this was in fact the intention. The patentee amended his specification in two respects: (1) He described the tube as always imbedded in the carbid—"extend the tube which forms the duct downward so that its end will be always embedded in the carbid"—a change of not much importance; and (2) he added this significant paragraph:

"It will be understood, from what has been said, that the function of the stirrer is to break up, pierce, or disturb the particles of the slaked carbid mass which, when the lamp is in use, forms at the delivery end of the tube. This slaked carbid mass tends to solidify and either shuts the water off altogether, or restricts it so that less water is delivered from the water-tube than the lamp demands for efficient operation. As it is sufficient, under certain circumstances, to insure the requisite water flow by so manipulating the stirrer, as to pierce, break up, or loosen the slaked carbid mass immediately around or at the mouth of the tube, it is obvious that the stirrer need not always be formed with a bent end, or so as to extend radially from the mouth of the tube."

Having thus described in his specification a kind of stirrer that would have covered Bleser's construction, he then amended claim 4 so as to read:

"In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a water-tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water-tube, and constituting a stirrer to break up slaked carbid around the outlet of the water-tube; *the rod operating to restrict and thus control the flow of water to the carbid*, as set forth."

The italicized words being the clause inserted.

[1] Now, if we construe the reissue so as to eliminate the need for a bent arm—and this was its principal purpose—it operates to broaden the original patent, and (thus construed) claim 4 cannot be sustained. We have stated the facts fully in order to present the situation clearly, but we do not think it necessary to discuss the controlling legal principles. We think the authorities settle the proposition that a reissue cannot be allowed to broaden the original patent (as Baldwin attempted to do), especially after such a lapse of time as seven years, and after the claim had been limited by a final adjudication. And this would be true, even if no stress were to be laid upon the rights that had intervened by reason of the Bleser device, although Bleser himself had been manufacturing that device for several years, and the present appellant had been manufacturing it for several months, before the reissue was applied for. Powder Co. v. Powder Works, 98 U. S. 126, 25 L. Ed. 77; Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783; James v. Campbell, 104 U. S. 357, 26 L. Ed. 786; Coon v. Wilson, 113 U. S. 268, 5 Sup. Ct. 537, 28 L. Ed. 963; General Electric Co. v. Richmond Co., 178 Fed. 84, 102 C. C. A. 138; Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053; Flower v. Detroit, 127 U. S. 563, 8 Sup. Ct. 1291, 32 L. Ed. 175; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

[2] On the patent question, therefore, we think the decree should have been in favor of the defendant.

[3] 2. Turning now to the subject of unfair competition, we may note, in passing, that the requisite diversity of citizenship exists in this case, so that the question of jurisdiction that might otherwise arise at this point need not be discussed. Schiebel Toy Co. v. Clark, 217 Fed. 761, 774, 133 C. C. A. 490. We agree with the District Court that deliberate unfair competition has been proved, and the only question that calls for consideration is the extent of the relief that has been awarded.

The decree complained of enjoins the appellant from—

"* * * directly or indirectly placing upon the market, or causing to be placed on the market, the acetylene gas-generating lamp identified in this suit as 'Plaintiffs' Exhibit No. 6,' and which is complained of in this case as an imitation of Plaintiffs' Exhibit No. 1, or any other acetylene gas-generating lamp, which shall not be so differentiated or distinguished in outward form and appearance from plaintiffs' said lamp, identified as Plaintiffs' Exhibit No. 1, that purchasers thereof will not likely be deceived by similarity of form and appearance or by accessories sold therewith into purchasing such lamps, made or marketed by defendant, thinking the same to be plaintiffs' lamps, and also from doing any act or thing calculated to induce the belief that acetylene gas-generating lamps, not manufactured or offered for sale by plaintiffs, are, in fact, of plaintiffs' manufacture."

It is no doubt true that this decree is giving the appellant trouble, but this was its object; and we are only concerned with the inquiry whether it goes too far. In our opinion it does not, but is carefully guarded so as to protect the right of the Grier lamp to make a fair (but not an unfair) attack upon the market. We agree that actual imitations are not always unfair, but at present this lamp is undoubtedly a slavish imitation of the Baldwin device; and we are by no means satisfied that the numerous identities are essentially due to structural and economical necessities. It is of course true that the Baldwin lamp has no right to monopolize the trade, but the plaintiffs do have the right to insist that the Grier lamp shall cease from being merely a designed and colorable imitation, and shall stand on its own merits. We have no doubt the appellant's ingenuity is capable of solving that problem to the satisfaction of the court below, and we do not feel obliged to point out in what particulars the offending lamp should be modified. As at present constructed, it passes the limit of healthy rivalry in trade, and was properly enjoined. But the following observations may perhaps be usefully made:

The Baldwin lamp is undoubtedly a useful improvement, as its extensive use may indicate, but it has no right to dominate the situation. Its shape and design are protected, not by patent, but merely by the rules that govern unfair competition; and it seems clear enough that the necessities of the art require that in size and arrangement all such lamps must bear a general resemblance among themselves. The container must be small, and must be divided internally into a water-chamber and a chamber for the carbid, and this necessity must influence the shape and arrangement to a considerable degree. Moreover, the lamp must be light in weight, especially when it is to be used in a mine, where it is ordinarily attached to a miner's cap. The patented features are concealed, and cannot be seen by ordinary inspection, so that unlawful interference therewith may be difficult to prevent; but it is not these features with which we are now concerned. The superficial details of construction certainly need not be identical in nearly every particular, as they are in Exhibit No. 6; and of course it is also unfair to represent the Grier lamp as a Baldwin, or as an improved Baldwin, lamp, or to accompany it with nearly identical instructions printed in the same foreign languages, and with the peculiarly-shaped cleaner referred to by the court below. All these matters were plainly intended to aid in confusing purchasers, and are abuses of the right to compete. It was also objectionable to stamp the appellant's name on a similar part of the lamp in raised characters that bear the same general form and appearance. There was no compelling reason for this, and we can hardly doubt its purpose, namely, to aid in misleading miners unacquainted with English. On the other hand, the cartons inclosing the lamps differ in appearance, and the Grier lamp has a self-sparker attached to the rim of the reflector; this too being a valuable aid in distinguishing the lamps. We have not exhaustively described the details of likeness and difference; our main purpose has been to avoid giving the impression that we regard the Baldwin lamp as having the right to exclude all

competitors, while protecting that lamp in the trade that has been acquired by legitimate means. We therefore repeat that the precise matter before us is the correctness of the decree, and for the reasons thus outlined, we think it was right. If the appellant desires a ruling from the court below upon a proposed change in the details and appearance of Exhibit No. 6, we have no doubt that a proper application for such a purpose will be entertained and passed upon in a fair and reasonable spirit.

So much of the decree below as refers to the subject of unfair competition is affirmed, but the rest of the decree must be modified in accordance with this opinion; the costs in the District Court and in this court to be equally divided.

VAN KANNEL REVOLVING DOOR CO. v. REVOLVING DOOR & FIXTURE CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 44.

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—REVOLVING DOOR.
The Van Kannel patent, No. 656,062, for a revolving door, discloses patentable invention and is valid; also *held* infringed.

2. PATENTS ⊂⊃328—INVENTION—REVOLVING DOOR.
The Van Kannel patent, No. 836,843, for a collapsible revolving door, *held* void for lack of invention.

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

This cause comes here upon cross-appeals from a decree of the District Court, Southern District of New York. Complainant brought suit for infringement on two patents, issued to Theophilus Van Kannel, No. 656,062, on August 14, 1900, for a revolving door, and No. 836,843, on November 27, 1906, for a collapsible revolving door. The court held that claims 1, 2, 3, and 8 of the first patent, and claims 13 and 14 of the second patent, were valid and infringed, and that claims 1 and 2 of the second patent did not disclose patentable invention. Both sides appealed.

The following is the opinion of Mayer, District Judge, in the District Court:

Theophilus Van Kannel was a prolific inventor of revolving doors; his first patent having been granted on August 7, 1888, upon an application filed in February of that year. On August 14, 1900, there was issued to Van Kannel patent No. 656,062, and on November 27, 1906, patent No. 836,843. These two patents were duly assigned to Van Kannel Revolving Door Company of West Virginia. That company had some financial difficulties, and ultimately the patents became the property of the complainant herein, a New Jersey corporation.

The defendant company installed a door at No. 170 Broadway, borough of Manhattan, New York City, which complainant asserts was an infringing structure. Mr. Ely, president of the defendant company, in his testimony frankly gave a description of this door which reads on the claims in con-

troversy. From this description, I think it is clear that, if valid, the claims of both patents here under consideration have been infringed. The sole question really in controversy is whether these patents disclose invention.

Van Kannel seems to have been the pioneer in this revolving door art, and his first patent, No. 387,571, August 7, 1888, covered a revolving storm door structure which consisted, broadly speaking, of a circular casement and a floor and ceiling in which was fitted to revolve a spindle, having three or more radiating wings, with side edges contacting with the circular casement, and whose upper and lower edges contacted with the floor and ceiling, and so spaced apart that, no matter in what position the revolving structure might be left after ingress to or egress from the building, the door passage would always be closed.

Van Kannel had in mind the possibilities of a panic, for he stated in his specification: "There are cases when the structure may only be intended for temporary use, and in such cases the entire structure may be removable. For instance, in Fig. 3 I have shown a structure the base of which is mounted on suitable wheels or casters, the structure being moved up to the doorway and secured thereto, if desired, by suitable hooks, catches, or other fastenings; a structure of this character being especially available for use at the doors of churches, theaters, and halls, so that it can be moved entirely out of the way to permit free exit when the audience or congregation is leaving the building. Where a temporary structure of this sort is used, the fastenings whereby the same is attached to the doorway should be of such a slight character that they can be readily broken or torn from their places in the event of a sudden rush against the door structure from the inside of the building, so that no obstacle to free egress will be afforded in the event of a panic. When one or more of the doors is hinged, it becomes necessary to brace the same, so that the door structure will preserve proper rigidity under ordinary circumstances, and although a rigid brace may be used for this purpose, such brace would have to be detached when the doors were swung back; hence I prefer to use as braces chains or ropes, which, being flexible, can hang down when the hinged doors are swung back, so that only one of the chains need be detached in order to free both doors."

The art was new, and the "panic proof" expedient was crude. The patent showed a revolving door with three wings, arranged so that, no matter in what position the door was left, the entrance was always closed. Van Kannel provided one way hinges for folding two of the wings, so that these wings could be folded against the third. These wings were rigidly secured by means of chains, and he attached the whole structure, ceiling and casement, to the building in such a way that, in case of a panic, the whole structure, without regard to the folding of the wings, could be broken away from the building and pushed into the street. In view of our present information, this method would doubtless prove clumsy, destructive, and inexpedient.

From 1888 until August 14, 1900, the date of the first patent here under consideration, there was apparently quite some activity in this art, as is evidenced by further patents to Van Kannel, as well as to Ife. Van Kannel, No. 588,620, dated August 24, 1897; Van Kannel, No. 588,888, dated August 24, 1897; Ife, No. 595,948, dated December 21, 1897; Ife, No. 596,029, dated December 21, 1897. We must therefore consider the first patent in suit in the light of what was or was not accomplished during this period of a dozen years intervening between the initiation of the art and the granting of the letters of August 14, 1900.

Van Kannel, in the specification of letters patent No. 656,062, shows that his invention is directed solely to the question of a so-called panic-proof door. He states: "My invention consists of certain improvements in that class of revolving doors which have a series of radiating wings rotating in a casing, the object of my present invention being to so construct the wings and casing of such a door that they will yield to the rush of a panic-stricken crowd; the end portions of the casing swinging outward and the wings of the door all being pushed to the front, so as to provide a wide and unobstructed passage on each side of the center of the door structure."

The claims relied on are as follows:

"1. The combination, in a revolving door, of a structure having wings mounted so as to be revoluble around a central axis in fixed radial relation

thereto, said wings having also independent hinges so disposed that all of the wings may be folded and lie side by side, so as to project in one direction from the center.

"2. The combination, in a revolving door, of a structure mounted so as to rotate about a central axis, a series of wings mounted so as to swing independently of their joint rotating movement about said axis, and self-releasing locking devices, whereby said wings are normally retained in fixed radial relation to said central axis.

"3. The combination, in a revolving door, of a series of wings mounted so as to rotate about a central axis, each of said wings being hinged so that the series may be folded side by side, and may project in one direction from the general axis of rotation, and means for locking said wings in position when they have been swung apart from each other."

"8. The combination, in a revolving door, of a center post with radiating wings normally locked to said center post, but mounted so that they will be automatically unlocked therefrom and swung forwardly to project side by side when a pressure is exerted upon them in other than a normal direction."

In claim 1 the predominant thought is to accomplish a result whereby all of the wings may be folded and lie side by side, so as to project in one direction from the center. In claim 2 the inventor refers to self-releasing locking devices. Claims 3 and 8 are directed to the same subject-matter; claim 8 being drawn in especially clear phraseology. Construing claim 3 in a highly technical way, one might say that it was anticipated by the patent of 1888; but this claim should not be torn from the context, and, if fairly construed, in connection with the context, I think that claim 3 may stand.

Briefly stated, what Van Kannel accomplished in this patent of August 14, 1900, was the construction and mounting of the wings themselves upon the central basis or spindle, in such manner that they could all be folded to lie in one direction and be braced apart normally by devices (called automatic or self-releasing), so that when abnormal pressure was brought against the wings they would fold and permit a panic-stricken crowd to pass out of the door. This, it seems to me, was an advance so marked that it rose to the dignity of invention. The expert for the defendant criticised the use of the terms "automatic" and "self-releasing," contending that the devices were not automatic nor self-releasing; but these devices are for all practical purposes automatic, because it is intended that they shall be released by the abnormal pressure exerted by an unthinking excited crowd.

The defendant urges that an analysis of the elements of the combination of this patent of August 14, 1900, will demonstrate that, as against the patent of 1888, this is double patenting; and it further contends that the idea of a turnstile is old, as is also the idea of making a door or similar device with fastening which will yield to pressure, or break because of pressure, in time of danger. But the answer is one so frequently given: Why did not Van Kannel, Ife, or any one else think of the combination of No. 656,062 during the dozen years? Van Kannel in his first patent had seen the necessity of providing against the danger which would be occasioned by a panic-stricken crowd; but his solution of that problem was not efficient, and it must be assumed that others thought the result in that particular accomplished by the first Van Kannel patent could not be improved upon. An analysis of the previous Van Kannel and Ife patents, above referred to, will show that none of them contemplated nor disclosed the subject-matter of the claims of the first Van Kannel patent here in controversy. Of the other patents cited as a part of the prior art, none need be considered, except the Ryan patent, No. 516,121, dated March 6, 1894. This patent, I think, relates to a remote art; but, even if deemed applicable, it does not anticipate, nor does it contain any disclosure sufficient to deprive Van Kannel's patent of invention.

The Ryan patent is for a drawbridge gate, and the object thereof was to provide a means for closing automatically the roadway and pathway of the approaches to the drawbridge, so as to prevent pedestrians and teams from falling into the water. The normal position of the gates is open, and then, of course, the bridge can be crossed by teams or pedestrians. What Ryan sought to accomplish was the prevention of injury to those who happened to be on the path or roadway when the approach to the draw was being closed; and

it may be said that he was dealing with a situation exactly opposite to that which Van Kannel was considering.

For the reasons outlined, I am of the opinion that the four claims above referred to are valid and infringed.

A much more difficult question arises when No. 836,843, of November 27, 1906, is considered. Here Van Kannel states: "The present invention relates to that class of revolving doors which are fitted between opposite segments of a casing in a doorway to permit the movement of persons through the doorway without the access of wind and dust. The object of the invention is to make the door wings collapsible when abnormal pressure is applied to any of the wings, so that in case of emergencies the doors may be collapsed automatically and swing to one side of the spindle, leaving open passages at opposite sides of the same for rapid ingress or egress. Revolving doors of such construction are thus suitable for use at the entrance of theaters, assembly halls, and retail stores, where it is desirable to exclude wind and dust, and where in case of panic it is equally important to furnish a free egress for the audience. Any rush of persons against the revolving doors operates in the present invention to collapse the doors automatically, whatever point in the doors be pressed upon, as the construction operates, without any skill or knowledge on the part of such persons, to detach the ties or other means employed for holding the door wings in their normal or radial positions. The adjacent faces of the wings are shown herein connected by flexible ties formed of wire rope and made adjustable as to length to set the wings at an equal distance from one another. One end of each tie is held to the wing detachably, and the fastening device for such end is hinged upon the wing, so that it may be moved outwardly to re-engage the tie whenever detached. The wings in the present invention are pivoted upon the central spindle in a novel manner, by providing a grooved disk near each end of the spindle and furnishing each wing with two fulcrum pins adapted each to engage the groove in one of the disks. A pinion is provided upon the spindle adjacent to each disk, and a toothed segment meshing with such pinion is attached to each of the wings and made concentric with the fulcrum pin, and the fulcrum pins are thus enabled to change their position upon the fulcrum plate when the wings are moved from their normal position by their constant engagement with the groove in the disk during the rolling of the segment upon the teeth of the pinion. The pins upon which the wings are supported are termed 'fulcrum pins' herein, as the doors are supported upon them and turn upon them during the swinging movement of the wings when collapsed. The boxes by which the pins are fixed upon the doors are termed 'fulcrum boxes,' and the disks which support the pins upon the spindle are termed 'fulcrum-disks.'"

The claims in suit are:

"1. In a revolving door, a central spindle, a series of wings pivoted thereto, and fixtures connecting the adjacent sides of the wings, and provided with automatically detachable fastenings adjusted to permit the automatic collapsing of the wings under abnormal pressure.

"2. In a revolving door, the combination with a suitable casing and a central spindle of a series of wings pivoted thereto, and ties attached to the adjacent sides of the wings, and secured by detachable fastenings adapted to hold the wings normally in a radial position upon the spindle, and adjusted to release the wings when subjected to abnormal pressure, to permit the collapsing of the wings."

"13. In a revolving door having collapsible wings, the combination, with a strap or cord fastened upon one wing, of a fastening device upon the adjacent wing, arranged and operated to grasp the end of such strap detachably and to resist the normal pressure upon the wings, and adjusted to release the strap under abnormal pressure, whereby the wings are automatically collapsed under such pressure.

"14. In a revolving door having collapsible wings, the combination, with a strap or cord fastened upon one wing and having a knob upon the end, of a fastening device upon the adjacent door comprising an abutment for one side of the knob, and a spring gripper opposed thereto and adjusted to retain the knob under the normal operation of the doors, and to release the knob under abnormal pressure, to permit the automatic collapsing of the doors."

In studying this second patent both as to structure and as to claims, it is to be noted that there is no evidence of manufacture under nor utility of the first patent (August 14, 1900). It will not be disputed that, in large centers there has been an increase of great buildings housing thousands of people. and that the mind of inventors would naturally turn to devising a door which would be a practicable commercial structure from the point of view of architectural requirements and cost of construction, and at the same time would possess efficient panic-proof features.

Looking at the structures of the first and second patents here concerned, what was the accomplishment of the second over the first? In the first patent each wing is provided with an independent, self-releasing locking device, and the wings, in the event of panic, are released from the ceiling separately, in order to hold the position shown in Figure 3 of the first patent. In the construction of the second patent in suit, the arrangement of the self-releasing locking device between the adjacent faces of the wings makes possible the collapsing of the wings to panic position after the release of a single fastening. Aside from this advantage, the parts are in a position for ready readjustment or the re-establishment of the door in operative position after collapsing.

The releasing of one of the straps or cords releases the wings, so that they may all be folded to panic position, no matter from what point of the door structure the releasing force may be applied; and this also facilitates the ready return to position of the three wings between which the connection has not been broken in any one collapsing operation. This cannot be said of the mode of operation of the first patent in suit, wherein each wing must be individually re-established to its radial position, which, while possible, would probably be accomplished only by aid of a stepladder, in view of the connecting means being positioned on the ceiling of the door.

Having noted the structural differences between No. 656,062 and No. 838,843, it becomes necessary next to read the claims, remembering, of course, that we are considering a combination. Analyzed even from the standpoint of liberal construction, claims 1 and 2 merely show change of location of the devices, in that there are "fixtures connecting the adjacent side of the wings" (claim 1) or "ties attached to the adjacent sides of the wings."

It seems to me that, in view of the disclosures of the August 14, 1900, patent, a man skilled in the art would naturally experiment to determine the location of the devices, that the result attained would not be invention, but merely the product of capable mechanical improvement, and that it will not do to extend the control of this art to any such comprehensive scope as is sought under these two claims.

Claims 13 and 14, however, state a combination of elements from which we have, apparently, a new structure in commerce, a new result for operative panic-proof doors, and all described with words of limitation sufficiently definite and limited to save the combination from all the prior art. Randall, 209,713, of 1878; Weaver, 319,532, of 1885; Van Kannel, 387,571, of 1888; Ryan, 516,124, of 1894; Van Kannel, 588,620, of 1897; Ife, 595,948, of 1897; Ife, 596,029, of 1897; Van Kannel, 641,563, of 1900; Van Kannel, 656,062 of August 14, 1900.

Even if doubt existed as to claims 13 and 14, that doubt must be resolved in favor of validity, in view of the presumption arising from the grant and from the utility of the structure as established by the testimony.

In view of the conclusions indicated, complainant may have a decree in accordance herewith, with half costs.[1]

T. W. Johnson, of Washington, D. C., for complainant.

C. G. Campbell, of New York City, for defendant.

Before LACOMBE, COXE, and WARD, Circuit Judges.

[1] It will be noted that the motion to strike out the testimony as to "panic-proof" was granted. In taxing disbursements, those incurred in connection with the "panic-proof" testimony will be deducted, and the balance will constitute the principal sum on which the half costs will be figured.

LACOMBE, Circuit Judge. [1] Judge Mayer has quoted quite fully from the patents and has set forth the eight claims involved; it will not be necessary to restate them here. Van Kannel was apparently a pioneer in the art of "revolving" doors, as distinguished from swinging doors. The revolving door has a series of radiating wings which rotate in a casing; the wings fit snugly in the casing, so as effectually to prevent the entrance of wind, rain, snow, or dust, either when the door is closed or when persons are passing through it. It is noiseless, and cannot be blown open by the wind, as the wind pressure is equal on both sides of the center of motion. It can be moved without noticeable resistance, as it requires no springs or weights to restore it to its closed position or any bumpers to prevent slamming. At it moves in but one direction, there is no possibility of collision when persons are passing both in and out at the same time. These features are all disclosed in an early patent to Van Kannel, No. 387,571, dated August 7, 1888, which has long since expired. That patent also provides for hinging one or more of the wings at a point near the central part, so that said wings can be thrown back against the fixed wing, thereby providing a clear opening through the structure to permit the carrying of a long object, like a ladder, in or out through the same, and also to provide for the circulation of air in the event of the occurrence of a suddenly warm day in the spring or fall, after the solid wings have been applied to the door.

There was one difficulty inherent in this structure: It could not move if pressure from one direction were applied simultaneously on both sides of the center of motion. That is the reason no gust of wind could blow it open. In the event, however, of a panic occurring within the building, followed by a rush to the door, pressure would be applied outwards on both sides of the center of motion, the door would not revolve, and egress from the room through the doorway would be blocked. This obvious danger connected with the use of revolving doors was not overlooked by Van Kannel, who in his 1888 patent undertook to avoid it by making his door and casing independent of the building, being mounted on wheels and held in the doorway by hooks or catches of light structure which would give way under abnormal pressure, allowing door, casing, and the front files of the crowd to roll out into the street together.

The first patent sued upon here discloses an improved method of adapting the door to a condition of panic. Each wing is hinged near the center of rotation and held normally in such relation to the rest of the wing that, when abnormal pressure comes, the holding parts will disengage and the hinged portions will swing forward, making a wide and unobstructed passage on each side of the central post on which the wings revolve. We fully concur with Judge Mayer in the conclusion that this patent (656,062) discloses patentable invention. The panic device of 1888 was crude and manifestly dangerous; the defect of the revolving door (jamming when a panic rush came against it) was obvious; during the 12 ensuing years patents for various improvements were taken out by Van Kannel and others, but none of them remedied the difficulty, which it must be presumed they were all trying to do, be-

cause, until that was remedied, the revolving door system was seriously handicapped. It is unnecessary to add anything to Judge Mayer's discussion of this patent and its claims. Defendant is clearly wrong in his contention that the device actually shown in this patent of 1900 is not automatic or self-releasing, as the claims describe it, but is a "weak or breakable device merely." When the abnormal pressure comes, nothing *breaks,* the holding devices are merely pulled or pushed out of engagement with other parts, and restoration of conditions is accomplished merely by re-engaging them, uninjured by temporary disengagement.

[2] The second patent in suit is evidently an attempt to extend the monopoly of the earlier patent by changing the names of the various elements. The District Judge found that its broader claims involved merely a change of location of holding devices, which did not rise to the dignity of invention. The narrower claims (13 and 14) disclose nothing but a combination of old elements which would be evident to an ordinary mechanic.

The decree is modified, so as to reverse as to these two claims and affirm as to all the others. No costs of this appeal to either side, as neither has prevailed as to all the claims in controversy.

VOSE v. UNITED STATES METAL PRODUCTS CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 159.

1. PATENTS ⊜328—INFRINGEMENT—WEATHER STRIPS.
   The Vose patent, No. 717,641, for improvements in weather strips, strictly construed, as it must be in view of the prior art, *held* not infringed.
2. PATENTS ⊜202—ASSIGNMENT—SCOPE.
   An assignment of patents, for which the assignor is "about to make application," with a request to the Patent Office to issue such patents "when granted" to the assignee, *held* not to include a patent previously issued to the assignor, but not mentioned in the assignment.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–289; Dec. Dig. ⊜202.]

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

This cause comes here on appeal from a decree of the District Court, Eastern District of New York, in favor of complainant. The suit was brought for alleged infringement of United States letters patent No. 717,641, issued January 6, 1903, No. 752,729, issued February 23, 1904, and No. 814,893, issued March 13, 1906. All three of them cover "improvements in weather strips" and were issued to Clifton Vose; his mother, the complainant, claims to be the assignee of each patent. The opinion of the District Court will be found in 216 Fed. 775.

D. W. Cooper, of New York City, for the appellant.

H. B. Philbrook, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The District Court was manifestly in error in including in the decree a finding that patents No. 752,729 and No. 814,893 "appear presumptively to be good and valid in law." Both of these patents were withdrawn from consideration of the court by complainant; it being stated that no claim of infringement of either of them was made.

[1] As to No. 717,641: The two claims read as follows:

"(1) In a window, the combination of a casing provided with grooves or tracks, a sash adapted to move within said grooves or tracks, angle-shaped strips secured in rabbets on the sides of the sash-frames and extending over the outer portions of the same, and means consisting of strips located in said grooves or tracks and extending between the angle-shaped strips and the sash, substantially as and for the purposes set forth.

"(2) In a window, the combination of a casing provided with grooves or tracks, a sash adapted to move within said grooves or tracks, angle-shaped strips secured to said sash, and unbent flat strips located in said grooves or tracks and forming bearing-surfaces for said sash, one portion only of said strips in the grooves being affixed to the casing, the free portion being adapted to co-operate with the angle-shaped strips to form a substantially dust-proof joint between the sash and casing, substantially as and for the purposes set forth."

From the patents put in evidence it is manifest that the art was a narrow one, admitting no broad range of equivalents, and requiring that specific limitations introduced as amendments to original claims should be given full force and effect.

The two metal strips, whose interlocking prevents the entrance of air and dust, are one of them flat, the other bent at a right angle; the flat one moving in the space between one flange of the angle-strip and the sash frame to which it is attached. The specification, which was practically unchanged from its original form, states that the flat strip is secured to the jamb at a point remote from the place where it engages with the other strip. Being thus fastened at that one point only it is in a measure "resilient" and "able to accommodate itself to the irregularities of movement of the sash." The specification further states that, as shown in the drawings, this flat strip is applied to the window with a thin lath of wood upon the jamb which necessarily leaves a space equal to the thickness of the thin lath between the free end of the strip and the jamb. It further states that the lath may not be always found necessary in actual practice, because the strip, being flexible, will accommodate itself to the movements of the flange with which it engages. As to the angled-strip *F* the specification says:

"The sash-bar is provided with a shallow rabbet cut along and inward in the plane of the sash-bar and registering with the outer edge thereof."

One flange of the angled-strip "is secured to the plane of the sash-bar and in the rabbet; the other flange extending beyond the outer edge of the sash-bar and inward to form a narrow groove or passage between itself and the sash-bar," through which groove the jamb strip plays.

The original claims included the method of affixing the flat strip at one point only, so located as to secure its resilience and also the rabbet cut on the sash for attachment of the angled-strip. These original claims were rejected on a reference to Hedberg patent 626,492, which

showed devices for use upon the upper and lower parts of such frames. The claims were then rewritten, making them quite clearly applicable to the parts of the sash-frames which move up and down. These claims refer to one of the engaging strips "being yielding in respect to the frame to which it is secured, whereby it may yield to maintain its proper relation to the other" strip—a somewhat awkward way of expressing its resilience. These new claims omitted all reference to the rabbet in which the angled-strip was placed.

These claims were again rejected; the Office citing, not only Hedberg, but also Nicol 601,081, Horsfield 632,922, and Lane 637,623. Examination of these four patents shows a great variety of methods for arranging metal strips, variously bent, so that they would interlock or press against each other and thus exclude air and dust. Another patent, Golden 263,365, not cited by the Patent Office, shows still another variety of bending and engagement.

The patentee thereupon again amended his claims, reducing them to two, phrased as they now stand in the patent. The first of these claims expressly states that the angle-shaped strips are "secured in rabbets" on the side of the sash. Inasmuch as the specifications expressly refer to this method of securing them and the claim makes such method of securing them an element, the natural construction of the claim would indicate that these words implied a limitation. It would have been so easy to have phrased the claim so as to state merely that the angled-strips were secured to the sash in such a way as to leave a passage for the other strip to play in, that the use of this narrower statement would seem to mean something. It is suggested that mere mechanical skill would indicate that an equally efficient structure could be made by affixing the strip to the sash without a rabbet. That is true enough, there would be no patentable invention in dispensing with the rabbet. But that does not dispose of the matter. The prior art was a crowded one filled with devices which it would seem mere mechanical skill, without any exercise of the inventive faculties, might easily have produced. That this patent discloses any invention over the prior art is very doubtful. Certainly if it does (and we do not now pass on that question) the claims must be closely restricted within the limits the patentee has himself imposed.

The second claim states that the jamb strip is "flat" and "unbent." This accords with the specifications which indicate two ways only in which a passageway for the engaging strip or flange is secured, viz., the thin lath, or the natural resiliency of the flat strip secured only at its further end. Certainly it would involve no invention to secure such passageway by bending the flat strip as defendant has. Indeed, precisely such a way of bending to accomplish just such a purpose is shown in Horsfield 632,922, Fig. 3. Mere mechanical skill would suggest such a change, but a strip thus bent would not be within the language of the claim. Had the patentee stated merely that the strips affixed to the casings were "flat," that word could fairly be interpreted as meaning only that they were not "angled" as were the other strips. In one of the rejected claims patentee describes these casing strips as "adapted to co-operate with said angle-strips"—an adaptation which

might be secured, not only as he showed by mere resiliency or by offsetting by a thin lath, but also by bending. When upon rejection of that claim he amended so as to state that this strip element of his claim was not only "flat," but also "unbent," such language cannot be extended to cover strips that are *bent* to secure passageway.

[2] Although we have thus discussed the scope of the patent in connection with the alleged infringement, we are clearly of the opinion that assignment of 717,641 by the patentee to complainant is not proved. Except for a statement in her own handwriting added long after the execution of the instrument, the assignment contains no reference to this patent. On the contrary, its language plainly indicates that it did not cover this patent. It recites that Clifton Vose has made certain new and useful improvements in weather strips, for which he is "about to make application for letters patent." It assigns full and exclusive right to all the improvements made by me, as fully set forth and described in the "specifications which I have prepared and executed, *preparatory* to the obtaining of letters patent therefor." It provides that the same may be held and enjoyed by the assignee "to the full end of the terms for which said letters patent *may be* granted," and requests and authorizes the Commissioner of Patents to issue said letters patent, "when granted" to the assignee.

This assignment was executed by Clifton Vose on April 8, 1903. But application for patent 717,641 was filed December 6, 1901, and the patent issued January 6, 1903. Manifestly the assignment covers some "new and useful improvements" other than those for which he had obtained a patent three months before.

The decree is reversed, with costs.

HENGERER v. REYNOLDS ELECTRIC FLASHER MFG. CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 65.

PATENTS ⊂=328—INFRINGEMENT—ELECTRIC DISPLAY LAMP.

The Gille patent, No. 794,296, for an electric display lamp, *held* not infringed.

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing a bill for infringement of letters patent No. 794,296, granted July 11, 1905, to H. L. Gille, for an electric display lamp.

The following is the opinion of Learned Hand, District Judge:

This case turns altogether upon the interpretation to be given to the phrases "cap covering the tip end" and "cap fitted to the tip end," contained in claims 1 and 2. If these include what the defendant insists should properly be called a "hood," and if they are valid, then the defendant infringes at least claim 2; otherwise, not. It must be confessed that the natural meaning of the words seem to bear out the defendant; nevertheless, the case is

one for interpretation from the general context of the patent and the file wrapper.

The specifications are short, and depend chiefly upon the accompanying diagrams, having no general language. The only description of the "cap" is at line 27, where it refers to the diagram showing a short cap, "shaped to fit over the tip end." Later (lines 51–55) the patentee refers to the shortness of the cap as designed to leave "the bulb intermediate of the cap and the base uncovered, so as to throw unobstructed rays against the display surface upon which the lamps are secured." So far, certainly, the words in question seem to have been deliberately chosen to confine the claims to short caps, because of a supposed advantage which has in fact not been realized in practice.

Furthermore, if we suppose that the patentee in claims 1 and 2 meant to include a cap covering the whole bulb, we must, of course, assume that the "spring device" was to be reversed in practice, which is perhaps an obvious expedient, but which nevertheless is nowhere suggested in the specifications. Moreover, this would weaken the resistance to pulling off, as the arms, *4*, *4*, would be nearer the greatest diameter of the bulb, and also the resistance to lateral dislocation. Whether it would still be possible adequately to hold on the cap must remain somewhat doubtful.

However, if one considers the claims separately, a different conclusion is suggested. The "short cap" is very definitely described in claim 3 as one terminating between the tip and the greatest diameter. There might be, of course, caps longer than this which did not wholly cover the bulb; but this definition is about the only one which could be stated, except in terms of degree, and it certainly shows that the scrivener had the distinction in mind. Now, if one limits claims 1 and 2 to such caps as are defined in claim 3, they become mere species of claim 3, and necessarily narrower than it. It is contrary to the general practice of patent scriveners to write specific claims in advance of the generic, and especially by omitting a part of the differentia contained in the broadest claim—here claim 3—and merely inserting the distinctive mark of the species; in claim 1, the detachable feature; in claim 2, the flange. The suggestion, therefore, is of a broader use of the word "cap" in these two claims. If we go to the file wrapper, this suggestion is very strongly corroborated, for we find that these claims all took their present form in answer to the citation of Livet, 707,433. Claim 1 avoided Livet by having the spring detachable; claim 2, by having the point of support a flange; claim 3, by having only a "short cap." The intention indicated by reading the claims themselves is much reinforced. It is quite true, on the other hand, that on April 10, 1903, at a time when claim 2 was specifically limited to a "short cap," and claims 1 and 3 were general, the patentee spoke of the invention as including only a "short cap"; but arguments in the office I disregard.

The total upshot of all this would be to leave the matter in some doubt, were it not for the Bilheller patent, 25,653, British 1897, in which appear the two missing elements of Livet, the flange and the detachable support, and which forbids the construction in question. The "flange" takes the same form as in the defendant's hood, assuming that it is a flange, as I believe. The detachable feature is present, more detachable certainly than the defendant's spring device, and still more than Livet's.

Now, this British patent was not discovered in the Patent Office, and no presumption of patentability, therefore, exists respecting it. It is for precisely the same sort of thing that all these patents cover. It answers every feature of claims 1 and 2, unless it be the following: In claim 1, "said device having detachable spring support upon the free edge of the cap;" in claim 2, "said device being supported upon said cap by means of said flange." The spring device in Bilheller, when not detached, is supported by the inside of the bead, just as it is in the defendant's device. When it is detached, it is naturally not supported by the cap at all, in that respect being like every other detachable spring device. There is, indeed, a genuine distinction between the Bilheller device and the defendant's, which in practice would be important: The spring device fastens upon the neck of the bulb by a clamp with a screw, so that, while the cap will slip on and off the spring, the spring itself will

not slip off the bulb. However, there is nothing in the patent in suit to lead one to suppose that the slipping on and off of the spring device is a part of the invention. Suppose, for example, a device was made precisely like the diagram except that the "free ends, *4*," on either side of the neck of the bulb, were joined together by clamps; could a suit for infringement be avoided? Clearly not; the claims would cover the device perfectly, and the chief purpose of the patent (lines 10–12) would be embodied—i. e., "to provide a simple and convenient removable cap for the ordinary incandescent lamp, so that caps of any desired colors may be used"—because that purpose is accomplished if the caps will freely slip off the springs. Perhaps the removability of the spring itself may be an added merit, but certainly the patentee has nowhere suggested it as a part of the invention.

The plaintiff raises objection to this anticipating patent upon the theory of its inoperability, basing his position upon the fact that an illustratve model would not operate in court. The arms, *D*, *D*, of the model were not made, as required, of "spring wire," but of rather stiff metal strips. Even so the demonstration was not carried out, and there is no testimony that the device will not work. That it will hold on the cap under all circumstances does not follow, any more than that the plaintiff's device will; but it is not necessary that either of them shall always hold in order to be operative. There is not the slightest reason to doubt that Bilheller's patent will work just as he says. As it stands it certainly infringes claims 1 and 2 quite as much as the defendant's hood, and it therefore necessarily forbids the desired interpretation of those claims. The only differentiation between the defendant and Bilheller rests in the slipping on and off of the spring, which, as I have shown, is no part of the patent, unless it is made over.

This patent in suit is in no sense a pioneer patent; it embodies no new principle; it makes no radically new combination; it is an especial and limited adaptation of something already known. Its success seems to have been substantial since 1909, but apparently not before. The electric sign with colored lights was known as early as 1900, and there was a demand for the invention as early as the filing of the application in January, 1903. If the patent had been a pre-eminently satisfactory answer, it is hard to see why it should have hung fire for six years. The facts suggest some adventitious reason for its subsequent success, such as capable business promotion, rather than any great inherent value in the invention. I cannot necessarily attribute the falling off in sales to the competition of the defendant, except that perhaps the short cap was inevitably doomed to a limited place as against the "hood." The supposed advantage of the short cap, which the patentee, both in his specifications and his file wrapper, so much emphasizes, turns out to be equivocal, and it may well be that it is, as the defendant insists, no advantage at all, but the opposite. In any event, the evidence of commercial use seems to be ambiguous, and I cannot look upon the patent as filling a long-felt want.

Bill dismissed for noninfringement.

D. W. Cooper, of New York City, for appellant.

J. R. Taylor, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The object of the invention, as stated in the specifications, is to "provide a simple and convenient removable cap for ordinary incandescent lamp, so that caps of any desired colors may be used."

Without discussing the question of patentable invention we fully concur with Judge Hand in the conclusion that infringement is not shown.

This is no pioneer patent; it presents no feature which calls for extreme liberality in broadening its claims.

Each of the claims, those in suit as well as those not sued on, includes the cap as an element: Claim 1 "a cap covering the tip end of" an incandescent lamp; claim 2 "a cap fitted to the tip end of the lamp"; claim 3 "a cap fitted to the tip end of the lamp, the free edge of said cap standing intermediate of the largest diameter of the lamp and its tip"; claim 4 "a cap fitted to the tip end of the lamp." Where the patentee has been so particular to confine the fitting of his cap, not merely to the "end" of the lamp, but specially to the "tip end," it is difficult to see how his claims can be expanded so as to cover a hood which covers practically the whole lamp. This conclusion is strengthened by the specification, which states that the cap is shaped to fit over the tip end of the lamp bulb, and adds:

"By having the cap cover only the tip end of the lamp the bulb intermediate of the cap and base is uncovered, so as to throw unobstructed rays against the display surface on which the lamps are secured."

As defendant's so-called "hood" covers practically the whole lamp bulb, there is no infringement.

The decree is affirmed, with costs.

LAUTER & SUTER CO. v. HILDRETH.

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

No. 1257.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—CANDY PULLING MACHINE.
The Dickinson patent, No. 831,501, and the Jenner patent, No. 804,726, both for candy-pulling machines, *held* not anticipated and valid. Claim 1 of the former and claims 7 and 8 of the latter also *held* infringed.

2. PATENTS ⊜174—CONSTRUCTION—IMPROVEMENT PATENTS.
A patent for a machine, which is an improvement only, is not entitled to as broad construction as the patent for the original or basic machine.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 249; Dec. Dig. ⊜174.]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by Herbert L. Hildreth against the Lauter & Suter Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 208 Fed. 1005.

George W. Lindsay, of Baltimore, Md., and Hector T. Fenton, of Philadelphia, Pa. (R. B. Tippett & Son, of Baltimore, Md., on the brief), for appellant.

George P. Dike, of Boston, Mass. (MacLeod, Calver, Copeland & Dike, of Boston, Mass., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

WOODS, Circuit Judge. [1] The reasoning of the District Judge, by which he reaches the conclusion that the defendant's candy-pulling

machine, operating under the Henry patent, is an infringement of the prior right of the complainant Hildreth, as assignee under the first claim of the Dickinson patent, leaves nothing to be added. While strong argument against it has been submitted, we think it remains unbroken.

It is necessary, however, to refer more at length to the finding by the District Court that the use of the Henry machine by the defendant is an infringement of the complainant's right as assignee under the seventh and eighth claims of the Jenner patent. The seventh and eighth claims of the Jenner patent are as follows:

"(7) A candy-pulling machine comprising a framing, a pin carried by the frame, and shafts supported by the framing on opposite sides of the pin and having crank-arms, and pins carried thereby and arranged to revolve around the pin of the frame, and means for driving the shaft substantially as set forth.

"(8) A candy-pulling machine having shafts provided with crank-arms and pins thereon and the framing supporting said shafts and having a pin around which the pins of the crank-arms revolve, substantially as set forth."

After noticing the admission that these claims may be read literally upon the Henry patent, the District Judge thus clearly shows the infringement:

"It is objected, however, that the actual machine shown and described in the drawings and specifications of the Jenner patent is different both from the Henry machine and from any machine from which the claims could be read. The machine shown in Jenner's drawings has three stationary and two revolving pins. In that machine the two which are movable revolve in the same direction. In a machine so constructed there must be more than one stationary pin if candy is to be pulled. But the specifications clearly say that if the movable pins are made to revolve in opposite directions the results will be at least equally good. When so made to revolve we have the Henry machine. It is a mere matter of detail, then, whether there is or is not more than one stationary pin. The seventh and eighth claims of the patent are not limited to a machine in which there is more than one stationary pin. The seventh and eighth claims of the Jenner patent seem to be valid and to be infringed by the Henry machine. That machine is doubtless an improvement (309) on the Jenner. If the owner of the Jenner patent were a different person from the owner of the Henry, the former would not be entitled to use the special features of construction which appears to be the only thing covered by the Henry patent, but that would give the proprietor of the latter no right to use the Jenner either with or without the addition of his own improvement."

This reasoning is in accord with the principle laid down in Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122.

It is insisted on appeal, however, that, assuming the correctness of the reasoning as to the priority of the Jenner patent over the Henry patent, yet the decree on this point should be reversed because Jenner's seventh and eighth claims were anticipated by Thibodeau's patent of August 11, 1903, under an application filed July 10, 1901.

[2] Having held that the Dickinson machine was the original invention on which all the other patents were founded, it must have, under the general rule, a broader construction than the others which could not claim to be anything more than improvements on Dickinson's invention by operating his device under better conditions. Miller v. Eagle Man-

ufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121; Bundy Mfg. Co. v. Detroit Time-Register Co., 94 Fed. 524, 36 C. C. A. 375.

Hence, although Thibodeau's invention had rotary pins or hooks which were horizontal, while those in the Dickinson machine were perpendicular and some of them stationary, yet Thibodeau's machine was an infringement, except as to his improvement. But Thibodeau's improvement could not have the broad construction as to equivalents allowed to an original inventor.

Jenner was junior to Thibodeau, and therefore, if there is no essential difference, the complainant could not have an injunction against the defendant under Jenner's seventh and eighth claims, while Thibodeau's senior right was outstanding. The main difference asserted by complainant's counsel is that in Thibodeau's machine the hooks move and revolve, while in the Jenner machine some of the hooks or pins are stationary. We think this difference clearly appears from the claims filed in the patent office, though it is earnestly contended by counsel for defendant that the seventh and eighth claims of Jenner do not show stationary pins or hooks.

The description of a pin in the frame and shafts with crank-arms revolving around the pin in the frame clearly implies that the pin was stationary. Indeed, this difference was admitted in the printed brief filed by counsel for defendant and was recognized and acted upon by the patent office.

Affirmed.

SPERRY & HUTCHINSON CO. v. FENSTER et al.

(District Court, E. D. New York. January 16, 1915.)

1. MONOPOLIES ⟸17—STATUTES—TRADING STAMPS.

Act Cong. October 15, 1914, c. 323, § 3, 38 Stat. 731, prohibiting the making of a contract fixing the price for merchandise on condition that the lessee or purchaser shall not use or deal in the merchandise of a competitor, if the effect of the contract is to substantially lessen competition or tend to create a monopoly, does not prohibit a trading stamp concern from restricting redemption privileges to subscribers under contract with it binding such customers to distribute stamps only to customers.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⟸17.]

2. ASSIGNMENTS ⟸5 — VALIDITY — TRADING STAMPS — REDEMPTION — "PROPERTY RIGHT."

Where complainant, a trading stamp concern, issued redeemable stamps only to subscribers under a contract by which the latter agreed to distribute the stamps only to customers, the right to redeem the stamps was a property right transferable by possession, while the license to use them for advertising purposes was not transferable without compensation to complainant, and hence complainant was entitled to enjoin the use of its stamps for advertising purposes by persons who had obtained them from subscribers in violation of the restriction.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 7–10; Dec. Dig. ⟸5.

For other definitions, see Words and Phrases, First and Second Series, Property Rights.]

In Equity. Bill by the Sperry & Hutchinson Company against Murray Fenster and others. Application for temporary injunction granted.

John Hall Jones, of New York City, for plaintiff.
Prindle, Wright & Small, of New York City, for defendants.

CHATFIELD, District Judge. The plaintiff seeks a preliminary injunction against several defendants, one of whom is in default, one appears in person, and the others are represented by attorney. The latter raises objections which go substantially to the issuance of any injunction upon the bill and petition, so that the matter will be considered in its entirety.

The papers show the usual condition presented in similar suits in which the defendants have obtained S. & H. Green trading stamps, under conditions equivalent to a purchase from the subscribers for these stamps, and are giving them to their own customers, and advertising so to do, as an inducement for trading.

It has been previously held, in a number of cases, that the plaintiff can restrict the giving of Green trading stamps, as a present or premium to customers, to the so-called "subscribers" who obtain under contract the right to give out these coupons (exchangeable for various premiums) by paying a consideration therefor and by agreeing to distribute the stamps only to customers. In other words, the subscriber contracts not to assign or transfer the advertising benefits which he expects to obtain from his purchase of stamps to be given to his customers who thus acquire the privilege of selecting a premium by holding evidence of having traded with that particular dealer to a certain amount.

The defendants contend that the plaintiff's practice of seeking to enjoin (and even in certain state jurisdictions to punish by prosecution) dealers who are using such trading stamps as an inducement to their customers to transact business, without having subscribed for the right so to do, and without having obtained the stamps by payment therefor to the company issuing the stamps, is contrary to the present decisions of the United States Supreme Court and to the provisions of the laws forbidding monopoly.

[1] The last statute upon this subject, known as the Clayton Law, and approved by the President upon the 15th day of October, 1914, provides in section 3 against the making of a contract or fixing of a price for merchandise on condition that the lessee or purchaser shall not use, or deal in, the merchandise of a competitor, if the effect of this contract would be to substantially lessen competition or tend to create monopoly. This statute forbids the converse of the acts complained of in the present action, and we have nothing to do with what might happen if the Green trading stamp people were seeking to forbid the use by its subscribers of any other kind of trading stamps. This might or might not be a restriction upon competition or tend to effect a monopoly.

Nor does the case of Bauer & Cie v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, control the present application. If the Sperry & Hutchinson Company refused to redeem

their coupons solely upon the ground that the coupons had been transferred after purchase from a subscriber, the Bauer Case, supra, would necessitate the ruling that such refusal to redeem would be justified only in case the party seeking to redeem had induced or knowingly assisted in some breach of contract.

The case of Bobbs-Merrill Co. v. Straus et al., 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, cited by the defendants, and the case of Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, decide that the vendor of goods which had been once sold at a price giving to that vendor all the profit which it could ask could not then restrict the further sale, at a loss, to the party making the resale.

Inasmuch as it was held that the rules of business competition did not require and would not allow the prohibition of transfer of articles in a way which would not affect the rights of the original vendor, the contracts seeking to prevent the subsequent sales were held to be in restraint of trade, contrary to the Sherman Law and the principles of common law.

[2] But the sale of trading stamps is much more like the transactions considered in Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, in that the reason for insisting upon a contract is to restrict the sharing in a certain legitimate privilege, to those who pay for the privilege, and to prevent, by a mere transfer of the trading stamps, the bestowal of the advantage of giving out the stamps, and of getting trade thereby, upon any person who might by holding the stamps be entitled to claim the rights of redemption.

It is evident that the intent and acts of persons taking the stamps and seeking to redeem them for a certain premium, and also the resultant benefits to that person, are entirely different and are based upon substantially different rights from those of a party who is seeking to attract customers and to build up his own trade through the privilege of dealing, as it were, in trading stamps, without payment for that privilege and with no intention of getting the goods for which the stamps are redeemable.

The right to redeem the stamps is a property right transferable by possession while the license to use them for advertising purposes is not transferable without compensation to the person granting that right, viz., the plaintiff herein.

This is exactly the distinction which seems to have been had in mind by Judge Thomas of this court in the case of Sperry & Hutchinson Co. v. Benjamin Benjamin et al., 221 Fed. 512 (March 27, 1905), and it is unnecessary to postpone the determination of this question as now raised until final hearing, for the reason that the defendants do not plead ignorance of the existence of some contract under which the trading stamps were issued; nor are they merely claiming to be innocent holders of particular stamps for which they have given a valid consideration. They are, on the contrary, insisting upon their right to knowingly and deliberately purchase from the licensee the benefits granted for a limited use and which they know could only be obtained by themselves by paying for one of the contracts above referred to.

The distinction suggested by the defendants, that they have not sought to induce anybody to break the contract, but that they have purchased these stamps in the open market, is no defense, in the face of actual notice to them that the stamps are not and could not be obtained from the Sperry & Hutchinson Company, except by some one who had entered into a subscription and paid for the privilege of obtaining them.

Temporary injunctions will issue.

In re KLIGERMAN.

(District Court, E. D. Pennsylvania. January 25, 1915.)

No. 4830.

1. BANKRUPTCY ⟸327—CLAIMS—PRESENTATION.

In general, a creditor is not compelled to present his claim against the bankrupt in bankruptcy court, and the only effect of his failure to do so is that the court will distribute the bankrupt's estate without regard to the nonappearing creditor, and the bankrupt's discharge may bar any further claim against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501, 502, 507, 515; Dec. Dig. ⟸327.]

2. BANKRUPTCY ⟸210—COURTS—JURISDICTION—LIEN CLAIMS.

Where a bankruptcy court has in its custody the entire assets of the bankrupt for distribution, including property claimed by creditor to be subject to a mechanic's lien, such court has jurisdiction to determine the validity of such lien in order to determine whether the claimant is entitled to a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321–323; Dec. Dig. ⟸210.]

3. BANKRUPTCY ⟸228—FINDINGS BY REFEREE—REVIEW.

A finding by a referee in bankruptcy that certain work on a building belonging to the bankrupt for which a mechanic's lien was claimed did not constitute "construction" within the state lien law, and that the lien was therefore invalid because not filed in time, was a finding of an ultimate fact, depending on inferences drawn from minor facts which could only be found from all the evidence including the testimony of witnesses, and hence such finding supported by evidence would not be set aside on review.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⟸228.]

In Bankruptcy. In the matter of bankruptcy proceedings of Harry Kligerman. On petition to review a referee's findings and adjudication against the validity of alleged mechanic's lien. Affirmed.

W. E. Bushong and John Haviland, Jr., both of Phœnixville, Pa., for claimants.

George B. Johnson, of West Chester, Pa., for bankrupt.

Walter S. Talbot, of West Chester, Pa., for trustee.

DICKINSON, District Judge. The scope of the discussion of the questions involved in this case is necessarily limited to the findings of the referee which the court is asked to review. Beyond this we cannot go, for the very practical reason that we have nothing else before us,

and therefore cannot know what, if any, other matters are pending before the referee. What these questions are, and how they arise, is disclosed by an outline statement of a few facts.

Shortly before the proceedings in bankruptcy began, each of the present petitioners supplied material to the bankrupt for work to be done, and which subsequently was done in and about a building, which afterwards became part of the bankrupt estate. Each of them filed liens under the provisions of the act of assembly of the commonwealth of Pennsylvania, approved June 4, 1901, known as the Mechanic's Lien Law (Act June 4, 1901 [P. L. 431]). The liens were filed within six months and after three months from the time the work was done. All other dates are rejected in this statement because no point is made of them. Without attempting an absolutely accurate statement or summary of the provisions of the Pennsylvania Mechanic's Lien Law, it is sufficient to further premise in a general way that under that law a claim for what may be characterized as ordinary alterations and repairs to an existing building must be filed within three months to acquire a valid lien, but a claim for the erection and construction of a new building may be filed within six months. It is furthermore provided by the third section of the act that changes of a certain character made to an existing building to adapt it to a new and distinct use make of the work a new construction within the meaning of the law. As the building with which we are concerned was an existing building, it is clear that the rights of the claimants under the laws of Pennsylvania turn solely upon the question of the fact of whether the work done was "erection and construction" within the meaning of the third section of the act of June 4, 1901. The statement of one other broad fact will unfold to view the whole situation of the parties to this controversy and disclose the exact position of the petitioners.

The property against which these claims were filed passed, along with the other property and affairs of the bankrupt, into the keeping of the court in bankruptcy for the purposes of its administration and determination of all questions of distribution and the discharge of the bankrupt. We are concerned now with a question of distribution. If these mechanic's lien creditors held valid liens against the property, they are preferential claimants upon the fund for distribution. If the liens are not valid, they share pro rata with the general creditors. The referee held the liens to be invalid.

The positions of the petitioners before the referee and reasserted here are these:

(1) The court is without power, authority, or jurisdiction, nor is it its province, to pass upon the validity of the mechanics' liens.

(2) Secondarily, and subject to the first position, petitioners assert the validity of the liens.

[1] To the list of cases, including Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, cited in support of the first proposition, many more might be added. It is clear, however, that petitioners have misunderstood the principle they invoke or have misapplied it. Whenever the property of an alleged bankrupt passes into the keeping of a court in bankruptcy, it passes for the purposes above indicated. Only such property, however, or such title to property as the bankrupt had,

so passes, and it passes subject to all claims and liens which any one has the right to assert against it. All rights of the bankrupt and others remain unaffected otherwise than as involved in the carrying out of the bankrupt law. If a claim of the bankrupt is to be asserted against a third party, the proceedings must be in that court which has jurisdiction of the case and the parties to it. Generally speaking, no creditor is compelled to present his claim against the bankrupt in the bankruptcy court. Again generally speaking, the only effect of his not so presenting it is that the court will proceed to distribute whatever estate of the bankrupt is in its hands without regard to the nonappearing creditor, and the discharge of the bankrupt may bar any further claim against him.

[2] When, however, the court has in its hands a fund for distribution, it is necessary for the court to determine among whom it shall be distributed. This in turn necessitates the adjudication of the rights of all claimants upon the fund. Therefore, whenever, as here, the claim upon the fund depends upon the validity of a lien which the claimant has or has had against a property, the validity of the lien must be determined. This is so clear as to forbid further discussion. The question comes to us as a simple question of distribution, and we have so determined it. The fact suggested that it arises collaterally out of and ancillary to a composition is not before us, and upon whether this would affect the question we express no opinion.

The findings of the referee upon the question discussed are affirmed.

[3] The second question, it will be observed, has been razeed to one of fact and to a single fact. Were the changes to this building such as to be a "construction" within the meaning of this act of assembly? The fact has been found by the referee against the claimants. It is true that this, although a fact, has in its determination the elements of an inference and involves the construction of the act of assembly. In this sense it is the ultimate fact. The inference, however, is one to be drawn from certain minor facts. These minor facts could only be found from all the evidence including and largely the testimony of witnesses. This brings the finding within the well-established rule. We have carefully reviewed the testimony and considered all the evidence, and the most which could be said for the claimants is that, had the referee reached a different conclusion, it could be supported only by invoking the rule which is now invoked against them.

We are unable to find any substantial basis for exception 6 of Morris P. Penrose to the referee's finding. Whatever opportunity the petitioners may have had to present their views to the referee before the making of the order in this case, they have now been fully heard, and there is no complaint but that their version of the facts and their views of the legal results flowing from these facts were fully presented to the referee and considered and disposed of by him.

The findings of fact as returned by the referee, and the conclusions of law deduced therefrom, and his report thereon, are affirmed.

UNITED STATES v. TOWNSEND.

(District Court, S. D. New York. January 28, 1915.)

No. 2435.

1. CRIMINAL LAW ⟸97 — OFFENSES ON HIGH SEA — VENUE — "FOUND" — "BROUGHT."

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. 1913, § 1023]) § 41, provides that the trial of offenses on the high seas or elsewhere out of the jurisdiction of any particular state or district shall be in the district where the offender is found, or into which he is first brought. *Held*, that the word "brought," as so used, meant taken or carried, as where the offense is committed on the high seas and the offender is taken into custody on the ship and then brought into court; while the word "found" means apprehended, as, where the offender, not having been taken into custody, is, after reaching port, arrested under lawful authority for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177–189, 191; Dec. Dig. ⟸97.

For other definitions, see Words and Phrases, First and Second Series, Brought; Find.]

2. CRIMINAL LAW ⟸97—VENUE—OFFENSES COMMITTED ON HIGH SEAS.

Where accused, as master of a ship, assaulted a member of his crew on the high seas, and then brought his ship at the end of her voyage to her pier in the borough of Brooklyn, county of Kings, and Eastern district of New York, where he was arrested, he was neither found nor brought within the Southern district of New York, within Judicial Code, § 41, providing that the trial of all offenses committed on the high seas shall be in the district where the offender is found or into which he is brought, and hence was not subject to prosecution in that district.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177–189, 191; Dec. Dig. ⟸97.]

3. CRIMINAL LAW ⟸97—OFFENSES—HIGH SEAS—FEDERAL COURTS—CONCURRENT JURISDICTION.

Judicial Code, § 97, provides that the District Court of the Southern and Eastern Districts of New York shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk and over all seizures made "and all matters done in such waters," etc. *Held*, that such section did not confer concurrent jurisdiction on the federal courts of the Southern and Eastern districts of New York, of offenses on the high seas, where the vessel after the commission of the offense was brought direct to her pier in the borough of Brooklyn.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177–189, 191; Dec. Dig. ⟸97.]

Henry C. Townsend was indicted for assault on a member of his crew on the high seas and filed a plea in bar to the court's jurisdiction, to which the government demurred. Overruled.

H. Snowden Marshall, U. S. Atty., and Gordon Auchincloss, Asst. U. S. Atty., both of New York City.

Henry A. Wise, of New York City, for defendant.

POPE, District Judge. The defendant, Townsend, is indicted for having, while master of the sailing vessel Manga Reva, and while upon the high seas on the trip from San Francisco to New York, committed

an assault upon one John Shea, a member of his crew. The indictment is under section 291 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1145 [Comp. St. 1913, § 10464]), which, so far as here material, reads as follows:

"Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, beats, wounds, * * * any of the crew of such vessel," shall be punished as provided by law.

The plea in bar, as elucidated by the mutually conceded facts at the hearing, shows that the defendant brought his ship upon the end of her voyage to her pier in the borough of Brooklyn, county of Kings, and thus in the Eastern district of New York. He was there arrested by a deputy United States marshal for the Eastern district of New York upon a warrant issued by a United States commissioner for that district, and, upon being arraigned before such commissioner, was held to appear before the District Court of the United States for the Southern District of New York. Subsequently the present indictment was found against him in this court. The question is whether the offense is properly laid in this district, or whether the case must be tried in the Eastern district of New York.

[1] The venue of such cases is prescribed by section 41 of the Judicial Code, as follows:

"The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought."

[2] A brief consideration of the meaning of the terms employed will be helpful. The difference between "brought" and "found" is the difference between presence by involuntary and voluntary act. By "brought" is meant taken, or carried. An illustration of this is where the violator of law upon the high seas is, following the crime, taken into custody upon the ship and then brought into port. On the other hand, where the defendant, not having been taken into custody, is, after reaching port, arrested or apprehended under lawful authority for trial for the offense, he is deemed to be found wherever such arrest occurs. Under the statute, the prosecution may be either in the district where the defendant is first brought (i. e., taken), or where he is found (i. e., apprehended). Kerr v. Shine, 136 Fed. 64, 69 C. C. A. 69, and cases cited. In the present case the defendant was not brought into this district, nor, indeed, into any district, for, as we have seen, he himself brought his vessel to Brooklyn. Neither was he found in this district, for, as we have seen, he was arrested on his vessel in Brooklyn. It follows therefore that he was neither found nor brought into this district, and, unless a further consideration, now to be mentioned, prevails, he cannot be tried here.

[3] It is argued for the government that section 97 of the Judicial Code gives this court concurrent jurisdiction with that of the Eastern district, and United States v. Arwo, 19 Wall. 486, 22 L. Ed. 67, is cited in support of the contention. That section is as follows:

"The District Courts of the Southern and Eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings,

Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters."

But the assault upon Shea was not "a matter done in the waters" of the counties named. Had section 41, above quoted, fixing the venue, read that the trial of all offenses upon the high seas should be deemed to have been committed in the waters of the district where the offender is found, there would perhaps be room for the contention that the act of Townsend was constructively done in the waters of the Eastern district, and that the Southern district thus has concurrent jurisdiction under section 97, supra. But section 41 does not so read. It fixes the venue absolutely and at a definite place, to wit, where the defendant is first brought or where he is found, and section 97, referring simply to matters done in the waters of the Eastern district, does not confer jurisdiction upon this district for an act done upon the high seas.

It only remains to be said that we do not find anything in United States v. Arwo contrary to what is here held. Neither the question certified to the Supreme Court in that case, nor the opinion of the court, refer in any manner to the statute then and now existing giving concurrent jurisdiction to the Southern and Eastern districts for matters "done on the waters" of those districts. The decision in that case is apparently upon the ground that the defendant was first found (i. e., arrested) by federal authority in the Southern district of New York, and was thus subject to this jurisdiction under the plain provisions of the statute.

We are of opinion that the plea in bar is well taken, and that the government's demurrer thereto must be overruled.

An order to that effect may be entered.

BERTON v. TIETJEN & LANG DRY DOCK CO.

(District Court, D. New Jersey. January 13, 1915.)

1. REMOVAL OF CAUSES ⊜19—ADMIRALTY AND MARITIME JURISDICTION—EMPLOYER'S LIABILITY ACT—ACTION IN PERSONAM.

Const. art. 3, § 2, provides that the judicial power of the federal courts is extended to all cases of admiralty and maritime jurisdiction, but Judicial Code, § 24 (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1913, § 991]), declares that the federal District Courts shall have original jurisdiction of all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the rights to common-law remedy where the common law is competent to give it. *Held*, that an action purely in personam by a machinist, working upon a vessel floated upon defendant's dry dock, to recover compensation for injury under the New Jersey Workmen's Compensation Act (P. L. 1911, p. 134), not being an action for tort or based on defendant's fault, was not within the exclusive jurisdiction of a federal court sitting in admiralty, but was an action of which the state courts had at least concurrent jurisdiction, and, such courts having first acquired jurisdiction, the action was not removable as one arising

under the Laws of the United States, and of admiralty and maritime jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37–46, 48, 52, 53; Dec. Dig. ⟸19.]

2. ADMIRALTY ⟸10—FEDERAL COURTS—JURISDICTION.
Admiralty courts will take jurisdiction of a contract only when the substance of the whole contract is maritime.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 131–149, 185–190; Dec. Dig. ⟸10.]

3. ADMIRALTY ⟸2—JURISDICTION—STATUTES—CONSTRUCTION.
Judicial Code, § 24, provides that the District Courts of the United States shall have original jurisdiction in all civil cases of admiralty and maritime jurisdiction, saving to suitors in all cases the right of common-law remedy where the common law is competent to give it. *Held*, that such saving clause does not embrace a proceedings in rem as used in the admiralty court; such proceeding not being a remedy afforded by the common law, though it does embrace proceedings in personam in which an attachment or writ of sequestration may issue against the vessel.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 18–28; Dec. Dig. ⟸2.]

4. COURTS ⟸492—JURISDICTION—CONCURRENT JURISDICTION—ATTACHMENT.
Where federal and state courts have concurrent jurisdiction, the one first acquiring jurisdiction will be permitted to retain it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1345; Dec. Dig. ⟸492.]

5. SHIPPING ⟸204—LIMITATION OF LIABILITY—"VESSEL."
Rev. St. § 3 (Comp. St. 1913, § 3), defines the word "vessel" to include every description of water craft or other artificial contrivances used, or capable of being used, as transportation on water, and sections 4283–4285 (Comp. St. 1913, §§ 8021–8023) provides for limitation of liability in favor of the owners of any ship or vessel, etc. *Held*, that a dry dock used for the repair of vessels, though capable of being floated and towed from place to place, was not a "vessel" within such provisions.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 639, 640; Dec. Dig. ⟸204.

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

At Law. Action by John Berton against the Tietjen & Lang Dry Dock Company, removed from the state court. On petition of Tietjen & Lang Dry Dock Company for limitation of defendant's liability, and petition of John Berton to remand. The former denied; the latter granted.

J. Emil Walscheid, of Town of Union, N. J., for plaintiff.
Foley & Martin, of New York City, for defendant.

RELLSTAB, District Judge. This suit was originally brought in the Hudson county court of common pleas, in the state of New Jersey, by John Berton, an employé of the defendant, Tietjen & Lang Dry Dock Company. His petition in that court was filed under the act of the New Jersey state Legislature approved April 4, 1911, entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employé in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder" (N.

J. P. L. 1911, p. 134), called the "Workmen's Compensation Act." Gregutis v. Waclark Wire Works (N. J. E. & A.) 92 Atl. 354. In such petition plaintiff alleged, inter alia, that he was a resident of the state of New Jersey; that the defendant was a corporation of said state; that on the 27th of January, 1912, and for a long time prior thereto, he was in its employ, working as a machinist; that on such date, and while so in the defendant's employ, working upon a vessel then in the defendant's dry dock, situate at the foot of Seventeenth street, in the city of Hoboken, state of New Jersey, he fell from a scaffolding upon which he had been directed to stand while so working and received severe injuries; that in consequence thereof he was forced to cease working; and that he "will be unable to follow his occupation of machinist or any other occupation for the next five years at least, and there is a strong probability that for the remainder of his life he will be unable to do any work of any kind whatsoever." The plaintiff further alleged that under the legislation referred to he was entitled to recover compensation from the defendant for such injuries, but that it disputed "its liability to pay him such compensation and refuses to do so." He concluded with a prayer that an order be made directing the defendant to pay him the money to which he claimed he was entitled under such legislation.

The defendant removed the suit into this court upon the ground:

"That said suit is one arising under the laws of the United States, and is one of admiralty and maritime jurisdiction, in this, to wit, that the injury alleged to have been suffered by the said John Berton in his said petition was sustained by him on a floating dry dock, while said dry dock was floating in a navigable stream, to wit, the Hudson river. That said dry dock was not fastened to the shore, but was afloat on said river."

Subsequently the defendant filed, in this court, its answer to the plaintiff's said petition, in which, after denying that the plaintiff was injured on the premises owned by it, it alleged that he, while in its employ, was "on a certain floating dry dock then in the waters of the Hudson river, off the foot of Seventeenth street in the city of Hoboken."

Upon the filing of such answer, the plaintiff presented his petition praying this court to remand said cause to the state court upon the ground that it was not one "arising under the laws of the United States or a case of admiralty and maritime jurisdiction, and that the injuries sustained by him were not sustained while in a floating dry dock in a navigable river, but that the injuries were sustained by him in a floating dry dock which was a permanent part of the city of Hoboken and state of New Jersey."

Thereupon the defendant presented its petition, alleging, in part, that it is a corporation of the state of New Jersey engaged in operating dry docks in the Hudson river at Hoboken, in the state of New Jersey, in the repairing of steamers and other maritime craft; that at the time the plaintiff alleged he was injured he was engaged in working on a steam tug which was on defendant's dry dock being repaired; that said dry dock was floating in the Hudson river, and not moored or made fast to the land in any way; that it is now moored to the land at Weehawken, N. J., and within the jurisdiction of the United States District

Court for the District of New Jersey; that the injuries received by the plaintiff while engaged in working for it were caused without knowledge, fault, or negligence on its part, but entirely by the negligence and carelessness of the plaintiff; that defendant believed other suits might be brought against it or its said dry dock by other parties claiming to have suffered loss, etc.; that the defendant desired to claim the benefit of sections 4283, 4284, and 4285 of the Revised Statutes of the United States (Comp. St. 1913, §§ 8021–8023); and prayed that Berton be restrained from prosecuting his said action except in this proceeding, and against said dry dock; and, in the event that this court should adjudge that the petitioner and such dry dock were liable for any injury to Berton, that such liability be limited to the amount of the value of its interest in said dry dock, her equipment, and pending freight.

To this the plaintiff answered, reasserting much that had been alleged by him in his said petitions, concluding with a prayer that defendant's "petition and libel may be dismissed as not being within the jurisdiction of this court," and, if that be denied, that defendant be required to pay him the compensation provided by said act of the state Legislature, and, if that be denied, that it be adjudged that the loss to Berton was incurred with the privity and knowledge of the owner of the dry dock and by its carelessness and negligence, that the prayer of the defendant to condemn the dry dock be denied, and that it be required to pay him the loss and damage suffered by reason of said injuries.

Of the testimony taken by the parties on the issues thus raised, only that relating to the jurisdiction will be considered, as it is clear that this suit must be remanded to the state court. This testimony shows that both plaintiff and defendant are citizens of the state of New Jersey; that the plaintiff, at the time of the alleged injury, and for some time prior thereto, was in the employ of the defendant, working as a machinist; that the defendant was the owner and operator of a floating dry dock, the frame of which is similar to a scow; that it was engaged in the repair of vessels which were floated upon such dock and by it raised clear of the water, the better to permit of the making of needed repairs; that such dock cannot be propelled by its own power, and, while capable of floating and being towed about on the surface of the water, was not built for the carrying of either passengers or freight; and that its movements, whether on the surface, or when being lowered or raised in the water, were for the purpose of raising vessels clear of the water, that they might be repaired; that at the time of the alleged injury the plaintiff was at work for the defendant as a machinist upon a vessel which had been floated upon the defendant's dry dock and then raised clear of the water for the purpose of being repaired; that the dry dock at that time was afloat, being held in position by her mooring post, a couple of feet away from the pier, by chocks so placed as to permit such dock not only to rise and fall with the tide, but to be moved laterally, and to be easily freed from her mooring log when desired.

[1] By article 3, § 2, of the United States Constitution, the judicial power of the United States Courts is extended "to all cases of ad-

miralty and maritime jurisdiction." The Constitution left it to Congress to say which of the United States courts should exercise such jurisdiction and to fix the scope thereof. In the exercise of such discretion Congress has frequently declared itself as to such jurisdiction, its latest expression being found in section 24 of the "act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911 (36 Stat. L. 1087, c. 231 [Comp. St. 1913, § 991 (3)]), which took effect January 1, 1912. By this section the District Courts are declared to "have original jurisdiction * * * of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." This is substantially the same as declared by Congress in the Judiciary Act Sept. 24, 1789 (1 Stat. L. 73, 76, c. 20), from which section 24 is mediately derived; the saving clause relating to the common-law remedy being exactly the same. If the plaintiff's right to recover depended upon the defendants being in fault, the court of admiralty might have taken jurisdiction, had its aid been invoked in the first instance, as the testimony establishes that the cause of the injury occurred wholly on navigable waters. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, and cases cited therein. The plaintiff, however, selected another forum in which to bring his suit, so that, except admiralty have exclusive jurisdiction over such cause of action, the cause must be remanded unless such jurisdiction be saved by the defendant's invoking the limited liability provisions of the United States statutes.

The plaintiff's right to recover for such injuries, however, as stated in his petition in the state court, or as fixed by that part of the state legislation invoked by him, does not rest upon the defendant's fault as the cause of such injuries. The effect of this statute is the incorporation into the relation of employer and employé a new right in the latter and a new obligation upon the former, and in furtherance thereof it provides compensation to workmen who have sustained injuries in their employment. The scheme of this Workmen's Compensation Act is twofold—compensation through action at law, or by legislative schedule. While the act permits an election by either party (Nitram Co. v. Court of Common Pleas, 84 N. J. Law, 243, 245, 86 Atl. 435), the latter scheme is declared in force unless the parties have taken the prescribed steps to put the other into operation (Sexton v. Newark District Telegraph Co., 84 N. J. Law, 85, 86 Atl. 451). In the case of the former, the employer's liability arises only in case he has been negligent—actually or legally imputed—and the employé had not been willfully negligent at the time of such injury. In the case of the latter, the employer's liability is fixed, without his being in fault, where the employé is injured by "accident arising out of and in the course of his employment * * * in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury." P. L. N. J. 1911, p. 134, 136, § 2, par. 7. Bateman Mfg. Co. v. Smith, 85 N. J. Law, 409, 411, 89 Atl. 979.

In the case at bar the plaintiff seeks the compensation fixed by the legislative schedule, and his right to such compensation, as already observed, does not depend upon the defendant's being at fault. The

nature of the obligation thus imposed upon the employer is purely economic and sociological. It bears no relation whatever to the modern common-law theory underlying the redress of private wrongs. The award to the injured employé is based on his being injured while in the course of his employment, and in consequence of an accident arising out of such employment, and not on the fault of his employer (American Radiator Co. v. Rogge [N. J.] 92 Atl. 85, 87), and the amount thereof is ascertained on the basis of his wages, regardless of whether such award be commensurate with the injury suffered. A suit to recover such compensation cannot be said to be one founded or sounding in tort. The legislative act referred to expressly declares that every contract of hiring, made subsequently to the time the original act went into effect, shall be presumed to have been made with reference to such obligation; and, by an amendment to such act, passed the same year (N. J. P. L. 1911, p. 763), all contracts of hiring made prior to such time are presumed to continue subject to such obligation unless either party, prior to the accident, shall have taken the prescribed steps to make such presumption inapplicable.

Neither the pleadings, nor the testimony taken on the issues raised thereby, alleges or shows that any such steps were taken in the present case, and the result is that this obligation thus legislatively thrust upon the employer is a part of the contract of hiring. Gregutis v. Waclark Wire Works, supra. Such an obligation was unknown to either the common or maritime law, as they existed at the adoption of our federal Constitution or the passage of the first Judiciary Act; and, while critically considered, it might be more appropriately placed in a class by itself than be classified as contractual, yet this legislative classification must govern. American Radiator Co. v. Rogge, supra. The Legislature in this respect has done nothing more than that which the courts have found it necessary to do, viz., annex to certain contractual relationships obligations not expressly undertaken. The law of implied contracts furnishes instances of such annexed obligations in matters resting solely in contract. The plaintiff was not a seaman or one engaged to carry out a maritime enterprise. He was a machinist, and his relation to the vessel in the repairing of which he was engaged was but incidental to his general employment as a machinist. The contract of hiring was essentially of a common-law nature, and what was done by the plaintiff at the time of his injury was merely an incident to his employment. Schuede v. Zenith S. S. Co. (D. C.) 216 Fed. 566, cited by the defendant, is not in point. In that case the plaintiff was a wheelsman upon a vessel owned by the defendant. He was a seaman, and the contract of hiring was maritime. The action in the state court, removed into the federal court on the ground of diversity of citizenship, was founded upon the fault of the defendant; it being alleged that the injury was due "to defective rigging and to an improvident order." In the state court the plaintiff would have had the benefit of the Ohio Employer's Liability Act (Gen. Code, § 6244 et seq.), which abolished several of the defenses available to the employer in the common-law action of tort some of which defenses were enforceable also in the maritime law. This legislation did not place upon the employer an obligation to compensate his employé in case of his being injured in the course of

employment, regardless of any fault of the employer. To recover under that act it was still necessary to show that the injury was due to the employer's fault. The cause of action was therefore founded in tort, and not in contract. That case is different from the one at bar in these important particulars: The contractual relation between the parties was maritime; the action was predicated upon the employer's fault; and the removal proceedings were founded in diversity of citizenship which, when invoked, was exclusive. These differences of grounds underlying jurisdiction and cause of action are radical and put the Ohio case in a different class from that to which the case at bar belongs. Neither the contract of hiring in the instant case, nor the obligation annexed to it by the New Jersey statute, is maritime (Insurance Co. v. Dunham, 78 U. S. [11 Wall.] 1, 20 L. Ed. 90), and neither is subject to the exclusive control of the maritime law.

[2] It is only when the substance of the whole contract is maritime that a court of admiralty takes jurisdiction. Plummer v. Webb, Fed. Cas. No. 11,233, 19 Fed. Cas. 891–894; The Orleans v. Phœbus, 36 U. S. (11 Pet.) 175, 9 L. Ed. 677; Richard v. Hogarth (Dist. N. J.) 94 Fed. 684, 685; The Pennsylvania, 154 Fed. 9, 83 C. C. A. 139. No different conclusion could be reached, should the asserted liability be held to lie in tort. Assuming that a tort could exist without fault—commission or omission and disregarding for present purposes this legislative pronouncement that the obligation is contractual—it is clear, even if the remedy provided for its enforcement is one that can be administered in the courts of admiralty, that it falls within the saving clause of paragraph 3 of section 24 of the Judicial Code, viz., "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." "Common-law remedy," as here used, is not to be restricted to such forms of remedy as were known in the common-law courts when the Judiciary Act of 1789 was passed. Section 9 of such act, after investing the District Courts with exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, added the saving clause quoted. Without such saving clause the District Courts would have exclusive jurisdiction in all such matters, but the adding of such clause manifests both a legislative recognition that there were causes of action cognizable in courts of admiralty over which the courts administering the common law could exercise jurisdiction, and a distinct purpose that, inasmuch as for the redress of such causes of action there were concurrent remedies, the suitor should have his choice of remedies, and the omission of the word "exclusive" in the subsequent legislation dealing with the admiralty jurisdiction emphasizes such purpose.

[3] What are concurrent remedies at the common law may not always be of ready determination, but since The Moses Taylor, 71 U. S. (4 Wall.) 411, 18 L. Ed. 397, it is settled that this saving clause does not embrace a proceeding in rem as used in the admiralty courts, as that is not a remedy afforded by the common law. This line of demarcation between proceedings which hold "owners responsible for damages committed by their vessel, without reference to the particular agent by whose negligence the injury was committed," and which might be brought in either the admiralty or common-law courts, at the suitor's

option, and those in rem in the maritime law which deem the vessel the offending thing, regardless of the responsibility of the owner or operator thereof, and which were cognizable only in the admiralty courts (Sherlock v. Alling, Adm., 93 U. S. 99, 108, 23 L. Ed. 819), has ever been observed, and the question whether a suitor has a common-law remedy, as well as one in admiralty, is practically limited to actions in personam. Concerning such actions, the authorities have justified the bringing in the state courts of suits in equity as well as at law, and have not confined them to such forms of remedies as were existing at the time the first judiciary act was passed. They have also sanctioned suits such as the changing civil conditions and relationships have induced legislative bodies to authorize, so long as they remained germane to rights recognized at the common law, ancient or modern, and did not encroach upon what were matters purely maritime.

In Leon v. Galceran, 78 U. S. (11 Wall.) 185, 191 (20 L. Ed. 74) it was said, with reference to this saving clause, that:

"The common law is as competent as the admiralty to give a remedy in all cases where the suit is in personam against the owner of the property."

And in Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 648, 20 Sup. Ct. 824, 829 (44 L. Ed. 921) it was said:

"The true distinction between such proceedings as are, and such as are not, invasions of the exclusive admiralty jurisdiction, is this: If the cause of action be one cognizable in admiralty, and the suit be in rem against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be in personam against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute * * * of a common-law remedy."

The following kinds of suits in personam, held to be properly brought in the state courts, illustrate the comprehensive meaning given to the phrase "common-law remedy," contained in such saving clause: Suits to recover mariners' wages, even though accompanied by writ of sequestration or process of attachment to hold the vessel to answer any judgment that may be recovered in the cause (Leon v. Galceran, supra); suits by shippers or consignee, free from fault, to recover for loss of or damage to cargo (The Atlas, 93 U. S. 302, 23 L. Ed. 863); suits brought under state statutes authorizing the recovery of damages to compensate for the pecuniary loss suffered by the widow and next of kin of one who died in consequence of the wrongful act of another, though the wrongful act were committed on navigable waters, and such a recovery could not be had at common law (Steamboat Co. v. Chace, 83 U. S. [16 Wall.] 522, 21 L. Ed. 369; Sherlock v. Alling, Adm., supra; The Lotta [D. C.] 150 Fed. 219); and a bill in equity to enforce a common-law lien dependent upon possession, though it be upon a raft for towage services (Knapp, Stout & Co. v. McCaffery, supra).

[4] It is within the power of Congress at any time to give the courts of admiralty exclusive jurisdiction over all matters of controversy arising upon navigable waters; but, so long as concurrent common-law remedies are saved, it is essential, in order to avoid undue friction be-

tween these two ancient and formerly conflicting jurisdictions, and to obtain a speedy, economical, and harmonious administration of justice, that in matters of concurrent jurisdiction that court which first takes cognizance should proceed without interference to a finality. Such a course rests not alone on comity, but on necessity. Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. Ed. 390; Westfeldt v. North Carolina Mining Co., 166 Fed. 706, 710, 92 C. C. A. 378. This suit must therefore be remanded, unless the appeal to the limited liability statutes requires that federal jurisdiction should be retained as the only court competent to afford such relief; for it is clear, however this statutory obligation imposed upon employers may be classified—contractual, delictual, or sociological—that it is not purely maritime in its nature. If not maritime, on that ground the suit is not removable; and, if maritime, it not being exclusively so as it is enforceable by a suit in personam cognizable in a court exercising common-law remedy, it is not removable, because the suitor had a choice of concurrent remedies, and his choice controlled.

[5] Sections 4283, 4284, and 4285, R. S., which embrace the limited liability provisions invoked, are derived from the act of March 3, 1851 (9 Stat. 635), which was "An act to limit the liability of shipowners, and for other purposes." This act was passed after the decision in New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U. S. (6 How.) 344, 12 L. Ed. 465 (1848), and perhaps because of it, which held that such navigation company was liable for failure to observe ordinary care in navigating a vessel which was totally lost by fire, even though it had a contract with the skipper casting upon him the risk of loss. The limitation of liability thus enacted, however, applied only to "owners of any ship or vessel," and the sections of the Revised Statutes appealed to limit the liability to "the owner of any vessel."

The statutory definition given to the word "vessel" includes "every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." R. S. § 3 (Comp. St. 1913, § 3).

Is a dry dock a vessel within the meaning of any of these statutory provisions? A stage designed to be used in connection with painting or repairing the side of a vessel would not become such merely because it was capable of floating on the water, though it were used by workmen in thus painting and repairing, while the same was on the water, rising and falling with the tide, or because it could be moved alongside or around such vessel, and while being moved was capable of holding persons and property. In what respect can a dry dock be distinguished from such a stage? True, it would be larger, and in addition to being capable of holding persons and property, and being used in moving them about, it would also be capable of being sunk to allow the water to come in, that a vessel might be floated thereon, and thereafter, upon being emptied of its water, of rising with the tide, lifting the vessel with it. It is, however, not designed or intended as a means of transportation, and merely that it can for temporary purposes be used for transporting either persons or freight does not make it a vessel within the definition of section 3 or the limited liability sections (4283-4289) of the Revised Statutes.

In Salvor Wrecking Co. v. Sectional Dock Co., 21 Fed. Cas. 281, Fed. Cas. No. 12,273, it was held (syl.):

"Services rendered in raising the sectional floating docks of the respondent are not the subject of salvage compensation, nor are they maritime, so as to give the admiralty jurisdiction of a suit to recover the value of such services."

In this case Judge Dillon, at page 283 of 21 Fed. Cas., said:

"The admiralty jurisdiction and the peculiar liens, rights, and remedies which the admiralty recognizes and enforces, spring out of the movable character of the vessels and vehicles which are the instruments of navigation, commerce, and trade. None of the reasons upon which this jurisdiction is founded, and these rights and remedies are given, apply to the stationary docks here in question; and my best judgment is that the controversy between these parties belongs to the courts of common law, and not to the court of admiralty."

In Snyder v. A Floating Dry-Dock (1884) 22 Fed. 685, this court (Nixon, J.) held that a floating dry dock with a floating pump was not a vessel constructed or used for the business of navigation or commerce.

In Cope v. Vallette Dry Dock Co. (1887) 119 U. S. 625, 627, 628, 7 Sup. Ct. 336, 337 (30 L. Ed. 501) it was held that a floating dry dock was not a subject of salvage service. In the course of the opinion Mr. Justice Bradley said:

"A fixed structure, such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water. The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage. A ferry bridge is generally a floating structure, hinged or chained to a wharf. This might be the subject of salvage as well as a dry dock. A sailor's floating bethel, or meeting house, moored to a wharf, and kept in place by a paling of surrounding piles, is in the same category. It can hardly be contended that such a structure is susceptible of salvage service. A ship or vessel, used for navigation and commerce, though lying at a wharf, and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service."

In The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73, this classification of floating dry docks with floating wharves, hinged ferry bridges, etc., is referred to approvingly.

In Ruddiman v. A Scow Platform (D. C.) 38 Fed. 158, it was held (syl.):

"A floating structure, designed to be moored alongside a wharf, so that carts containing refuse to be dumped into boats can be driven over it from the wharf, is not a vessel within the meaning of the maritime law, and no lien for wharfage attaches to it under that law."

In this case, Judge Brown, at pages 158 and 159 of 38 Fed., said:

"To admit of a maritime lien, the scow structure must be a 'vessel,' within the meaning of the maritime law. I am of opinion that the structure in question, though afloat, is not such a vessel, because it was not designed or used for the purpose of navigation, nor engaged in the uses of commerce, nor in the transportation of persons or cargo; and to be a 'vessel' it must meet some of these tests. * * * This structure, though, as I have said, capable of being moved, was designated to be comparatively permanent. By

its nature, build, design, and use, it belonged, I think, to that considerable class of cases, such as dry docks, floating saloons, bathhouses, floating bethels, floating boathouses, and floating bridges, all of which have been held not to be vessels within the maritime law"—citing cases.

To the same effect is The San Cristobal (D. C.) 215 Fed. 615.

Of the cases cited by counsel as opposed to the view that a floating dry dock is not a vessel within the purview of the limited liability provisions, Simpson v. The Ceres, 22 Fed. Cas. 172, Fed. Cas. No. 12,881; Shewan v. New England Nav. Co. (D. C.) 155 Fed. 860; Seabrook v. Raft, etc. (D. C.) 40 Fed. 596; The Mackinaw (D. C.) 165 Fed. 351; The M. R. Brazos, 17 Fed. Cas. 951, Fed. Cas. No. 9,898; The F. & P. M. No. 2 (D. C.) 33 Fed. 511—are not in point. These are cases of alleged maritime tort committed on navigable waters, in which character of cases it is not the person or thing injured or occasioning the injury that furnishes the test of jurisdiction, but the locality—navigable waters—where the tort was committed.

The Public Bath No. 13 (D. C.) 61 Fed. 692, was held to have been built on boats designed and used in navigation and transportation.

The Sunbeam, 195 Fed. 468, 115 C. C. A. 370, was a scow employed in carrying stone, though at the time of injury it was used as a derrick boat in unloading vessels.

On this finding of facts these water craft were vessels within the statutory definition referred to.

In The Chas. Barnes Co. v. One Dredge Boat (D. C.) 169 Fed. 895, the court held that the boat was intended for and used in transporting a permanent cargo (engines, machinery, etc., to pump out coal barges), and that no distinction could be made between a permanent and temporary cargo as applied to "transportation," within such statutory definition.

In Re Sanford Ross (D. C.) 196 Fed. 921, a barge with a piledriver aboard, and moved from place to place by tugs, was held to be a vessel and entitled to the limited liability provisions. This case, however, on appeal (204 Fed. 248, 112 C. C. A. 516), was reversed on the ground that, even if such craft were a vessel within the meaning of such provisions—the court finding it unnecessary to pass judgment on that point—the owner was privy to the fault which occasioned the injury.

In The Public Bath and Barnes Co. v. Dredge Boat Cases, Cope v. Vallette Dry Dock Co. was distinguished; in the former that the bath boat was not permanently moored, and in the latter that the dry dock was "not intended for transportation of anything." With reference to the distinction made in The Public Bath Case: In the Vallette Dry Dock Case the phrase "permanently moored," though appearing in the headnote and used in the opinion, can hardly be said to have been employed as controlling the distinction between what was and what was not a vessel, within the meaning of the maritime law. The mooring of that dry dock, as affecting permanency, was unsubstantially different from the method employed in the case at bar. In both cases, the docks were not only capable of floating, but must float while serving as dry docks, and the mooring was for no other purpose than to hold the docks comparatively stationary while in service. Permanency as a fixity was neither in the mind of the judge writing such opinion, nor

practicable in actual service, as both perpendicular and lateral movement, in some degree, was necessary in rendering such docking service. "Permanently," as there used, seemingly, was in the sense of "remaining or continuing indefinitely," one of the uses of such word, and it was undoubtedly intended to distinguish between a craft designed and used to move from place to place in the course of navigation and transportation of persons and goods, and one which to answer the purpose of construction must be comparatively stationary. And as qualifying "mooring," it was used to distinguish between that temporary mooring of ships or vessels falling within the first class, while they were being unloaded, loaded, or repaired, etc., preparatory to navigation in commerce, and that mooring of a structure falling within the other class, which remains indefinitely at a given place, and whose aid to navigation consists exclusively in the work done at such place. It is not necessary, however, in the present case, to distinguish such cases cited by the defendant, either from the Vallette Dry Dock Case or from the one at bar. The present case is controlled by the Vallette Dry Dock Case and The Robert W. Parsons, supra, which directly hold that not mere ability to float constitutes a vessel within the maritime law, but that the purpose of being used, or the actual use in navigation as a means of transportation, are the essential requirements. In The Robert W. Parsons, supra, Mr. Justice Brown, 191 U. S. at page 30, 24 Sup. Ct. 12, 48 L. Ed. 73, said that "only the purpose for which the craft was constructed, and the business in which it is engaged," are the determining factors whether such craft was a ship or vessel; and at page 34 of 191 U. S., at page 13 of 24 Sup. Ct. (48 L. Ed. 73), that "there is no doubt of the proposition that a dry dock itself is not a subject of salvage service or of admiralty jurisdiction, because it is not used for the purpose of navigation." No exception to this criterion was taken in the dissenting opinion rendered in that case, but, on the contrary, it was concurred in; Mr. Justice Brewer, at page 40 of 191 U. S., at page 16 of 24 Sup. Ct. (48 L. Ed. 73), saying:

> "That a dry dock is to be considered as land in the maritime law seems to be clear from the decision of this court in Cope v. Vallette Dry Dock Co., 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, in which it was held that a dry dock was not a subject of salvage service."

As, in my opinion, the dry dock under consideration is not a vessel within the meaning of the limited liability provisions, it is unnecessary to consider whether the plaintiff's suit could have been properly removed into this court, or whether he could be compelled to submit his cause of action to this court under such provisions, as his suit is the only one pending or threatened against the owner of such dock for any cause of action growing out of its use or for any cause of action having any relation thereto, even though the dry dock could be held to be within such provisions. On this point, see The Lotta (D. C.) 150 Fed. 219, 223, and cases cited.

The suit removed into this court, however classified, assuming it to be cognizable in a court of admiralty, not being one over which such court has exclusive jurisdiction, and the parties being citizens of the

same state, and the limited liability provisions of the United States statutes not being applicable, such suit must be remanded to the state court whence it came.

The plaintiff is entitled to a decree to such effect, with his costs to be taxed.

OLD COLONY TRUST CO. v. CITY OF TACOMA.

(District Court, W. D. Washington, S. D. January 20, 1915.)

No. 18.

1. STREET RAILROADS ⟸54—MORTGAGES—AFTER-ACQUIRED PROPERTY.
Where a street railroad mortgage by its terms was to cover all the company's property, both real and personal, and "now and hereafter acquired," together with all franchises, rights, and privileges granted by the city and any and all franchises, rights, and privileges which might be granted thereafter, etc., it covered a subsequent franchise authorizing the railroad company to sell electricity for power as against the city.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 133; Dec. Dig. ⟸54.]

2. COURTS ⟸366—FEDERAL COURTS—STATE STATUTES—CONSTRUCTION.
Construction of state statutes by the highest appellate court of the state is binding on the federal courts sitting in such state.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⟸366.]

3. COURTS ⟸365—FEDERAL COURTS—JURISDICTION—QUESTIONS INVOLVING PROPERTY—DETERMINATION—COMITY.
Where federal jurisdiction depends on diversity of citizenship alone and no constitutional question is involved, a federal court, in the absence of controlling authority, will determine a question touching particular property in the same way as it has been determined by the courts of the state, unless the federal court is fully convinced that the decision of the state court is erroneous.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⟸365.]

4. STREET RAILROADS ⟸61—FRANCHISE—CONSTRUCTION—FORFEITURE—"PERFORM."
A provision of a street railroad company's franchise that failure of the grantee, its successors or assigns, to perform any and all conditions in the ordinance specified and mentioned for a period of 30 days after notice shall be ground for forfeiture, etc., was not limited to affirmative duties imposed on the grantee, because injunctive relief would afford an adequate remedy so far as things forbidden were concerned but included both; the word "perform," in the connection in which it was used, being ample to express inaction as well as action.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50–54; Dec. Dig. ⟸61.
For other definitions, see Words and Phrases, First and Second Series, Perform.]

5. STREET RAILROADS ⟸61—FRANCHISE—FORFEITURE—EVIDENCE.
Notice of forfeiture of a street railroad company's power franchises having been served by a city because of the company's failure to desist in furnishing electricity for power purposes, evidence *held* insufficient to warrant a finding that a railroad company's officers were wrongfully or intentionally misled by the officers of the city, or that the latter's acts

and statements warranted the company in assuming that the resolution declaring forfeiture would be disregarded.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 50–54; Dec. Dig. ⊂⊃61.]

Suit by the Old Colony Trust Company, as trustee, etc., against the City of Tacoma. Complaint dismissed.

James B. Howe, of Seattle, Wash., and John A. Shackleford, of Tacoma, Wash., for complainant.

T. L. Stiles and Frank M. Carnahan, both of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. Suit is brought by complainant, mortgagee of the property of the Tacoma Railway & Power Company, asking that the defendant city be enjoined from taking any steps to forfeit a franchise granted the mortgagor for electric power purposes by a certain city ordinance and from asserting title to, or attempting to control, the electric appliances constructed thereunder.

Suit was brought to enjoin the forfeiture of this franchise in the state court by the mortgagor, in which suit the city secured a decree forfeiting the franchise and property used under it. The complainant in the present suit was not a party to such litigation, and there is no evidence that it had notice thereof. Upon appeal, the Supreme Court of the state of Washington affirmed that decree. Tacoma Ry. & P. Co. v. City of Tacoma, 79 Wash. 508, 140 Pac. 565.

This court in a suit by the grantee of the Tacoma Railway & Power Company, under a transfer made after the rendition of the opinion in the foregoing case by the Supreme Court, but before entry in the trial court of the remittitur, refused an injunction, forbidding the city interfering with the property installed under the franchise, forfeited to the city by the ruling of the state court. P. S. T., L. & P. Co. v. City of Tacoma (D. C.) 217 Fed. 265.

This court has already held in the present suit, upon the authority of Old Colony Trust Co. v. Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410, that complainant was not, necessarily, concluded by the decree in the state court against its mortgagor, the Tacoma Railway & Power Company, to which suit it was not a party.

[1] Upon the consolidation of certain street railway companies, the mortgage in question was given, in 1899, to the complainant herein. The power franchise in question was not granted until 1905, some six years after the giving of the mortgage.

While it appears in the mortgage that the company was mainly engaged in a street railway business, it must be assumed that the articles of incorporation of the Tacoma Railway & Power Company authorized it to engage in the power business, else the franchise would not have been granted. The name of the company also indicates that it was to engage in the power, as well as street railway, business.

The mortgage covers much property. By its terms, it was to cover "all this company's property, both personal and real and both now and hereafter acquired." After this general language, a large amount

of property is described in detail, including franchises, under many particular ordinances. After which occurs the following language:

"Also any and all other franchises, rights and privileges hitherto granted by said city of Tacoma * * * to any person or corporation whatever, formerly owned by said Tacoma Railway & Motor Company (one of the consolidated companies), * * * also any and all other franchises, rights and privileges which may be granted hereafter, by said city of Tacoma, * * * either to the original grantee or grantees named in either of the aforesaid ordinances (whether those hereinabove specifically mentioned or any other hereinafter referred to only in general terms), or to said Tacoma Railway & Motor Company as the successor in interest of such original grantee or grantees, in and by any ordinance or ordinances amending, enlarging, extending or otherwise modifying either or any of said existing ordinances."

Upon the part of the city it is contended that the description of the "after-acquired property" in the mortgage is not sufficient to cover the franchise and property now in question, and that therefore the complainant has no interest sufficient to support its suit.

The foregoing shows an intention to mortgage "after-acquired" franchises both particularly and generally, and nothing appears in the situation, circumstances, or language of the mortgage showing any intent to include only franchises for the operation of street cars.

The following cases have been called to the court's attention: Guaranty Trust Co. v. Atl., etc., R. Co. (C. C.) 132 Fed. 68; Beall v. White, 94 U. S. 382, 24 L. Ed. 173; Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637; Parker v. New Orleans, etc., R. Co. (C. C.) 33 Fed. 693; T. R. & P. Co. v. Tacoma, 79 Wash. 508, 140 Pac. 565; Farmers', etc., Co. v. Commercial Bank, 11 Wis. 207; Dinsmore v. Racine, etc., R. Co., 12 Wis. 649; Farmers', etc., Co. v. Cary, 13 Wis. 110; Farmers', etc., Co. v. Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689; Aldridge v. Pardee, 24 Tex. Civ. App. 254, 60 S. W. 789; Brainerd v. Peck, 34 Vt. 496; Meyer v. Johnston, 53 Ala. 237, 331. The foregoing cases are all clearly distinguishable from the present case.

Whether such language as that used in the mortgage in the present case would suffice as against an innocent purchaser from the mortgagor for value, it is not necessary to determine. In the present case the mortgagor and mortgagee have treated and recognized the mortgage as covering this franchise and the property used under it. As the city could not object to a mortgage being placed upon the franchise after it was granted, it is clear that it is not in a position to question the existence of the lien of the mortgage where the language, at most, is uncertain and ambiguous and the parties to the mortgage have given to it a construction extending the lien over the property in question.

A mortgage of after-acquired property can only attach to such property in the condition in which it comes into the mortgagor's hands. Jones on Corporate Bonds and Mortgages, § 114.

The following recitals from the decision of the state court show the main questions in controversy, consideration of which is asked herein:

"The respondent, the city of Tacoma, is a city of the first class, and since 1893 has owned and operated a municipal lighting plant. In 1912, it quali-

fied itself to take over the entire lighting business of the city. The appellant owns and operates a street railway system in the city of Tacoma. In 1890, the Legislature passed an act (Laws 1890, p. 131) classifying cities, and empowering cities of the first class to frame their own charters. It also empowered them (Rem. & Bal. Code § 7507, subd. 7 (P. C. 77, § 83): 'To lay out, establish, open, * * * or otherwise improve streets, alleys, avenues, * * * and to regulate and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof.'

"In pursuance of this power, the respondent framed an independent charter, and amended the charter in 1896, prohibiting the legislative power of the city from granting to any person or corporation a franchise, privilege, or right 'to sell or supply water or electric lights within the city of Tacoma to the city or any of its inhabitants,' as long as the city owns a plant or plants for that purpose and is engaged in the public duty of supplying water or light, subject to the exception that the city might grant a franchise to supply water or electric light to any part of the city not supplied or furnished by the city plant, 'to cease and determine at such time as the city of Tacoma shall furnish and provide water and light in said section or part of the city.' This amendment was carried into the charter of 1909.

"In harmony with the charter, the city council, in 1905, adopted an ordinance granting to the appellant, its successors and assigns, for a period of 25 years, 'the right, privilege, authority, and franchise,' to erect and maintain poles, lines, and conduits and to stretch wires thereon along, across, and underneath the streets and alleys of the city for the purpose of transmitting, distributing, and selling electric current, to be furnished and used for the purpose of furnishing 'power and heat, or either of them,' for power and heating purposes, and 'for lighting street cars,' and providing that it should not 'furnish power to be used for lighting or generating electricity for lighting.' It was provided that the stipulations in the ordinance should not prevent the city from granting the appellant 'by special permit' the right to furnish electric current 'for lighting purposes,' subject to the provisions of the city charter and the laws of the state; 'such permit, however, to be revocable at any time at the option of the city.' The ordinance further provided: 'Sec. 11. 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 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 this 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 and assigns, shall also forfeit and surrender to the city of Tacoma, all poles, lines, wires, or other property that may be locatel 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.' Ordinance No. 2,295.

"Another section of the ordinance provided that the grant was subject to the right of the city at any time, on 30 days' notice to the grantee, to repeal, change, or modify the grant, if the franchise granted was not exercised in accordance with the provisions of the ordinance; 'and the city council reserves the right so to do, and this section shall be considered as a cumulative and additional remedy to that provided by section 11 of this ordinance.'

Another section of the ordinance, in express terms, reserved to the city the right to maintain and operate an electric light, heat, and power plant. The appellant filed an acceptance of the ordinance, as follows: 'And the said Tacoma Railway & Power Company, by its manager and upon due authority of its board of directors, agrees to be bound by the conditions, limitations, and obligations set forth and contained in said ordinance.'

"In December, 1908, the appellant entered into a contract with the Northern Pacific Railway Company, wherein it obligated itself to furnish to that company, at its depot in the city and at its shops in South Tacoma, all the electric power that it uses 'for power purposes and for lighting purposes, for a period of ten years from the date of said contract.' On the 2d day of April, 1913, the city then being qualified to take over all the lighting business within its boundaries, passed a resolution revoking the permit which it had theretofore granted to the appellant to furnish electric current for lighting purposes, and providing that, from and after April 15th following, it should cease to furnish any current for that purpose. On April 21st following, the council passed a resolution, reciting that the appellant was then supplying electric current to be used directly and indirectly for lighting purposes. The resolution directed the commissioner of public works to notify the appellant that, in case of failure to comply with the terms and conditions of the ordinance before the expiration of 30 days after service of the notice, the city would consider the franchise granted by the ordinance null and void, and would claim a forfeiture of all poles, wires, lines, and other property located or constructed in pursuance of the ordinance, unless the same should be removed within 60 days as specified in section 11, and that the council would repeal the ordinance. The notice was served on April 23d. The appellant declined to comply with the notice, and on the 22d day of May commenced this action, praying that the appellant be enjoined from repealing the ordinance or declaring the same null and void, and praying that it be enjoined from asserting a forfeiture. The city answered, setting forth the matters and things to which we have adverted, and praying that the appellant be enjoined from furnishing electric power in the city, to be used directly or indirectly for lighting purposes; and that the ordinance to which reference has been made, 'and every right, privilege, authority, and franchise granted thereby,' be forfeited and declared to be null and void.

"It was adjudged that all the powers granted by the ordinance had been forfeited by the appellant in continuing to furnish the Northern Pacific Railway Company with power for lighting; that the ordinance should be null and void and of no further effect; that the appellant should be no longer entitled to exercise any privileges under it 'except to remove its poles, lines, wires, and other property from the streets of said city'; that the appellant be enjoined from maintaining poles, lines, or stretching or maintaining wires thereon, in, over, upon, or across the streets or alleys of the city, and from transmitting electric current over said lines or wires for the purpose of furnishing 'power or heat,' or for any other purpose arising out of, or dependent upon, such ordinance. It was further adjudged that, unless the appellant shall 'within sixty days after the entry of this decree, remove its poles, wires, and other property from the streets, alleys and public places of the city, the same shall be thereupon forfeited to and be the property of the city of Tacoma.'

"The appeal presents four principal questions: (1) Was the condition in the ordinance that the appellant should not furnish electricity for lighting purposes a valid one; that is, did the city have the power to so limit the franchise? (2) If so, was the limitation abrogated by the public service commission law (Laws 1911, p. 543)? (3) Did the refusal of the appellant to discontinue furnishing power to the Northern Pacific Railway Company for lighting purposes warrant the court in adjudging a forfeiture? And (4) did the court commit error in excluding certain testimony? These questions will be treated in the order stated." 79 Wash. at pp. 510–514, 140 Pac. 565–567.

[2] The first two of the four questions mentioned depend upon the construction of state statutes, and the construction given to them by

the state court is binding upon this court. Upon the third question the state court held that the equitable maxim that equity abhors a forfeiture means that, ordinarily, property will not be declared forfeited where the franchise, or contract, leaves a discretion in the court, and that such maxim and rule has no application in a case such as the present, where the letter of the franchise, itself, makes express provision for such forfeiture.

[3] Where the jurisdiction depends on diversity of citizenship, alone, and no constitutional question is involved, as in this case, in the absence of authority controlling on this court, where the decision of the state court touches the same property, in consideration of the results should the decisions be conflicting, while not absolutely bound by the ruling of the state court, more than ordinary weight must be given it and its finding followed, unless the court is fully convinced that it is erroneous. In view of the reasoning of the state court and the analysis made by it of the decisions on this question, its ruling is approved and followed.

The ordinance in question contains the following provisions:

"Section 1. That there be and is hereby granted to the Tacoma Railway & Power Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, its successors and assigns, for a period of twenty-five (25) years, the right, privilege, authority and franchise to erect and maintain pole lines and underground conduits and to stretch wires thereon and therein, over, along, across and also underneath the streets and alleys of the city of Tacoma in the manner hereinafter provided, for the purpose of transmitting, distributing and selling electric current to be furnished and used for the purpose of furnishing power and heat, or either of them, and the further right to charge for such current a reasonable compensation and for any other use or uses to which electricity may be put, except as hereinafter provided; provided that neither said Tacoma Railway & Power Company, nor its successors or assigns, shall have any right to supply electric current to be used directly or indirectly for lighting purposes, or to run motors, dynamos or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association or corporation, except, where the grantee herein, its successors and assigns, may furnish current for street railway purposes, then and in that event current may be sold for lighting street cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway & Power Company, its successors and assigns, the right to sell power for power and heating purposes, and for lighting street cars; but in no event, except as hereinafter provided, shall the said grantee, its successors or assigns furnish power to be used for lighting or generating electricity for lighting; provided further, however, that nothing in this section contained shall prevent said city from granting the said Tacoma Railway & Power Company, its successors and assigns, by special permit, the right to furnish any person, firm or corporation within said city or said city, electric current for lighting purposes, subject to the provisions of the city charter and the laws of the state of Washington; such permit, however, to be revocable at any time at the option of the city. * * *

"Sec. 11. 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 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 this 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 service of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors and assigns, to perform any or 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 and 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. * * *

"Sec. 17. This grant is subject to the right of the city council at any time, on thirty days' written notice to said grantee, its successors and assigns, by the commissioner of public works, authorized so to do, hereafter to repeal, change or modify this grant, if the franchise granted hereby is not operated in accordance with the provisions of this ordinance or at all, and the city council reserves the right so to do and this section shall be considered as a cumulative and an additional remedy to that provided by section 11 of this ordinance."

[4] Other sections of this ordinance impose upon the grantee of the franchise many affirmative obligations. The only ground of forfeiture authorized is that set forth in paragraph 11:

"The failure of said grantee, its successors or assigns, to perform any and all conditions in this ordinance specified and mentioned for a period of thirty days after notice."

It is now contended that this language contemplates only the failure to perform those affirmative duties imposed upon the grantee of the franchise by the terms of the ordinance; that, so far as those things forbidden to be done by the grantee are concerned—as was the right to furnish electricity for lighting purposes—it was not intended that a forfeiture might be enforced, for such a violation; that injunctive relief in such a matter would afford an ample remedy.

It may be conceded that such relief would be more appropriate and more nearly complete to prevent the grantee's doing acts forbidden to it in the franchise, than to compel the performance of those acts undertaken by it; but the language used shows no intent to limit the right of forfeiture as contended. One of the conditions of the franchise was that the grantee should, in no event, without a permit from the city, furnish electric power for lighting. True, the word "perform," considered by itself, is more appropriate to express action than inaction; but, when considered in the connection in which it was used—"perform any and all conditions of the ordinance specified and mentioned"—it is clear that it contemplates both the doing and the not doing of those things required. In such connection it means the carrying out, or the fulfilling, of all conditions of the ordinance.

Thirty days were allowed the Tacoma Railway & Power Company, under the resolution of the city council, within which to comply with its requirements and avoid a forfeiture. During this 30 days, there is evidence of various conversations between the officers of the Tacoma Railway & Power Company and the executive officers of the city and certain correspondence between officers of the company in charge of the matter. Evidence of such conversations was, by the state Supreme

Court, held inadmissible; it appearing to that court that they had occurred before the passage of the resolution of April 21st. The evidence in the present case is that a number of these conversations were after the passage of the resolution. This evidence, doubtless, shows that the officers of the Tacoma Railway & Power Company were not acting in hostile defiance of the requirements of the resolution.

This evidence, also, shows that the city was not prepared at this time to immediately take care of all of the needs of the Northern Pacific Railway Company, being supplied by the Tacoma Railway & Power Company under its contract with that company. It further shows that the officers of the Tacoma Railway & Power Company were acting under the belief that the city's officers, on account of the foregoing fact, would not insist upon a forfeiture pending an adjudication in court of the questions that had arisen between the Tacoma Railway & Power Company and the city, even though the former did continue to furnish electric power, under its contract, to the Northern Pacific Railway Company, of too high a voltage for light, but which was, by the Northern Pacific Railway Company transformed on its own premises to a lower voltage and used for lighting purposes.

These officers of the Tacoma Railway & Power Company acted in the evident belief that the resolution of April 21st was to be treated as a threat of forfeiture, only as a step deemed—as they understood—by both the officers of the Tacoma Railway & Power Company and the city, to be necessary in order to bring the matter into court for adjudication, and made without any real purpose upon the part of the city, or its officers, to actually forfeit the franchise in pursuance of the resolution in case the company failed to comply with the requirements of the resolution within the 30 days therein provided.

[5] This is as far as the preponderance of the evidence goes. It fails to establish, by the clear and convincing proof necessary, that the officers of the city wrongfully or intentionally misled the officers of the Tacoma Railway & Power Company in this regard. Nor is there a clear preponderance showing acts or statements by the officers of the city of such a nature as to warrant the officers of the defendant company in assuming that the resolution declaring a forfeiture, under the terms therein specified, would be disregarded.

This conclusion renders it unnecessary to consider what, if any, effect representations, or concessions on the part of the executive officers of the city, or officers acting in their executive capacity, would have towards modifying such a resolution of the city council.

Particular significance is not to be attached to the fact that the Tacoma Railway & Power Company had contracted with the Northern Pacific Railway Company, for the period of ten years, to furnish the latter company with electric power for lighting purposes, as showing a willingness to violate the provisions of its franchise, for, at the time of making this contract, the former company had a permit from the city for this purpose. Though this permit was revocable at any time, the Tacoma Railway & Power Company had no notice that its revocation was definitely contemplated, and, in its contract with the Northern Pacific Railway Company, provision was made for the eventuality of the revocation by the city of this permission.

After the city answered in the state court and by cross-complaint prayed the forfeiture of the franchise, and pending the trial of that cause, the city and Tacoma Railway & Power Company entered into an agreement, by the terms of which the latter was to continue supplying the Northern Pacific Railway Company electric current for lighting purposes, but it was stipulated that the forfeiture claimed by the city on account of the acts complained of in the cross-complaint should be unaffected by this subsequent agreement. While this tends to show the city unprepared to handle the needs of the Northern Pacific Railway Company at the time of the claimed forfeiture, it is not sufficient to deprive the city of its right of forfeiture provided for in the franchise.

The prayer of the complaint is denied.

In re ATLAS.

(District Court, N. D. Illinois. April 13, 1914.)

No. 21447.

1. BANKRUPTCY ⊂=414—DISCHARGE—DENIAL—BURDEN OF PROOF.
Creditors objecting to a bankrupt's discharge on the ground that he had concealed goods with intent to hinder, delay, and defraud his creditors are only required to prove the facts by a preponderance of the evidence and not beyond a reasonable doubt.

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

2. BANKRUPTCY ⊂=414—DISCHARGE—GROUNDS—PROOF—CORPUS DELICTI.
Evidence that prior to the filing of the bankruptcy petition the bankrupt stated that his stock was worth $7,500 or $8,000, which was proven not to be so, was insufficient to establish that he had concealed goods with intent to hinder, delay, and defraud his creditors, as a ground for discharge, in the absence of further proof of the corpus delicti that he had assets which he had not turned over to his trustee.

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

In Bankruptcy. In the matter of bankruptcy proceedings of Rubin Atlas. On motion to approve a report of the referee recommending that the bankrupt's application for discharge be denied. Recommendation of referee disapproved, and discharge ordered.

This trouble comes up on a motion to approve the report of the referee recommending that the discharge of the bankrupt be denied. That report shows that two specifications were made in the formal objections to the discharge: First, that the bankrupt concealed goods with the intent to hinder, delay, and defraud his creditors. Second, that the bankrupt failed to keep any books of account. So far as the second specification is concerned, no evidence was introduced before the referee. The referee finds in his report that, about two weeks before the bankruptcy proceedings, the bankrupt had a conversation with one of his creditors and the creditor's attorney, and that the bankrupt then, in answer to a question, stated that he had goods of the value of $7,500 or $8,000. The bankrupt denied ever having made any such statement, but did testify that when the petition was filed he had a stock valued at $3,500 only. The referee found that the preponderance of the evidence was against the bankrupt, and denied the discharge.

Herman Frank, of Chicago, Ill., for petitioning creditors.
B. M. Shaffner, of Chicago, Ill., for bankrupt.

CARPENTER, District Judge (after stating the facts as above). In support of the discharge, it is urged that inasmuch as the first specification involves moral turpitude, and, if proved, would render the bankrupt liable to criminal prosecution, the facts should have been proved beyond a reasonable doubt.

[1] This is a civil case, and notwithstanding the evidence might not be sufficient to convict, if the bankrupt had been indicted and put upon trial for the criminal offense of concealing assets on the eve of bankruptcy, it may be sufficient to support the denial of the statutory discharge. A preponderance is enough. The facts need not be proved beyond a reasonable doubt. See United States v. Regan, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494.

[2] The real question involves the character of the evidence. It preponderates clearly that the bankrupt, some two weeks prior to the filing of the petition, stated that his stock of goods was worth $7,500 or $8,000. The only evidence in the record is as to whether or not that statement was made. The creditor and his attorney said that it was; the bankrupt denied it. Assuming that the evidence shows that such a statement was made, it does not follow that the statement, as made, was true. Something akin to the corpus delicti is lacking. The bankrupt, of course, will be denied his discharge for willfully concealing assets with intent to hinder, defraud, and delay his creditors; but there is no proof here that he had assets to conceal. The proof relates solely to statements which the bankrupt made prior to the filing of the petition in bankruptcy, which may or may not have been true. This, in my opinion, is not sufficient to bar the discharge.

The recommendation of the referee that the discharge be denied is not approved, and the discharge is ordered.

UNITED STATES OIL & LAND CO. v. BELL et al.

(Circuit Court of Appeals, Ninth Circuit. January 11, 1915. Rehearing Denied March 9, 1915.)

No. 2415.

1. JUDGMENT ⟸828—CONCLUSIVENESS—RES JUDICATA.

Judgment of the state Supreme Court that premature service in a notice of an intention to move for a new trial did not deprive the court of jurisdiction to hear an appeal nor constitute a reason for its dismissal on the ground that the court was without jurisdiction to hear it, etc., was res judicata and conclusively binding on a subsequent grantee of land sold under the judgment appealed from on a collateral attack on such judgment in a federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504–1509; Dec. Dig. ⟸828.

Conclusiveness of judgments as between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

2. APPEAL AND ERROR ⟸1180—STAY PENDING APPEAL—EXECUTION OF DEED —REVERSAL—EFFECT.

Where, in a suit to enforce an alleged trust, the defendant, in order to stay execution of an adverse judgment requiring him to convey an undivided half of the land to each of two persons, executed a deed as required and deposited it with the clerk of the court according to Code Civ. Proc. Cal. § 944, the deed never having been delivered, but remaining in the possession of the clerk until the judgment appealed from was reversed such reversal vacated the deed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626–4631, 4658, 4659; Dec. Dig. ⟸1180.]

3. MORTGAGES ⟸217—TRUST DEED—EFFECT.

The grantor of a deed of trust to secure an indebtedness only is still the beneficial owner of the property and may still maintain any necessary action dealing with the title, so that in a suit by him affecting the title the court acquires jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 559–562; Dec. Dig. ⟸217.]

4. JUDICIAL SALES ⟸50—EFFECT—RIGHTS OF PURCHASER.

Where judgment was rendered imposing a lien on certain real property for an indebtedness due from D. to intestate, and in February, 1906, an order of sale was entered on the judgment and the land was sold by a commissioner to the administratrix and conveyed to her, such judgment and sale disposed of the question of title to the land as between the administratrix and the grantees of B., after which they had no interest in the land and were not concerned in the act or manner in which the administratrix discharged a prior lien on the land to secure money borrowed by the intestate with B.'s consent and credited on his indebtedness.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 90–94, 96; Dec. Dig. ⟸50.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Frank H. Rudkin, Judge.

Suit by the United States Oil & Land Company against Teresa Bell, as administratrix of the estate of Thomas Bell, deceased, with

the will annexed, and others. Bill dismissed, and complainant appeals. Affirmed.

Thomas Bell, the uncle of John S. Bell, gave to the latter, in 1874, 14,000 acres of land in Santa Barbara county, Cal. Thomas thereafter loaned money to John until, in 1885, the latter's indebtedness to Thomas was over $50,000. Upon a settlement then had, John reconveyed to Thomas 4,000 acres of the land. Thomas continued to advance money to John, and debited him with the amounts advanced, and charged him interest. In 1887 John and Thomas united in a sale of both tracts to one Grover, who paid one-fifth in cash, and gave notes for the balance. John's portion of the cash payment was applied on his indebtedness, leaving a balance of $25,500 due to Thomas, to secure the payment of which Thomas was, by agreement, to hold Grover's notes. On Grover's failure to pay his notes, and upon the agreement of John and Thomas to release him from his obligation thereon, he reconveyed both tracts of land in 1889 to George Staacke, who was the bookkeeper and confidential agent of Thomas. John continued to draw upon Thomas until the close of 1891, when his indebtedness to Thomas was over $100,000. In February, 1892, Thomas wrote John that it was inconvenient for him to be out of the use of the large sum of money which John owed him, and that he had borrowed $60,000 of the San Francisco Savings Union on the security of both tracts of land. The $60,000 so borrowed was placed to the credit of John. Staacke made his note to the savings union, and Thomas indorsed it, and to secure its payment Staacke conveyed, by deed of trust, both tracts of land to Campbell and Kent as trustees for the savings union. John continued to draw upon Thomas until the latter's death in October, 1892, when the balance he owed Thomas was more than $52,000.

Shortly after the death of Thomas, John presented to the executors of the will of Thomas a claim against the estate to the effect that Thomas had agreed to hold and manage John's 10,000-acre tract, to receive all the rents and profits thereof until an expected railroad through the land should be completed, or until a sale of the land could be had, and to pay him (John) the sum of $360 each month, independent of the rents and profits of said land, and that both said land and the rents and profits should be charged with the payment of said monthly sum. The executors rejected this claim, and in March, 1893, John began the suit of John S. Bell v. George Staacke et al. in the superior court of Santa Barbara county, to enforce his claim, making the executors also parties defendant. The complaint in that action alleged that Staacke held the 10,000 acres in trust for John and in trust for Thomas Bell, according to his beneficial interest; that the monthly payments of $360 were a lien and charge upon the land and by agreement were to be advanced by Thomas to John, to be reimbursed to Thomas out of the proceeds of the sale of the land. The defendants in that action denied that Thomas ever made any such agreement, and they filed a cross-complaint, alleging the fact to be that John's 10,000 acres were held in the name of Staacke in trust for the payment of John's indebtedness to Thomas, and they demanded judgment against John for the payments due, and a decree for the sale of John's 10,000 acres, and the application of the proceeds of the sale to the payment thereof. Nothing further was done in that action until four years later. In December, 1896, John conveyed the 10,000-acre tract to his wife, Kate M. Bell, and in 1897 he and his wife joined in a conveyance of an undivided one-half thereof to James L. Crittenden, John's attorney. In June, 1897, an amended and supplemental complaint was filed in the action, changing the object and purpose thereof. That complaint alleged that Staacke held the 10,000-acre tract solely in trust for John, and to convey to John on demand, and denied that John was indebted to Thomas in any amount, and prayed that Staacke be compelled to convey the land to the plaintiffs. The complaint also alleged that Staacke had, in violation of his trust, borrowed $60,000 from the San Francisco Savings Union, and conveyed the land to the trustees, and that he and Thomas Bell had appropriated to their own use the money so borrowed. Neither the trustees nor the savings union were made parties defendant.

On these issues, the cause of Bell v. Staacke was tried before Judge Day in June, 1897. The judge filed a written opinion in favor of the executors on their cross-complaint. There was some delay on the part of the defendants to have the findings and decision entered. Thereafter, on the motion of plaintiff, the judge vacated the submission and ordered a new trial. Proceedings were had in the meantime by which Teresa Bell, the widow of Thomas Bell, was appointed special administratrix of Thomas Bell's estate, and thereafter she became administratrix with the will annexed. In June, 1900, she having been substituted as defendant in the place of Staacke, the cause was a second time tried before Judge Day. At the conclusion of that trial, the judge decided that Staacke had held the 10,000-acre tract solely in trust for John, and to convey the same to him on demand free from any lien or claim in favor of Thomas. The findings were made and filed on March 6, 1901. Judgment was rendered July 9, 1901, directing Staacke to convey to Catherine M. Bell and James L. Crittenden each an undivided one-half of the 10,000-acre tract, and in the same judgment it was found that John was indebted personally to Thomas, at the date of the latter's death, in the sum of $52,120.15, and that the administratrix of Thomas' estate have judgment against John for that sum, with interest. The defendants moved for a new trial, and their motion was denied. They gave notice of an appeal to the Supreme Court from the order denying their motion for a new trial, and also from all of the judgment except that part which adjudged that John was indebted to Thomas. On taking the appeal, Staacke duly signed and acknowledged a deed to Kate M. Bell and James L. Crittenden each of an undivided one-half of the 10,000-acre tract of land, and deposited it with the clerk of the court; its delivery to abide the decision of the Supreme Court on the appeal. There was a motion to dismiss both appeals. The Supreme Court granted the motion as to the appeal from the judgment, on the ground that the appeal was premature in that it was taken before the judgment had been copied into the judgment book, but denied the motion to dismiss the appeal from the order denying the motion for a new trial. Bell v. Staacke, 137 Cal. 307, 70 Pac. 171. The Supreme Court reviewed the evidence in the case, and ordered a new trial as to all of the issues except that involving the amount of the indebtedness of John. Bell v. Staacke, 141 Cal. 186, 74 Pac. 774. The action came on for trial in the superior court the third time in April, 1904, before Judge Taggart. Findings were made in favor of the administratrix of Thomas Bell on the cross-complaint, and judgment was entered on October 28, 1904, adjudging that a lien existed in favor of Thomas Bell's estate upon the 10,000-acre tract, for payment of John's indebtedness, which at that time, with interest, was $95,901, and it was ordered that the land be sold to pay such indebtedness. The plaintiffs made a motion for a new trial, which was denied, and an appeal was taken to the Supreme Court from the judgment and from the order denying a new trial. The appeal from the judgment was dismissed, and, on the appeal from the order denying a new trial, the judgment was affirmed. Bell v. Staacke, 151 Cal. 544, 91 Pac. 322. In pursuance of the judgment, the land was sold, and Teresa Bell, as administratrix of Thomas Bell's estate, became the purchaser; she bidding therefor $109,000, the total amount of John's debt with interest and costs. Upon the expiration of the time for redemption, Teresa Bell, as administratrix, received a deed to the 10,000 acres.

In the meantime, in August, 1898, and after the first trial of the case of Bell v. Staacke, Kate M. Bell and James L. Crittenden brought a suit against the San Francisco Savings Union and Pond and Kent, who were at that time the trustees in the deed of trust, and against the executors of Thomas Bell's estate and the heirs of Thomas Bell, alleging facts similar to those alleged in the complaint of Bell v. Staacke, and praying that it be adjudged that the defendants had no interest or estate in said land, but that the land belonged to the plaintiffs, and that it be adjudged that the land had been deeded to Staacke in trust to convey the same to John as owner thereof, that Staacke received the naked legal title in trust for John, to convey the same to him, and that Staacke had no power to borrow the $60,000 or to make said deed of trust. The defendants, the San Francisco Savings Union, and the trustees

of the trust deed in that suit alleged that, at the time when Staacke borrowed the $60,00 and made the note and deed to secure the same, they had no knowledge or information that John had any claim or interest in the 10,000-acre tract, and never received notice of such claim or interest until four years later, when John and the executors of the Thomas Bell estate applied to the savings union for an extension of the time of payment on the note. They alleged, also, that on December 22, 1896, an agreement in writing had been made between the savings union, as party of the first part, and John S. Bell, as party of the second part, and Staacke, as party of the third part, and the executors of the will of Thomas, whereby the time for payment of the principal of said promissory note of Staacke was extended until December 22, 1898; that the agreement before its execution was submitted for examination to, and approved by, John and his attorneys, and was executed by John on the advice of his attorneys. Nothing further was done in that suit until March 29, 1902, when Teresa Bell, as administratrix, filed an amendment and supplement to the answer of the executors, alleging the same matters in substance that were pleaded in the cross-complaint of the defendants in Bell v. Staacke, and she alleged the pendency in the same court of the action of Bell v. Staacke, and that on June 29, 1901, judgment in that action had been made and entered in favor of herself as administratrix upon her cross-complaint, and against John, for the sum of $52,120, with interest and costs, and that said judgment was still in force, and the administratrix in her answer prayed that it be adjudged and decreed that Staacke held the legal title to the 10,000-acre tract in trust for the use and benefit of the administratrix of said estate as security for the payment of said sum of $52,120, with interest thereon, and in trust to sell said land and apply the proceeds to the payment of that judgment.

The action of Bell v. San Francisco Savings Union was brought to trial on June 13, 1904, before Judge Taggart, the judge who conducted the third trial of Bell v. Staacke, and while the latter case was under submission to the said judge. Teresa Bell, as administratrix, then filed a further amended answer, alleging the proceedings in Bell v. Staacke, and praying that the cause of Bell v. San Francisco Savings Union be abated until final determination of the other action. The court proceeded, however, and on February 20, 1905, made findings, and on March 14, 1905, rendered a decision in favor of the San Francisco Savings Union and the Mercantile Trust Company, which had been substituted as trustee, but holding and adjudging that Teresa Bell as administratrix was entitled to have the 10,000-acre tract offered for sale first, by the trustee, the Mercantile Trust Company, and it was expressly found in the decree that in the case of Bell v. Staacke, which was then pending, all questions of the relations between John S. Bell and his grantees on the one hand, with Staacke and the estate of Thomas Bell on the other, "are in course of judicial determination and settlement therein." The decree therefore made no adjudication of the rights between those parties, leaving the question of their rights to be determined by the decision in Bell v. Staacke. After receiving her deed from the commissioner, Teresa Bell paid to the trustee for the savings union the amount due it.

On March 2, 1912, the United States Oil & Land Company, a corporation of Arizona, the appellant herein, claiming to be the owner of an undivided one-half interest in the 10,000-acre tract by conveyance from James L. Crittenden and wife, brought in the court below the present suit against Teresa Bell, as administratrix, and numerous other defendants, to quiet the complainant's title to an undivided one-half of said tract, to set aside the conveyance to Teresa M. Bell of May 26, 1908, to obtain a decree that she as administratrix execute to the complainant a good and sufficient deed of conveyance of an undivided one-half of said tract, and that the other defendants execute deeds likewise of said tract, and for other relief incident to the cause of suit alleged. In the bill it was alleged that the conveyance made by Staacke to Kate M. Bell and James L. Crittenden on July 8, 1901, and delivered to the clerk of the court, became and was an absolute grant and conveyance of the title in fee in and to said tract to the said grantees and vested in each of them an undivided one-half of said lands, and that the conveyance be-

came final on or about December 29, 1901, and one of the prayers of the bill was that the clerk of the superior court of Santa Barbara county deliver to the county recorder of that county the said deed for record in the records of that county.

Upon the answers of the defendants to the bill setting up the proceedings in the actions in Bell v. Staacke and Bell v. San Francisco Savings Union, the substance of which is contained in the foregoing statement of the facts, and upon the stipulation of counsel that the papers purporting to be copies of judgments, orders, and decrees claimed to have been rendered and entered in the said causes in the state courts are substantially correct copies thereof, the cause was submitted for decision upon the pleadings, and thereupon it was ordered that the bill of complaint be dismissed and that the defendants recover from the complainant their costs.

Richards & Carrier, of Santa Barbara, Cal., and James L. Crittenden, of San Francisco, Cal. (Jacob M. Blake, of San Francisco, Cal., of counsel), for appellant.

Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, Cal., for appellees W. P. Hammon and F. C. Van Deinse.

T. Z. Blakeman, of San Francisco, Cal., for appellees Teresa Bell as administratrix and others.

Peter J. Crosby, of Oakland, Cal., for appellees Eustace Bell and others.

Lewis W. Andrews, Thos. O. Toland, and Andrews, Toland & Andrews, all of Los Angeles, Cal., for appellee Union Oil Co. of California.

Edmund Tauszky, of San Francisco, Cal., for Associated Oil Co.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant bases its right to the relief sought in the bill primarily upon the decree rendered in favor of Bell on the second trial of the case of Bell v. Staacke in the superior court of Santa Barbara county, and upon the deed which Staacke deposited with the clerk of that court in order to effect a stay of the proceedings pending the appeal from the judgment in that case, and contends that, notwithstanding the fact that the decree so appealed from was vacated by the Supreme Court and that upon the new trial ordered by that court all the issues were found against the appellant's predecessors in interest, the decree upon the third trial and the proceedings had thereunder were of no binding force for the reasons: First, that, after dismissing the appeal from the final judgment, the Supreme Court had no jurisdiction to award a new trial; second, that at that time the legal title to the land in controversy was vested in the trustees of the San Francisco Savings Union, and the equitable title was vested in that corporation, and therefore the superior court had no jurisdiction to deal with the subject-matter of the suit; and, third, that the decree in Bell v. San Francisco Savings Union was later in point of time than the decree in Bell v. Staacke, is inconsistent therewith, and protects the rights of the appellant.

[1] The contention that the Supreme Court had no jurisdiction to grant a new trial in the case of Bell v. Staacke is based upon the proposition that the notice of intention to move for a new trial which

was filed in the superior court was premature and ineffectual for any purpose. This question was definitely ruled and adjudged by the Supreme Court of California adversely to the appellant's contention, in Bell v. Staacke, 137 Cal. 307, 70 Pac. 171. When that case was in the Supreme Court on a motion to dismiss the appeal from the order denying a new trial, that court said:

"The premature service of a notice of intention to move for a new trial, or a failure to serve such notice at all, might be a good reason for denying the motion, but does not deprive this court of jurisdiction to hear the appeal; nor does it constitute a reason for its dismissal upon the ground that the court has not jurisdiction to hear it. Matters occurring prior to the order appealed from cannot be considered on the motion to dismiss an appeal."

And the court sustained that doctrine by reference to a line of its own decisions. Again, in Bell v. Staacke, 141 Cal. 186, 74 Pac. 774, when the appeal from the order of the superior court denying the motion for a new trial came on to be heard on its merits in the Supreme Court, that court, in dealing with the express objection which is here urged, namely, that the notice of intention to move for a new trial was prematurely given, said:

"There is nothing in this point. The findings and conclusions of law were filed March 6, 1901, in due time, and on March 19, 1901, defendants gave their notice of intention to move for a new trial. Some two months afterwards the judge of the lower court, on his own motion, and reciting that such findings had been inadvertently omitted, made and filed two additional findings upon two issues raised by the plaintiff's answer to defendants' cross-complaint. * * * These were in no way connected with the findings upon which the decree in favor of plaintiff was founded, and neither party attacks them, nor has either party appealed from, or questioned, this part of the decree."

And again, in Bell v. Staacke, 151 Cal. 544, 91 Pac. 322, when the appeal from the judgment of the superior court on the third trial of the action was heard, the same question was again presented to the Supreme Court, and that court said:

"A claim that the superior court had no jurisdiction to retry this case, notwithstanding that it was remanded by this court for a new trial, is based on the fact that the appeal from the former judgment in favor of plaintiff was dismissed. This, it is said, constituted an affirmance of the judgment, preventing the subsequent giving of any other judgment. But a judgment, even although expressly affirmed on appeal, is vacated by an order granting a new trial. See Swett v. Gray, 141 Cal. 83 [74 Pac. 551]."

The judgments in those cases are res judicata and are conclusively binding upon the appellant in this collateral attack thereon. They leave no room for the application of the principles announced in Muhlker v. Harlem Railroad Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, and Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, cited and relied upon by the appellant.

[2] As to the deed made by Staacke on July 8, 1901, and delivered to the clerk of the court, it is sufficient to point to the fact that the deed was so made and deposited solely for the purpose of procuring a stay on Staacke's appeal, as required by the provisions of section 944 of the Code of Civil Procedure, and that the deed was never de-

livered, but remained in the possession of the clerk until the judgment appealed from was vacated. When that was done, the deed became a nullity. Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84.

[3] We find no merit in the contention that in all the phases of the litigation in Bell v. Staacke, both in the superior and the Supreme Courts, there was no jurisdiction of the res, and no subject-matter of the suit, for the reason that the legal title to the land stood in the trustees and the equitable title in the San Francisco Savings Union. This proposition is advanced, notwithstanding that John S. Bell began the action in Bell v. Staacke against Staacke and the executors of Thomas Bell, for the purpose of establishing his right and interest in the 10,000-acre tract in controversy, and omitted to bring into the controversy the San Francisco Savings Union or the trustees of the deed of trust. If this contention were sustained, the appellant would thereby be deprived of the title which it claims by virtue of the judgment of June 29, 1901, in Bell v. Staacke, and upon which it bases its right to the relief sought by the bill, and would also be deprived of its claim to title by virtue of the deed made by Staacke and deposited with the clerk of the court, for the appellant, to obtain the relief sought, must allege and prove a superior right and title in itself. In Williams v. City of San Pedro, 153 Cal. 44, 49, 94 Pac. 234, 236, it was said:

"If he has no title, he cannot complain that some one else, also without title, asserts an interest in the land."

But the contention involves a misconception of the effect of the trust deed. The conveyance by Staacke to the trustees, although in form a trust deed, was in law a conveyance given to secure an indebtedness. The grantor was still the beneficial owner, and could maintain any necessary action dealing with the title. That such is the effect of such an instrument is settled by the decisions of the state of California. Kennedy v. Nunan, 52 Cal. 326; King v. Gotz, 70 Cal. 236, 11 Pac. 656; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314.

In Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813, the court said:

"Under these decisions and statutes, it would seem that, while we must say that the title passes, none of the incidents of ownership attach, except that the trustees are deemed to have such estate as will enable them to convey."

In Herbert Craft Co. v. Bryan (Cal.) 68 Pac. 1020, the court said:

"The passing of the legal title in such case is mostly ideal. It is deemed to have passed only for the purpose of enabling the trustee to convey a title. In all other respects the title remains in the trustor."

In Tyler v. Currier, 147 Cal. 31, 81 Pac. 319, the court said:

"While the deed of trust in one sense passed the title, yet it did so only for the purpose of security, and was, except as to the form and the procedure by which the loan could be enforced, substantially a mortgage."

Again, in MacLeod v. Moran, 153 Cal. 97, 94 Pac. 604, the court said:

"These decisions are based upon the fact that such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carriers none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. * * * The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead."

See, also, C. A. Warren Co. v. All Persons, etc., 153 Cal. 771, 96 Pac. 807.

The appellant asserts that rights in its favor were adjudged in the decree in Bell v. San Francisco Savings Union, and that the decree therein finally and conclusively determined the rights of all parties who were involved in the litigation in Bell v. Staacke, and determined the status of the savings union and its trustees as purchasers for value and without notice. The action in that case was commenced for the purpose of obtaining a decree that the deed of trust was void as against John S. Bell and his successors in interest. That relief was denied, the deed was held valid, and the Mercantile Trust Company, as trustee, was directed to sell the 10,000-acre tract, to pay to the savings union $158,000 out of the proceeds, and to pay the balance, if any, to Staacke, his heirs or assigns, and the decree adjudged that the plaintiffs therein "take nothing by this action." On the plaintiff's appeal, the judgment was affirmed. The appellant, however, claims an advantage to itself in the fact that the judgment in the Savings Union Case was later than that in Bell v. Staacke, and therefore controlling. But the relative priority in time of the judgments is wholly unimportant. Judgment was entered in Bell v. Staacke on October 17, 1904, and judgment was entered in the Savings Union Case on March 14, 1905; but both cases were pending at the same time in the same court, and before the same judge, and the judgment in the latter case expressly referred to the pendency of the litigation in the former case, and left for adjudication the questions therein involved. It is impossible to see that the appellant's predecessors in interest obtained anything by either decree. In the San Francisco Savings Union Case, the rights of Thomas Bell in the land held by Staacke were expressly recognized. In the opinion on the appeal in that case (153 Cal. 74, 94 Pac. 225) the court said:

"In the foregoing discussion we have said nothing as to the contention of the appellants Crittenden and United States Oil & Land Company that the court erred in denying them any priority as against the estate of Thomas

Bell. It is found, however, that the action of Bell v. Staacke, the pendency of which was set up in the pleadings, was still pending at the time of the decision, and that the question of the relations between John S. Bell and his grantees on the one hand, with Staacke and the estate of Thomas Bell on the other, in respect of the indebtedness of John S. to Thomas Bell and of the 10-000-acre tract, are involved in said action and 'are in course of judicial determination and settlement therein.' But judgment, accordingly, made no adjudication of the rights of John S. Bell and Thomas Bell (or their successors) as between each other, leaving the question of those rights to be determined in Bell v. Staacke. If it could be said that Staacke had no interest in this controversy as to priorities between John S. Bell and Thomas Bell, the finding as to the pending action (which is not attacked) clearly made it the duty of the court to reserve for adjudication in that action the matters therein involved."

But the appellant urges that, in any view of the facts of the case, Teresa Bell as administratrix is an involuntary trustee for the appellant of an undivided one-half interest in the land in controversy under the terms of the trust created in Staacke by the deed from Grover, and that this trust was revived in her whether she obtained the legal and equitable title which Staacke had when he conveyed to the trustees, or whether that conveyance be considered void and her payment of the debt due the savings union be deemed the voluntary act of one who was jointly liable to pay the same; that in either case she occupies toward the land in question the position of one who, with notice of the trust, has again received the title thereto after it once passed into the hands of a bona fide purchaser. This contention ignores the important and salient facts of the litigation.

[4] In February, 1906, an order of sale on the judgment in Bell v. Staacke was issued out of the superior court of Santa Barbara county. A month later the commissioner sold the 10,000-acre tract in controversy under that judgment to Teresa Bell, as administratrix, and thereafter be executed a deed to her. That judgment and sale disposed of the question of the title as between Teresa Bell, administratrix, and the grantees of John S. Bell. The latter, having thereafter no interest in the land, were not concerned in the method of the payment and discharge of the lien of the savings union. Teresa Bell, being the owner of the land, had the right to pay, as she did, the amount due the savings union, and discharge the property of the lien and prevent a sale thereof to satisfy the judgment rendered in favor of the savings union. By that act the grantees of John S. Bell acquired no equities in the property. They could have obtained no advantage from a sale of the land. The appellant's bill can be sustained only on the untenable theory that the final judgment in Bell v. Staacke is a nullity. In brief, the appellant comes into a court of another jurisdiction and asks it, in a collateral attack upon the judgment of the Supreme Court of the state of California, to decide that that court either misconstrued or erred in applying its own laws and rules of practice. As was said in Michigan Trust Co. v. Ferry, 228 U. S. 346, 354, 33 Sup. Ct. 550, 552 (57 L. Ed. 867):

"It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws."

The grantors of the appellant have had their day in court. The propositions on which the appellant bases its claim to relief have been adjudged against it, and its bill is without equity.

The decree is affirmed.

STATE OF WEST VIRGINIA v. ADAMS EXPRESS CO.

(Circuit Court of Appeals, Fourth Circuit. January 13, 1915.)

No. 1325.

1. INTOXICATING LIQUORS ⟸6—PROHIBITION—DELIVERIES BY CARRIER.
Since the right of a state under its police power to enact prohibitive legislation is based upon the recognized evil of the consumption of liquor as a beverage, the state can, not only prohibit acts which amount to sale at common law, but also other acts within its border, such as deliveries by carriers which tend to defeat or weaken its public policy of preventing consumption of liquor as a beverage.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. ⟸6.]

2. INTOXICATING LIQUORS ⟸6 — REGULATION — STATE POWERS — PLACE OF SALE.
The power of a state to regulate its internal commercial affairs includes the power to change the rule of common law that a sale is completed on delivery to a carrier, to a rule that a sale of intoxicating liquors is not completed until delivery by the carrier to the consignee, and that the place of delivery shall be the place of the sale, so long as such legislation does not interfere with interstate commerce.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. ⟸6.]

3. INTOXICATING LIQUORS ⟸13—PROHIBITION—PLACE OF SALE—CONSTITUTIONALITY OF STATUTE.
The amendment to Constitution of West Virginia prohibiting the manufacture and sale of intoxicating liquors, even if intended to apply only to sales under the common-law rule that delivery to the carrier shall complete the sale, does not impliedly deprive the Legislature of its power to enact Acts W. Va. 1913, c. 13, § 3 (Code 1913, c. 32a, § 3 [sec. 1282]), providing that the place of sale should be the place of delivery by the carrier.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 15; Dec. Dig. ⟸13.]

4. INTOXICATING LIQUORS ⟸265—DELIVERY BY CARRIER—INJUNCTION.
The fact that Acts W. Va. 1913, c. 13, § 3, exempts the carrier from the provision that any person who shall act as the agent or employé of a manufacturer or seller, or person keeping intoxicating liquor, shall be guilty as a principal, does not prevent the issuance of an injunction to restrain the habitual giving of aid by a carrier to those engaged in violating the law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 404; Dec. Dig. ⟸ 265.]

5. INTOXICATING LIQUORS ⟸262—DELIVERY BY CARRIERS—STATUTE.
Nor is the requirement of that act that the carrier shall keep books showing the name of the consignee of liquors consent that the carrier might transport and deliver contraband liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 402; Dec. Dig. ⟸262.]

---

6. INTOXICATING LIQUORS ⇐262—SOLICITING ORDERS—USE OF MAIL.
The fact that one who solicits orders for intoxicating liquors to be delivered in West Virginia contrary to the laws of that state makes use of the United States mails for that purpose affords no protection to him, or to the carrier delivering the liquor sold as the result of such solicitation.
[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 402; Dec. Dig. ⇐262.]

7. COMMERCE ⇐8 — REGULATION — INTOXICATING LIQUORS — WEBB-KENYON ACT.
The Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (U. S. Comp. St. 1913, § 8739), which prohibits the shipment of intoxicating liquors into a state to be received, possessed, sold, or in any manner used contrary to the state law, applied to liquor shipped into West Virginia contrary to Acts W. Va. 1913, c. 13, though the act was adopted before the Webb-Kenyon Act.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⇐8.]

8. COURTS ⇐365—RULES OF DECISION—STATE DECISIONS—CONSTRUCTION OF FEDERAL STATUTE.
A decision by a state court that the Webb-Kenyon Act does not apply to shipments of intoxicating liquor contrary to a state statute adopted before its enactment is not controlling upon the federal courts, since the question is one of the construction of the federal statute rather than of the state statute.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⇐365.]

9. INTOXICATING LIQUORS ⇐112½ New, vol. 20 Key-No. Series—REGULATION —TRANSPORTATION.
The Webb-Kenyon Act, prohibiting the shipment into a state of intoxicating liquors to be there received, possessed, sold, or in any manner used in violation of law, prohibits the delivery by a carrier of liquor transported from without the state, to a consignee within the state for his own personal use, in view of Acts W. Va. 1913, c. 13, § 3, prohibiting the sale of intoxicating liquors and providing that the sale shall be deemed to be made in the county where delivery is made by the carrier to the consignee.

10. COMMERCE ⇐9—INTERSTATE COMMERCE—INTOXICATING LIQUORS.
The Webb-Kenyon Act is not unconstitutional as an attempt to confer upon the states the power to regulate interstate commerce, since Congress has the power to exclude from interstate commerce either absolutely or conditionally articles which are recognized to be injurious.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 6; Dec. Dig. ⇐9.]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit for injunction by the State of West Virginia against the Adams Express Company, an association. From a decree of the District Court dismissing the bill (219 Fed. 331), complainant appeals. Reversed.

Fred O. Blue, of Charleston, W. Va., and Wayne B. Wheeler, of Columbus, Ohio, for appellant.

George E. Price, of Charleston, W. Va., and Joseph S. Graydon, of Cincinnati, Ohio (Lawrence Maxwell, of Cincinnati, Ohio, on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. The state of West Virginia brought this suit in the circuit court of Kanawha county against the Adams Express Company, R. H. Clendenin, and Edward Beigel, alleging: That Beigel, a resident of Cincinnati, Ohio, sent through the mails to many persons in West Virginia circular letters soliciting the purchase of intoxicating liquors, contrary to the law of the state; that Clendenin, induced by the solicitation, ordered from Beigel one-fourth of a barrel of beer which was carried by the Adams Express Company from Cincinnati to Charleston, W. Va., and was there held by the carrier ready for delivery when the bill was filed; and that Beigel intends to continue to ship into West Virginia by the defendant express company beer on orders so solicited. The breach of duty to the state alleged against the express company was its failure to use due diligence to ascertain before carrying the beer whether the contract for its sale was made in pursuance of an illegal scheme of solicitation, and that by delivering the beer, as it intended, it would aid Beigel in his unlawful attempt to make sales in West Virginia, inasmuch as the statute makes the place of delivery the place of sale. Beigel was not served. The relief asked, with which we are now concerned, is that the state—

"be awarded an injunction against the said defendant, the Adams Express Company, restraining it, its agents, employés, and representatives, from delivering to the defendant R. H. Clendenin the consignment aforesaid of one-fourth barrel of draught beer; and that defendant the Adams Express Company, its agents, employés, and representatives, be enjoined from delivering to the defendant, or to any other person, any shipment of liquors manufactured by the Pabst Brewing Company and handled by said defendant Beigel, or any of his agents, representatives, or employés at any place where said defendant express company operates in the state of West Virginia, within the jurisdiction of the court, unless the consignee of any such liquors can show to the satisfaction of the defendant express company, its agents, representatives, and employés, that he without solicitation from said Beigel, or any of his agents, representatives, or employés, ordered the consignment of liquors for his own personal lawful use without having received from said Beigel, or any of his agents, representatives, or employés, advertisements or letters soliciting orders for liquors, or price lists or order blanks advertising or soliciting from the consignee orders for liquors."

A preliminary order of injunction was made by the state court, but upon removal of the cause to the District Court for the Southern District the District Judge, on motion of the Adams Express Company, dissolved the injunction and dismissed the bill, holding that the state law could not prevent solicitation through the United States mails for the sale of liquor, and that there is nothing in the Wilson Act or the Webb-Kenyon Act which authorizes the state to interfere with the shipment and delivery of liquors ordered by a citizen of West Virginia for his own personal use from a licensed dealer without the state.

The appeal requires a consideration of the scope and effect of the West Virginia constitutional and statute law and the effect upon it of the act of Congress of March 1, 1913, known as the Webb-Kenyon Act.

[1] 1. In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which

drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage.

We are not concerned in this case with the question whether the state Legislature or the state Legislature and the Congress in conjunction can forbid a citizen to drink intoxicating liquors or purchase them in another state and bring them into the state of West Virginia for his own consumption; but with the very different question whether the state may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the state. We think it can be demonstrated that this question must be answered in the affirmative—that it can be made perfectly manifest that shipments into the state and deliveries by common carriers, by which liquor dealers outside of prohibition states were enabled to thwart the efforts of state governments to save the people of the state from the liquor evil, have been forbidden by state legislation made valid by the withdrawal of the protection of interstate commerce from such shipments under the act of Congress known as the Webb-Kenyon Act.

The amendment to the Constitution of the state of West Virginia, known as article 6, § 46, ratified in November, 1912, prohibits "the manufacture and sale and keeping for sale" of intoxicating liquors, with exceptions not material here; and it provides that:

"The Legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

On February 11, 1913, the Legislature enacted a statute to take effect July 1, 1914, which in section three contained this provision:

"Except as hereinafter provided, if any person acting for himself, or by, for or through another shall manufacture or sell or keep, store, offer or expose for sale; or solicit or receive orders for any liquors or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor * * *; and any person, except a common carrier, who shall act as the agent or employé of such manufacturer or such seller, or person so keeping, storing, offering or exposing for sale said liquors, or act as the agent or employé of the purchaser of such liquors, shall be deemed guilty of such manufacturing or selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employé." Laws 1913, c. 13 (Code 1913, c. 32a, § 3 [sec. 1282]).

[2] 2. At the argument it seemed to be conceded that state legislation would be effective to make the place of delivery the place of sale, with respect to transactions within the scope of the state legislative power. The power of the state to enact laws regulating and control-

ing commercial transactions within its own limits, subject only to the condition that the regulations shall not arbitrarily impair property rights or interfere with interstate commerce, has been affirmed in Sinnot v. Davenport, 63 U. S. (22 How.) 227, 16 L. Ed. 243, Delamater v. South Dakota, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733, and innumerable other federal and state decisions.

"The internal commerce of a state—that is, the commerce that is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the federal government." Sands v. Manistee River Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149; Hart v. State, 87 Miss. 171, 39 South. 523, 112 Am. St. Rep. 437.

This power includes the regulation of sales and the change of the general rule of the common law, that delivery to the carrier is a completion of the sale, into a general statutory rule as to every sale that it shall not be complete until delivery to the consignee, or into a special statutory rule that the sale of intoxicating liquors shall not be complete until delivery to the consignee, and that the place of delivery shall be the place of sale. The validity of such a special statutory regulation is illustrated in State v. Herring, 145 N. C. 418, 58 S. E. 1007, 122 Am. St. Rep. 461, and State v. Patterson, 134 N. C. 612, 47 S. E. 808.

[3] 3. There is nothing in the amendment of the state Constitution that takes away by implication this power of the Legislature to provide that the place of delivery shall be the place of sale. It is true that the constitutional amendment prohibits "the manufacture, sale and keeping for sale" of liquors. But it does not indicate a purpose to deprive the Legislature of the power to determine what shall be considered the place of sale. Even if it be assumed that the framers of the amendment, in prohibiting the sale of liquors, had in view the general common-law rule that the sale was to be considered made out of the state on delivery to the carrier and intended to incorporate that conception of a sale into the prohibition of the organic law of the state as a permanent state policy, that by no means implies an intention to take from the Legislature the power to make other regulations and restrictions to be conveniently altered or added to or repealed from time to time as circumstances might require, but not considered proper to be imbedded in the Constitution as the permanent law of the state. This obvious and general principle was applied to constitutional and statutory provisions as to the liquor traffic in State v. Hooker, 22 Okl. 712, 98 Pac. 964.

[4] 4. The point is earnestly pressed that, even if it be true that under the statute in West Virginia delivery in any county of the state is a sale in that county, yet, under an exception of the statute, the express company has the right to promote illicit sales by daily carrying liquor to be delivered in the state in violation of its laws. The section of the statute above quoted does exempt a common carrier from the provision that any person "who shall act as the agent or employee of such manufacturer, or such seller or person so keeping, storing, offering or exposing for sale liquors shall be deemed guilty of such manufacturing or selling, keeping, storing, or exposing for sale as the case may be," and shall be punished as provided by this section. This exemption of the common carrier from punishment by fine and imprisonment for the carriage or storing of liquor cannot by any stretch

be held to imply consent by the state that the carrier may engage in the business of promoting the liquor traffic by conveying it to the place of sale. For such action the carrier by reason of the difficulties of its position may well be exempted, as in this instance, from punishment as a criminal the same as if it were a principal in the crime of keeping or selling. But the doctrine is well established that one who, either from carelessness or design, habitually serves those who are engaged in pursuits either criminal or detrimental to the public interest as established by legislative enactment, should be restrained by injunction from rendering the nefarious service, even if that service be not criminal in the sense that statutory punishment is not prescribed for it, or even if the statute excludes the idea of punishment for it as an active and knowing participation in the principal crime. The exception of the carrier from punishment by fine or imprisonment as an active participant in the crime of selling or keeping or storing, because of the difficulties of its situation, does not at all imply that habitual aid extended to others violating the law shall not be subject to injunction as a nuisance. If the obstruction of commerce be a nuisance subject to the remedy of injunction, as was held in Re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, surely the active perversion of commerce by conveying goods to be delivered in violation of law may be enjoined. The principle, which seems too plain for further elaboration, is thus stated in the case cited:

"Every government, intrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing to one resulting in injury to the general welfare, is often of itself sufficient to give it standing in court."

[5] 5. The requirement relied on by the express company that common carriers shall keep books showing the name of the consignee, etc., may better be regarded as a means of gaining information upon which to seek relief against the transportation and delivery by carriers of contraband liquor as distinguished from that to be legitimately used under the exceptions set out in the statute, than as a consent that they should transport and deliver contraband liquor.

6. The right of the state to an injunction against the persistent transportation by the express company of liquor to be delivered in West Virginia, in pursuance of a contract of sale made in another state, is reinforced by the fact that the express company has transported the liquor which Clendenin was induced to order from Beigel by solicitation through circulars and price lists, expressly forbidden and made criminal by section 8 of the statute, and that the express company intends to continue to transport and deliver for Beigel to purchasers in West Virginia liquors which he has contracted to sell, and intends to deliver through the express company, on orders obtained by solicitation forbidden by the statute. But as we have endeavored to show, the relief of injunction is not dependent on this consideration.

[6] 7. It makes no difference that the United States mail was used

for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses, In re Palliser, 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514; United States v. Thayer, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673; Hayner v. State, 83 Ohio St. 178, 93 N. E. 900; State v. Morrow, 40 S. C. 221, 18 S. E. 853.

8. The express company further contends that the state is not entitled to an injunction against the delivery in West Virginia of the liquor which it has transported for Beigel, or against its intended transportation and delivery of liquor which Beigel intends to consign to other persons in West Virginia, on the assertion that these transactions are under federal protection as interstate commerce and beyond the reach of the Legislature of the state. This proposition is admitted to be sound, unless the Webb-Kenyon Act removes the protection, and subjects the delivery of liquor in West Virginia to the inhibition of the state Legislature, although the contract of sale be made in Ohio for the shipment of liquor to West Virginia.

[7] 9. The position is untenable that the Webb-Kenyon Act has no application, and therefore is without efficacy to extend the scope of the state legislation to interstate dealings in liquor because that statute was not enacted until March 1, 1913, after the West Virginia statute had been passed on February 11, 1913. The point has not been decided by the Supreme Court of West Virginia. There is a dictum in State v. Miller, 66 W. Va. 436, 66 S. E. 522, 19 Ann. Cas. 604, in favor of the position of the express company, where the question was the application of the Wilson Act to West Virginia legislation. But, as the court expressly stated, the point was not and could not be involved since the state statute under consideration had been re-enacted after the passage of the Wilson Act.

[8] But even if this had been a direct decision, we do not think it could prevail against the contrary view of the Supreme Court of the United States; for we venture to think the question is not one of the construction of a state statute, but of the force and effect of a federal statute in a state law, and on such an issue the decisions of the Supreme Court of the United States are controlling. That court thus determined the matter in Re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, in passing on the effect of the Wilson Bill:

"Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

This principle has been reaffirmed in Butler v. Goreley, 146 U. S. 303, 13 Sup. Ct. 84, 36 L. Ed. 981; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; Central P. C. R. Co. v. Nevada, 162

U. S. 512, 16 Sup. Ct. 885, 40 L. Ed. 1057; Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75.

[9] This is the Webb-Kenyon statute including the title:

"An act divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted, etc., that the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, * * * from any foreign country into any state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

10. The terms of the statute are so plain and unambiguous that we are unable to perceive that its interpretation requires any resort to construction. The Wilson Bill withdrew the protection of interstate commerce from liquor and made it subject to the state law only after arrival and delivery to the consignee. But under that statute, after arrival and delivery to the consignee "imported liquor fell within the category of domestic articles of a similar nature." In re Rahrer, supra.

The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill liquor dealers in one state were protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment or transportation of liquor from one state into another, not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in any manner used in violation of the state law. This is a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The state of West Virginia has enacted with reference to a contract for the sale of liquor that "the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee," and it expressly forbids a sale within the state. This makes the receipt or delivery have the effect of a sale, and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of state prohibition laws which it was the manifest intention of the Congress to remove. The Supreme Court of Kentucky has held that, although the state statute expressly prohibits the delivery of liquor by a common carrier, and such prohibition is valid as to all in-

trastate shipments, yet the Webb-Kenyon Act does not permit such prohibition to extend to interstate commerce where the liquor is for personal use. Adams Express Co. v. Commonwealth, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342.

11. All other decisions we think are in complete accord with the conclusion we have reached, namely, that the Webb-Kenyon Act puts without the protection of interstate commerce liquor shipped into the state to be sold, received, or used, when sale, receipt, or use is forbidden by the state law. Palmer v. Express Co., 129 Tenn. 116, 165 S. W. 236; State v. Doe, 92 Kan. 212, 139 Pac. 1169; State v. Express Co. (Iowa) 145 N. W. 451; United States v. Oregon-Washington R. & N. Co. (D. C.) 210 Fed. 378; Van Winkle v. State (Del.) 91 Atl. 385; Ex parte Peede (Tex.) 170 S. W. 749; Southern Express Co. v. State (Ala.) 66 South. 115; Amer. Express Co. v. Beer (Miss.) 65 South. 575. The general trend of congressional debate on the bill attributed the same meaning to the act, as did also the opinion of the Attorney General given to the President on the question of its constitutionality. Since delivery by one party is necessary to the receipt by another, if receipt be forbidden by a statute, deliveries might well be enjoined as acts promoting illegal receiving of liquor. Under the West Virginia statute they are the subject of injunction as sales within the state.

[10] 12. The constitutionality of the Webb-Kenyon statute is attacked on the ground that it is an attempt by Congress to confer on state Legislatures the power to regulate interstate commerce. This, we think, is a complete misapprehension. That the Congress has power to outlaw and exclude absolutely or conditionally from interstate commerce intoxicating liquors or any other deleterious substance has been very often decided. Ex parte Rahrer, supra; Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905; Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. The distinction is between things deleterious and things beneficial or innocuous. The power to regulate is the power to make reasonable rules of admission or exclusion. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat.

13. The following language of Mr. Justice White in Vance v. Vandercook, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, referring to the regulations of the South Carolina dispensary law, was cited here and has been cited elsewhere as giving countenance to the notion that the Congress has no right to legislate against the shipment or transportation of liquor intended for personal use from a license state to a prohibition state:

"On the face of these regulations, it is clear that they subject the constitutional right of the nonresident to ship into the state and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of a citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of

the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States."

It is perfectly manifest that this language refers to the constitutional provision giving the Congress control of interstate commerce to the exclusion of the states, and not to the power of the Congress under the authority of the Constitution to exclude absolutely or conditionally deleterious substances.

As to intoxicating liquors, though universally recognized as deleterious, the Congress has not seen fit to exclude them entirely from interstate commerce, but has made the exclusion on this condition, namely, that they shall not be transported by common carriers into particular states when such transportation would be especially injurious to the public interest, in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the state has seen fit to adopt. The courts can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of the states of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy.

We think that the state of West Virginia is entitled to the order of injunction prayed for, and it will be so ordered.

Reversed.

UNITED STATES FIDELITY & GUARANTY CO. v. EICHEL et al.

(Circuit Court of Appeals, Third Circuit. February 3, 1915. Rehearing Denied February 18, 1915.)

No. 1850.

1. PRINCIPAL AND SURETY ⊜112—CONTRACTOR'S BONDS—ACCEPTANCE OF NOTES.

The liability of the surety on a contractor's bond conditioned for the payment of laborers and materialmen was not affected by the acceptance of notes for the amount of claims for labor and materials, or by the proof of the notes, instead of the open accounts, in a bankruptcy proceeding against the contractor, as, it not appearing that the notes were given in payment, they would be regarded merely as security.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 226–234; Dec. Dig. ⊜112.]

2. PRINCIPAL AND SURETY ⊜113—APPLICATION OF PAYMENTS.

Where a contractor indebted to the C. Company for materials furnished for use on three different contracts, for the performance of only two of which plaintiff was the contractor's surety, made payments from time to time without any application thereof being made by either party at the time, the C. Company, after the contractor had become bankrupt, and two years after the payments had been made, had no right to apportion such payments between the several contracts, as a debtor, in making payments, may apply them to whichever debt he may select, and if he makes no selection the creditor has the right of application, but, if neither acts at the time of payment, the law, in the absence of special equities, applies the money to the oldest debt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 235–239; Dec. Dig. ⊜113.]

---

3. PRINCIPAL AND SURETY ⊂⊃66—EXTENT OF LIABILITY—PURCHASE OF CLAIMS AT DISCOUNT.

Equity cannot sanction the conduct of the president and manager of a contracting company, his wife, its trustee in bankruptcy, and the trustee's attorney, in buying claims against the company at a discount, the trustee to share in the profits of the transaction, and they could recover against the contractor's surety only the sum actually paid by them, and not the face value of the claims.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 108–110, 112; Dec. Dig. ⊂⊃66.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the United States Fidelity & Guaranty Company against Laura Eichel and others. From the judgment, complainant appeals. Reversed, with instructions.

William E. Schoyer, of Pittsburgh, Pa., for appellant.

William M. Hall, of Pittsburgh, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This controversy has become so intricate that we cannot dispose of it as briefly as we should like. But we shall try to condense the facts as much as possible.

The transactions to be summarized began more than ten years ago, when the United States Fidelity & Guaranty Company became surety on several bonds given to the government by contractors on public works. On these bonds—all of which contained the usual condition that the principal would pay laborers and materialmen promptly and in full—the Evansville Contract Company was originally liable as principal, or afterwards became liable. On February 27, 1904, the Contract Company was adjudged bankrupt in the Northern District of West Virginia, and three trustees were appointed—one of them, Madison J. Bray, afterwards becoming sole trustee. Our principal concern is with his conduct, and no attention need be paid to his cotrustees. His attorney during the period chiefly in question was Philip W. Frey, and his conduct also is attacked. So, too, is the conduct of Laura Eichel and of her husband, Jacob Eichel; Jacob having been a large stockholder, as well as the president and general manager, of the Contract Company, and having carried on the company's business for the trustees after the adjudication.

The suit now before us is in equity, and was brought under the following circumstances: Within about a year after the adjudication, Bray, Frey, and the Eichels bought, or caused to be bought, at a discount certain claims for materials that had been furnished to the bankrupt under the contracts upon which the Guaranty Company was surety. Ultimately these claims were all assigned to Laura Eichel, and she brought 18 separate suits thereon against the Guaranty Company, first in a court of the state of Pennsylvania, and afterwards in the United States District Court for the Western District. The latter suits were brought to November term, 1907, but a final determination was delayed

for several years. In October, 1912, while they were still pending, a bill in equity was filed against Laura Eichel, Jacob Eichel, Madison J. Bray, and Philip W. Frey. The service on Jacob Eichel was set aside, but the suit proceeded against the others. The bill asserted, inter alia, that the Guaranty Company had equitable defenses to some of the suits at law, but could not set them up in those actions, and for this reason, as well as to prevent a multiplicity of suits, the company prayed the court to take jurisdiction of all matters in controversy between the parties, and in the end to determine what amount, if any, the Guaranty Company was liable to pay because of its suretyship. There was no doubt that the Company was liable to some extent, but the precise amount depended upon the solution of several disputed questions. Without further reference to the pleadings or to the regularity of the proceeding, it will be enough to say that the defendants acquiesced in this prayer, and that testimony was taken and a hearing had upon the merits; the final result being, that the district court entered a decree against the Guaranty Company in favor of Laura Eichel for the face of the claims sued on—$59,769.08—with interest. From this decree the present appeal is taken, and the Guaranty Company contends that (while it is liable in some amount) its maximum liability is the amount paid for the claims by the defendants, and its true liability is much smaller.

For the moment we shall disregard what was done in West Virginia, and shall confine ourselves to the suit in the Western District of Pennsylvania, in order to decide two questions of minor importance.

[1] The Guaranty Company set up as a defense to seven of the claims sued upon—Nos. 42, 44, 45, 51, 52, 54, and 55 of November term, 1907—that the claimants had already been paid either in whole or in part because they had received certain promissory notes from the Contract Company. These notes, however, are still unpaid, and we agree with the court below that they were neither given nor accepted in payment, and therefore, under familiar principles, are to be regarded merely as security. Neither do we think it material that these notes were proved in the bankruptcy proceeding as the foundation of the creditors' claims either in whole or in part. In substance, the claims were precisely the same as if the creditors had proved upon their open accounts, for there was certainly no doubt about the character and standing of these notes. We think the subject needs no further attention.

[2] The other question has to do with the application of certain payments that had been made by the Contract Company to the Clydesdale Stone Company, two of whose claims are sued on at Nos. 24 and 25, November term, 1907. One of these claims is for material furnished between October 4 and November 20, 1901, upon a particular contract, and the other claim is for material furnished between November 8, 1901, and June 18, 1902, upon another contract. Upon both of these contracts the Guaranty Company was surety, and was therefore liable for the amount properly due upon both of the claims. How much is due is the point in dispute, and the question arises in this way: From time to time the Contract Company made payments to the Stone Company on open account, no application of these payments being

made by either party at the time. This, of course, would make no difference, if these two claims comprised the whole indebtedness of the Contract Company to the Stone Company; but there is a third claim for materials that were furnished from October, 1902, to July, 1903, on a third contract upon which the Guaranty Company is not a surety, and therefore it may (and probably does) make a difference to the Guaranty Company upon which portion of the open running account the general payments made by the Contract Company should be applied. This account embraced the materials furnished upon the three contracts, and it appears that what was actually done with the Contract Company's payments was this: On July 1, 1904, several months after the bankruptcy, the Stone Company assigned its whole claim to Frey, and at that time undertook to apply the payments that had previously been made, distributing them (in the words of the court below) "by proper apportionment to the several contracts." This application was sustained on the ground that, "so far as appears, no surety of the bankrupt will be required to pay more of the Stone Company's account against the bankrupt than may be properly required of it." This may perhaps be true, although it does not certainly appear; but the difficulty is that the Stone Company had no right to make the application. The general rule on this subject is well known. The debtor, who is paying his own money, may apply it to whichever of his debts he may select. If the debtor makes no selection, the creditor has the right of application. If neither acts at the time of payment, the law applies the money to the oldest debt. Special equities may require special treatment, but the general rule requires the application just stated. No special equity appears in the present case. Probably there was a surety on the third contract, but he is not in court, and we are left to conjecture what special claim to consideration he might be able to present. But, aside from this, the Stone Company had no right to make a nunc pro tunc application two years after the payments had been made, and several months after the principal debtor had gone into bankruptcy. The rights of creditors against the estate had been fixed, and the Stone Company could not change them. In this respect therefore the decree needs to be modified, although we must leave the details to the district court.

[3] Let us now turn to what was done in West Virginia. We should extend this opinion unduly if we set out the numerous facts in detail; and to do so would be needless repetition, for elaborate statements have already been made by the Court of Appeals for the Fourth Circuit in Bray v. Fidelity, etc., Co., 170 Fed. 689, 96 C. C. A. 9, and by the Supreme Court in an affirming opinion reported in 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055. We shall content ourselves therefore by referring to these statements with the same effect as if we repeated them in full. It is sufficient to say here that these decisions settled the following proposition: That the bankruptcy court in West Virginia had exclusive jurisdiction to determine whether the foregoing claims, which had then been sued upon in Pittsburgh, and had also been allowed by the referee in bankruptcy as preferred claims, should be re-examined, and (if re-examined) whether the holders thereof—namely, Bray, Frey, or the Eichels—had a right to have them rated

and paid at their face value as preferred; and to determine also whether Bray, as "trustee, and others who were employed to assist him in the management of the estate [had] been speculating in claims against it and procuring or acquiescing in their improper allowance and classification." United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 218, 32 Sup. Ct. 625, 56 L. Ed. 1055.

In the exercise of this exclusive jurisdiction the bankruptcy court took the following steps: On January 4, 1913, eight months after the decision of the Supreme Court, the referee made an order distributing all the assets of the bankrupt estate, and awarding to the preferred claims (which could not be paid in full) a dividend of 66⅔ per cent. He did not calculate this percentage on the face of the claims, but on the amount that had been paid for them by Bray, Frey, or the Eichels, giving the following reasons for his conclusion:

"Now, as to the purchase of the so-called preferred claims by Jacob and Laura Eichel, I am of the opinion that, under the circumstances, they had no right to engage in this transaction with a view of making a profit, and that these claims should be allowed for the amount at which they were purchased, and not for their face. Jacob Eichel was a heavy stockholder in the Evansville Contract Company, was a member of the board of directors, and president of the company—in fact, was the active head and manager. While the Company was a going concern and in active business, no one will contend that he, while president, or holding any other office in the corporation, could have legally bought up claims against his company for the purpose of making a profit on them. He would have had a right to purchase claims against his company, even at a discount, but the company, and not he, would be entitled to the profit. The fact that his company had gone into bankruptcy did not change his position. He was not only still president of the company, but was in the employ of the trustees of the bankrupt. It was to him they had to look for information concerning the past business transactions of the corporation; perhaps it was to him they had to look for information concerning the correctness or the incorrectness of these very claims. Under our law, as I understand it, an agent, the officer of a corporation, or a person occupying any position of trust or trust relationship, such as trustee, special commissioner, executor, or administrator, has no right to deal or barter for profit in the business or property of his principal, corporation, cestui que trust, decedent, or estate that he represents; and, if he does to the disadvantage of the person or interests he represents, the transaction will be held to be void; and, on the other hand, if the transaction turns out advantageously, the profits will inure to the benefit of the principal, corporation, cestui que trust, estate, property, or business he represents. What is here said concerning the position of Jacob Eichel applies with equal force to M. J. Bray and Philip W. Frey. Mr. Bray was and is the trustee of the bankrupt corporation, and Mr. Frey was one of the attorneys of the trustee at the time these claims were purchased by him, as the agent of Mrs. Laura Eichel. It is said that Mr. Bray was not interested in these claims at the time of their purchase, but became interested afterwards. However this may be, the evidence shows that it was his credit that obtained the money with which they were purchased, and that the claims were held as collateral security for this money, not merely to protect the bank, because it was amply protected and secured by the indorsement of Mr. Bray, but they were held for the protection of the latter. It is shown by the testimony of Mr. Bray himself that he carried the claims on his private account book as the 'Frey Accounts,' and that he is to have one-half of the profits arising from the transaction. Mr. Frey, as already stated, while acting as the agent of Mrs. Laura Eichel in the purchasing of these claims, was, at the same time, one of the attorneys for the trustees. As such attorney, it might have become his duty to advise the trustees relative to the validity of, or the amount justly due and owing on, these very claims. In case of litiga-

tion over them, it would have been the duty of Mr. Frey to represent the trustees, and through them the bankrupt estate, and it is not at all hard for one to imagine a situation where the interest of the client would be directly opposed to the interest of the attorney, if Mr. Frey is permitted to purchase these claims for Mrs. Eichel, and at the same time have an interest in the profits. I do not mean to intimate that these parties were guilty of anything dishonest, or that they ever anticipated taking advantage of the situation which they occupied in relation to these claims, or the position of trust which they held, but no court of justice should, with its sanction, permit men to occupy a position so exposed to temptation, nor countenance such an opportunity for one man to wrong another. No man can well serve two masters, especially when the interests of those two masters conflict, and therefore the law does not encourage nor countenance the attempt.

"Charges of fraud and collusion are made against the parties interested in the purchase of these claims, and especially against Mr. Bray, the trustee, but they are not sustained by the evidence; in fact, there is no evidence in this record, according to my opinion, even tending to prove it, and it is not upon that theory that I have arrived at the conclusion herein set forth, but because the law forbids such transactions, no matter how free they may be from the taint of fraud, and if the trustee's connection with the purchase of these claims justified suspicion, the open, manly way in which he has testified and voluntarily offered his private papers and accounts that they might go into the record must convince any one that he was actuated by no impure or dishonest motive. While I cannot uphold his position from a legal standpoint, yet I feel that it is only justice that he, as an officer of the court, should be relieved from the suspicion of dishonesty.

"The contention of Jacob Eichel that he had an understanding with the agent of the Bonding Company that he was to buy up these claims, and that he did it with his consent, does not alter the situation. According to Mr. Eichel's own evidence, the offer or proposition came from himself and the agent, Mr. Wood, only gave a tacit or negative assent; that is, he raised no particular objection. When the question of allowing the trustees to go on with the work was under discussion, some anxiety was expressed lest the Bonding Company might be called upon to make good the unpaid labor and material claims, before the work could be completed and these claims paid off by the trustees in the regular course of business, as every one seems to have thought at that time that there would be plenty of funds to pay all. Then it was that Mr. Eichel said that he would take care of that; he would get control of these claims, and would guarantee that the Bonding Company should never be bothered with them. I would infer from this conversation, as detailed in the evidence, that Mr. Eichel's object was to allay the anxiety of the Bonding Company rather than to make a binding contract whereby he might speculate upon the misfortunes of the surety for the bankrupt company, of which he was the president, and had been the active business manager when it went ashore on the financial rocks and breakers. There was certainly nothing in this conversation, on that occasion, as he gives it himself, to convey the idea that he expected to buy up these claims at 65, 70 or 80 per cent. of their face, and collect 100 per cent. from the surety. It may be sufficient to relieve him of the suspicion of any wrongful intent originally, but it does not relieve him of the duty he owed to his company, its creditors and its surety."

When the matter came before the District Court on a petition to revise, Judge Dayton affirmed the referee's order, but declared the trustee's conduct to be fraudulent in the following opinion, which has not been reported:

"This proceeding in bankruptcy was started in February, 1904, nearly ten years ago. A very careful reading and consideration of this petition to revise and the voluminous record certified in connection therewith has fully convinced me that this unfortunate condition of affairs has largely arisen from two mistakes made in the very beginning: First, in the assumption

that a court of bankruptcy could ever, by and through its trustees or otherwise, undertake to carry out government contracts for the building of river and harbor improvements; and, second, in selecting an utterly dishonest and unscrupulous individual as trustee in the person of M. J. Bray. In extenuation of the first it may be said that it was done by my predecessor at the instance of parties interested, who saw visions of great profits to be derived therefrom, but in the end inevitably were confronted by great losses by reason thereof. As to the second, no one could foresee that, in violation of all obligations, both moral and legal, this trustee in bankruptcy, after assuming to carry out these same contracts, after having utterly failed to realize all hopes of profit on the part of creditors, but, on the contrary, had caused them large loss, could conceive the scheme of still further victimizing these unfortunate creditors. It is clear in this case as anything reasonably can be established that this trustee, Bray, in connection with Jacob Eichel, the president and manager of this bankrupt corporation, entered into a scheme to buy up labor and material claims, entitled to liens upon the bankrupt's property, at enormous discounts, and, through the attorney of the trustee, succeeded in doing so to the extent of an investment therein of $27,037.39, for $35,663.82 of par value. They, of course, well knew they could not do this in their own names, so they did so in the name of Laura Eichel, the wife of Jacob. She was simply a figurehead—a go-between. Bray furnished the money, and he was to have half the profits of the discount. He and Eichel very carefully saw to it that these claims were proven and decreed to be preferred ones so far as November 19, 1904, and the Surety Company was notified that the money was in hand to pay them and they would be paid. They then stood on Bray's (trustee's) books in the name of Frey, his attorney. This decree of the referee ascertaining the amount and right to preferred payment of these claims has never been appealed from or reversed. The scheme moved so far very smoothly, and likely no discovery would have been made of it had Bray and Eichel been satisfied with the something over $8,000 personal profit derived by them from the discount of creditors' claims, money to pay which in full was in Bray's hands, realized from the sale of plants of the bankrupt of which he was trustee. Their greed and avarice, however, caused them to overreach themselves. Money made in this way came so easy and they wanted more. Thereupon the further scheme suggested itself to them that the bankrupt's surety could be sued upon the indemnity contract, executed by the bankrupt to the government, and made to pay each and all these claims they had thus bought in, and then the fund arising from the sale of the plants, etc., of the bankrupt could be disbursed in payment of unsecured claims for which the surety was not liable. They became interested in such unsecured debts, and started actively, by suits instituted against the surety company in another jurisdiction and state, to seek the recovery from it, on its surety contract, of these preferred claims, so as to permit the fund arising here from the sale of plants, etc., to be disbursed upon the unsecured debts in which they were interested. It needs no citation of authority to support the legal proposition that trustees in bankruptcy are not appointed for the purpose of allowing them to filch and defraud creditors for their own gain, but for the honestly protecting and securing to the creditors every dollar that can be realized for them from the bankrupt's estate. They should be appointed in the beginning from those who are wholly disinterested, and will remain so disinterested until their duties are done and they are discharged. Had my attention heretofore been called to Bray's conduct, he would have been summarily removed from his trusteeship. He would be now removed, if anything more was to be done in this proceeding by him except disburse the funds in his hands, and if the appointment of another trustee was not calculated to cause delay and additional expense.

"Certain it is, however, that in this bankrupt court, where equity is administered, I will allow no technicalities upon their suggestion to prevent the annihilation of this corrupt and fraudulent scheme of his and Eichel's. I therefore heartily concur with the referee's ruling that prevents them from realizing the $8,000 profit from the buying up of these creditors' claims. Nor

will I for a moment interfere with the decree of the referee made nine years ago, ascertaining these preferred claims to be such, at the instance and for the general benefit of this trustee, Eichel, the president and manager of the bankrupt, and their go-between, Mrs. Eichel. It seems to me it is wholly immaterial as to how the knowledge of this fraudulent scheme and conduct has been presented. There is one thing for the court to do, and that is to condemn and defeat it in the promptest and most emphatic way possible, for these trustees in bankruptcy are, in a sense, only the court's agents. I am in absolute and full accord with the referee's rulings in this case, and the decree complained of in this petition to revise will be in all respects affirmed."

On December 7, 1914, the Court of Appeals of the Fourth Circuit affirmed the District Court, 218 Fed. 987, 133 C. C. A. 669, saying in a brief per curiam that it "was unnecessary to repeat the argument in support of these conclusions."

We need not determine whether this decision in the Fourth Circuit bound Laura Eichel under the rule of res judicata. Assuming that she may not be bound, we have considered the evidence independently, and agree with the appellant that Bray, Frey, and the Eichels were parties to a plan to buy the claims at a discount in order that Bray might share in the profits of the transaction; and we agree also that a court of equity cannot sanction such conduct. The court below took a different view, holding that the purchase at a discount was lawful, and that the Surety Company was liable to Laura Eichel for the face value of the claims, instead of for the sum actually paid. In this respect the decree was erroneous and must be corrected.

Without discussing them, we need only add a few words about two other matters. In our opinion, the claims of the Pittsburgh Trolley Pole Company and of Nicola Bros. stand, in substance, on the same footing as the others, and should be allowed against the Guaranty Company only for the amount actually paid for them. And we decline to consider in this proceeding the effect of the counter indemnity given by Bray to two of the Evansville banks to protect them against loss under the indemnity to the Guaranty Company that is referred to in the statements of fact found in 170 Fed. and in 225 U. S. This is a matter with which Laura Eichel had nothing to do, and the decree now under consideration is only determining her right against the Guaranty Company. She is entitled to recover a certain sum from that company, and the amount cannot be diminished by deducting money that Bray may owe to the company under a contract to which she was not a party, and of which (so far as appears) she had no knowledge.

The subjects of interest and of costs in the court below we shall leave for determination by the District Judge in the final adjustment. Our decree will only cover the costs of this appeal.

It is evident from what has been said that the decree appealed from must be considerably diminished, but we are not in a position to state the true amount exactly. Whatever sums have been awarded by the bankruptcy court in West Virginia on account of these claims should, of course, be credited, and such other credits should be given as may be necessary when the claims specially referred to herein are adjusted.

The decree is reversed, with the costs of appeal, and with instructions to enter a decree in accordance with this opinion.

BASSETT, County Treasurer, v. UTAH COPPER CO.

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

No. 4027.

1. APPEAL AND ERROR ⊜719—REVIEW—ERROR NOT ASSIGNED.
Comp. Laws Utah 1907, § 2566, as amended by Laws 1909, c. 63, provides for the assessment of mining property by the state board of equalization, and that any mine owner dissatisfied with the assessment may apply to the board for its correction between certain dates. Sections 2684–2686 provide generally that any property owner may pay a tax under protest, and in an action against the officer to whom it is paid may recover any part which is adjudged illegal. *Held*, that the refusal of a District Court to charge a jury that a corporation mine owner was precluded from maintaining an action under such statute because of its failure to apply to the board of equalization for a correction of its assessment between the dates specified in the statute was not a "plain error," which the Circuit Court of Appeals could consider under rule 11 of the court (188 Fed. ix, 109 C. C. A. ix), in the absence of an assignment of error covering the question, and especially where it was shown that plaintiff's officers had appeared before the board several times prior to the time fixed for such formal application and discussed with it the questions at issue between them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982, 3490; Dec. Dig. ⊜719.]

2. TAXATION ⊜366—ASSESSMENT—STATEMENT BY CORPORATION TAXPAYER.
Where the form furnished by a state taxing board to a mining corporation for its annual statement required by statute contained a blank space for the post office address of the person making the same, the fact that such blank was not filled did not invalidate the statement, when the required address was given in full in another place therein.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 612–619; Dec. Dig. ⊜366.]

3. TAXATION ⊜366—ASSESSMENT—STATEMENT BY CORPORATION TAXPAYER—"MANAGING AGENT."
Comp. Laws Utah 1907, § 2566, as amended by Laws 1909, c. 63, requires an annual statement from mine owners to the state board of equalization as a basis for taxation, to be verified, if a corporation, by its "president, secretary, superintendent or managing agent." Plaintiff corporation filed such a statement, verified by one who described himself as "tax agent," and who, it was shown, was the general tax agent of the company. *Held*, that he was a "managing agent" within the meaning of the statute, and that in any event, where the statement was accepted by the board without objection and made the basis for plaintiff's assessment, his authority to make it could not thereafter be questioned (citing Words and Phrases, Managing Agent).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 612–619; Dec. Dig. ⊜366.]

4. TAXATION ⊜375—ASSESSMENT—VALUATION OF PROCEEDS OF MINES.
Items of expenditure allowable to a mining company as deductions in the valuation of the proceeds of its mines for purposes of taxation, under Comp. Laws Utah 1907, § 2568, as amended by Laws 1909, c. 63, considered.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 624, 631, 671; Dec. Dig. ⊜375.]

In Error to the District Court of the United States for the District of Utah; John A. Marshall, Judge.

Action at law by the Utah Copper Company against Fred C. Bassett, County Treasurer. Judgment for plaintiff, and defendant brings error. Reversed, subject to right of plaintiff to file remittitur.

I. E. Willey and Barnard J. Stewart, both of Salt Lake City, Utah, for plaintiff in error.

A. C. Ellis, Jr., and Russell G. Schulder, both of Salt Lake City, Utah (Dickson, Ellis, Ellis & Schulder, of Salt Lake City, Utah, on the brief), for defendant in error.

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

SMITH, Circuit Judge. The defendant in error, the Utah Copper Company, hereafter called the plaintiff, is a New Jersey corporation, and is and was during the year 1911 owner of an extensive low-grade copper mine carrying lead and a trace of gold and silver, near Bingham, in Salt Lake county, Utah. The metals in the mine are mixed with silica, and this crude mixture contains about 1½ per cent. of copper and 20 cents in gold and silver to the ton. The Constitution of Utah, which went into effect January 4, 1896, provides (section 4, art. 13):

"All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such mines or mining claims, and the net annual proceeds of all mines and mining claims, shall be taxed by the state board of equalization."

This being not self-executing (Mercur Gold Mining & Milling Co. v. Spry, 16 Utah, 222, 52 Pac. 382), the Legislature passed the following statute (section 2504, Compiled Laws of Utah 1907):

"Sec. 2504. All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal, or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless surface ground, or some part thereof, of such mine or claim is used for other than mining purposes, and has a separate and independent value for such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes shall be taxed at its value for such other purposes; and all the machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of such mines or mining claims, and the net annual proceeds of all mines and mining claims, and also the net annual proceeds of coke made from coal, or bullion or matte made from ore not taxed, which is deemed a product of the mines, shall be taxed as other personal property."

In 1909 the Legislature, by chapter 63, passed the following as substitutes for the Compiled Laws indicated:

"Sec. 2513. All property and franchises owned by railroads, street railroads, car, telegraph and telephone, electric light, pipe line, power, canal, ir

rigating and express companies operated in more than one county in this state, and all the machinery used in mining and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such mines or mining claims, and the net annual proceeds of all such mines and mining claims, in this state, must be assessed by the state board of equalization as hereinafter provided."

"Sec. 2566. Every person, corporation, or association engaged in mining upon a vein or lode, or placer mining claim, containing any gold, silver, coal or other valuable mineral deposits, must each year, make out a statement of the gross yield of the above named metals or minerals from each mine owned or worked by such person, corporation, or association during the year next preceding the first Monday in January and the value thereof, which statement shall give the fine ounces of gold and silver, and pounds of lead and copper, also the net annual proceeds of coke made from coal, or bullion or matte made from ore not taxed which is deemed a product of mines. Also a statement showing all the machinery used in mining, and all property and surface improvements upon or appurtenant to each mine or mining claim, which have a value separate and independent of all such mines or mining claims owned or worked by such person, corporation or association during the year preceding the first day of January, and the value of the same at twelve o'clock on the first day of January. Such statement must be verified by the oath of such person, or by the president, secretary, superintendent or managing agent of such corporation or association, who must furnish the same to the state board of equalization on or before the second Monday of February in each year. The owner or owners of any mines, dissatisfied with the assessment made upon its net proceeds, or other property, may between the third Monday in May and the second Monday in June apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it to equalize the same with the assessment of other property.

"Sec. 2567. The statement mentioned in the preceding section as to net proceeds of mines must contain a true and correct account of the actual expenditures of money and labor in extracting the ore or mineral from the mine, transporting the same to the mill or reduction works, and the reduction of the ore and the conversion of the same into money, or its equivalent, during the year.

"Sec. 2568. In making the statement of the expenditures mentioned in the preceding section there must be allowed all money expended for necessary labor, machinery, and supplies needed and used in the mining operations, for improvments necessary in and about the workings of the mine for reducing the ore, for the construction of mills and reduction works used and operated in connection with the mine, for transporting the ore, and for extracting the metals and minerals therefrom; but the money invested in the mines or improvements during any year except the year immediately preceding such statement must not be included therein. Such expenditures shall not include the salaries or any portion thereof of any person or officers not actually engaged in the work of the mine, or personally superintending the management thereof."

"Sec. 2571. If any person, corporation, or association engaged in mining, as mentioned herein, refuses or neglects to make and deliver to the state board of equalization the statement mentioned in this chapter, the state board of equalization must assess and list the property, and assess the net proceeds of mines from the best information and knowledge it can obtain. Such person, corporation or association refusing upon demand to furnish such statement to the state board of equalization, shall be subject to a like penalty as is provided in subdivision two, section twenty-five hundred and twenty-one and in section twenty-five hundred and twenty-two, Compiled Laws of Utah 1907, for failure to furnish statement to a county assessor.

"Sec. 2572. Nothing in this title contained shall be construed to exempt from taxation the improvements, buildings, erections, structures, or machinery placed upon any mine or mining claim, or used in connection therewith, which have a value separate and independent of such mine or mining claim, or supplies used either in mills, reduction works or mines, but such property must be assessed as provided by law."

The plaintiff having filed a statement in attempted compliance with section 2566, which showed the net proceeds of the mine for the year 1911 to be $1,835,796.13, the state board of equalization deducted from the credits claimed by the company on account of mining $113,058.76, on reduction $136,350.73, on Arthur mill $885,368.34, on Magna mill $139,545.33, or a total of $1,274,323.16, and added this to the amount reported by the company as net earnings, and assessed the company upon net earnings at $3,110,119.29. This was certified as required by law to the authorities of Salt Lake county, and the plaintiff was taxed thereon $86,974.48. This it paid under protest, and brought suit to recover $35,636.45. The case was tried by the court to a jury, and at the conclusion thereof the court directed the jury to return a verdict for the plaintiff for $29,444.83, and the county treasurer, hereafter called the defendant, sued out this writ of error.

[1] It is first contended that this action would not lie at all because of the closing portion of section 2566:

"The owner or owners of any mines, dissatisfied with the assessment made upon its net proceeds, or other property, may between the third Monday in May and the second Monday in June apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it to equalize the same with the assessment of other property."

It is said that the action of the board under this statute was judicial in character, and the fact that no such application for correction was made defeats this action. Stanley v. Supervisors of Albany, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Western Union Telegraph Co. v. Gottlieb, 190 U. S. 412, 426, 23 Sup. Ct. 730, 47 L. Ed. 1116. It is provided by rule 11 of this court (188 Fed. ix, 109 C. C. A. ix):

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. * * * When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned."

We find no assignment on this subject conforming to this rule. The only assignment that in the most remote way refers to this particular portion of the statute is the tenth:

"Tenth. The court erred in refusing to give to the jury the following special charge, requested by the defendant: 'The jury are instructed that, under the law of this state, every person, corporation, or association engaged in mining upon a vein or lode, or placer mining claim, containing any gold, silver, coal, or other valuable mineral deposits, must each year make out a statement of the gross yield of the above-named metals or minerals from each mine owned or worked by such person, corporation, or association, during the year next preceding the first Monday in January, and the value thereof, which statement shall give the fine ounces of gold and silver, and pounds of lead and copper, and also the net annual proceeds of coke made from coal, or bullion or matte made from ore not taxed, which is deemed a product of the mine; also a statement showing all machinery used in mining, and all property and surface improvements upon or appurtenant to each mine or mining claim, which have a value separate and independent of all such mines or mining claims owned or worked by such person, corporation, or association, during the year preceding the 1st day of January, and the value of the same at

12 o'clock on the 1st day of January. Such statement must be verified by the oath of such person, or by the president, secretary, superintendent, or managing agent of such corporation or association, who must furnish the same to the state board of equalization on or before the second Monday of February in each year. The owner or owners of any mine, dissatisfied with the assessment made upon its net proceeds or other property, may between the third Monday in May and the second Monday in June apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it to equalize the same with the assessment of other property. If any person, corporation, or association engaged in mining, as mentioned herein, refuses or neglects to make and deliver to the state board of equalization the statement mentioned in this chapter, the state board of equalization must assess and list the propery and assess the net proceeds of mines from the best information and knowledge it can obtain. Such person, corporation, or association, refusing upon demand to furnish such statement to the state board of equalization, shall be subject to a like penalty as is provided in subdivision 2, section 2521, and section 2522, Compiled Laws of Utah 1907, for failure to furnish statement to a county assessor. If you find that the statement, so required to be made by such person or corporation, was not verified by the oath of the president, or secretary, or superintendent, or managing agent of said corporation, and that the said board of equalization, after a hearing and investigation, determined what said net proceeds of plaintiff's mines were, for the year 1911, and that the same was assessed at $3,110,119.29 as the net proceeds of said mine, then you are instructed that the action of said board, in determining the said net proceeds to be the sum of $3,110,119.29, and the levy and assessment thereon was valid; and you are instructed to bring in a verdict for the defendant.'"

This manifestly has reference to the next point considered by the court, and was not a setting out "particularly" of the question now under consideration. The question at once arises whether this is a plain error, which would permit, if not require, the court to consider the point. This seems to require a consideration of sections 2684, 2685, and 2686 of the Compiled Laws of Utah, which are as follows:

"Sec. 2684. In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the county or municipality on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

"Sec. 2685. In case it be determined in such action that said tax or license, or any portion thereof, so paid under protest was unlawfully collected, judgment for recovery thereof and lawful interest thereon, together with costs of action, shall be entered in favor of the plaintiff, and upon being presented with a duly authenticated copy of such judgment, the proper officer or officers of the county or municipality whose officers collected or received such tax or license shall audit and allow such judgment, and cause a warrant to be drawn on the treasurer of that county or municipality for the amount recovered by said judgment in favor of the legal holder thereof; and when any such judgment has been or may hereafter be obtained against a county, and any portion of the taxes included in the judgment were state, state school, county school, or district school taxes which have been or may hereafter be paid over to the state, state school, county school, or to any school district, by such county, the proper officer or officers of the state, state school, county school, or any school district shall, upon demand by such county, cause a warrant to be drawn upon the treasurer of the funds of the state, state school, county school, or any school district, and in favor of such county, for the amount of such taxes received by the state, state school, county school, or any

school district, together with legal interest thereon and an equitable portion of the costs of the action.

"Sec. 2686. The remedy hereby provided shall supersede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded, except in unusual cases where the remedy hereby provided is deemed by the court to be inadequate."

It appears that after the attempted compliance with section 2566 by the plaintiff at the direction and request of the state board the officers and agents of the plaintiff appeared four times before it, and the question of the deductions claimed by the plaintiff corporation were on each of these occasions considered and discussed by the board and the officers of the plaintiff.

In Centennial Eureka Mining Co. v. Juab County, 22 Utah, 395, 62 Pac. 1024, the Supreme Court of Utah had to pass upon the question of an assessment upon the net proceeds of a mine for the period from May 31, 1895, to May 31, 1896. This, it will be noted, was for a period from May 31, 1895, to January 4, 1896, before the present Constitution of the state was adopted, and until April 5th, when the first law was passed to carry into execution the constitutional provision, and the time from April 5th to the end of the fiscal year, when there were both constitutional and statutory provisions for such tax. Referring to the statute just quoted, the court said:

"When a party pays an unlawful tax under protest, a cause of action, under the provisions of section 180 [sec. 2684] at once accrues in favor of such party to recover such tax."

It is manifest that, even if the provision referred to in section 2566 was applicable to the plaintiff, the failure to hold that no action would lie in the absence of such application is not a plain error, which this court could consider, even were it so inclined.

[2] The second point made is that, the plaintiff having failed to file a statement as required by section 2566 of the Compiled Laws as amended, the assessment was made under section 2571 of said laws. The alleged defect in the statement is that it failed in the verification to give the post office address of the agent, C. M. Brown, and that he was not the managing agent of the plaintiff as required by section 2566.

There was no requirement of law that the verification of the managing agent should show his post office address, except that under chapter 63 of the Laws of 1909, section 2584, in defining the powers of the state board of equalization, in the third subdivision thereof includes the power "to make out and prepare and enforce the use of forms in relation to the assessment of property," and the form furnished for the statement provided for in section 2566 has a blank in which to insert the post office address of the affiant. In this case, in place of filling in his post office address at that point, in the caption of the same form he filled in:

"Owner, Utah Copper Company. Residence and post office address, C. M. Brown, Tax Agent, 604 McCornick Building, Salt Lake City, Utah."

The contention that when, upon the form itself furnished by the state board of equalization, the post office address was thus given in full, the failure to fill it in at the particular point a blank was left for

it in his affidavit will defeat the plaintiff's claim for over $27,000 is so refined and technical that to sustain it would bring a court into disrepute. But it is said that C. M. Brown, who made this affidavit, was not the managing agent, as required by section 2566, although he swore he was. The term "managing agent" in this connection has never been defined by the Supreme Court of Utah.

[3] It appears that C. M. Brown has been assessor of Salt Lake county, and after his term was out he was employed by the plaintiff as its general tax agent. The character of his employment as tax agent appeared upon the face of the statement, and no criticism of it was ever made by the state board of equalization. In the absence of an authoritative construction by the Supreme Court of Utah, we think that one specially employed as tax agent and in general charge of all the company's tax matters was a managing agent within the meaning of the statute. See 5 Words and Phrases, 4320. Suffice it to say that the board of equalization never raised any question as to his right to make the affidavit, but accepted it and made the assessment by correction of his statement, and it is not for the defendant to successfully raise this question.

[4] This brings us to the merits of this case, and the facts were, so far as is shown, undisputed. It appears that a portion of the mines was leased for the year 1911, and in accounting for receipts the plaintiff only accounted for the royalties paid as rent. It must be remembered that the tax in question is a personal property tax (section 2504, Compiled Laws of Utah 1907), and if any further taxes were to be imposed on account of the portion of the mines leased they should have been assessed to the lessees. Aside from this the plaintiff made an agreement in open court that the entire proceeds of the mining operations of the Utah Copper Company were $12,836,779.82, which included the royalties and no more, and no effort was ever made to cancel this agreement. The state board of equalization allowed $1,954,793.38 as a deduction under the heading of development for stripping. Defendant now asks to have this revised in order to offset apparently the disallowance of some items by the state board of equalization. The contention is that more stripping was done than necessary, but it was not intended the state should take over the management of the mine and say that this shaft was unwise or this stripping improper.

Waiving the question as to the right of the defendant to set up matter that the state board of equalization allowed to furnish an offset to matter it erroneously disallowed, the court is of the opinion that, as the evidence without conflict shows the sum claimed was actually expended for that purpose in the year 1911, it was properly allowed, notwithstanding the ore under the stripping was not all mined that year. If, as is probable, there is ore under the stripping, the state will get its taxes the year it is mined. If there should be no ore under the stripping, the company would have lost the money so spent, and under the state system of taxation it ought to collect nothing on it in the way of taxes. The state board also allowed under the head of development $25,032.19, expended for a dumping ground for still lower grade ore than the average. For the reasons already given as to stripping charged, this was properly allowed by the District Court. The state board

refused to allow plaintiff $1,024,913.67 on account of improvements at the Arthur and Magna Mills, at Garfield, Salt Lake county, Utah. There are no facilities at the mines for the operation of reduction works. There is no adequate supply of water, which is essential to separate 21 tons of silica from every 22 tons of crude material. At the nearest available place, about 12 or 14 miles from the mine in a direct line and about 18 miles by railroad, but within the same county, the plaintiff erected two mills, one called Arthur, and the other called Magna. These mills do no business, except for the plaintiff company. Certain enlargements or improvements were made in them in 1911. The board of equalization refused to allow credit for these works. These sums were clearly expended "for the construction of mills and reduction works used and operated in connection with the mine," and this sum should have been allowed under section 2568 of the Laws of Utah of 1909. It appears, however, that $17,115.48 was expended at the mills in bunkhouses, a messhouse, and a dormitory. These expenditures should not have been included in the reductions. The court allowed as deductions office expenses at Salt Lake City, $38,541, purchasing agent at New York $4,000, and C. M. Brown, tax agent, $375. None of these items should have been allowed.

The conclusion is that the gross deductions, as embraced in the verdict, were $60,731.48 too much. The taxes upon this sum amount to $1,698.35, and the interest at 8 per cent. from the time of payment to the time of trial amounts to $67.55. The total excess of the recovery was therefore, $1,765.90.

It is therefore ordered that, if the defendant in error, the plaintiff below, files with the clerk of the District Court of Utah within 60 days a remittitur from the face of the judgment of $29,444.83 the sum of $1,765.90, thus leaving said judgment at its date for $27,678.93, upon the filing of a certificate to that effect from the clerk of the United States District Court for the District of Utah, the judgment in this case will stand affirmed; otherwise, it will be reversed and remanded, with directions to set aside the verdict and grant a new trial; and in any event there will be a judgment for the costs of this court against the defendant in error.

PITTSBURG-BUFFALO CO. v. AMERICAN FIDELITY CO.

(Circuit Court of Appeals, Third Circuit. February 4, 1915.)

No. 1890.

1. PRINCIPAL AND SURETY ⇐162—DISCHARGE OF SURETY—DEPARTURE FROM CONTRACT—QUESTIONS FOR JURY.

On an issue as to whether a surety on a contract to purchase coal had been discharged by reason of alleged departure, whether an order for coal given by the buyer was one contemplated by and to be performed under the terms of the contract, or whether the order and its acceptance formed a separate and independent contract, on which questions the evidence was in irreconcilable conflict, *held* for the jury.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 442–445; Dec. Dig. ⇐162.]

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. PRINCIPAL AND SURETY ⟸162—CONTRACTS—ALTERATION.
Where a surety for performance of a contract denies liability on the ground that it has been altered, and the evidence as to whether alterations and changes have in fact been made and their nature, is conflicting, whether the contract has been altered, and, if so, whether the alterations are material, are for the jury.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 442–445; Dec. Dig. ⟸162.]

3. PRINCIPAL AND SURETY ⟸99—CONTRACT—ALTERATION—DISCHARGE—"NEW CONTRACT."
Alteration of a contract, in order to discharge a surety, must be such as to transform it into a new and different contract, requiring the concurrence of the parties making the alteration, and a meeting of minds in forming the new undertaking, since a "new contract" means a new agreement, and contemplates action by both parties making it.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.]

4. PRINCIPAL AND SURETY ⟸99—CONTRACTS—DEPARTURE.
Where a secured contract providing for the sale of Annabelle coal did not inhibit the parties from making other contracts for the sale of other coals, the fact that the buyer purchased from and sold for the seller other grades of coal, and that the seller had contracted with the buyer for the sale of coal without notice to the surety, did not constitute departures, so as to relieve the surety from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.]

5. PRINCIPAL AND SURETY ⟸99—CHANGE OF CONTRACT—DEPARTURE.
Where a secured contract for the sale of Annabelle coal placed no territorial restrictions for the sale of coal on the buyer, the fact that the buyer, with the knowledge of the seller, purchased its coal for export and for delivery outside the territory prescribed in the contract, and went into the export business in competition with the seller, were not such departures as would relieve the surety from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.]

6. PRINCIPAL AND SURETY ⟸162—CHANGE OF CONTRACT—DEPARTURE.
Where a secured contract for the sale of Annabelle coal provided that the buyer should act as the seller's sales agent, and should make sales at prices fixed by the seller on specified commissions, whether sales made by the buyer at different prices constituted a departure, so as to relieve the surety from liability, depended on whether the coal so sold was Annabelle coal, and whether such sales were of coal delivered under the contract and made with the selling company's knowledge, which questions were for the jury.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 442–445; Dec. Dig. ⟸162.]

7. PRINCIPAL AND SURETY ⟸99—CHANGE OF CONTRACT—DEPARTURE.
Where a secured contract for the sale of coal by plaintiff to D. & Co. provided that the latter should take monthly 50 per cent. of the output of the Annabelle mines, but contained no penalty for a breach of such provision, such breach merely restored to plaintiff the right to enter D. & Co.'s otherwise exclusive territory and sell in competition with them the portions of the coal which they failed to take under their contract, so that a breach of such covenant did not constitute a departure from or an alteration of the contract terms, relieving the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.

Discharge of surety by alteration of instrument, see note to Zeigler v. Hallahan, 66 C. C. A. 6.]

8. PRINCIPAL AND SURETY ⟸99—CHANGE OF CONTRACT—DEPARTURE.
Whether plaintiff's act in accepting notes from D. & Co. for coal delivered under a secured sales agency contract, instead of requiring payment on the 20th of the month for coal sold in the previous month, as the contract provided, constituted a departure relieving the surety from liability, depended on whether the notes were given and accepted in payment, and whether the change in the manner of payment so operated to affect the rights and liabilities of the surety as to discharge it from liability under the relaxation of the rule of strictissimi juris, when applied to undertakings of corporate sureties for profit, the first of which questions was for the jury.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.]

9. PRINCIPAL AND SURETY ⟸99—CHANGE OF CONTRACT—DEPARTURE.
Where a secured sales agency contract only prevented plaintiff from selling Annabelle coal in the territory given to D. & Co., the fact that plaintiff shipped other coal into D. & Co.'s territory did not constitute a departure from the contract, relieving the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.]

10. PRINCIPAL AND SURETY ⟸99—CHANGE OF CONTRACT—DEPARTURE.
Where a secured sales agency contract applied solely to Annabelle coal, the fact that the selling agents purchased coke produced from other mines, and that the coal company sold coke to such agents under orders providing different terms of profit and rates of payment than those specified in the contract, did not constitute a departure.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 158–161; Dec. Dig. ⟸99.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Wm. H. Hunt, Judge.

Action by the Pittsburg-Buffalo Company against the American Fidelity Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

William A. Stone and E. O. Golden, both of Pittsburgh, Pa., for plaintiff in error.

Richard H. Hawkins, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The Pittsburg-Buffalo Company, the plaintiff corporation, hereafter referred to as the Coal Company, was in the business of selling coal for mine operators, and was under contract to provide a market for and to sell the entire product of the Annabelle mines. J. K. Dimmick & Co. was a copartnership engaged in the business of selling coal chiefly to consumers. On January 20, 1912, the Coal Company entered into a contract with Dimmick & Co., whereby the former appointed the latter its exclusive agent for the sale of coal from the Annabelle mines, in territory which may be described as the New England states, and also its agent for the sale of the same coal in a portion of the Middle Atlantic states, reserving to itself the right to sell Annabelle coal in the latter district directly through certain of its agencies then established, and to fill orders for Annabelle coal for sale outside of the districts described, and to name

the price at which Annabelle coal should be sold in the two districts, below which neither party could make sales. The terms of sales and payment contemplated that Dimmick & Co. should send orders to the Coal Company, and that the coal, when shipped, should be billed to Dimmick & Co. at the selling price thereof, less the commission stipulated, and that thereafter Dimmick & Co. should rebill the coal to their customers, guaranteeing payment therefor. Dimmick & Co. undertook to purchase from the Coal Company enough coal each month to enable the Annabelle mines to run at least 50 per cent. of their capacity; otherwise, the Coal Company reserved to itself the right to enter Dimmick & Co.'s territory and sell Annabelle coal. The period of the contract extended from the date of its execution to March 31, 1915.

To secure the full performance of the contract, each party executed and delivered to the other a bond in the sum of $25,000, upon which the American Fidelity Company, the defendant in this action, and hereafter referred to as the Surety Company, became surety. Upon the bond executed by Dimmick & Co. and the Surety Company to the Coal Company, this action was brought. The breaches of the contract relied upon for recovery on the bond had their origin in an order made on November 9, 1912, by Dimmick & Co. upon the Coal Company, and by the latter accepted and in part performed. By this order Dimmick & Co. directed the Coal Company to ship and consign to them at Curtis Bay Piers, Baltimore, Md., 30,000 tons of Annabelle coal in monthly installments of 10,000 tons, beginning December 1st thereafter, at the net price of $1.40 per ton, payment on the 20th of the month following, confirming an agreement previously made between officers of the two companies. In December, 1912, 10,000 tons were shipped, and on January 2, 1913, notes were given in an amount equal to the total purchase price thereof, maturing upon dates beyond January 20, 1913, and when due were paid. During the month of January, 1913, pursuant to the same order, a quantity of coal was shipped by the Coal Company to Dimmick & Co., for which the Coal Company was not paid, and for which it claimed payment in the sum of $9,390.07, which amount represents the selling price of the coal, less commissions retained, pursuant to the contract. Thereafter Dimmick & Co., notified the Coal Company to cease shipments and refused to take more coal. The Coal Company was able to sell for the account of Dimmick & Co. only a portion of the coal contracted for delivery in the month of February, and thereby sustained a loss of $2,762.62. This sum, and the aforementioned sum of $9,390.07, make a total sum of $12,152.69, which, together with interest thereon from March 20, 1913, is the amount which the Coal Company seeks to recover in this action.

The Surety Company defended this action upon the ground that the order made and accepted on November 9, 1912, and in part performed by both parties, was not made under the contract upon which it was surety, or, if under that contract, it was made after the terms thereof had been departed from and materially altered and varied, without notice to it, thereby discharging it from its surety obligation. The par-

ticulars in which it claims departure, excepting the last, are acts exclusively attributed to Dimmick & Co., and are enumerated as follows: That Dimmick & Co. (1) purchased from and sold for the Coal Company other grades of coal than the Annabelle coal; (2) purchased plaintiff's coal for export, and delivery outside of the prescribed territory; (3) sold coal at prices not fixed by the Coal Company, in some instances yielding profits in excess of the commission stipulated, and in others causing losses; (4) went into the export business in competition with the Coal Company; (5) instead of acting as sales agent, became speculators, selling coal short and for future deliveries; (6) did not take monthly 50 per cent. of the output of the Annabelle mines; and (7) that, instead of settling for coal sold each month upon the 20th of the following month, gave notes which were accepted by the Coal Company. Based upon the argument that these acts were departures from the contract, and that therefore the Surety Company was discharged, the Surety Company moved that the jury be directed to render a verdict for the defendant. The motion was allowed, and the verdict directed.

In denying a motion for a new trial, and entering judgment on the verdict, the court delivered an opinion wherein it appears that the grounds upon which it directed a verdict for the defendant were acts which, though related to those of Dimmick & Co., were more directly attributed to the Coal Company, and for convenience are named and enumerated as follows: The Coal Company (8) entered into other contracts with Dimmick & Co. for the sale of coal, without notice to the surety; (9) shipped coal into the designated territory from other mines than from the Annabelle mines; (10) shipped coal and coke upon terms as to profits and rates of payment different from those fixed by the contract; and (11) instead of requiring Dimmick & Co. to make payments on the 20th of each month, the Coal Company permitted them to make payments at different periods and by promissory notes.

The one question before the court on review, based upon the one error assigned, is whether the trial court erred in directing the jury to return a verdict for the defendant. At the trial there was no dispute about the execution of the contract of January 20, 1912, the delivery and acceptance of the order of November 9, 1912, the amount of coal delivered pursuant thereto, its price, the failure of Dimmick & Co. to make payment therefor, and the result in damages to the Coal Company. The testimony was addressed principally to questions whether certain acts of Dimmick & Co. were departures from the contract, whether the Coal Company had knowledge thereof or gave assent thereto, whether contracts for the sale of coal other than Annabelle coal were made between the two companies, and whether Dimmick & Co. sold coal at prices other than at the price stipulated, and disposed of the same for export and in territory other than that described in the contract. Of the several questions involved in the confusion of the controversy, there are three which in our opinion stand out boldly.

[1] The first is whether the order of November 9, 1912, was one of a number of orders contemplated by and to be performed under

the terms of the contract of January 20, 1912, for the faithful performance of which on the part of Dimmick & Co. the Surety Company was primarily bound, or whether that order and its acceptance formed a separate and independent contract, in no way related to nor intended to be performed under the terms of the contract of January 20, 1912, for the faithful performance of which the Surety Company was never bound. At the trial the Surety Company did not raise this question in this precise form, being rather inclined to treat what was done as departures from the contract on which the Surety Company was surety; nevertheless the testimony presents this question, and in presenting it the testimony discloses irreconcilable conflict. We are of opinion that the court below erred in not submitting to the jury this question as one preliminary to all others, for, had the jury found that the order of November 9, 1912, was in itself a separate and independent contract—that is, a contract for the performance of which the defendant surety company never became surety—there would have been no occasion to have considered any other question.

We find two other questions raised by the testimony. Assuming that the jury found that the order of November 9, 1912, and its acceptance, did not constitute a separate and independent contract, but was an order made or attempted to be made under the terms of the contract of January 20, 1912, then the second question is whether the parties to the contract had by their words or acts altered or changed its terms, and, if such was found to have been the case, then, third, whether the alterations or changes extended to the essential features of the contract, and were of a materiality that discharged the surety from its liability.

[2] Upon the question whether alterations and changes had in fact been made, and, if made, what were their nature and extent, the testimony was unquestionably conflicting. Whether a contract has been altered or changed, and the character and extent of the alterations made, if any, are questions of fact to be determined by the jury from the testimony when conflicting, though the materiality of such alterations, when established, is a question of law for the court. We think the court below erred in withholding these questions of fact from the jury. Before this court, as well as before the court below, there was presented no novel question of the law of suretyship, and in considering the law which at present is applicable to this case we need make reference to but several of the many decisions cited. This court held in the case of Zeigler v. Hallahan, 131 Fed. 205, 66 C. C. A. 1, that:

> "In determining whether a surety is discharged by an alteration of the principal contract without his consent, the question is not whether the change was or could be prejudicial to him, but whether it effected a material alteration of the agreement to which his undertaking of suretyship related; and, if it did, he is discharged, even though the change may have been beneficial to him."

In the same case, Judge Dallas, speaking for this court and quoting from Cross v. Allen, 141 U. S. 537, 12 Sup. Ct. 71, 35 L. Ed. 843, stated the rule to be:

"That any material change in the contract on which he is a surety, made by the principal parties to it without his assent, discharges the surety, even though he may be benefited by such change; the reason being that he has not assented to the contract in its altered form, and has a right to stand upon the very terms of his undertaking."

In Bensinger v. Wren, 100 Pa. 503, the court said that:

A surety "has a right to stand upon the very terms of his obligation and is bound no further. Any unauthorized variation in an agreement which a surety has signed, that may * * * substitute an agreement different from that which he came into, discharges him." Miller v. Stewart, 9 Wheat. 680, 6 L. Ed. 189; Smith v. U. S., 2 Wall. 219, 17 L. Ed. 788.

[3] There is no question concerning this law. The only question is whether this law applies to the facts of this case, and the only way to solve that question is to submit the case to a jury, in order that from the conflict of the testimony it may be determined whether the parties to this contract did in truth make alterations in it, and, if so, to ascertain their nature and extent. The theory of the discharge of a surety from a contract which has been altered is based upon the fact that he is not a party to the new contract created by the alteration. If by alteration an old contract is transformed into a new or different one, thereby discharging a surety, a concurrence of the parties in making the alteration and in the meeting of their minds in forming the new undertaking must have been present. A new contract means a new agreement, and a new agreement between parties to an old one contemplates the action of both parties in making it. Therefore we are of opinion that the court below erred in failing to submit to the jury the question whether the terms of the contract to which the obligation of the Surety Company related had in point of fact been altered by the parties, and, if found so to have been altered, then in failing to submit to the jury, under appropriate instructions upon the law, the question whether the alteration was made by the act or with the consent of both parties with respect to an essential feature, thereby changing the contract from what it was when the Surety Company undertook to assure its performance.

The Surety Company, however, takes a position far in advance of this, and maintains, with respect to certain matters, that by the conduct of Dimmick & Co., without regard to the knowledge of or acquiescence therein on the part of the Coal Company, it is nevertheless discharged from its obligation of suretyship, and asks us to hold as a matter of law that if Dimmick & Co. sold a ton of Annabelle coal outside of their prescribed territory, or at a price that yielded more or less profit than that fixed by the commission named in the contract, though the Coal Company neither assented to, acquiesced in, nor was informed of such a sale, an alteration in the contract was made, though made by Dimmick & Co. alone, which released the Surety Company from its obligation to the Coal Company upon the defaulted payment of Dimmick & Co. for coal purchased, contending that by its obligation of surety it had not undertaken to protect and save harmless the Coal Company from acts of Dimmick & Co. done otherwise than in the manner contemplated by the contract.

[4] The charge by the Surety Company (1) that Dimmick & Co. purchased from and sold for the Coal Company other grades of coal than Annabelle coal, and the ground for the court's refusal to grant a new trial (8) that the Coal Company had entered into other contracts with Dimmick & Co. for the sale of coal without notice to the surety, do not constitute departures, for nowhere in the contract do we find anything that inhibited the Coal Company and Dimmick & Co. making other contracts for the sale of other coal.

[5] The departures charged against Dimmick & Co., even with the knowledge of the Coal Company (2) that Dimmick & Co. purchased plaintiff's coal for export, and for delivery outside of the prescribed territory, and thereby (4) went into the export business in competition with the Coal Company, cannot be construed as departures from the original contract, because there is nothing in the contract which forbade or hindered Dimmick & Co. buying coal for export or for delivery outside of the prescribed districts. While by the contract the Coal Company surrendered the right to sell Annabelle Coal in the New England district, and with certain exceptions in the Middle Atlantic district, it placed no territorial restrictions for the sale of coal upon Dimmick & Co.

[6] Whether the fact, if true, (3) that Dimmick & Co. sold coal at prices not fixed by the Coal Company, yielding profits in excess of the commission stipulated, or at prices resulting in losses, constitutes a departure, depends first upon a solution of the disputed question whether such coal was Annabelle coal, and, if found so to be, then of the question whether such sales were made of coal delivered under the contract and made with the consent and the knowledge of the Coal Company. This is a matter for a jury under appropriate instructions upon the law. If the acts charged to Dimmick & Co. as departures (5) that instead of acting as sales agent for the Coal Company they became speculators, selling coal short and for future deliveries, relate to coal other than Annabelle coal purchased under the contract, then clearly there is nothing within the purview of the contract which prevented Dimmick & Co. indulging in such practices. If the acts complained of relate to Annabelle coal purchased under the contract and sold in a manner different from that prescribed by its terms, the question of departure from the contract is to be determined only by the jury upon proper instructions from the court as to the materiality of the departure and its prejudice to the corporate surety.

[7] The fact, if such it be, that Dimmick & Co. (6) did not take monthly 50 per cent. of the output of the Annabelle mines, does not constitute a departure. The covenant provides no penalty for a breach for which resort may be made either to Dimmick & Co. or to their surety. It simply restores to the Coal Company the right to enter the otherwise exclusive territory of Dimmick & Co. and sell in competition with them the portions of the coal which they failed to take under their covenant. A breach of this covenant is not a departure from nor an alteration of the terms of the contract. It is a breach of one of its provisions, immaterial to the surety.

[8] The principal departure in or alteration of the contract charged by the Surety Company against both parties and found by the court to

have been disclosed by the testimony is (7) (11) that on different occasions, instead of paying on the 20th of the month for coal sold in the previous month, Dimmick & Co. gave and the Coal Company accepted notes. Undoubtedly, whatever was done in the giving and accepting of notes for the coal deliveries of the previous month was done by the concurring acts of the two parties; but whether the notes were given and accepted in payment therefor, and for that reason discharged the surety from its obligation, is a question of fact to be found by the jury, under instructions by the court upon the law, first, whether the transaction constituted payment (30 Cyc. 1194–1201; Bouvier's Law Dictionary, title Payment); and if found to be payment in law, then, second, whether the change in the manner of payment from that prescribed by the contract, though without injury to the surety resulting therefrom, so operated to affect the rights and liabilities of the surety as to discharge it from its obligation, under the relaxation of the rule of strictissimi juris, when applied to the undertakings of corporate sureties for profit. Title Guarantee & Surety Co. v. Baglin (3d Circuit) 178 Fed. 682, 102 C. C. A. 182; Fidelity & Guarantee Co. v. U. S. (3d Circuit) 178 Fed. 692, 102 C. C. A. 192; Atlantic Trust Co. v. Laurinburg (4th Circuit) 163 Fed. 695, 90 C. C. A. 279; Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242.

[9] The ground for the court's refusal to grant a new trial, (9) that the Coal Company had shipped coal from other mines than from the Annabelle mines to the designated territory of Dimmick & Co., is an act not prohibited by the contract. The restrictions which the Coal Company placed upon itself with regard to selling coal in the territory given to Dimmick & Co. extended only to the sale of Annabelle coal.

[10] The remaining ground for the court's refusal to grant a new trial, (10) that the Coal Company shipped coal and coke upon terms as to profits and rates of payment different from those fixed by the contract, may or may not be a variation of the terms of the contract properly construed. In the first place, the departure alleged by the Surety Company (1) that Dimmick & Co. purchased coke produced from other mines, and the departure found by the court, (10) that the Coal Company sold coke to Dimmick & Co. under orders providing different terms of profits and rates of payment than provided by the contract, are wholly without point, because there is nothing in the contract relating to or prohibiting the sale and purchase of coke.

The contention that the Coal Company shipped coal to Dimmick & Co. upon terms as to profits and rates of payment different from those prescribed by the contract presents questions for the jury, first, whether the coal so shipped was Annabelle coal; second, whether such shipments were made under the contract, and whether the terms as to prices and payments were varied from the terms thereof; and, if found so to be, then, under proper instructions from the court upon the law, third, whether the same were material changes in the essential features of the contract. In giving to certain of the terms of the contract in suit the interpretations which appear in this opinion, we have restricted our consideration to those phases of it upon which directly bear the questions presented for review. We disclaim an at-

tempt or an intention to otherwise or to a greater extent construe its provisions.

The judgment below is reversed, and a new venire is awarded.

JOSEPH R. FOARD CO. OF BALTIMORE CITY et al. v. STATE OF MARYLAND to Use of GORALSKI et al.

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

Nos. 1272–1275.

1. MASTER AND SERVANT ⊜301—LIABILITY FOR NEGLIGENCE OF SERVANT—SUBSIDIARY CORPORATION.

Where a ship brokerage company organized and completely controlled a stevedoring company, whose officers were its own officers, furnished its office, kept its accounts, and handled all its funds, paid its losses, and kept its profits as a charge for managing its business, the two companies were identical as to third persons, and both were liable for damages caused by the negligence of an employé of the stevedoring company in conducting its business

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

2. EXPLOSIVES ⊜8 — INJURIES FROM ACCIDENTAL EXPLOSION — ACTION FOR DAMAGES.

A finding by the trial court that an explosion of dynamite while being loaded on a ship was caused by the striking of one of the boxes with a bale hook by a foreman of stevedores in attempting to force the box into place *held* sustained by the evidence.

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

3. MASTER AND SERVANT ⊜315—INJURY TO THIRD PERSON—EXPLOSION OF DYNAMITE—LIABILITY OF CARRIER—NEGLIGENCE OF INDEPENDENT CONTRACTOR.

Loading, dynamite, gasoline, gunpowder, naphtha, and other inflammable or explosive substances for transportation is necessary to commerce and is not a nuisance; and since dynamite may be loaded with safety, if adequate care be taken in the details of the work, to guard against concussion and heat, a carrier by sea, which contracts with a stevedoring company of good standing and reputation for carefulness to do such loading, is not liable for damages caused by an explosion, due to the negligence of an employé of the contractor.

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

4. MUNICIPAL CORPORATIONS ⊜745½ — LIABILITY FOR TORTS — RESPONSIBILITY FOR ACTS OF OFFICERS.

Actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives, from which it derives no profit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1568, 1569; Dec. Dig. ⊜745½.

Liability for torts of public officers, see note to Mayor, etc., of City of New York v. Workmen, 14 C. C. A. 534.]

5. STATUTES ⊜107—VALIDITY OF ENACTMENT—SUBJECT AND TITLE OF ACT.

Act Md. 1912, c. 32, amending Code Pub. Loc. Laws Md. art. 4, § 6, relating to Baltimore city, and especially restricting the liability of the city

for the exercise of the powers over the Patapsco river conferred by Acts Md. 1908, c. 148, *held* not invalid, as embracing more than one subject, under Const. Md. art. 3, § 29, providing that every law enacted "shall embrace but one subject and that shall be described in its title"; the one subject of such act being the charter powers and obligations of the city.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121–134; Dec. Dig. ⊂⊃107.]

6. COURTS ⊂⊃366 — FEDERAL COURTS — AUTHORITY OF STATE DECISIONS — VALIDITY OF STATE STATUTES.

A federal court should be reluctant to adjudge a state statute to be in conflict with the state Constitution before it has been passed on by the state courts, especially when the highest court of the state has rendered a decision on the assumption of its validity, although the direct question was not presented or decided.

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

7. MUNICIPAL CORPORATIONS ⊂⊃57—STATUTORY LIMITATION OF LIABILITY.

The general rule is that the state, in conferring powers and imposing obligations on municipalities, may limit both the powers and the obligations as it sees fit.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. ⊂⊃57.]

Appeals from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suits in admiralty by the State of Maryland, to the use of Frances Goralski, widow, Mary Goralski, infant, Joseph Gielner, and Andrew Gielner, against the General Stevedoring Company, the Joseph R. Foard Company of Baltimore City, the Mayor and City Council of Baltimore City, and the Munson Steamship Line, and by Gustave Lies against the same respondents and the Maryland Steel Company, with 16 other cases. Decrees for libelants against the General Stevedoring Company and the Foard Company, and for the other respondents, and numerous parties appeal. Affirmed.

For opinion below, see 213 Fed. 51.

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

Charles Markell, of Baltimore, Md. (Gans & Haman, W. Calvin Chesnut, and Daniel H. Hayne, all of Baltimore, Md., on the briefs), for Maryland Steel Co.

J. Morfit Mullen, of Baltimore, Md. (George Dobbin Penniman, of Baltimore, Md., on the briefs), for Samuel Carter et al.

Thomas F. Cadwalader, of Baltimore, Md. (H. N. Abercrombie, of Baltimore, Md., on the briefs), for stevedores.

Samuel B. Plotkin, of Baltimore, Md., for Charles Davies.

Charles R. Hickox, of New York City (Convers & Kirlin, of New York City, on the briefs), for Alum Chine Steamship Co.

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

Charles S. Haight, of New York City (John W. Griffin and Haight,

Sandford & Smith, all of New York City, on the briefs), for Munson Steamship Line.

Alexander Preston, of Baltimore, Md., for Maryland Steel Co. in Case No. 1275.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On the morning of March 7, 1913, a large quantity of dynamite exploded on the British steamship Alum Chine lying in the quarantine anchorage of the port of Baltimore on the Patapsco river. The ship was destroyed, more than 30 men were killed and a number injured, and other ships in the vicinity were damaged. The first indication of the disaster was a slight explosion or puff in or near a box of dynamite which Bomhardt, a stevedore foreman, was trying to force into position in a tier of boxes. The District Court heard together the 25 libels filed, and held in an elaborate and strong opinion that the explosion was due entirely to the negligence of the stevedore foreman in loading the dynamite, and not to fire originating in the coal from careless handling or other negligence on the part of the ship crew, and adjudged damages in favor of those who had suffered injury against Joseph R. Foard Company and the General Stevedoring Company as the independent contractors liable for the negligence of the foreman, their employé.

[1] 1. The District Court was clearly right in holding untenable the position taken by the Foard Company that the loading was done by the General Stevedoring Company as independent contractor and that it alone was responsible for any negligence in handling the dynamite. Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company, the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a department of the business of the Foard Company as shipbrokers and agents. The two companies had the same officers; the Stevedoring Company handled no funds, except through the Foard Company; its losses were paid by the Foard Company and dealt with as if they were that company's own losses. All of the profits of the Stevedoring Company were kept by the Foard Company as a charge for managing the business. There are other like circumstances, but these are sufficient to show that the Stevedoring Company was organized and controlled and its affairs so conducted as to make it a mere instrumentality of the Foard Company. This being so, the two corporations must be regarded, as to the outside public, identical. Interstate Telegraph Co. v. Baltimore, etc., Co. (C. C.) 51 Fed. 49; Baltimore & O. Telegraph Co. v. Interstate Telegraph Co., 54 Fed. 50, 4 C. C. A. 184; In re Watertown Co., 169 Fed. 252, 94 C. C. A. 528; Chicago, etc., Co. v. Myers, 168 Ill. 139, 48 N. E. 66.

But, even if the usual current of business of the two corporations had been separate, in this instance the contract to load the vessel was with the Foard Company, and the evidence tends to show that it made no separate contract with the Stevedoring Company, but co-operated with and completely controlled it. The two companies, therefore, will

be treated as one in this discussion, to be referred to as the Foard Company.

[2] 2. The next issue in sequence is whether the dynamite was exploded by the negligent act of Bomhardt, a stevedore foreman, in striking with a bale hook, or otherwise handling with violence, a box containing dynamite, or by a fire originating in the ship from spontaneous combustion, due to the negligent storing of coal, or from other negligence in the management of the ship. If the former was the cause, the Foard Company is liable; if the latter, then the Foard Company is free from liability, since it is not charged that it had control of anything on the ship except the dynamite.

There was some evidence to the effect that the dynamite was not brought on the ship in the safest way; that the men employed were only the ordinary stevedores, when safety required men specially selected and trained; and that they wore leather shoes, with tacks, instead of the safer rubber shoes. But all this, if true, is not material, for there is no evidence whatever that anything done or omitted by the Foard Company had any connection with the explosion, except the use of a bale hook and the violent handling of a box of dynamite by Bomhardt. The dynamite was stored tier on tier in a specially prepared framework placed in the hold of the ship on a level surface of coal. It was necessary to fit the boxes closely, so as to guard against the danger in transportation of explosion by concussion. The loading of the entire cargo of 300 tons had been almost completed.

That the first explosion was at or in a box of dynamite when Bomhardt was trying to force it into its place between two other boxes is proved by the testimony of all the witnesses who had opportunity to observe, including Bomhardt himself. The only variance is as to whether the explosion immediately followed a violent blow on the box with a bale hook, or came after Bomhardt had discarded the bale hook and was trying to force the box in by "marrying"—that is, by placing two boxes in the shape of an A and forcing them down by pressing hard on the apex.

The District Judge has found the overwhelming preponderance with the large number of witnesses who testified that the explosion was coincident with a violent blow with the bale hook, and against Bomhardt and the one other witness who testified that Bomhardt did not have a bale hook when the explosion occurred. No further statement of the facts is necessary to show that this conclusion has not only reasonable, but very strong, support in the evidence, and cannot be disturbed.

There is as little doubt that any violent handling of dynamite or other act producing considerable concussion or friction is dangerous, and, except when required by necessity, negligent. It may be true, as contended, that a bale hook might be used so gently as to be a safe implement; but, since dynamite is known to explode from concussion, it is perfectly plain that the violent striking of a box containing such a destructive explosive with an instrument as heavy and inflexible as a bale hook would tend to prove negligence. Even if the danger of explosion be slight, such an act would still be evidence

of negligence, for due care is care proportionate to the consequences to be apprehended. The evidence shows that the danger of the use of such implements in handling dynamite is generally recognized, and that the Foard Company made some effort to prevent its men from using them.

It is contended, nevertheless, on the part of the Foard Company, that neither the first nor the final explosion could have resulted from handling or striking the box of dynamite, and that both explosions were due to a fire on the ship originating in some other way. In support of this position it is insisted: (1) That according to scientific opinion the dynamite, being frozen, could not have been exploded by a blow which did not drive the point of the hook through the box to the dynamite, and that it was demonstrated that the point of the hook could not have gone through the box; (2) that, if the fire had originated from a slight explosion of a small quantity of the dynamite, it is scientifically certain that the explosion of the mass would have followed immediately, and not, as it did, after the lapse of 10 or 12 minutes; (3) that these scientific inferences are supported by the testimony of witnesses who saw smoke coming from a different part of the ship after the first explosion.

At the time of the explosion the temperature was 21 degrees Fahrenheit, while the freezing point of dynamite is 52 degrees Fahrenheit. In transportation there had been considerable variation in temperature. Inclosed as it was in paper and packed in close wooden boxes, the more exposed surfaces would probably be frozen, while the protected interior would not. That some of the dynamite was less sensitive, due to freezing or other cause, is indicated by the fact that a considerable quantity was found intact after the explosion. On this the two expert witnesses agree. They also agree in saying that dynamite which has been frozen and partly thawed is peculiarly liable to explode, and that its action is erratic. On this point Dr. Munroe, the expert called by the Foard Company, testified:

"The occasion for that greater sensitiveness of this frozen dynamite which is being thawed lies in the fact of the exudation of the nitroglycerine from the material, so that we have a film with the liquid nitroglycerine upon the surface of the stick, and that liquid nitroglycerine is more sensitive to heat and shock than the compound mixture is."

Referring to the testimony of some of the witnesses that the explosion broke open the box and sent two nails into the face of one of the men, Dr. Munroe said:

"It is possible for a small portion of the dynamite to have been exploded, and, if the material was frozen, or partly frozen, to set material on fire; but to have been of sufficient amount to have thrown the nails about, so as to imbed them in the person of a man, without producing more profound effect, seems to me almost impossible."

Then follows this question and answer, on which the Foard Company mainly relies to disprove the explosion from the stroke of the bale hook:

"Q. Suppose there was an explosion which was sufficient—leaving out the nail question for the moment—sufficient to knock three men down who are

near the box, state whether it is conceivable that the explosion could come from dynamite in that box without affecting the other dynamite in the box. A. In my opinion it would be most improbable."

The witness then expresses the opinion that under the conditions described spontaneous combustion in the coal might have been the cause of the fire and the explosion. The only support in fact that this theory has is the testimony of a number of persons on other vessels that after the first explosion they saw smoke rising from the forecastle, and not from the hatches where the explosion occurred. Considering the volatile nature of smoke, its liability to drift with air currents on the ship, and the distance of the observers from the ship, an inference that the fire originated from the coal would be nothing more than plausible conjecture. It cannot be accepted against the positive and undisputed testimony of many persons on the scene, who saw no fire or smoke, and felt no heat, and who testified that an explosion followed instantly on the violent handling of the dynamite by Bomhardt.

Nor is it possible, in view of this testimony, to draw the inference that the explosion could not have been produced by the blow on the box, and is therefore an unexplained accident, for which no one can be held liable. It is vigorously argued against the District Judge's finding of the act of Bombardt as the proximate cause of the accident that it is opposed to this reasoning by him:

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

This, taken with other portions of the opinion, meant nothing more than that from the standpoint of the expert the chances of such an accident—a blow, a slight explosion produced by the blow breaking open the box, an interval of 10 or 12 minutes, followed by a general explosion, without exploding all the dynamite—would have been regarded, reasoning deductively, almost infinitesimal; but the court must accept the positive and undisputed evidence of many witnesses that it did so occur. The preponderance of the evidence leaves no escape from the conclusion that the proximate cause of the explosion was the violent handling of the dynamite and the use of a bale hook.

[3] 3. Passing from the contest between the Foard Company and the Munson Steamship Company, the next error assigned is the refusal of the District Court to hold the Munson Steamship Line, charterer of the Alum Chine, liable along with the Foard Company to those who suffered damages. There is no dispute that the Foard Company was an independent contractor. Imbrovek v. Hamburg-American S. P. Co. (D. C.) 190 Fed. 229; Atlantic Transport Co. v. Imbrovek, 193 Fed. 1019, 113 C. C. A. 398.

It is insisted, however, that the Munson Company cannot avail itself of the rule that the independent contractor alone is liable for damage caused by his negligence: (1) Because by due inquiry it would have ascertained that the Foard Company was not a stevedore company, efficient in the careful loading of dynamite; and (2) because the work was inherently dangerous.

4. It is true that the Munson Company would be liable if it had failed to exercise reasonable care to select a competent contractor. 26 Cyc. 1265. But due care on this point does not require inquiry into all the details of the contractor's methods. Contracts to load vessels are given to stevedores, because they are better qualified than the ship company to ascertain the best methods and carry them out safely. It would be hardly possible to find a stevedore with a higher reputation for promptness and safety than the Foard Company. It was the leader of the business in Baltimore, and had loaded dynamite and other explosives for many years without serious accident. It is clear that the finding of due diligence by the District Court in this respect is well sustained.

5. It is not easy to state definitely the limitation of the doctrine that an independent contractor alone is liable for his own negligence which will square with reason or with the numerous authorities on the subject. Manifestly one who contracts for another to erect a nuisance, or to trespass on his neighbor, or to violate a statute, or do any other wrong, cannot escape liability for injury caused by the wrong. This has been held from the earliest cases to Weinman v. De Palma, 232 U. S. 571, 34 Sup. Ct. 370, 58 L. Ed. 733.

We shall not attempt the fruitless task of analyzing and attempting to reconcile the numerous cases passing on the general proposition, so difficult of application, that liability cannot be escaped by employing an independent contractor, where the work is inherently dangerous, unless proper precautions are taken. They have been elaborately discussed in the briefs, and most of them are collated and commented on in notes in 65 L. R. A. 833, 76 Am. St. Rep. 382, and 26 Cyc. 1559. Reason and consideration of the practical results of the various decisions seem to justify this statement as to work inherently dangerous.

The rule that responsibility is on the independent contractor alone does not apply when at the inception of the undertaking a man of ordinary reason should know that in the natural course of things the work would certainly or probably result in injury to another, unless some distinct and definite precautions be taken, although the details of the work be done with due care; as, for example, guarding a hole dug in the street, or protecting buildings close to blasting operations from rocks which would probably strike them, or protecting a wall when excavating by it. But the exception does not extend to work which could be surely performed with safety upon the sole condition that due care be exercised in the details of its execution.

Applying this rule, the Munson Company is not liable. Loading dynamite, gasoline, gunpowder, naphtha, and other inflammable or explosive substances is necessary to commerce and is not a nuisance. The Ingrid (D. C.) 195 Fed. 596, and authorities cited; Ingrid v. Central Railroad Co. (2d Circuit) 216 Fed. 72, 132 C. C. A. 316. There was no distinct and definite precaution to be taken, so as to make sure that due care in the details of the work would make it safe. It was not disputed that dynamite may be loaded with perfect safety, if adequate care be taken against concussion and heat. There was no danger

of either, except from the details of the work, and therefore the independent contractor alone was liable.

[4] 6. Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transhipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit. Boehm v. Baltimore, 61 Md. 265; Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643; Hagerstown v. Klotz, 93 Md. 437, 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437; Note, Van Cleef v. Chicago, 23 L. R. A. (N. S.) 636; Rogers v. City of Binghampton, 186 N. Y. 595, 79 N. E. 1115; City of Mansfield v. Bristor, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 852, 10 Ann. Cas. 767; Salmon v. Kansas City, 241 Mo. 14, 145 S. W. 16.

[5] This court held in State of Maryland v. Miller, 194 Fed. 775, 114 C. C. A. 495, that the statute law of Maryland made the city of Baltimore liable for the damages to a vessel caused by sinking piles and cutting them off just below the water surface in the Patapsco river by one to whom the city had given a permit to drive the piles. The Patapsco river is beyond the corporate limits of the city, but the court held that the statute which gave the city power to provide for the preservation of navigation of the Patapsco river imposed the obligation to see that obstructions which had been placed there with its consent or with its knowledge or opportunity for knowledge should be made safe. After this decision the General Assembly of Maryland in 1912 enacted a statute containing this provision:

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

A municipality is not liable for things done or omitted outside of its limits, unless the liability be imposed by statute; and the act of 1912 in terms removed the liability imposed by the act of 1908, under which State of Maryland v. Miller was decided. We are unable to agree with the District Court that this act was invalid under the Constitution of Maryland, which provides that "any law enacted by the General Assembly shall embrace but one subject and that shall be described in its title." It is true that the title of the act refers to some sections of the charter of the city of Baltimore and some of the Code of Public Laws of Maryland under the title "City of Baltimore." But the one sub-

ject is the charter powers and obligations of the city of Baltimore. Worcester v. School Com'rs, 113 Md. 305, 77 Atl. 605.

[6] The validity of this act of 1912 is recognized by the Supreme Court of Maryland in Ridgely v. Mayor, etc., of Baltimore, 119 Md. 571, 87 Atl. 909. A federal court should be reluctant to adjudge a state statute to be in conflict with the state Constitution before it has been passed on by the state courts, especially when the highest court of the state has rendered a decision on the assumption of its validity although the direct question was not presented or decided. Michigan Cent. R. R. v. Powers, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744; L. & N. R. R. v. Garrett, 231 U. S. 305, 34 Sup. Ct. 48, 58 L. Ed. 229.

[7] The general rule is that the state, in conferring powers and imposing obligations on municipalities, may limit both the powers and the obligations as it sees fit. MacMullen v. Middletown, 187 N. Y. 37, 79 N. E. 863, 11 L. R. A. (N. S.) 391; Goddard v. Lincoln, 69 Neb. 594, 96 N. W. 273; Schigley v. City of Waseca, 106 Minn. 94, 118 N. W. 259, 19 L. R. A. (N. S.) 689, 16 Ann. Cas. 169. This power of a state to limit the obligations of a city, it is true, cannot extend to exempting it from an act or omission which would constitute an actionable wrong under the admiralty law. Workman v. New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314. But the accident in this instance was not due to any act or omission on the part of the city which could possibly be designated a maritime tort. It could hardly be contended that there is any rule of admiralty requiring the city to superintend the details of loading a ship. Even careful licensing of stevedores would not have excluded the Foard Company; nor would it have excluded Bomhardt, for the testimony shows nothing against him except that he was pushing and boisterous and that he sometimes took a drink. It does not show that he was an inebriate or incompetent or generally careless.

But if invalidity of the act of 1912 be conceded, then we agree with the District Court that negligence cannot be imputed to the city in selecting the place of the accident as a proper one for unloading dynamite. Dynamite being a necessity and its transportation lawful, the community must bear such risk of damage from its transportation as cannot be avoided by due care. It is at least doubtful if any degree of care would result in finding an anchorage in the harbor, reasonably accessible, where the explosion of a cargo of dynamite would not be destructive. Remoteness from habitations and business houses, smoothness of water, freedom from fogs, ease of transfer from car to ship, must all be considered, and due care and sound judgment exercised. The conclusion of the District Court is well supported that under the facts before it the city chose wisely, or at all events that the choice was made by a competent official, acting with due care and in good faith, and that the city incurred no liability.

7. The employés of the Maryland Steel Company claim damages from that company for their injuries on the ground that the company violated its duty to furnish them a safe place to work by anchoring its ship, the Jason, on which they were employed, within 1,200 feet of the

Alum Chine laden with dynamite. As loading dynamite is not a nuisance, but is universally recognized as a legitimate business, and the Jason was in the designated anchorage grounds, it follows from the views already expressed that her owner is not liable to those who happened to be on the ship for not changing his anchorage, whenever it was discovered that another ship was loading dynamite. That has become one of the many perils which those who are employed on the sea take upon themselves.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. ALDRIDGE. †

(Circuit Court of Appeals, Fifth Circuit. December 15, 1914.)

No. 2711.

1. PLEADING ⟸87—PLEAS—SHORT FORM—CONSENT.
Where a defendant pleaded the general issue and special pleas, as authorized by Code Ala. 1907, § 5331, it was prejudicial error for the trial court, over defendant's objection, to strike out such special pleas, compel defendant to plead in short form, and enter on the docket, without his consent, that any matter of defense might be given without reference to the pleading, and that the record should show an agreement that any legal matter might be introduced without reference to the pleas.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 180; Dec. Dig. ⟸87.]

2. COURTS ⟸340—FEDERAL COURTS—STATE COURTS.
While by the Conformity Act (Rev. St. § 914) federal trial courts in actions at law are governed by the statutes of the state, the federal appellate courts are not amenable to the statutes or rules of the state courts adopted in pursuance thereto, but are governed by the statutes of the United States and by rules adopted pursuant to the powers therein granted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 900; Dec. Dig. ⟸340.

State laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

In Error to the District Court of the United States for the Southern Division of the Northern District of Alabama; William I. Grubb, Judge.

Action by E. A. Aldridge against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Forney Johnston, of Birmingham, Ala., for plaintiff in error.

D. H. Riddle, of Talladega, Ala., and Stallings & Nesmith, of Birmingham, Ala., for defendant in error.

Before WALKER, Circuit Judge, and SHEPPARD and CALL, District Judges.

CALL, District Judge. This is a writ of error sued out by plaintiff in error from the judgment rendered against it in the United States District Court for the Southern Division of the Northern Dis-

---

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied February 11, 1915.

trict of Alabama. The suit was brought in the state court for Shelby county and proceeded to trial under the issues made by the complaint and pleadings filed thereto until the testimony was in and argument begun to the jury, when the plaintiff amended its complaint by increasing the ad damnum clause to an amount cognizable by the District Court of the United States. Thereupon the defendant below filed its motion, tendered by the bond required, to remove said cause to the District Court, which was done. The case came on for trial at a subsequent term of the District Court, and the plaintiff under the proceedings allowed and recognized in Alabama, tendered his complaint as filed in the state court, consisting of two counts, whereupon the defendant tendered its demurrer theretofore filed in the state court to same, which demurrer was heard and overruled. The defendant then tendered its pleas, the plea of general issue and some 14 special pleas. The plaintiff had on file in the record of the case sent up from the state court demurrers to the special pleas, and without making any motion to strike any or all of said special pleas, or any parts of the same, and without again tendering said demurrers theretofore filed to said special pleas, and before any ruling on said demurrers by the District Court, volunteered to agree to plead in short by consent with leave to give in evidence any legal matter. The defendant declined to enter into any such agreement and insisted on its right to have the issues on which the case was to be submitted to the jury defined and settled by its pleas then tendered. The trial court overruled the objection and the exception of the defendant, declined to receive or consider the pleas or any of them, and announced:

"That the court would enter on the docket that any matter of defense may be given without reference to the pleading; that the record would show an agreement that any legal matter be introduced without reference to pleas."

The defendant then excepted to such ruling and objected to proceeding with the trial under such circumstances, which objection was overruled, and the defendant excepted to such ruling.

The plaintiff in error has assigned some 34 grounds of error, some of them with subheads, but we shall only discuss the sixth and seventh grounds of error assigned, as in the judgment of a majority of this court these errors necessitate a reversal and remanding of this cause for a new trial.

The sixth assignment of error is the court erred in declining to receive or entertain defendant's several special pleas. The seventh error is the court erred in requiring defendant to proceed with the trial without pleas specially setting forth the defenses relied upon. There is no doubt that under the decisions of the Supreme Court of Alabama, the parties to a suit may by consent plead in short, and if the court approves, proceed to trial under the issues thereby made, and it is also well established that by such proceeding the parties thereto estop themselves from complaining of such proceeding, and the defendant will not thereafter be heard to complain that his right to plead the general issue and special pleas guaranteed him under the laws of Alabama (Code Ala. 1907, § 5331) has been denied.

[1] There can be no question in this case of pleading in short by

consent, for the reason that the record in this case affirmatively shows that there was no consent on the part of the defendant, but on the contrary, it was forced to trial over its very strenuous objections to the mode of procedure adopted by the court in this case, and its exceptions properly and seasonably reserved to the ruling of the court.

Pleading in short is commonly used in Alabama, and in Abercrombie v. Mosely, 9 Port. (Ala.) 145, Justice Goldthwaite said:

"It is to be regretted that this laxity of pleading was ever countenanced by the court, but it has prevailed too long, and been sanctioned by too many decisions, to be now overturned. If the parties to a cause will consent to this course of pleading, perhaps no very evil consequences will flow from it."

"This is not a proper method of pleading, in the absence of statute, unless adopted by consent." Ency. of Pleading and Practice, 560.

"There was no consent on the part of the plaintiff to receive the plea as it was pleaded, and it was clearly erroneous to hold it good." Shields v. Byrd, 15 Ala. 822.

Thus we see that, in the absence of statutory authority for such pleas, consent of the parties is a necessary ingredient, and there is no statutory authority for the same in Alabama. As far back as Abercrombie v. Mosely, Justice Goldthwaite, supra, deplored the reception of such pleas even by consent. Again, Justice Dargan, in Strange v. Powell, 15 Ala. 456, says:

"We know that the practice has prevailed in the Circuit Court of pleading the usual pleas merely by stating their name, and when no objection is made to the pleas thus pleaded, we will not permit the objection to be first raised in this court. * * * But when objections were made to such pleas in the court below and are not waived here, we cannot consider them as pleas, nor pronounce that the court erred in striking them out, even if they would have constituted a bar if pleaded in due form."

It was well said by Chief Justice Waite, in Hill v. Mendenhall, 21 Wall. 455, 22 L. Ed. 616:

"The office of pleading is to inform the court and the parties of the facts in issue; the court that it may declare the law, and the parties that they may know what to meet by their proof."

See, also, McFaul v. Ramsey, 20 How. 524, 15 L. Ed. 1010, where Mr. Justice Grier says:

"Hence it is necessary that the parties should frame the allegations which they respectively make in support of their demand or defense into certain writings called pleadings."

It would seem on principle that the defendant has the right, before he is forced to an introduction of his testimony, to know which of the issues he has tendered, if supported, will bar the recovery, and to have those issues, when definitely made, disclosed by the record, so that the action of the court in eliminating any of them may properly be presented for review. Unless the record shows this, the appellate court cannot and will not review the action of the trial court. As said by Justice McClellan in Blair v. Williams, 159 Ala. 659, 49 South. 72, "In this court a complainant must show error on the record," and although in that case the parties by consent pleaded in short and with leave to offer in evidence any facts that could be specially pleaded, the Supreme Court affirmed the judgment because the record did not

show error. So, also, Converse Bridge Co. v. Collins, 119 Ala. 534, 24 South. 561.

Section 5331, Code Ala. 1907, provides:

"The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, must plead specially the matter of defense."

In the instant case the defendant tendered the general issue and some 14 special pleas, setting up contributory negligence, and assumption of risk, to meet different phases of the testimony as it might be produced. Each and every of the pleas were stricken down by the court against the objection of the defendant, and the court against such objection undertook to frame such issue for the defendant, not by requiring an amendment when the particular plea was an insufficient statement of fact or redundant, nor by striking any pleas that were unnecessary repetitions, but by making a docket entry that any matter of defense may be given without reference to the pleading. Clearly this was an invasion of the right secured to it by section 5331 of the Alabama Code, above quoted, and when done, not with the consent of the defendant, but against its objection, is reversible error, unless it affirmatively appears from the record that it is error without injury.

[2] We are referred by the attorneys for defendant in error to rule 45 (61 South. ix) of the Supreme Court of Alabama, but it is pertinent to remark in this connection that said rule cannot be invoked for our guidance in this case. The statutes of the state, under section 914 of the Revised Statutes, govern the trial courts in actions at law, but the proceedings in the appellate courts are not amenable to such statutes or rules adopted in pursuance thereof, but are governed by the statutes of the United States and the rules adopted in pursuance of the powers therein granted.

The defendant in error claims that the judgment should be affirmed because, if error was committed, it was error without injury, and refers to Garner et al. v. Morris, 65 South. 1002, to support his contention. We have examined that case, as well as Taylor et al. v. Corley et al., 113 Ala. 580, 21 South. 404. These cases are not alone in deciding the questions therein decided. There are many decisions from the many states and many cases in the United States courts which have decided that error committed by the trial court will not support a reversal when such error has not resulted in injury to the appellant or plaintiff in error. An examination of Garner v. Morris will show the quotation relied upon is obiter dicta.

In this case, after a careful review of the record herein, we are not able to say that it affirmatively appears that no injury was done plaintiff in error by the action of the court in striking its pleas and forcing it to trial with no issue of fact made. It would, we think, be impossible for the jury, in the mass of testimony introduced, to bear in mind and apply to the different issues outlined in the charge of the court, covering some 18 pages of the record, the salient facts bearing on those issues as defined in the charge, and which were not the issues as proposed by defendant.

Due and orderly procedure requires that the issues or claims of the plaintiff on the one hand, the defenses sought to be set up by the defendant on the other, should be succinctly stated to the jury before the introduction of testimony is begun. Garrett, Adm'r, v. Louisville & Nashville R. Co. (Nov. 30, 1914), 235 U. S. 308, 35 Sup. Ct. 32, 59 L. Ed. ——. We recognize the rule that the introduction of immaterial evidence that could not affect the verdict is not reversible error, but it must appear to the appellate court that such immaterial evidence could not affect the party complaining injuriously. And, as before stated, we could not say on this record that the defendant was not injuriously affected by the court forcing it to trial with only the plea of general issue and permission to give in evidence any matter of legal defense. Its positive statutory right to plead its defense and thus formulate the issues it desired to present to the jury, so long as said issues were material and no unnecessary repetitions, was invaded. It seems to a majority of this court that it is not a sufficient answer to say, "You must show injury." It seems to us that the words of Justice Phelan, in Brooks v. McFarland, 20 Ala. 483, are pertinent and can be applied to this case with effect:

"The court erred in overruling the demurrer. The error of the court in sustaining the plea entered of course into the trial and instruction to the jury."

For the errors pointed out the case will be reversed and remanded for a new trial, the costs to be taxed against the defendant in error.

It is so ordered.

BOMBARGER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 9, 1914.)

No. 2498.

CRIMINAL LAW ⊜1173—INSTRUCTION TO IGNORE QUESTIONS AS IMPROPER—REFUSAL TO GIVE—HARMLESS ERROR.

On the trial of a defendant charged with the violation of Pen. Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (Comp. St. 1913, § 10381), by sending through the mails a letter giving information where and by whom an abortion could be procured, where a witness was asked if defendant made a proposition to her to assist in performing abortions, which question on objection was excluded, it was prejudicial error for the court, also in the presence of the jury, to refuse to give an instruction to the jury not to consider such question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164–3168; Dec. Dig. ⊜1173.]

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

Criminal prosecution by the United States against L. G. Bombarger. Judgment of conviction, and defendant brings error. Reversed.

P. G. Dedmon, W. P. McLean, and D. W. Odell, all of Ft. Worth, Tex., and Bernard Titche, of New Orleans, La., for plaintiff in error.

Jas. C. Wilson, U. S. Atty., and William E. Allen, Asst. U. S. Atty., both of Dallas, Tex.

Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

CALL, District Judge. The plaintiff in error in this case was, on March 12, 1913, indicted for violating section 211 of the Penal Code of 1910, which declares certain matter nonmailable, and provides a penalty for "whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable." The section provides, among other things, that:

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind, giving information directly or indirectly * * * where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed," shall be non mailable.

The indictment, omitting the formal parts, charges that:

"On the 17th day of August, A. D. 1912, one L. G. Bombarger, whose Christian name is to the grand jurors unknown, did unlawfully, knowingly, and feloniously deposit and cause to be deposited in the United States post office at Ft. Worth, Texas, for mailing and delivery, certain nonmailable matter; that is to say, he, the said L. G. Bombarger, had, on or about the seventeenth day of August, 1912, received the following inquiry, to wit: 'Pond Creek, Oklahoma, Aug. 15, 1912. Dr. Bombarger, Ft. Worth, Texas—Dear Doctor: I am writing to ask you to perform a professional service that may not be exactly in your line. I am a man of family and have been so unfortunate as to get a young woman in a family way. Can I arrange with you to take the case and give her proper treatment so as to relieve her condition at once? She is about two months gone now. Want to arrange

to bring her to Ft. Worth part of this month, when I have to go there on business. Please drop me a line advising whether you will take the case and how long girl will have to stay there. Yours truly, John O'Long, Box 42.' And thereupon and thereafter and heretofore, to wit, on the seventeenth day of August, A. D. 1912, and within the jurisdiction of this court, to wit, within Ft. Worth, Tarrant county, state of Texas, he, the said L. G. Bombarger, did unlawfully, knowingly, and feloniously deposit and cause to be deposited in the United States post office at Ft. Worth, Texas, for mailing and delivery, a certain envelope, which said envelope then and there had United States postage thereon, and which said envelope was addressed, 'Mr. John O'Long, Box 42, Pond Creek, Okla.,' and which envelope so deposited and so stamped and so addressed then and there contained one sheet of paper with the following words and sentences thereon, to wit: 'Ft. Worth, Texas, Aug. 17, 1912. Mr. John O'Long—Dear Sir: Your letter to hand and contents noted. I think from what you say you are up against an operation. When you come to this city you may call upon me and I will give you my advice. Yours truly, L. G. Bombarger, M. D., 513½ Main St.'—and which said letter so deposited and caused to be deposited by him, the said L. G. Bombarger, then gave information indirectly by whom an operation for the producing of abortion would be done and performed, to wit, by him, the said L. G. Bombarger, he, the said L. G. Bombarger, then and there well knowing at the time he deposited and caused to be deposited in the said United States post office for mailing and delivery, within the venue aforesaid, on the date aforesaid, the same said envelope, addressed as aforesaid, containing the sheet of paper with the writing thereon as aforesaid, the same said writing and import thereof," concluding in the usual manner.

The plaintiff in error thereupon on the 24th day of March, 1913, filed his motion to quash, containing six grounds. Before the trial he also demurred to the indictment on the ground that for various reasons section 211 of the Penal Code was unconstitutional and void. The motion to quash and the demurrer were each, on hearing same, overruled and denied, and the action of the trial court in making each of said orders is assigned as error herein; the first six assignments being directed to the court's action in overruling the motion to quash. The seventh assignment is to the court's action in overruling the demurrer to the indictment. We have carefully examined the grounds of said motion to quash and the demurrer, and are satisfied the trial court committed no error in overruling said motions, and will not pause to discuss them.

The bill of exceptions, No. 2A, contains a motion to compel the United States to make disposition of a former indictment against him, which motion the court overruled, and its action is assigned as error in the eighth assignment. The trial court properly exercised its discretion in said ruling, and no possible injury could have resulted to the defendant by such ruling.

The bill of exceptions contains what purports to be a motion in arrest of judgment. The record proper shows no such motion. However, even if said motion in arrest was in the record and could be considered, it is simply repeating the grounds of the demurrer, and, if not valid on demurrer, would be equally unavailing in a motion in arrest. Assignments 22, 25, 26, and 27 are directed to the court's attention in denying the motion in arrest.

Assignments 9 and 10 are directed to the action of the court in admitting the testimony of C. W. B. Long, a witness for the government, who testified to going to see Bombarger and the conversation that

ensued. The plaintiff in error strenuously insists upon these assignments, but after a careful consideration of the same we are of opinion that said assignments are not well taken. The other assignments, except the 11th, are based on the court's charge, or its neglect to charge, as contended by plaintiff in error, these being assignments numbered 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 23. We have examined each of these assignments and are satisfied that no reversible error is pointed out by either of them. We think the case of Grimm v. U. S., 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, settles the contentions of plaintiff in error against him.

We come now to consider the eleventh assignment of error, to wit, that the court erred in refusing to instruct the jury not to consider the question asked Mrs. Nahona Stayton, to which action of the court the plaintiff in error reserved his exception. Bill of exception No. 5 shows the government called Mrs. Nahona Stayton as a witness, and the district attorney asked her the following question, after inquiring her name and if she knew Dr. Bombarger:

"Along in the summer of 1912, did he come to you and make a proposition to you to assist him in performing abortions and dividing the fees?"

The court sustained the objection of plaintiff in error to the question, whereupon the district attorney offered certain advertisements. What they were the bill of exceptions does not show, but thereupon counsel for plaintiff in error moved the court to instruct the jury not to consider the question propounded by the district attorney in their presence to the witness Stayton. This the court did not do, and it was properly excepted to.

We think the court should have so instructed the jury. The question was rankly leading, did not tend to prove any issue in the case on trial, and very prejudicial to the defendant. The question was asked in the presence of the jury, and could have been intended for no purpose other than to prejudice the defendant before them. We cannot assume that the district attorney was so ignorant of the rules of evidence that he did not know such a question, framed as it was, was leading, according to all the rules, was entirely irrelevant and immaterial to the issue then being tried, of conveying information through the mails, and violently prejudicial to the defendant on trial. Such an assumption would do violence to our common sense. The motion for the instruction was made also in the presence of the jury, and the court's failure or refusal to so charge them must have left upon their minds the idea that they might consider it in arriving at their verdict.

"It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will inadvertently and unconsciously enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not." Whart. Crim. Ev. (10th Ed.) § 32.

Again:

"While the law regards as relevant all facts touching the credibility of the accused, or that can aid a jury to determine the weight of testimony, and while the question of relevancy must rest largely in the discretion of

the trial judge, to be exercised by him with regard to the particular facts of each case, there is a marked distinction drawn between such facts and those sought to be brought out that merely tend to degrade the accused, or by innuendo to place irrelevant testimony before the jury. Such questions, 'Is it or not true that you have served a term in the penitentiary?' or 'Have you not been arrested for felony?' where not propounded in good faith, or asked concerning facts that in themselves are relevant, constitute reversible error, even though such questions are objected to at the time on the ground of irrelevancy, and the answer excluded by the court. The reason is the irrelevant facts have been placed before the jury by innuendo, the sinister influence remains, nor is it destroyed by the exclusion. It rationally follows, therefore, that the jury has been prejudiced against the accused, as fully as though the irrelevant facts themselves had been admitted, and nothing that the court can say entirely obliterates the effect." Whart. Crim. Ev. (10th Ed.) vol. 1, p. 56.

A number of appellate courts have gone to the full extent of the quotation above from Mr. Wharton, and will be found referred to in People v. Wells, 100 Cal. 459, 34 Pac. 1078. It is not necessary for us to go to that length in the present case. Here the request of the accused to have the court specifically charge the jury not to consider the question of the district attorney was ignored, and not given, and the action of the court seasonably excepted to by the accused. Nothing was done by the court to eradicate from the minds of the jurors the prejudice against the accused instilled by this question. The refusal or neglect of the court to do this must have left its impression also on their minds.

It might be well to call to the attention of the prosecuting officers the quasi judicial position they occupy as officers of the court and officers of the government which they represent. Their duties require them to prosecute, not persecute. They are appointed to enforce the laws under the beneficent system that requires the proofs of the prosecution to be so strong as to convince the minds of the jury to a moral certainty. They represent the government and as well the defendant, a citizen of that government; and the burden of seeing that the accused has a fair and impartial trial rests upon them equally as upon the court. This burden is not supported when the prosecuting officer by innuendo, asking leading questions that can only bring out irrelevant testimony, seeks to prejudice the accused before the jury. It is to be deplored that this is sometimes done in the heat of a trial.

For the error assigned in the eleventh assignment, the judgment is reversed, and the case remanded for a new trial.

PREST-O-LITE CO. v. HEIDEN et al.†

(Circuit Court of Appeals, Eighth Circuit. January 4, 1915.)

No. 4118.

(Syllabus by the Court.)

TRADE-MARKS AND TRADE-NAMES ⊂=72—UNFAIR COMPETITION—WHAT CONSTITUTES.

The filling by a competitor of, or by a stranger to, the Prest-O-Lite Company, of an empty Prest-O-Lite tank bearing the trade-mark "Prest-O-Lite," or the selling, exchanging, or delivering such a tank so filled without completely and permanently obliterating and removing the trade-mark and other marks by letters or figures indicating that the tank is a Prest-O-Lite tank, and securely fastening to it a conspicuous notice that the tank is not filled with Prest-O-Lite gas, constitutes unfair competition. Placing a label over the trade-mark bearing a notice that the tank is not filled with Prest-O-Lite gas, fastened to the tank with shellac and removable by the use of a knife or scraper, does not relieve from liability for unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 83; Dec. Dig. ⊂=72.

Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Smith, Circuit Judge, dissenting.

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

Suit by the Prest-O-Lite Company against Herman E. Heiden and another, doing business as the Little Rock Headlight Company. From a decree for defendants, plaintiff appeals. Modified and affirmed.

Moore, Smith & Moore, of Little Rock, Ark. (Winter & Winter, of New York City, on the brief), for appellant.

W. E. Hemingway, G. B. Rose, and D. H. Cantrell, all of Little Rock, Ark. (J. F. Loughborough, of Little Rock, Ark., on the brief), for appellees.

Before SANBORN, SMITH, and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. The Prest-O-Lite Company makes and sells packages of acetylene gas for supplying automobile headlights, and undertakes to and does furnish any owner of an empty tank to one of its packages at any considerable city or town, and at many villages in the United States and parts of Canada, one of its filled tanks in exchange for this empty tank, for 10 per cent. of the cost of the original package. It has expended more than a million dollars in establishing this system of exchange, providing a stock of its gas packages at every considerable town ready for exchange, and advertising its gas packages and its system. It adopted and has used "Prest-O-Lite" as a trade-mark for its packages which it displays on its cylindrical tanks containing its gas, and on December 25, 1906, it registered this trade-mark After the business of this company and its system of exchange of its filled packages for its empty tanks had become fully established, ad-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

† Rehearing denied March 25, 1915.

vertised, and well known throughout the country, and in February, 1913, the defendants below commenced to gather and fill empty Prest-O-Lite tanks with gas which they produced and to sell these packages of their gas and to exchange them for empty Prest-O-Lite tanks for a small consideration. The Prest-O-Lite Company brought suit against them for infringement of its trade-mark and for unfair competition; the defendants by their answer denied both; evidence was produced; and at the final hearing the court below rendered a decree against the defendants, by which it enjoined them from filling, selling, or exchanging any of the tanks bearing the trade-mark Prest-O-Lite without covering the trade-mark with a notice that the contents of the tank were not prepared by the Prest-O-Lite Company or that they were not Prest-O-Lite gas. The Prest-O-Lite Company appealed from the decree because the court adjudged that the filling, selling, and exchanging by the defendants of the Prest-O-Lite tanks with the trade-mark covered by the label used by the defendants at the time of the decree did not constitute unfair competition, and because it did not enjoin the defendants from filling with their gas the Prest-O-Lite tanks, or selling or exchanging them when so filled, unless they first completely and permanently obliterated the plaintiff's trade-mark from the tanks. The tanks of the plaintiff are steel cylinders or bottles, and the Prest-O-Lite trade-mark is fastened upon them in this way: The tanks are first plated with copper; they are then plated with nickel; then a resisting material outlining the letters of the trademark is placed on the nickel surface, and the tank is given another coat of copper, which adheres to every part of it, except the lettering, so that the letters of the trade-mark then appear in nickel on the copper plating. These letters are not in the steel tank, and they can be removed by grinding them off with proper machinery for about nine cents a tank, but the defendants have not suitable machinery for this purpose. Before this suit was commenced, and up to the time that the preliminary injunction was granted, the defendants pasted on the Prest-O-Lite tanks, which they filled with their gas and sold, or exchanged, a paper label bearing the words: "This tank is filled with Pure Acetylene Gas (Not Prest-O-Lite Gas). Headlight Gas Company. Little Rock, Arkansas"—but the words "Not Prest-O-Lite Gas" were in type much smaller than the words "Pure Acetylene Gas," and the labels did not always cover the plaintiff's trade-mark and often slipped from the tanks. After the preliminary injunction they enlarged the words "Not Prest-O-Lite Gas" to the size of the words "Pure Acetylene Gas" and put the labels on over the plaintiff's trade-mark with shellac. They covered the bottom of the label with shellac, and also the top of it. Then water does not remove it, and it may be taken off with a knife or scraper, and the record shows that one of the dealers to whom the defendants furnished Prest-O-Lite tanks labeled in this way made a practice of removing the labels before he exchanged them with the consumers or users. The legal effect of the decree below is to adjudge: (1) That it is an infringement of the plaintiff's trade-mark and unfair competition for the defendants to fill with their gas the empty Prest-O-Lite tanks, or to sell or exchange or deal in gas packages so made; but (2) that they may fill, sell, or exchange them if they cover the plaintiff's trade-mark with a paper label fastened

with shellac, or otherwise in such a way that it is not capable of being easily detached, and which bears a notice that the tank is not filled with Prest-O-Lite gas.

Much argument in the briefs relates to the soundness of the first proposition. But the defendants have not appealed, and that question is not here for review. The second proposition alone is challenged by the appeal. Upon records not materially different from that in this case, that proposition has been exhaustively discussed, deliberately considered, and repeatedly decided—twice by courts of equally authority with that of this court. The United States Circuit Courts of Appeals of the Sixth and Seventh Circuits have adjudged that parties are not entitled to refill Prest-O-Lite tanks with their gas, to sell gas packages so made, or to exchange them without completely and permanently obliterating and removing from the tanks the trade-mark "Prest-O-Lite." Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692, 696, 131 C. C. A. 626; Prest-O-Lite Co. v. Davis, 215 Fed. 349, 350, 131 C. C. A. 491. And so are the decisions in Prest-O-Lite Co. v. Avery Lighting Co. (C. C.) 161 Fed. 648, 650, 652; Prest-O-Lite Co. v. Davis (D. C.) 209 Fed. 917, 922, 923, 924; Prest-O-Lite Co. v. H. W. Bogen (C. C.) 209 Fed. 915, 916; Prest-O-Lite Co. v. Post & Lester Co. (C. C.) 163 Fed. 63, 64. Unless this court was thoroughly convinced that these decisions were erroneous, it would be its duty to follow them in the interest of uniformity of decisions and certainty of law. A thoughtful consideration of the question in the light of the evidence in the record in this case, of these authorities, and of the only opinion to the contrary that has come to our attention, Prest-O-Lite Co. v. Auto Acetylene Light Co. (C. C.) 191 Fed. 90, has satisfied that the conclusions reached in the cases first mentioned above are rational and just and should be followed. Reference is made to the opinions in those cases for the reasons for this result, and further discussion of the question is omitted because it would be nothing but a repetition of what has already been so well said in those opinions.

Let the decree below be modified so as to read as follows, and, so modified, let it be affirmed.

Modified Decree.

Now on this day comes the complainant by its solicitors, Winter & Winter and Moore, Smith & Moore, Esqs., and the defendants by their solicitors, Rose, Hemingway, Cantrell and Loughborough, Esqs., and the said cause is submitted to the court on oral testimony introduced at the hearing, depositions of witnesses heretofore filed in said cause, documentary and other evidence introduced at the hearing; and the court having heard the evidence and argument of counsel, and being well and sufficiently advised in the premises, doth find that the use on Prest-O-Lite tanks filled with the gas of the defendants of the label shown to be now and since the granting of the preliminary injunction in use by the defendants, constitutes, as did the use of the labels used by said defendants on such tanks before that time, unfair competition, and that the defendants have been and still are guilty of unfair competition with the complainants, and the court does hereby order, adjudge, and decree that the defendants, and each of them, their agents, servants, and

representatives, be, and they are, hereby restrained and enjoined from hereafter filling or refilling with acetylene dissolved in acetone steel tanks, bottles, or cylinders bearing the complainant's registered trade-mark "Prest-O-Lite," and from selling or exchanging or in any way dealing in such bottles or cylinders so filled or refilled by the defendants or others than the complainant without first completely and permanently obliterating and removing from each thereof that trade-mark, and all other marks, by letters or figures indicating that the tank is a Prest-O-Lite tank and securely fastening thereon a conspicuous notice that the tank is not filled with Prest-O-Lite gas.

It is further ordered, adjudged, and decreed that none of the tanks or cylinders formerly owned by the complainant, and formerly bearing its trade-mark when filled by the defendants, shall be sold or exchanged by the defendants, or any of their agents or vendees, who have notice of this decree or of the injunction it contains and directs without completely and permanently obliterating and removing from each of them the trade-mark "Prest-O-Lite" and all other marks, by letters or figures indicating that the tank is a Prest-O-Lite tank and securely fastening thereon a conspicuous notice that the tank is not filled with Prest-O-Lite gas.

SMITH, Circuit Judge (dissenting). The package in question consists of an outer metallic case lined with asbestos and containing liquid acetone, into which acetylene gas is forced under pressure. The apparatus was originally patented as No. 664,383, and known as the Claude & Hess patent. This patent expired June 30, 1910. Commercial Acetylene Co. v. Schroeder, 203 Fed. 276, 121 C. C. A. 474; Commercial Acetylene Co. v. Searchlight Gas Co. (D. C.) 197 Fed. 908; Id. (C. C.) 188 Fed. 85; Cameron Septic Tank Co. v. City of Knoxville, 227 U. S. 39, 33 Sup. Ct. 209, 57 L. Ed. 407.

While this patent was in existence it was a close question as to the right of a purchaser to have his tank refilled by other than the complainant. Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816. The owner of the patent in question, by notice forbidding such refilling, succeeded in preventing it. Commercial Acetylene Co. v. Widrig (C. C.) 190 Fed. 201. By the expiration of the patent there was given to the public the right, not only to make the entire apparatus, but to make it under the name which had become indissolubly attached to it. Singer Manufacturing Co. v. June, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

Every one, therefore, has the right to manufacture or fill Prest-O-Lite tanks under that name and therefore to fill old tanks, and no one by a trade-name adopted during the life of the patent could prevent the right passing to the public, not only to manufacture and refill the tanks, but to manufacture and refill them under the trade-name which had become indissolubly attached to them.

The trade-mark in this case was filed four years before the expiration of the patent. While, therefore, every one can now make and refill a Prest-O-Lite tank, he must so mark the goods as to indicate that they are his manufacture and not that of the Prest-O-Lite Company.

The packages have been sold at $12 each, while for refilling a charge has been made in later years of only $1, thus showing that the original sale is the principal thing and the charge for refilling is an incident.

The tanks in question are sold outright, and the purchaser can destroy them if he will. There is no right to compel the total erasure of the name Prest-O-Lite, for every one has the right to put it on. The complainant originally put a brass plate on its packages which could be easily removed. It then substituted an indented inscription which could not be removed except by grinding or some form of erosion of the metal.

If it should, as appears to me, be erroneously held that the original trade-name must be removed, then by this change the public is deprived by the act of the complainant of its right upon the expiration of the patent by the substitution of a substantially irremovable inscription. There is no method at Little Rock by which this inscription can be removed, and the monopoly which the complainant had for many years under its patent has become, according to the majority opinion, a perpetual monopoly. The change in the manner in which this inscription was thus put upon the package is an evidence that the unfair trade is on the part of the complainant. As I understand the majority opinion, if the complainant can devise some method by which the inscription can be carried clear through the metal constituting the case of the package, it will not only then be impracticable for every one but the complainant to fill the packages, but wholly impossible, and the monopoly will be complete to what the law has given to the public.

It is set up in the answer that over the inscription of the complainant has been fastened by the defendant, with shellac, so that it is not affected by water, an inscription in red ink as follows:

By the order for the temporary injunction it was ordered:

"The defendants and each of them, their agents, servants, and representatives, be restrained and enjoined from hereafter filling or refilling with acetylene dissolved in acetone any of the steel bottles or cylinders described in the bill of complaint bearing the complainant's registered trade-mark, viz., 'Prest-O-Lite,' and from selling or exchanging or in any way dealing in said bottles or cylinders when so filled or refilled by the defendants or persons other than the complainant, without in every case covering the aforesaid trade-mark engraved on said bottles or cylinders by and with a notice which shall wholly cover said trade-mark and entirely conceal the same from observation and shall contain a statement in large type that the contents of said bottle or cylinder are not prepared by the Prest-O-Lite Company. Said notice shall be so securely attached and affixed to said bottle or cylinder as not to be capable of being easily detached therefrom in the hands of any dealer who might come into possession of said bottles or cylinders or any of them, and none of the bottles of the plaintiff, when filled by the defendants as aforesaid, shall be sold by them or their agents and vendees without said label thereon, as hereinbefore set forth."

And by the final decree it was provided that the court—

"doth find that the label shown by the proof to be now, and since the granting of the interlocutory injunction, in use by the defendants, is not easily removable, and the printing on the label, the manner of attaching, and the place attached to the package do not constitute unfair competition, and does order, adjudge, and decree that the defendants, and each of them, their agents, servants, and representatives, be restrained and enjoined from hereafter filling or refilling with acetylene dissolved in acetone any of the steel bottles or cylinders described in the bill of complaint bearing the complainant's registered trade-mark, viz., 'Prest-O-Lite,' and from selling or exchanging or in any way dealing in said bottles or cylinders when so filled or refilled by the defendants or persons other than the complainant, without in every case covering the aforesaid trade-mark engraved on said bottles or cylinders by and with a notice which shall wholly cover said trade-mark and entirely conceal the same from observation, and shall contain a statement in large type that the contents of said bottle or cylinder is not prepared by the Prest-O-Lite Company, or that the contents is not Prest-O-Lite gas. Said notice shall be so securely attached and affixed to said bottles or cylinders as not to be capable of being easily detached therefrom in the hands of any dealer who might come into possession of said bottles or cylinders or any of them, and none of the bottles of the plaintiff, when filled by the defendants aforesaid, shall be sold by them or their agents and vendees, who have notice of this injunction, without said label thereon as hereinbefore set forth."

The inscription thus required to be put by the defendants upon the tanks in my judgment goes beyond any right the complainant can insist upon; and being thoroughly convinced that the decisions cited in the majority opinion are erroneous, I deem it my duty to respectfully dissent.

In re MILLER BROS. GROCERY CO.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2519.

BANKRUPTCY ⊂=316—PROVABLE CLAIMS—RENT OF PERSONAL PROPERTY.

Under a lease of a store cash carrier system for 7 years at a rental payable quarterly, which provided that if any installment of rental should remain unpaid for 60 days after it became due the entire rental to the end of the lease should at once become payable without demand, and that in case the lessee became bankrupt the balance of the rental for the entire term should be considered at once due and payable without notice or demand, and that the lessor might at any time thereafter enter the premises and take possession of the system, and thereby terminate all rights and interest of the lessee, the lessor could either take possession of the system on default by the lessee or have the benefit of the accelerated maturity of the rents, but was not entitled to the benefit of both provisions, and by taking possession of the system it lost its right to future rents, and though the lessee was in default for more than 60 days prior to bankruptcy, the subsequent taking possession by it of the system required its claim for future rents to be disallowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474–477; Dec. Dig. ⊂=316.]

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

In the matter of the Miller Bros. Grocery Company, bankrupt. From an order (208 Fed. 573), reversing an order of the referee and allowing in full the claim of the Lamson Company, the trustee appeals. Reversed, and order of the referee affirmed.

E. M. Flowers and L. B. Hall, both of Toledo, Ohio, for appellant.

Fritsche, Kruse & Winchester, of Toledo, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The Miller Bros. Grocery Company and the Lamson Consolidated Store Service Company on November 15, 1911, executed a contract, in terms a lease, under which the Store Service Company installed a cable cash carrier system in the store of the Grocery Company in Toledo, Ohio, and on December 14, 1911, the work of installing the carrier system was completed. The lessee was to use the system on its premises for 7 years from date of installation, and for as many successive years thereafter as it might elect to extend the lease; but the lessor reserved the right to terminate the lease at any time after 7 years, upon giving 60 days' written notice. The lessee was to pay rental quarterly in advance on the 1st days of March, June, September, and December in each year at the rate of $250 per annum, subject to a credit of $100 (for an old carrier system turned over to the lessor), which was to be deducted in sums of $25 from each of the first four quarterly installments of rent. January 19, 1912, the lessee paid the rental for the time between date of installa-

tion and March 1st; on that date the first quarterly installment of $62.50, less $25 on account of the old carrier system—that is, a balance of $37.50—became payable (in advance); but that sum was not paid, nor has anything further been paid on account of rent. May 16th following an involuntary petition in bankruptcy was filed against the Grocery Company. July 8th the company was adjudicated a bankrupt, and August 10th the trustee was elected. The Lamson Company meanwhile succeeded in title and interest to the rights of the Lamson Consolidated Store Service Company, and on August 26th filed its proof of claim for $1,618.35, which was made up as follows: The total rental for seven years $1,750, less the rental paid January 19th, and the $100 for the old carrier system; but, before filing its claim, the Lamson Company in that month took possession of the new carrier system and removed it to its factory in Lowell, Mass. The referee allowed $37.50, which amount was fixed as above pointed out; and upon review the court below reversed the order of the referee and allowed the entire claim. This occurred July 5, 1913, and on the same date the trustee was allowed an appeal.

The question is whether the Lamson Company was entitled both to take back the carrier system and insist upon allowance of its entire claim. The lease does not in express terms authorize this to be done. It is urged, however, that reasonable interpretation warrants such a result. The lease provides:

Paragraph 3: "* * * If any installment of rental shall remain unpaid for sixty days after it becomes due. the entire rental to the end of this lease shall become at once payable without demand."

Paragraph 6: "And these presents are upon this condition, that in case of a breach by lessee of any of the covenants or agreements herein, or in case the lessee becomes bankrupt, insolvent, or makes an assignment for the benefit of creditors, or discontinues business in the premises for any other reason whatsoever, the balance of rental for the entire term of this lease shall be considered at once due and payable without notice or demand on the part of the lessor; and it is also provided that the lessor may, at any time after such a breach of this lease occurs, enter the premises, take possession of said system, and thereby terminate all rights and interest of the lessee in said system."

It is to be observed that upon the happening of events described in this language two distinct advantages in terms arise in favor of the lessor: One is the acceleration of the maturity of future rents, and the other the right to take possession of the carrier system and so terminate the lease. Still it is further to be observed that the lessor is not in terms given the right to take possession of the carrier system and at the same time enforce payment of the rents so matured. According to the true intent of the lease, as it seems to us, the lessor is entitled to the benefit of either the accelerated maturity of rents or the possession of the carrier system, but not of both. The claim that the intention was to give to the lessor both advantages overlooks the fact that this would take from the lessee the only consideration it could ever receive for its obligation to pay rent at all—its possession and use of the carrier system; and, further, in spite of maturing future rents in the manner pointed out, all possibility of ever earning such

rents, and of so giving any consideration therefor, would be removed by the lessor's act. Surely, if we say the least of it, to justify such a result as this, language of the most explicit character should be employed; and we find no provision expressly fixing liability upon the lessee to pay rents which in the nature of things could not be earned after re-entry of the lessor.

It is true the lessor insists that this particular carrier system was practically worthless at the time it was taken away; but upon this theory it is difficult to see, and it is not explained, why the lessor took it back. The system was in use only about five months prior to the bankruptcy. The lease required the lessor at its own expense to supply all parts necessary to keep the system in proper repair, excepting where the defect was caused by carelessness of the lessee and where the rental was overdue, and required the lessee at the expiration of the term to return the system in as good order and condition as it was at the date of the lease, "reasonable use and wear thereof excepted." It is therefore plain that the parties expected the system to endure at least seven years. The lessor called its foreman to show the condition of the carrier system at the time it was received at its factory. He described the system, as then dismantled, in detail; and it must be said that it comprised many parts, such as stations, station stands, tracks, brackets, flanges, cash boxes, drive wheels, shaftings, and the like. He said the steel parts were covered with rust and other parts were tarnished. He seemed at first to think the system had been "junked"; but he qualified this later by a statement that shaftings, hangers, and couplings were to be rebabbitted, polished, etc., and, while it was in substance said that adjusting such a system to a particular store, as here, would materially lessen its value for any other store, we are not convinced that a system composed almost entirely of metal and used only five months could not be utilized elsewhere to material advantage.[1]

It results that the lessor's theory savors of forfeiture of substantial rights of the lessee, and it need not be said that forfeitures are not favored. It is conceded that, if the subject of the lease were real estate, re-entry of the lessor would put an end to the lessee's liability to pay unearned rent; and it ought to follow that, if the instrument in issue is to be treated as a lease, a like conclusion should be reached here. The decision of the court below, as we understand it, considers the provability of the lessor's claim for rent (under the Bankruptcy Act) as the test of the right to have it allowed; the theory being that, since the March installment of rent was in default for more than 60 days prior to the bankruptcy, the rent for the entire term of the lease had matured "without demand" and become "a fixed liability * * * absolutely owing" at the time of the filing of the petition (section 63a1), and so the lessee's liability was not regarded as affected by the lessor's

[1] It is worthy of notice that the Lamson Consolidated Store Service Company, the original lessor of this system, made no such claim, as is here urged, in respect of one of its carrier systems which had been in use almost a year and which was in issue in Re Merwin & Willoughby Co. (D. C.) 206 Fed. 117, 118, 122.

act of retaking the carrier system. (D. C.) 208 Fed. 573, 575, 576. This places too much stress upon the provision for maturing rent without demand, and fails to observe the real significance of the lessor's re-entry; indeed, it was believed that the waiver of demand for payment of rent under the present lease distinguished the instant case from that of Lamson Consol. Store Service Co. v. Bowland, 114 Fed. 639, 52 C. C. A. 335 (C. C. A. 6th Cir.).

We regard this as error; for we think the present case is ruled by the decision in that case. True, the lease involved in that case did not in express terms provide for accelerating the maturity of future rents without demand, and one of the reasons assigned in the opinion was that no demand had been made; but that was not the only or controlling reason. The lessor there was distinctly authorized, in the event of breach of covenant or in case of bankruptcy or insolvency, to enter upon the store premises *without notice or demand,* and take possession of the carrier system, and thereby determine all right and interest therein of the lessee. Bankruptcy ensued, the lessor entered the store premises and took possession of the carrier system, but its claim for future rents was disallowed. It was the effect upon the lessee's liability for future rent, which the court there ascribed to the lessor's resumption of possession of the carrier system, that is important here. That the effect was to release the lessee from such liability is traceable throughout the opinion; it was only in the event that possession had been taken upon some ground which kept the lease alive that re-entry would not be regarded as fatal. It is not shown in the instant case that possession was taken with any idea of keeping the lease alive; and since it was the act of the lessor here, as it was there, which put an end to the lease, we do not see how precipitating the maturity of future rents here gives rise to any material distinction between the two cases; for when the lessor here, like the lessor there, resumed possession of the system and terminated the lease, it destroyed its power, as already stated to earn future rents, whether their maturity had been precipitated or not, and thereby obviously subjected its claim to the defense of failure of consideration. And this defense is as clearly open to the trustee in bankruptcy as it would have been to the lessee if bankruptcy had not intervened.

The order of the court below must be reversed, and, since the quarter's rent allowed by the referee was payable in advance, and was substantially earned before the bankruptcy, the order of the referee is affirmed, with costs.

GLADDEN v. GABBERT et al.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1915.)

No. 2679.

1. APPEAL AND ERROR ⊜977—REVIEW—RULING ON MOTION FOR NEW TRIAL.
A motion for a new trial, though denominated a "motion in arrest of judgment," is addressed to the discretion of the trial judge, and his ruling thereon is not reviewable on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. ⊜977.]

2. APPEAL AND ERROR ⊜930—REVIEW—VERDICT—APPROVAL BY TRIAL COURT.
Whether the jury ignored special instructions is wholly for the consideration of the trial judge, and it will not be presumed that he permitted a verdict to stand which was in violation of such instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3755–3761; Dec. Dig. ⊜930.]

3. APPEAL AND ERROR ⊜215—PRESENTING QUESTIONS IN LOWER COURT—OBJECTIONS—FAILURE TO READ INSTRUCTIONS.
The failure of the trial judge to read special instructions to the jury before handing same to them cannot be assigned as error, where no objection was made at the time by either party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309–1314; Dec. Dig. ⊜215.]

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

Action by Charles S. Gladden against J. T. Gabbert and another. Judgment for defendants, and plaintiff brings error. Affirmed.

St. John Waddell, of Memphis, Tenn., for plaintiff in error.

James Stone, of Oxford, Miss., and Herbert Holmes, of Senatobia, Miss., for defendants in error.

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

PARDEE, Circuit Judge. This is an action of ejectment, brought by the plaintiff in error to recover two tracts of land, and mesne profits, situated in the Western division of the Northern district of Mississippi. To the plaintiff's declaration the defendants pleaded a general issue of not guilty and the statute of limitations of 10 years, with adverse possession, under the laws of the state of Mississippi. On December 13, 1912, there was a trial before a jury, resulting in a verdict for the defendants.

After a motion for a new trial was refused, the case was brought here for review upon some seven assignments of error, only two of which are insisted upon, stated by counsel as follows:

"I. The court erred in overruling plaintiff's motion in arrest of judgment and for a new trial.

"(a) The evidence overwhelmingly showed that the first tract of land sued for was a part of section 7, and that the second tract of land sued for was a part of the south half of section 8, and under this evidence said lands

were the property of plaintiff, and the verdict of the jury should have been in favor of plaintiff, under the admissions of the defendants as set forth in the stipulation in the record.

"(b) There was no evidence introduced by defendants which, after giving the same full consideration, was in any way sufficient to uphold the verdict of the jury for defendants.

"(c) The verdict of the jury was directly contrary to and clearly ignored the special instructions of the court given to them at the request of plaintiff.

"(d) The verdict of the jury was clearly contrary to the law as given them by the court, and contrary to all the evidence in the case.

"(e) The verdict of the jury is without any reasonable support, either under the law as given by the court or under any reasonable construction of the evidence introduced.

"II. The court erred in merely handing the jury the written requests for special instructions as asked by plaintiff, and in not reading said special instructions to them, or delivering the same orally, because it is evident, from the utterly unauthorized verdict as returned by the jury, that they either did not read said instructions, or, if they did read same, they evidently did not regard said instructions as binding or controlling, and ignored same in finding their verdict."

The bill of exceptions shows the following proceedings in the trial after the evidence was closed:

"C. S. Gladden v. Gabbert & Moore.

"In this case the plaintiff requests the court to charge the jury specially as follows: [Here follow copies of requested instructions, marked 'Filed December 12, 1912,' covering some five printed pages of the record, not necessary to insert.]"

Requests for special instructions, being in writing, were at the time handed to the court by plaintiff's counsel, and the court, having examined same, handed all of them to the jury, without either reading same to the jury or commenting thereon, and at the same time stated to the jury as follows:

"Gentlemen of the jury: The plaintiff's counsel has asked certain special instructions to be given you touching the matters involved in this suit, and, the requests for same being in writing, I hand you said written requests, all of which I give you, and you will now retire and make up your verdict."

And thereupon the jury retired to consider of their verdict, and returned into open court a general verdict in favor of the defendants. And thereupon the court rendered judgment for the defendant. And thereupon plaintiff, by his counsel, moved the court in open court to arrest the judgment in favor of the defendants, and to set aside the verdict of the jury and said judgment, and grant him a new trial, upon the following grounds:

"In the District Court of the United States for the Western Division of the Northern District of Mississippi.

"C. S. Gladden, Plaintiff, v. J. T. Gabbert and M. P. Moore, Defendants.

"In this case comes the plaintiff, by his attorney, and moves the court to set aside the verdict of the jury and judgment of the court rendered thereon, and grant him a new trial, upon the following grounds, to wit:

"1. Because the verdict of the jury is against the clear preponderance of the evidence.

"2. Because the verdict of the jury is contrary to the instructions of the court.

"3. Because the verdict of the jury is not supported by any evidence in the case, and is clearly contrary to the instructions as given by the court.

"4. Because the court erred in giving its oral charge to the jury as to the burden of proof on plaintiff to establish title by a preponderance of the evidence, in not distinguishing and calling attention to the agreement of parties that title was to follow the disputed boundary of the land in controversy.

"5. Because the court did not charge the jury orally on the facts in this case and the law governing same, as is set forth in plaintiff's first, second, third, fourth, fifth, sixth, and seventh written request for the same.

"For these and other causes to be assigned on the hearing hereof, the plaintiff moves the court to set aside the verdict of the jury and the judgment rendered thereon, and grant him a new trial.

"St. John Waddell, Attorney for Plaintiff.

"Filed December, 1913. S. E. Oldham, Clerk."

And thereupon the court overruled said motion of plaintiff, to which action of the court the plaintiff then and there excepted, and his exceptions were allowed and noted, and plaintiff prayed a writ of error therefrom to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, La., which was granted by the court upon plaintiff executing cost bond for the same, conditioned and payable as required by law, in the sum of $500, and was granted 90 days in which to prepare and file herein his bill of exceptions and assignments of error; said order being in words and figures as follows:

"C. S. Gladden, Plaintiff, v. Gabbert and Moore, Defendants.

"This cause came on this day to be heard on the motion of the plaintiff to set aside the verdict of the jury and judgment of court rendered thereon in this case, and to grant him a new trial; and the court, after fully considering the same, doth order and adjudge that said motion be and the same is hereby overruled and denied. To the foregoing order of the court, the plaintiff in open court excepted, and prayed a writ of error therefrom to the United States Circuit Court of Appeals for the Fifth Judicial District, at New Orleans, La., and which is here granted by the court, upon the plaintiff executing cost bond for same in the sum of five hundred ($500.00) dollars, conditioned and payable as required by law, and on application of plaintiff in open court he is granted and given ninety days from this term of this court in which to prepare and file herein his bill of exceptions in this case, and his assignment of error on said writ of error, and the same, when prepared and filed within that time, is to be taken and considered as if now filed.

"And it further appearing to the court that all the original maps and plats introduced as evidence in this case are difficult and intricate to copy, and the wood exhibits of surveyors' marks taken from trees, introduced and filed as evidence in this case, cannot be copied, and that all of said exhibits are material evidence in the determination of this case, it is further ordered that said original maps, plats, and wood exhibits be forwarded with the transcript of the record in this case to said Circuit Court of Appeals as a part thereof, without attempting to copy the same therein.

"And to all of said action of the court in overruling plaintiff's motion to arrest the judgment in this case in favor of the defendants, and to set aside said judgment and the verdict of the jury, and to grant a new trial, and to the action of the court in overruling each one and all of the grounds set up in said motion to arrest said judgment and set same aside and grant a new trial, the plaintiff then and there in open court excepted, and his said exceptions were allowed and noted; and he tenders this bill of exceptions, setting forth all of the same, and asks that the same be signed and sealed and made a part of the record in this case.

"And all of which is accordingly done, this the 8th day of February, 1913.

"H. C. Niles, Judge."

This statement of the case shows that there was no request to the court on the trial of the case to instruct a verdict for the plaintiff,

nor any exceptions taken to any of the rulings of the court during the trial; and it was only some two months later, after a motion for a new trial was overruled, that exceptions were taken to the rulings of the court, and then only to the errors of the court in overruling the plaintiff's motion to arrest and set aside the judgment and grant a new trial.

[1] Considering now the assignments of error insisted upon, we premise by saying that the motion presented to the court below, the overruling of which was excepted to, though denominated in the first assignment of error and pressed in argument as a "motion in arrest of judgment," was purely and simply a motion for a new trial, and it is well settled that motions for a new trial are addressed to the sound discretion of the trial judge, and his ruling thereon is not reviewable on writ of error, and we find nothing in this record to take this case out of the rule.

As to the objection that the verdict was contrary to and unsupported by the evidence, we find that there was evidence on the part of the defendant, admitted without objection, which, given full credence, warranted the verdict returned by the jury.

[2] Whether or not the jury ignored the special instructions of the court was a matter wholly for the consideration of the trial judge, who gave the instructions, and we cannot on this writ of error presume that the trial judge, having power in the premises, would permit a verdict to stand that was in clear violation of his instructions.

[3] The second assignment of error is to the effect that the judge erred in not reading to the jury the special instructions given by him, and in not delivering the same orally, to all of which a sufficient answer is that whatever the court did in the premises was not at the time, nor before the jury retired, objected to by either party, and therefore is to be presumed to have been all that the law required in the case.

On the record we find no reversible error, and the judgment of the District Court is affirmed.

OAK GROVE CONST. CO. v. JEFFERSON COUNTY.

(Circuit Court of Appeals, Sixth Circuit. February 2, 1915.)

No. 2526.

1. COURTS ⇐312 — FEDERAL COURTS — JURISDICTION — ASSIGNED CLAIMS — "CONTENTS OF CHOSE IN ACTION."

Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (Comp. St. 1913, § 991 [1]), provides that federal courts shall not entertain a suit to recover the contents of any chose in action in favor of any assignee, unless the same suit might have been there brought by the assignor. *Held*, that the prohibition involved in the clause "contents of a chose in action" was one against a suit on an assigned right of action, and hence the act did not apply to an action by an Alabama corporation on a Tennessee contract to perform certain public work for defendant, a Tennessee county, which contract was assigned to the corporation by a Tennessee partnership, with which it was origi-

nally made, to recover on disputed items all accruing subsequent to the assignment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–875; Dec. Dig. ⊂⊃312.

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

2. NOVATION ⊂⊃5—CONTRACT FOR PUBLIC WORK—ASSIGNMENT.
Where, on the letting of a contract by a county for the doing of certain public work, the county took a bond from the contractors as required, and after they had assigned the contract to a foreign corporation, the county, though acquiescing in the assignment, did not require a bond from it, there was no novation, nor release of the partnership from liability, or intent on the part of the county to accept the corporation's promise to perform in substitution.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 5; Dec. Dig. ⊂⊃5.]

3. COUNTIES ⊂⊃126½, New, vol. 20 Key-No. Series—CONTRACTS ASSIGNABLE—PUBLIC WORK—ASSIGNMENT TO FOREIGN CORPORATION.
A contract between a county and contractors for certain public work, executed in Tennessee, did not involve personal trust or confidence, and was assignable by the contractors to a foreign corporation under Shannon's Code Tenn. § 3516, providing that contracts generally are assignable, etc.

4. COUNTIES ⊂⊃126½, New, vol. 20 Key-No. Series—CONTRACTS—ASSIGNABILITY—ESTOPPEL.
Where, after a contract for public work between a county and a partnership, had been assigned by the latter to a foreign corporation, the county with knowledge of the assignment made no objection for three years to performance by the corporation, but accepted its work, and thereafter made no counterclaim against the assignors, and they claimed nothing against the county, it was too late for the latter, when sued for work and materials under the contract, to deny that the assignment took the full effect necessary to support the action, and this, though the contract forbade subletting without the written consent of the county.

5. COUNTIES ⊂⊃49—CONTRACTS—ACQUIESCENCE—MODE.
Acquiescence by a county in an assignment of a contract for public work by contractors was available, though not made by the full board of county commissioners at a formal meeting assembled.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 56–60; Dec. Dig. ⊂⊃49.]

6. COUNTIES ⊂⊃125 — ASSIGNMENT OF CONTRACT — INSUFFICIENCY — IMPLIED CONTRACT.
Where an assignee of a county construction contract was not entitled to recover on the contract because of alleged insufficiency of the assignment, but it was within the power of the county's board of commissioners to make a completely valid and binding contract with the assignee for the work, and for more than three years the county's commissioners, with knowledge that plaintiff was performing the work, acquiesced therein, plaintiff, if unable to recover on the express contract, could recover for work and materials under an implied one.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 186; Dec. Dig. ⊂⊃125.]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by the Oak Grove Construction Company against Jefferson County. From a judgment for defendant, plaintiff brings error. Reversed and remanded.

L. D. Smith, of Knoxville, Tenn., for plaintiff in error.
W. R. Turner, of Knoxville, Tenn., for defendant in error.

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

DENISON, Circuit Judge. The county of Jefferson, in 1906, after due preliminaries, let a road construction and improvement contract to five men associated as a partnership as "Oak Grove Construction Company." Very soon afterwards, and before much construction work was done, these associates organized an Alabama corporation, named "The Oak Grove Construction Company" (the plaintiff), and assigned to it their contract. The work was continued by plaintiff about three years, and the county paid plaintiff, on estimates, from time to time, the greater part of the expense of the work. At the end, plaintiff brought this suit to recover a balance of several thousand dollars, all made up of disputed items, and all having accrued on account of its materials furnished and work done long after the assignment. Under these circumstances, it is said that the trial court had no jurisdiction, because the suit was brought upon an assigned contract, and the assignors were citizens of the same state with defendant.

[1] The provision of section 1 of the act of 1887 as amended by Act Aug. 13, 1888 (25 Stat. 433), to the effect that the federal courts shall not entertain a suit to recover the contents of any chose in action in favor of any assignee, unless the same suit might have been there brought by the assignor does not, in our judgment, apply to this case. The ambiguity inherent in the phrase "recover the contents of a chose in action" has been cleared by deciding that the prohibition is one against suit upon an assigned right of action. Shoecraft v. Bloxham, 124 U. S. 730, 735, 8 Sup. Ct. 686, 31 L. Ed. 574; Kolze v. Hoadley, 200 U. S. 76, 82, 26 Sup. Ct. 220, 50 L. Ed. 377. And see Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 58 L. Ed. —— (Jan. 5, 1915). Since in this case the court below directed a verdict for the county, we must assume, for the purposes of this review, whatever facts plaintiff's testimony tended to show. From this point of view, it is clear that the suit is not brought upon an assigned right of action. The assignors never had any right to bring a suit to recover either the agreed price or the reasonable value of the materials furnished and work done by plaintiff. The right of action originally accrued to the plaintiff, it never existed until plaintiff parted with these considerations, and thereupon it vested in plaintiff and vested nowhere else. As was said in Paige v. Rochester (C. C.) 137 Fed. 663, 665, plaintiff's "cause of action does not depend upon the assignment of a chose in action to him, but upon the assignment of a right to him by which, by performance, he acquired a chose in action to himself."

There is no substantial distinction between the present case and American Co. v. Continental Co., 188 U. S. 104, 23 Sup. Ct. 265, 47 L. Ed. 404, in which an assignee of a contract sued the other original party with reference to a breach which occurred after the contract had been assigned, and such a suit was held not within the prohibition. True, there had been, in that case, a greater degree of substi-

tution and release of the assignor than our subsequent discussion herein of the subject of novation indicates to be essential to the maintenance of this action; but the opinion of the Supreme Court expressly denies the importance of substitution. The result is placed upon the arising of a new contract between defendant and assignee. The same character of new contract is alleged and (by tendency) proved here—the kind which comes from the transfer of an assignable contract and subsequent continuing performance by the assignee, and the other party's acceptance and recognition of the assignee as one entitled to perform and to receive performance. The present case is also well within the principle of Superior City v. Ripley, 138 U. S. 93, 96, 97, 11 Sup. Ct. 288, 34 L. Ed. 914, which has been applied to circumstances analogous to those here involved (Seymour v. Farmers' Co. [C. C. A. 7] 128 Fed. 907, 63 C. C. A. 633) as well as to the converse situation (Eau Claire v. Payson [C. C. A. 7] 109 Fed. 676, 48 C. C. A. 608).

Plant Co. v. Jacksonville Co., 152 U. S. 71, 72, 14 Sup. Ct. 483, 38 L. Ed. 358, is not inconsistent with the view we adopt. A railroad company, being by contract entitled to a specific consideration for constructing its road, employed the Plant Company to build the railroad, and the Plant Company did this work for the railroad. Then the railroad assigned to the Plant Company the railroad's right to recover the consideration, and it was held that the situation was governed by the prohibition against suits by an assignee; but the distinction between that case and this is obvious. To make the cases parallel, it would have to be supposed that in this case the partnership employed the corporation to do the construction work as the agent of the partnership, and that theory is urged by defendant as a proper inference from the facts; but it is not the theory upon which this review must depend. Plaintiff's testimony tended to show the other theory which we have stated.

Corbin v. Black Hawk, 105 U. S. 659, 26 L. Ed. 1136, is also clearly distinguishable. That suit was to enforce specific performance of a promise made to plaintiff's assignor, the contract was still executory on both sides, and an inseparable part of the right sued for had fully accrued before the assignment, and passed thereby. We conclude that neither upon the demurrer nor upon the motion to instruct was the defendant entitled to prevail on the jurisdictional question.

[2] The trial court put its final action upon the ground that a novation as between the first parties and the later parties was necessary, and that this did not sufficiently appear. If by novation is meant complete substitution, whereby the corporation took for all purposes the place of the partnership and the partnership was released from all liability under the contract, we agree with the trial court that this did not appear. The law requires the county to take a bond from the contractors. This was done when the contract was let to the partnership; but no such bond was required of the corporation, nor was its propriety suggested. This circumstance alone—although it is aided by others—makes clear that there could have been no purpose to release the partnership from its liability, and to accept, in substitution, the promise of the corporation.

This conclusion of fact causes the record to present the question whether, lacking such novation, plaintiff may nevertheless recover; and the nature of the real inquiry here is shown by reciting the situation. There is no attempt to compel the county to perform an executory contract, nor to accept continuing performance from an unsatisfactory assignee. It is not asked to assume any continuing relations with an assignee. Whether the assignors were released from their obligations is not practically important, because those obligations have been fully met, and the county, with all due formality, has accepted the work and acknowledged complete performance of the contract.[1] No resort to the contract terms is now proposed, save as a measure of compensation for some of the work. No claim under the contract is made by the assignors, and no double liability against the county is suggested. The county, with knowledge of the assignment, saw the assignee performing for three years, accepted performance, made partial payments to the assignee, fully accepted the whole work, but refuses to pay the balance due. Such a refusal must be supported by some imperative rule of law, before it can be justified.

[3] Support is sought in the proposition that the contract was not assignable by the partnership, unless with the consent of the county, accompanied by all formalities and conditions essential to make the contract valid in the first place; and this comes to saying that the contract was not assignable at all, for to require the completely formal execution of a new contract is to deny that the assignment was operative. The original contract was one made in pursuance of Tennessee statutes, the question has to do with the rights, powers, and liabilities of a Tennessee municipal corporation, and pertinent Tennessee decisions must be followed. By statute in that state (Shannon's Code, § 3516), as interpreted by its decisions, contracts generally are assignable. We find nothing to indicate that the rule is any different from that recognized and applied in Arkansas Co. v. Belden Co., 127 U. S. 379, 387, 8 Sup. Ct. 1308, 32 L. Ed. 246, viz., that a contract is assignable unless its execution involves personal trust or confidence. In Smith v. Hubbard, 85 Tenn. 306, 312, 2 S. W. 569, it was held, in an opinion by Judge (later Mr. Justice) Lurton, that a contract of this precise character was assignable by the one who agreed to do the work, and that the assignee could bring suit thereon against the municipality. It is not clear that the work, which earned the money sued for, had been performed by the assignee, though that seems probable; but, in any event, the generally assignable character of such a contract is established. It is true that the case does not decide whether the municipality could have been compelled to accept performance from the assignee, though there are decisions to that effect. See cases cited in Arkansas v. Belden Co., supra, 127 U. S. at page 390, 8 Sup. Ct. 1308, 32 L. Ed. 246.

[4] Neither does it determine whether a recognition and acceptance of the assignee as the party performing is at all inconsistent with re-

[1] The proofs tended to show that the commissioners for the county actually went over the improvements with plaintiff's representatives, and actively recognized the carrying on and completion of the contract by plaintiff.

taining the full contract liability against the assignor. It has been held that there is no such inconsistency. See Devlin v. New York, 63 N. Y. 8, holding that the assignee has a right to perform, and this without releasing the assignor, followed in New England Co. v. Gilbert Co., 91 N. Y. 153, 167. Both of these questions are here academic. The contract was (for some purposes at least) assignable, and it was assigned. The county made no objection, but accepted the work from the assignee. No counterclaim against the assignors exists. The assignors claim nothing against the county. It is too late to deny that the assignment took the full effect necessary to support this action.

The same considerations make unimportant the fact that the contract forbade subletting, unless by the written consent of the county. Whether this prohibition against subletting extended to an entire assignment, and, if it did, whether this provision had been waived by the conduct of the county in other instances, are questions of no importance. In this instance the county has, in fact, acquiesced in the transfer and allowed the assignee to execute the contract. Upon this general subject, the comments of the Supreme Court in Cincinnati Co. v. Western Co., 152 U. S. 200, 202, 14 Sup. Ct. 523, 524 (38 L. Ed. 411) are highly pertinent:

"Upon this the defendant invokes the rule laid down in Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379 [8 Sup. Ct. 1308, 32 L. Ed. 246], and insists that the contract was of such a nature that it could not be assigned by the Gas Illuminating Company to plaintiff without the consent of defendant, which consent was positively refused. But that doctrine has no application under the circumstances of this case. Defendant could not accept these goods from the plaintiff, and then refuse to pay for them. It is immaterial whether there was an assignment from the Gas Illuminating Company to the plaintiff or not, or whether, if there was one, it was ever assented to by the defendant or not. When the defendant ordered the goods from the Gas Illuminating Company, and the plaintiff forwarded the goods upon that order, the defendant might have returned them, and declined to have any dealings with the plaintiff; but it could not accept the goods and use them, and then say it never ordered the goods from the plaintiff, never had any contract with it, and never assented to any assignment to the plaintiff of its contract with the Illuminating Company."

[5] We conclude that the plaintiff was entitled to go to the jury upon the theory of assignment, notice thereof to the county, acceptance or acquiescence by the county, and performance by plaintiff. Nor do we think that notice and acquiescence must be to or by the full board of commissioners in formal meeting assembled. Notice to the county and action or acquiescence by the county after notice are the things to be established, and the Supreme Court of Tennessee has held that notice to two commissioners, if not to one, of a similar board is enough. Smith v. Hubbard, supra, 85 Tenn. at page 313, 2 S. W. 569. And see Land Co. v. Jellico, 103 Tenn. 320, 322, 52 S. W. 995.

[6] The declaration contained also a count which is now said to state a case upon the theory of a contract, express or implied, to pay the reasonable value of the materials and labor which were furnished and received. The trial court thought this count insufficient to accomplish this purpose, and a motion to amend was denied, because made too late. We may well assume that the trial court was right in these respects; but, as the case is to be tried again and amendment may be

permitted, the merits of this question should be noticed. We have no doubt that, if the proofs were insufficient in the opinion of the jury to establish the requisite notice to the county or the acquiescence which has been discussed, they nevertheless tended to establish a liability as upon implied contract against the municipality to pay for what it had accepted and kept and is using. It is freely admitted that it was within the power of the board of commissioners to make a completely valid and binding contract with the plaintiff for all this road work. The objection is that the power was not properly exercised; and, in that class of cases, the Supreme Court of the United States has repeatedly declared and enforced the municipal liability. Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659. This court recently had occasion to state the same rule and the exceptions to it. Eaton v. Shiawassee County, 218 Fed. 588, 134 C. C. A. 316, filed December 8, 1914. The Tennessee decisions are fully and clearly to the same effect. Madison County v. Gibbs, 9 Lea (Tenn.) 383, 386; Land Co. v. Jellico, supra; Rhea Co. v. Sneed, 105 Tenn. 581, 584, 58 S. W. 1063. Defendant cannot deny that plaintiff may sue under the contract, and thus defeat the action as one on express contract, and, at the same time insist that plaintiff was acting pursuant to an express contract, and thus defeat the claim to recover under an implied contract.

It is doubtless unnecessary to repeat that we have taken as facts everything which plaintiff's evidence tended to show, and that we intend to intimate no opinion as to whether the jury ought to draw the inferences which these assumptions involve.

The judgment below is reversed, with costs, and the case remanded for a new trial.

WELTY v. REED.

(Circuit Court of Appeals, Eighth Circuit. February 3, 1915.)

No. 4057.

1. INDIANS ⟸15—INDIAN LANDS—CREEK AGREEMENT—SALE OF ALLOTMENTS—FIVE-YEAR RESTRICTION—APPLICATION.

The five-year restriction on conveyances of land allotted under Creek Agreement (Act June 30, 1902, c. 1323, 32 Stat. 500), as provided by section 16, applies only to allotments made to living Creek citizens in their own right, and not to those made on behalf of deceased members of the tribe.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. ⟸15.]

2. INDIANS ⟸15 — INDIAN LANDS — ALLOTMENT — CREEK AGREEMENT — RESTRICTIONS ON ALIENATION—RIGHT OF ALLOTTEE.

Land was allotted to K., a full-blood Creek Indian, by the Commission under Curtis Act June 28, 1898, c. 517, 30 Stat. 495. Thereafter the Original Creek Agreement was adopted by Act Cong. March 1, 1901, c. 676, 31 Stat. 861, which became effective by ratification by the Creek Nation May 25th following. K. died April 6, 1901, and patents were issued to his heirs under section 6 of the Agreement, providing that all allotments made to Creek citizens by the Commission prior to the ratification of the Agreement were confirmed, and the same, as to appraisement and all things else, should be governed by the provisions of the Agreement, etc.

Held that, there being nothing in the Agreement suggesting necessity for reallotment on the death of the allottee, K., by such allotment, acquired an estate in the land which was inheritable; and hence his heirs, though the patent was issued to them direct, held by reason of their right of inheritance from him, and not as original allottees by virtue of being heirs of a Creek citizen, and the land was subject to the five-year restriction against alienation, except with the approval of the Secretary of the Interior, as provided by Supplemental Creek Agreement (Act June 30, 1902, c. 1323, 32 Stat. 500) § 16.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. ⟸15.]

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

Action by Andrew Reed against Edwin A. Welty. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 197 Fed. 419.

George S. Ramsey, of Muskogee, Okl. (Robert J. Boone, of Tulsa, Okl., and S. H. Lattimore and C. L. Thomas, both of Muskogee, Okl., on the brief), for appellant.

A. N. Frost, of Muskogee, Okl., and Robert Hardison, of Greenville, Ky., Sp. Asst. Attys. Gen., and James B. Diggs, of Tulsa, Okl., amici curiæ.

Lewis C. Lawson, of Holdenville, Okl., for appellee.

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

HOOK, Circuit Judge. Reed sued Welty to quiet his title to land which had been allotted under laws relating to the Creek Nation of Indians. Both claimed under conveyances from heirs of Thomas Knight, a Creek citizen of the full blood.

[1] The question is whether the conveyance to Reed, not having been approved by the Secretary of the Interior, violated the restrictions against alienation imposed by section 16 of Act June 30, 1902, c. 1323 (32 Stat. 500), commonly called the Supplemental Creek Agreement. It was made less than five years from the time the Agreement became effective. So far as material, the section is as follows:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear. * * * The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void

and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

In Skelton v. Dill, 35 Sup. Ct. 60, 235 U. S. 206, 59 L. Ed. — (decided November 30, 1914), the Supreme Court held these restrictions applied only to allotments made to living Creek citizens in their own right, not to those made on behalf of deceased members of the tribe. Reed's original petition contained an averment that Thomas Knight died intestate before receiving his allotment, and after his death the land in controversy was allotted to his three children as his heirs. On demurrer the trial court held the pleading sufficient—that the restrictions against alienation did not apply. Reed v. Welty, 197 Fed. 419.

[2] This conclusion would be sustained by Skelton v. Dill; but afterwards Reed amended his petition and gave his case a different aspect. It appears from the amended petition that on May 18, 1900, while Thomas Knight was living, the Commission to the Five Civilized Tribes set the land in controversy aside to him as an allotment, that a certificate of allotment of that date was duly issued to him, that he died intestate April 6, 1901, leaving as his heirs three children, who were also on the rolls of Creek citizens of the full blood, and that patents were thereafter duly issued to them.

The allotment to Thomas Knight was made by the Commission under Act June 28, 1898, c. 517, 30 Stat. 495, known as the Curtis Act. This was followed by Act March 1, 1901, c. 676, 31 Stat. 861, commonly called the Original Creek Agreement, which was not to be effective until ratified by the Creek Nation. As already stated, Thomas Knight died April 6, 1901. On May 25, 1901, the Original Agreement was ratified by the Creek Nation and thereafter patents were issued to the heirs. Section 6 of this Agreement provides:

"All allotments made to Creek citizens by said Commission prior to the ratification of this Agreement * * * are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein. * * *"

According to the amended petition the patents were issued direct to the heirs of Thomas Knight without reallotment of the land to them. It may be observed that section 7 of the Original Agreement contained restrictions against alienation similar to those of section 16 of the Supplemental Agreement; also that under the Curtis Act the lands allotted were nontransferable until after full title was acquired.

It is contended on behalf of Reed, who prevailed below, that Thomas Knight was not an allottee within the meaning of section 16 above quoted, but that the land went direct to his heirs free from restrictions. It is urged that the allotment made to him under the Curtis Act gave merely an exclusive right of use and occupancy of the surface, and not a legal or equitable estate susceptible of inheritance at death; also that, as Thomas Knight died before the Original Creek Agreement became effective, the allotment to him, such as it was, lapsed, there being no such thing as an allotment to a dead person, and therefore in his case there was nothing to confirm by section 6 of that Agreement; and, finally, that the execution of deeds direct

to the children was equivalent to an allotment to them in his behalf. By the express terms of section 16 of the Supplemental Agreement the five-year restriction extended to the "allottee and his heirs." No exception was made of cases where heirs had also received or were entitled to allotments in their own right as citizens. It was quite probable that Creek citizens would secure by direct allotment to them and by inheritance from other allottees more land than needed, or that noncitizens might become owners by inheritance; but the acts of Congress contemplated that whatever hardship the restriction on alienation would cause in such cases should be corrected, if at all, by the Secretary of the Interior, who was authorized to relieve the restriction and approve conveyances. Though it might be clear that allottees should be allowed to sell inherited lands, the terms and conditions of sale by those not greatly competent in such affairs were manifestly important, and control and supervision were wisely vested in the Secretary, who could act according to the circumstances of each particular case. Thomas Knight received an allotment under the Curtis Act, and was therefore an allottee. His allotment was in the class affirmatively designated as "allotments" by the confirmatory section of the Original Agreement. When that Agreement took effect there were 10,000 or more of such allotments under the Curtis Act to approximately two-thirds of the total number of Creek citizens, covering the most thickly settled and improved lands of the Nation. They were none the less allotments, though the estate so evidenced did not embrace the underlying minerals added by the subsequent Agreement. There is nothing in that Agreement suggesting the need of a reallotment upon the death of an allottee.

We also think the estate or right of such an allottee was intended as inheritable. The plans for distribution of the Creek lands were the result of agreement between the government and the Creek Nation. Whatever power Congress might otherwise have exercised, it chose to make the matter the subject of convention with the Indians rather than of pure legislation, and in construing the Agreements regard should be had to the sense naturally conveyed to those principally to be affected. If under the Agreements mere unexercised rights to allotment of lands and moneys were descendible or inheritable (see section 28, Original Agreement, and sections 7 and 8, Supplemental Agreement), there is no difficulty about a right that has been exercised. An allotment to a Creek citizen under the Curtis Act gave an interest or estate that would descend to his heirs at his death. See Goat v. United States, 224 U. S. 458, 470, 32 Sup. Ct. 544, 56 L. Ed. 841. The subsequent patents to the heirs were a recognition of their inheritance of the allotted lands, not of an unexercised right. And that is the theory of the amended petition, though the argument was otherwise. After reciting the allotment to Thomas Knight, his death, the names of his heirs, the patents for the lands, etc., the pleading continues:

"Said lands passed to said heirs in equal parts under and by virtue of the Original Creek Treaty. * * *"

An argument is also made upon the provisions as to homesteads in section 16 of the Supplemental Agreement. The administrative con-

struction was that the limitation discharged upon default of children born after May 25, 1901, was the limitation specially applicable to homesteads, and not the general five-year restriction against alienation by the "allottee or his heirs." However this may be, no selection of a homestead of 40 acres out of the 160 allotted to Thomas Knight appears to have been made, and that fact cannot be employed to repeal the general restriction as to the entire allotment. In this particular the case is unlike Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834.

The decree is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

G. W. YOUNGS MINING CO. v. COURTNEY.

In re HURON MINING CO.

(Circuit Court of Appeals, Sixth Circuit. January 5, 1915.)

No. 2664.

1. LANDLORD AND TENANT ⊂=198 — RE-ENTRY BY LANDLORD — UNACCRUED RENTS.

A forfeiture and re-entry by the lessor under a lease between rental periods releases the lessee from liability for all rents not fully accrued.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 763; Dec. Dig. ⊂=198.]

2. MINES AND MINERALS ⊂=70—MINING LEASE—CONSTRUCTION—EFFECT OF FORFEITURE.

A lease of iron ore lands for mining purposes for 30 years required the payment of a tonnage royalty, with a minimum payment each year, payable quarterly. It also provided that, if in any year the minimum payment required from and paid by the lessee was more than the agreed royalty on the tonnage produced in that year, the ore so paid for and not removed might be removed without payment in any subsequent year, provided it was in excess of the tonnage required to produce the minimum royalty in that year. In some years the royalty paid by the lessee on the ore produced exceeded the required minimum, but in others the minimum which it paid was in excess of the royalty on the ore produced, so that it became entitled to remove ore without payment in subsequent years in case its production was sufficient. Seven years after the lease, default was made in a quarterly payment, and two days later the lessor served notice of forfeiture, pursuant to which it took possession of the property a few days after the bankruptcy of the lessee. It also claimed a lien under the contract on bankrupt's personal property for the royalty due. *Held* that, while bankrupt had not produced sufficient ore in the current year to entitle it to a set-off for the excess of royalties paid, it had a contingent right thereto, which would have been valuable, but for the arbitrary forfeiture of the lease, and which the court might properly consider when the lessor was asking equitable relief, in effect in aid of its forfeiture.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192–197; Dec. Dig. ⊂=70.]

3. MINES AND MINERALS ⊂=64—MINING LEASE—TRANSFER OF PROPERTY BY LESSEE—SALE OR LEASE.

Claimant, a lessee of iron ore lands which it was mining under a lease for 30 years, transferred all of its property, including its plant, machin-

ery, ore on hand, and leasehold interest, to bankrupt, in consideration of a cash payment and a further payment of a large royalty for 15 years, with a specified minimum payment each year, payable quarterly. After about 7 years there was default in a quarterly payment, and it at once gave notice of forfeiture and took possession of the property. *Held* that the contract between the parties was not merely a lease, but was an executory contract of sale, and that under the law of Michigan, having declared a forfeiture and terminated the contract for default in payment of an installment of the purchase price, claimant could not also recover such installment.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 181–184; Dec. Dig. ⟸64.]

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

In the matter of the Huron Mining Company, bankrupt; Joseph S. Courtney, trustee. The G. W. Youngs Mining Company appeals from an order of the District Court disallowing its claim for a lien. Affirmed.

The MacKinnon heirs owned lands supposed to contain iron ore. In August, 1905, they leased the premises to Youngs for exploration and working for the period of 30 years upon a royalty of 16 cents per ton with a minimum royalty of $2,000 per year, payable quarterly on January 20th, April 20th, July 20th and October 20th each year. The same year Youngs subleased the premises to the Youngs Company, which agreed to perform all the obligations of the lessee in the first lease, and, in addition, to pay Youngs a royalty of 9 cents per ton, with a minimum royalty of $1,000 per year, payable quarterly, as above. The next year, the Youngs Company sold its lease or subleased the same premises to the Huron Company, which agreed to make payments in amounts required by the first two leases, and also to pay the Youngs Company a royalty of 30 cents per ton, with a minimum royalty of $30,000 per year, payable quarterly, as above. During the three years, 1907–1909, the Huron Company mined and shipped more than 300,000 tons of ore, and paid to the three parties more than $99,000 which would have been the minimum royalty for the period. Each lease contained an agreement that if in any year the minimum payment, required from and made by the lessee, was more than the agreed royalty for the actual tonnage of that year, and "if in any one or more years more iron ore is thus paid for than is actually mined and removed in said year or years, then and in that event the iron ore so paid for and not removed may be removed in any subsequent year during the continuance of this lease without payment therefor, but such iron ore so permitted to be removed in any subsequent year in consideration of such prepayment must be in excess of the tonnage required" to amount to the agreed annual minimum. Obviously, if $30,000 was the separable and minimum annual royalty payable from the Huron Company to the Youngs Company, and the rate was 30 cents per ton, this required a minimum of 100,000 tons per year. If, however, the minimum royalty should be treated as one gross sum, $33,000, and the total royalty as 55 cents per ton, this required a minimum annual tonnage of 60,000. During each of the three years, 1910–1912, the Huron Company shipped more than 60,000 and less than 100,000 tons, paid to the MacKinnon heirs and to Youngs tonnage royalty in excess of their respective minima, and paid to the Youngs Company $30,000 each year. The result was that at the end of this three-year period, and after crediting to the Youngs Company 30 cents per ton on all ore shipped, it had paid the Youngs Company $8,586 not represented by such credit; in other words, it had, to this extent, paid for more ore than had actually been mined and removed, and was entitled to remove such ore in a subsequent year without payment therefor (of the 30-cent royalty to the Youngs Company), after it had, in the subsequent year, paid the agreed minimum. At the end of the third quarter of 1913, the tonnage shipped for that year was 44,000 (all shipped during that

quarter), while the minimum royalties to the three parties for the three quarters were $24,750. The Huron Company had paid the minimum for the three parties for each of the first two quarters, amounting to $16,500, and there remained unpaid the minimum for the third quarter, $8,250, of which $7,500 was due for the benefit of the Youngs Company, $250 for Youngs, and $500 for the MacKinnon heirs. On October 22d the Youngs Company gave the Huron Company the 60-day notice of forfeiture for nonpayment which was provided for in the lease between them. On December 17th, just before the 60 days expired, the Huron Company filed its voluntary petition in bankruptcy, and adjudication was made in due course. December 26th the Youngs Company served notice that the default had become absolute, and that it had taken "absolute, final, and unqualified possession of said property." The trustee in bankruptcy, in February, gave notice that he abandoned any right to continue the lease on behalf of the estate.

Thereupon the Youngs Company, pursuant to a paragraph of the lease which gave it, for unpaid royalty, a lien on all machinery and personal property on the premises, claimed to hold such property to secure its claim against the bankrupt for its minimum royalty or rental of $30,000 per year for the third and fourth quarters of 1913, and at the same rate computed for 1914 until the trustee's February abandonment. The trustee denied any such right. Finally it was agreed to let the trustee keep possession and to submit the whole controversy to the bankruptcy court. The Youngs Company filed its petition, and prayed that the amount due it be adjudicated, and its lien therefor confirmed and foreclosed. The trustee asked a judgment that there was no claim or lien, and an order directing him to sell the property free from lien. The District Court decreed that the Youngs Company had no valid claim, and ordered sale as prayed by the trustee. The Youngs Company appeals, but assigns no error on that part of the order which directed a sale free from lien.

N. C. Spencer, of Escanaba, Mich., and A. F. Dixon, of Stambaugh, Mich., for appellant.

J. E. Tracy, of Marquette, Mich., and S. H. Holding, of Cleveland, Ohio, for appellee.

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

DENISON, Circuit Judge (after stating the facts as above). 1. The contract involved is not free from ambiguity as to whether it contemplated a minimum annually of 60,000 or 100,000 tons. The construction put upon it by the parties clearly shows that they treated it as calling for the 100,000 minimum. We do not find it necessary to determine the question, but assume that the construction of the parties is the one which should be adopted.

[1] 2. The minimum royalty or the rental payable to the Youngs Company for the third quarter was due and payable October 20th; that for the fourth quarter would not be payable until January 20th. The Youngs Company's forfeiture and rescission became effective December 22d. Nothing was then due, excepting the payments for the third quarter; and the 30-cent royalty ($13,200) to the Youngs Company upon the ore taken out or carried away during the third quarter was less than the minimum royalty ($15,000) which had actually been paid to it on its own account for the first two quarters, and against which the Huron Company had taken out no ore. So there was nothing that would, on December 22d, give the 30-cent royalty for the last quarter any aspect, save that of a rental then partly accrued, but not due or payable. Under such circumstances the forfeiture and re-entry be-

tween rental periods forfeits every payment not fully earned. Speaking for the Circuit Court of Appeals of the Eighth Circuit, and citing authorities, Judge Sanborn said, in American Co. v. Pueblo Co., 150 Fed. 17, 30, 80 C. C. A. 97, 110 (9 L. R. A. [N. S.] 557, 10 Ann. Cas. 357):

"The termination of a lease during its term by surrender, by re-entry, or by eviction, without more, discharges the lessee from liability for rents that have not accrued, but leaves him liable for all the rents which have accrued and become due. * * * But a surrender, re-entry, or eviction between rent days, or at any time before the rent has fully accrued, releases the lessee from liability therefor, and defeats an action for its recovery."

And see Nicholson v. Munigle, 6 Allen (Mass.) 215.

The same principle applies here, if we consider this contract as a lease. There is nothing to indicate that the forfeiture, completed in December, was held open for the benefit of the trustee, or that his abandonment in February was operative to forfeit any existing right. It follows that neither the minimum for the last quarter of 1913 nor the fractional amount accruing in 1914 can survive the forfeiture; and the Youngs Company claim, prima facie provable, if the contract is one of lease, was $7,500, the third quarter's minimum.

[2] 3. The above-stated balance of $8,586, coming over from 1912, cannot operate to offset the $7,500 minimum rental for the third quarter of 1913. The error in assuming that it works such payment or offset comes from overlooking its contingent character. It did not represent ore which the Huron Company had paid for and was absolutely entitled to take in 1913, but only that which it was entitled to take in 1913, *if and after* it had taken, or at least paid for, the minimum for 1913; and this point never was actually reached, nor do we see that it was precipitated by the forfeiture in October and December, and so to be thought of as reached constructively.

4. Notwithstanding the conclusion of the next preceding paragraph, it is not to be doubted that the Huron Company had an equity, represented by this $8,586 advance payment. It stood for ore in the ground, which, judging from the average of the elapsed years of the term, the Huron Company would, sooner or later, become entitled to remove without payment; and this right was arbitrarily cut off and its maturity made impossible by the Youngs Company's election to forfeit the lease. The Youngs Company now seeks the aid of a court of equity to enforce a lien which, except for this forfeiture, might not have required enforcement; in other words, by its own action in forfeiting the lease, it has caused a loss or forfeiture of the Huron Company's contingent, but valuable, right to take free ore, and this contingent right, had it not been arbitrarily destroyed, might well have proved of value equal to the defaulted rental. Under familiar principles, the court will not be inclined to give its aid, even in this collateral way, to the enforcement of a penalty or forfeiture; but in the view we take of the case we do not need to decide whether this consideration alone would lead to the denial of the lien.

[3] 5. The contract here involved, and which we have so far for convenience called a lease, was of a peculiar and a mixed character. Its substantial result was to sell and assign the rights of the Youngs

Company as lessee under and pursuant to the two underlying leases. It conveyed all the existing assets of the so-called lessor, including ore, stock piles, mining machinery, accounts receivable, etc. It recited that it was for a consideration of $50,000 cash payment, in addition to the agreed future royalties, and in addition to the assumption and payment of $75,000 existing debts of the lessor. The total agreed royalty of 55 cents per ton is conceded to be a much higher royalty than had ever been paid in the district. Whenever 1,500,000 tons should have been mined, and the royalty thereon (which would be $450,000) should have been paid, the lessee's—or grantee's—obligations were ended, and it would hold the property for the remainder of the term free from royalties. As these payments were required to be at the rate of at least $30,000 per year, the rent—or royalties, or purchase price—would be paid in full in 15 years, and the remaining 14 years would be rent free. Assuming that the operations would be evenly distributed over the whole term, this would mean that each royalty payment of 30 cents per ton would operate, one-half as payment for what had been mined, and one-half in advance. Taking the whole transaction together, it was in effect a sale and assignment of the Youngs Company's leasehold rights and its entire business and assets for a total consideration of $575,000, $125,000 to be paid at once and $450,000 in equal annual installments for 15 years—or, perhaps, more rapidly—and the postponed payments, for security and for convenience, took the shape of royalties or rentals. While, for many purposes, the contract was one of lease, yet we cannot doubt that, in its general aspect, it was, at least equally, if not predominantly, an executory contract of sale.

It is settled law in Michigan that the vendor in an executory sale contract, exercising his contractual right of forfeiture for the vendee's nonperformance, cannot at the same time thus rescind the contract and also enforce its matured provisions. Specifically, it is held that such a vendor, either of real estate or personalty, who has forfeited the contract and taken back possession because the vendee failed to make a payment when it was due, cannot maintain an action to recover that payment. The cases as to personalty are reviewed and applied in Perkins v. Grobben, 116 Mich. 172, 74 N. W. 469, 39 L. R. A. 815, 72 Am. St. Rep. 512; and as to real estate Judge Christiancy said, in Goodspeed v. Dean, 12 Mich. 352:

"The plaintiff elected to treat the contract as void, and gave defendant a notice to quit. By this election we think he must be understood as having also relinquished his right to the amount then due upon the contract. He could not treat it as void in respect to the rights which it secured to the defendant and valid in respect to those which it secured to himself. Having declared it void as to the land, it was void also as to the payments which it had bound the defendant to make for the land. There was nothing, therefore, upon which plaintiff could base a right of action for either the principal or the interest which had become due upon it."

When we consider both this principle, with its necessary application to this case, and also the fact that to enforce and foreclose the lien would be, in some measure, aiding to enforce a forfeiture, as pointed out in paragraph 4 above, we are satisfied that the court rightfully dismissed the petition.

6. Whether the contract be regarded as a sale or a lease, the compensation promised to these underlying lessors, at the total rate of 25 cents per ton (and which, for the third quarter, amounted to about $9,500 above the minimum which the Huron Company had paid to them during the year), partakes of the character of a purchase price of items severed from the realty and carried away; and whether the right to recover such $9,500 was lost to these lessors by the forfeiture of the lease would present a question not within any issue here decided. There was no direct contract relationship between them and the Huron Company. The petition herein, filed by the Youngs Company, does not allege that there had been any novation, or that it was complaining for and in the interest of and in the right of these lessors. On the contrary, it alleges that it had paid to them their total royalty earned for the third quarter, whereby it was entitled in its own right to recover from the Huron Company this amount as well as its own royalty. It follows that whatever claim it has thus merged with its own and thus asserts on its own account must be treated as an integral part of its own claim. The unit of accounting is not the quarter, but the year; and we find that, during the year 1913, the total royalties earned at 55 cents per ton were $24,250, and that upon this the Huron Company had paid $16,500. The total amount of earned royalty unpaid was therefore less than the total minimum for the third quarter; and the controversy in the only aspect in which it can now be considered—as one between the Youngs Company and the Huron Company—thus appears to relate substantially to nothing except a minimum and unearned royalty, a pure rental, and is fully covered by what has been said.

7. At the hearing, the purchaser of the property at the sale which the trustee, before any appeal was taken, had made pursuant to the order, applied for a further bond which would protect him against damages arising because he had been enjoined from removing the property pending appeal. The motion suggested that the present bond running to the trustee would not protect the purchaser. Our disposition of the appeal makes it unnecessary to decide this motion. If it could have been presented long enough in advance of the hearing on the merits to permit an effective order for a further bond, it would have required decision.

The order appealed from is affirmed, with costs.

HENRY v. TACOMA RY. & POWER CO.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 9, 1915.)

No. 2453.

WITNESSES ⊂=369—BIAS—INTEREST IN RESULT.

Where a street car conductor contracts with his employer to reimburse it for any damages that his negligence may cause it, in an action against such railroad for personal injuries caused by the negligence of such conductor, plaintiff is entitled to show that through the above agreement the conductor has a direct interest to falsify his testimony regarding his part in the accident; there being a conflict between his testimony and the plaintiff's.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1187, 1188; Dec. Dig. ⊂=369.]

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

Action by M. G. Henry against the Tacoma Railway & Power Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Anthony M. Arntson, and T. W. Hammond, both of Tacoma, Wash., for plaintiff in error.

John A. Shackleford and F. D. Oakley, both of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action to recover damages for personal injuries alleged to have been sustained by the plaintiff in error by reason of the negligence of the defendant in error in operating one of its cars in the city of Tacoma. The verdict of the jury and the judgment based thereon being against the plaintiff, he has brought the case here by writ of error.

The bill of exceptions shows that on the trial he was a witness on his own behalf, and in describing the accident testified, among other things, that the car came and stopped to let on a number of passengers who were waiting for it; that the entrance to the car was in the center; that he stepped aside to permit a couple of ladies to precede him, and that as the last one stepped on he grasped the handhold of the car with his left hand, put one foot upon the step, reached with his right hand for the other handhold and had secured a light hold, when, without warning, the car started; that he was jerked off his feet, felt himself going, thought he was going under the rear trucks of the car; and that that was the last he knew of what happened.

One Mathieson was the conductor in charge of the car at the time of the accident, and there was also on the car a "student conductor" named Roberts. Mathieson testified on behalf of the defendant railroad company, and among other things as follows:

"About 12:15 o'clock he made the regular stop at Twenty-First street. There were no passengers to get on there. The car stopped 5 or 10 seconds,

he saw that everything was clear, and the student conductor gave the bell to go ahead. The car had gone about half its length, when a passenger swung on. 'He kind of slipped like, but, as near as I can remember, he grabbed the front handhold and kind of swung himself on. He kind of slipped back, and his side kind of struck up against the car, and he complained of hurting his wrist when he got on the car, and he said that we had started the car too quick. That is all I remember that was said.'"

The witness further testified that he was standing at the time just back of the center rail at the entrance to the car, and that when he first saw the plaintiff the latter was running alongside the car; that the car had gone, he should judge, about half its length, and was moving at the rate of 2½ to 3 miles an hour. It will be observed that between the above testimony of the plaintiff and that of the defendant's witness Mathieson there is a decided conflict in respect to how the accident happened.

Other inconsistencies in the testimony of the respective parties need not be referred to. Manifestly, if the plaintiff's version of the accident was true, the defendant company might have been held liable for the plaintiff's injury, and the verdict of the jury might have been in his favor; whereas, if it was true, as testified by Mathieson, that the plaintiff got on the car after it had started and was in motion, the verdict might well have been, as it was, in favor of the defendant company.

The credibility of the respective witnesses was, as a matter of course, for the jury, and, as bearing upon the credibility of the defendant's witness Mathieson, the plaintiff sought to recall him for further cross-examination, and to show by him that he had signed with the defendant company an agreement, similar to the defendant's Exhibit G, signed by the "student conductor," Roberts, which agreement is as follows:

"This agreement, made this 24th day of March, 1911, between Tacoma Railway & Power Company, a New Jersey corporation, hereinafter caller 'employer,' party of the first part, and J. W. Roberts, of Tacoma, Washington, hereinafter called 'employé,' party of the second part, witnesseth: That in consideration of the employer furnishing employment to the employé as a conductor—motorman—upon its street railway lines, the employé agrees as follows, to wit:

"I. That he will perform said service as conductor—motorman—faithfully and to the best of his ability, exercising his best care and judgment to avoid accidents.

"II. That he will reimburse the employer for all damages or injuries to, or caused by, the street car he is operating, wherein said damage or injury is due to the negligence of the employé, and in the event that said damage or injury arises from the concurring negligence of one or more other employés, then this employé agrees to reimburse the employer his proportionate share of the same.

"III. The employer, by its superintendent, shall be the sole judge of the extent of the damage or injury done, and shall also whose fault or negligence produced the same, and what the employé's proportionate share shall be in cases of the concurring negligence of several employés.

"IV. In the event that the negligence of the employé is found by the employer to have resulted in damage or injury, as aforesaid, then such damage or injury shall be paid to the employer in sums not exceeding ——— per cent. of the wages of the employé during each and every succeeding calendar month, said per cent. being deducted from the employé's wages as they accrue. In case the employé leaves the service of the employer before the amount of the aforesaid damage or injury shall have been fully paid to the employer, then the employer shall retain from the wages or other

moneys due the employé a sufficient sum to cover the balance due on said damage or injury.

"In witness whereof, the employer has caused this agreement to be executed by its officer thereunto duly authorized, and said employer has affixed his signature, the day and year first above written.

"Tacoma Railway & Power Company,
"By J. W. Roberts.

"Witnesses: George Hendry."

The action of the court in refusing to allow the plaintiff in the case to show that the witness Mathieson had a direct interest in the result of the trial was duly assigned for error, and constitutes such error as requires the reversal of the judgment; for, there being a direct conflict between the testimony of the plaintiff and that of Mathieson upon the vital point in the case, the plaintiff was certainly entitled to show that Mathieson, as well as himself, had a pecuniary interest in the result, to the end that the jury might correctly weigh the testimony of each.

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

In re JANAVITZ.

JANAVITZ v. ARBUTHNOT-STEPHENSON CO.

(Circuit Court of Appeals, Third Circuit. February 6, 1915.)

No. 1867.

1. BANKRUPTCY ⊂⊃409—DISCHARGE—FAILURE TO KEEP BOOKS.

One conducting a department store, whose bookkeeper left some months before the bankruptcy, after which no books at all were kept by which the condition of the business could be ascertained, may be properly held to intend the natural consequence of his acts to conceal the condition of the business, so as not to be entitled to discharge in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. ⊂⊃409.]

2. BANKRUPTCY ⊂⊃414—DISCHARGE—FAILURE TO KEEP BOOKS—EVIDENCE OF INTENT.

The testimony of the bankrupt and of his agent, who had charge of the business, that there was no intent to conceal the condition of the business by the failure to keep books, is admissible to refute the presumption of such an intent, but is not conclusive.

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

3. BANKRUPTCY ⊂⊃409 — DISCHARGE — FAILURE TO KEEP BOOKS — ACTS OF AGENT.

A bankrupt, who had intrusted the entire conduct of his business to an agent, may be denied a discharge because of the agent's failure to keep books with intent, in which the bankrupt did not participate, to conceal the condition of the business, since that is not a crime, but mere civil misconduct.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 739, 752–757; Dec. Dig. ⊂⊃409.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of bankruptcy proceedings against Max Janavitz. From an order refusing a motion for discharge, opposed by the Arbuthnot-Stephenson Company, the bankrupt appeals. Affirmed

Charles H. Sachs, of Pittsburgh, Pa., for appellant.
Alexander J. Barron, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This was a case of involuntary bankruptcy, begun by petition filed on July 5, 1912. A discharge was refused on two grounds: (1) Failure to keep proper books of account; and (2) fraudulently concealing assets. The special master and the District Judge sustained both objections, and the bankrupt has appealed.

The facts bearing upon the first objection are these:

Janavitz had formerly lived in Duquesne, and had been discharged in bankruptcy about 10 years before. Afterwards he carried on business in Monessen, either for himself or in partnership, finally opening a large department store in 1907 for his individual account. His wife, Rosa, always assisted her husband in his various enterprises. During the bankrupt's absence in Europe several years ago, he gave her a power of attorney (which he testified "is still in effect") to conduct the business as she thought best, including the right to hire and discharge subordinates. She was assisting him when he took sick in March, 1911, and thereafter she was practically in sole charge of the business, conducting the store, buying and selling goods, hiring and discharging clerks, and signing checks in her husband's name. After the petition was filed she furnished the data for the schedules. Her husband testified that after he returned from a hospital in January, 1912, he did not take full charge of the business, "but as much as I could I looked after the financial end of it and did the buying when I was able." In April, 1912, he fell desperately sick again, and (whether he was at home or in a sanitarium) he did not know what was being done until after the creditors' petition was filed. From January, 1907, to May 13, 1912, a capable bookkeeper had been in charge of the accounts and the cash. The books were carefully kept, so as to show the financial condition of the bankrupt at any time. But the bookkeeper asked for a larger salary, and after several months' delay—due apparently to her sense that increasing financial trouble made her continued service more than usually desirable—she went away. A substitute was provided as cashier, but she could not keep books, and from early in May there are practically no books or accounts. This is admitted, and indeed it is clear that for nearly 60 days it would have been impossible to ascertain the bankrupt's financial condition from the records of the business. The defense is made that the bankrupt's sickness and other troubles rendered his wife unable to do the work herself, or (as we understand) even to see that it was done by some other person.

Upon these facts, testified to before him, the master sustained the objection, finding that the conceded failure during two months to keep the required books was with intent to conceal the bankrupt's condition. Two questions are raised upon this appeal: (1) Would the foregoing facts justify the court in refusing a discharge to Rosa Janavitz, if she

herself were the bankrupt? and (2) if so, do these facts justify the court in holding the bankrupt liable for his wife's conduct?

[1, 2] Upon the first question the decided cases may not be altogether in harmony, but in our opinion, if Rosa were the bankrupt, she would be properly chargeable with intending the natural and probable consequences of her own acts and omissions. Re Hanna (C. C. A., 2d Cir.) 168 Fed. 238, 93 C. C. A. 452; Re Alvord (D. C.) 135 Fed. 236; Re Schachter (D. C.) 170 Fed. 683, and (we may be permitted to add) Re Goldich (D. C.) 164 Fed. 882. No doubt the testimony of Rosa and her husband was competent and relevant to refute the presumption, but it did not satisfy the master (who heard the witnesses) or the District Judge, and an examination of the record has not convinced us that their finding was wrong.

[3] This brings us to the second question: Under the facts proved, is the bankrupt chargeable with this disobedience of the act? Failure to keep satisfactory books is not a crime; it is merely civil misconduct, and we see no good reason why a bankrupt who intrusts his whole business to an agent should not be required to take the risk of his agent's conduct as in many other instances. The object of the statutory provision is to make it easy to ascertain the bankrupt's financial condition, and if the agent voluntarily disobeys this requirement the object is frustrated, and the principal may justly be visited with the consequences of his agent's misdoing. No doubt this rule may sometimes seem to operate harshly, but we think much of the attack upon it is influenced by the assumption that the conduct condemned by the act is criminal conduct, where the individual intention of the person charged is in most cases all-important. But we repeat that the intent now under examination is not to commit a crime, and should not be judged from that point of view. Principals are continually charged with serious liability for acts of their agents, even if they have forbidden the agents to do such acts, and the present situation is not as favorable as that. The agent here was in sole and complete control of the principal's business with his full consent, and we do not see how he can escape liability for her acts or omissions, when he certainly could not escape if she had been merely his bookkeeper.

It is not necessary to consider the objection that assets were fraudulently concealed.

The order appealed from is affirmed.

STEINFELDT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1915. Rehearing Denied March 9, 1915.)

No. 2444.

COMMERCE ⊂=31—FOREIGN COMMERCE—REGULATIONS—IMPORTATION OF OPIUM —CONSTITUTIONALITY OF STATUTE.

Act Feb. 9, 1909, c. 100, § 2, 35 Stat. 614 (Comp. St. 1913, § 8801), making punishable one who receives, conceals, buys, or sells opium prepared for smoking, knowing it to have been imported contrary to law, is a valid exercise of the power to regulate foreign commerce, since the acts therein prohibited encourage and induce the unlawful importation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 24; Dec. Dig. ⊂=31.]

In Error to the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

Max Steinfeldt was convicted of receiving and concealing opium prepared for smoking purposes, knowing it to have been unlawfully imported, and he brings error. Affirmed.

Bert Schlesinger and P. S. Ehrlich, both of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal.

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

GILBERT, Circuit Judge. The plaintiff in error was convicted under an indictment which charged him with receiving and concealing opium prepared for smoking purposes, knowing the same to have been imported into the United States contrary to law; the indictment having been brought under the last portion of section 2 of the Act of February 9, 1909 (35 Stats. at Large, 614, c. 100 [Comp. St. 1913, § 8801]). The plaintiff in error admits that the first portion of the section, which prohibits the importation of opium into the United States, is constitutional, but denies the constitutionality of the portion thereof under which he was indicted and convicted, and he contends, in effect, that the point at which opium unlawfully imported into the United States is transferred to the possession of another, is the disappearing point of the authority of the United States over the same, and that at that point the opium loses its identity as an article of foreign commerce, and becomes mixed with the taxable property of the state, and becomes subject to the police power of the state to regulate the public health, morals, and social welfare of the citizens of the state, and is no longer subject to federal authority.

The contention cannot be sustained. We may assume, as the plaintiff in error contends, that the act under consideration was passed under the authority of Congress to regulate commerce with foreign nations, and that it is an absolute prohibition of the importation of opium, and

is not the exercise of the authority of Congress to levy duties, imposts, and excises; but we find no ground for holding that the authority of Congress does not go the full extent of the legislative act in question. To receive or conceal opium after it is imported, and with knowledge of its illegal importation, is in effect to participate in the illegal importation. It is an act which encourages, induces, and supplements the act of the illegal importer. This is what the plaintiff in error did. Opium was found in his possession, and he knew that it had been imported contrary to law. In a similar case, Judge McPherson said that:

"The offender's possession of such opium within the territory of the United States—his possession of it elsewhere is not now in question—is sufficient evidence of guilt to justify a jury in convicting." United States v. Caminata (D. C.) 194 Fed. 903.

The act of February 9, 1909, is similar in its general provisions to section 3082 of the Revised Statutes (Comp. St. 1913, § 5785), which provides that one who "shall fraudulently or knowingly * * * receive, conceal," etc., "merchandise, contrary to law, * * * knowing the same to have been imported contrary to law, shall be" subject to fine, etc. Under that law it has been held that, where a defendant was found in possession of smuggled goods, it was incumbent upon him to explain his possession to the satisfaction of the jury, and that otherwise he would be found guilty. United States v. Fraser (C. C.) 42 Fed. 140; Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709. In the case last cited, Reagan was found guilty of receiving into his possession and concealing 40 head of cattle which had been smuggled into the United States fraudulently and knowingly and with intent to defraud the United States. Those cases are analogous to the case at bar, and the principle involved is the same.

The case is distinguishable from United States v. Gould, 25 Fed. Cas. 1375, and Keller v. United States, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066, cited by the plaintiff in error. In the first of those cases the indictment did not allege that the defendant held the slave knowing her to have been unlawfully imported, and although in the Keller Case it was held that the portion of Act February 20, 1907, c. 1134, § 3, 34 Stat. 898 (Comp. St. 1913, § 4247), which makes it a felony to harbor alien prostitutes, was unconstitutional as to one who harbored such a person without knowledge of her alienage or her unlawful coming into the United States, on the ground that such a regulation was matter within the police power reserved to the state, the distinction to be observed between that case and this is the fact that the harboring which was forbidden by law had nothing to do with the unlawful importation, was entirely dissociated therefrom, and was purely a regulation as to dealings by persons who, in the matter involved, were subject only to state regulation. The plaintiff in error cites, also, Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, and Zakonaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218; but we find nothing decided therein that is pertinent to the case at bar.

The judgment is affirmed.

PORTER v. ELLIS.

SAME v. TITUSVILLE FRUIT & FARM LANDS CO.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1915.)

Nos. 2676, 2677.

MASTER AND SERVANT ⊂=157—DUTY OF MASTER—WARNING—USE OF DANGEROUS SUBSTANCE.

An instruction by a master to an inexperienced servant to take dynamite caps and fuse and to explode dynamite charges therewith does not necessarily inform the servant of the danger from allowing sparks from the lighted fuse to come in contact with caps other than the one to which it was attached, and the master is liable for failing to give warning of such danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. ⊂=157.]

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Actions by Raymond L. Porter against E. W. Ellis and against the Titusville Fruit & Farm Lands Company. Judgment for the defendant in each action, and plaintiff brings error. Reversed and remanded.

Charles M. Cooper and Charles P. Cooper, both of Jacksonville, Fla. (J. J. G. Cooper, of Jacksonville, Fla., on the brief), for plaintiff in error.

A. W. Cockrell, Jr., and Alston Cockrell, both of Jacksonville, Fla., for defendants in error.

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

WALKER, Circuit Judge. The defendant in error in each of these cases is sought to be charged with the liability which one engaged in a dangerous occupation incurs by his negligent failure to inform his employé engaged therein of the dangers accompanying the task to which the latter is assigned, of which he remains in ignorance and suffers in consequence. Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464; Louisville, etc., Ry. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594. It may be conceded that the direction which the several counts of the amended complaint show was given to the plaintiff—to take certain fuse and dynamite caps of the defendant and with the same explode dynamite charges and blow up and remove certain designated trees—carried information that fire transmitted through the fuse to a dynamite cap and charge would cause a dangerous explosion. But it does not seem to a majority of the court that it can properly be said that to one unfamiliar with such things, as the plaintiff, whose regular employment was that of a first relief or assistant engineer of an excavator machine, was alleged to have been at the time he was hurt, this direction necessarily imparted information of the danger arising from the proximity to the lighted fuse of dynamite caps other than the one with reference to which the fuse was

placed and lighted, or made him aware of the necessity of caution in having such other caps far enough away to avoid the danger of their being exploded by sparks from the lighted fuse.

It is the opinion of the majority of the court that the averments of the several counts of the complaint, as it was amended, fairly negative knowledge on the part of the plaintiff of the last-mentioned danger, arising from the presence near him, when he lighted the fuse, of the other dynamite caps furnished to him, and show the existence of states of fact which charged the defendant with the duty of giving warning of that danger, which was one incident to the task to which the plaintiff was assigned, but was unknown to him, and that the defendant's failure to inform the plaintiff of the danger from that source was such negligence on its part as to charge it with liability. It requires a very hypercritical construction of the complaint to infer from its averments that the plaintiff realized that, at the place where he left them, the caps not intended to be exploded were likely to be set off by sparks from the fuse. An inexperienced person may be liable to expose himself unnecessarily to danger from the proximity of dynamite caps other than the one in connection with which a fuse is used, unless that danger is called to his attention and he is instructed how to avoid it. The averments of the complaint are to the effect that the plaintiff did incur such danger as a result of his ignorance of it and of the defendant's negligent failure to give him the needed information and instructions on the subject. The conclusion is that the complaint as amended was not subject to demurrer on any of the grounds assigned.

It follows that the judgment must be reversed, and the cause be remanded.

LIPMAN v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 4, 1915.)

No. 1921.

CONSPIRACY ⊂=21—INSTRUCTION—VENUE.

Where, in a prosecution of a bankrupt for conspiracy formed in Philadelphia to conceal assets from his trustee, no serious contention was made that the conspiracy was formed in New Jersey, and only one conspiracy was in question, though some of the acts that went to prove it were done in New Jersey and some in Pennsylvania, and the court's charge implied throughout that the criminal agreement must have been made in Philadelphia, to sustain a conviction, and no request for a special charge was made, it was not error to omit to charge that, before the jury could convict, they must find that the conspiracy took place in Pennsylvania.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 28, 29; Dec. Dig. ⊂=21.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Abe Lipman was convicted of conspiracy to conceal assets from his trustee in bankruptcy, and brings error. Affirmed.

Wm. T. Connor, of Philadelphia, Pa., for plaintiff in error.
Robert J. Sterrett, of Philadelphia, Pa., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

J. B. McPHERSON, Circuit Judge. The plaintiff in error and his sister were convicted of a conspiracy to conceal assets from his trustee in bankruptcy. The indictment charges that the conspiracy was formed in Philadelphia (where both defendants resided), setting out two overt acts: (1) The execution of a bill of sale by Lipman to his sister, "covering a large amount of dry goods and other merchandise which formed part of his assets"; and (2) the removal "to a store at Pleasantville, New Jersey, [of] large amounts of dry goods and other merchandise which had theretofore been at his store at 418 Market street" (Philadelphia).

The only complaint now made of the trial is because the District Judge did not tell the jury:

"That before they can convict it will be necessary for the conspiracy to have taken place within the jurisdiction of this court; that if the conspiracy took place in New Jersey then the verdict would have to be not guilty."

This is the language of the defendant's exception, and it is no doubt true that the charge does not give this precise instruction; but the reason probably is because no such instruction was needed. The charge implies throughout, and the trial proceeded upon the theory, that the criminal agreement was made in Philadelphia. Much of the four days was taken up with evidence about various acts bearing upon the question whether such an agreement was made in this city, and of these evidential acts the signing of a bill of sale in Atlantic City for the Pleasantville store was only one. Certainly an overt act would be committed in the Eastern District of Pennsylvania by fraudulently removing goods from that district to Pleasantville, and we do not understand that a serious contention was made that the conspiracy was formed in New Jersey. Only one conspiracy was in question, although some of the acts that went to prove it were no doubt done in New Jersey and some in Pennsylvania. We see no error in the instructions given by the learned judge. He was not asked to give any specific charge on this subject, and we are satisfied that the jury could not have been misled. The case of Roukous v. United States, 195 Fed. 353, 115 C. C. A. 255, is not in point.

The judgment is affirmed.

HARRY BROS. CO. v. YARYAN NAVAL STORES CO. et al.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1915. Rehearing Denied February 22, 1915.)

No. 2687.

APPEAL AND ERROR ⊂=5—FORM OF REMEDY—EQUITABLE PROCEEDINGS—PLEA OF INTERVENTION—DISMISSAL—JURISDICTION.

An order dismissing a plea of intervention in an equitable proceeding is reviewable by appeal only, and not by a writ of error; and when an attempt is made to have the same reviewed on writ of error, the Circuit Court of Appeals acquires no jurisdiction, though the parties may have consented thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8–21; Dec. Dig. ⊂=5.]

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

In an equitable proceeding, wherein the Yaryan Naval Stores Company and others were parties, the Harry Bros. Company intervened. From an order dismissing the plea of intervention, intervener brings error. Dismissed.

George S. Dodds, of Gulfport, Miss., for plaintiff in error.

Hanun Gardner, of Gulfport, Miss., for defendants in error.

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

PER CURIAM. The writ of error in this case challenges the correctness of the order, made by the District Court, dismissing the plea of intervention interposed by the Harry Bros. Company in an equitable proceeding therein pending. No question of jurisdiction has been raised, and on the argument counsel for the parties treated the questions discussed as properly here for adjudication.

The proper mode, however, of reviewing questions arising in equity causes is by appeal, and where that mode is not followed there is no jurisdiction in the appellate court. And this want of jurisdiction cannot be waived, nor can jurisdiction be conferred by consent of parties. Four Hundred and Forty Three Cans of Egg Product v. United States, 226 U. S. 172, 33 Sup. Ct. 50, 57 L. Ed. 174; Leo Lung On v. United States, 159 Fed. 125, 86 C. C. A. 513; United States v. Emholt, 105 U. S. 414, 26 L. Ed. 1077. See, also, United States v. Hudson, etc., Co., 200 Fed. 956, 119 C. C. A. 293.

The writ of error should therefore be dismissed; and it is so ordered.

COLLINS v. BOARD OF CONTROL OF LOUISIANA STATE PENITENTIARY et al.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1915.)

No. 2703.

HABEAS CORPUS ⟸113 — APPEAL — JURISDICTION — CONSTITUTIONAL QUESTIONS—APPELLATE COURT.

An order denying a writ of habeas corpus, issued on the only jurisdictional ground that petitioner was in custody in violation of the Constitution of the United States, is appealable direct to the Supreme Court under Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (Comp. St. 1913, § 1215), providing that appeals and writs of error may be taken from the District Courts direct to the Supreme Court in any case which involves the construction or application of the Constitution of the United States, and is not appealable to the Circuit Court of Appeals.

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

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

Habeas corpus, on petition of John L. Collins, to obtain his release from the Board of Control of the Louisiana State Penitentiary and others. From an order dismissing the writ, petitioner appeals. Dismissed.

John L. Collins, in pro. per.

R. G. Pleasant, Atty. Gen., of Louisiana, for appellees.

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

PER CURIAM. The petition for the writ of habeas corpus did not suggest the existence of any jurisdictional ground for the issuance of the writ, other than that the petitioner was "in custody in violation of the Constitution * * * of the United States." Rev. Stat. U. S. § 753 (Comp. St. 1913, § 1281). Appeals and writs of error may be taken from the District Courts direct to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States." Judicial Code U. S. § 238. The appellate jurisdiction of this court does not extend to cases "in which appeals and writs of error may be taken direct to the Supreme Court," as provided in the section above quoted. Judicial Code, § 128.

It follows that this court is without jurisdiction to review the ruling sought to be presented here for review, and that the appeal should be dismissed. Railroad Commission of Louisiana et al. v. Morgan's L. & T. R. & S. S. Co., 195 Fed. 66, 115 C. C. A. 127.

And it is so ordered.

STEWART v. DALLAM.

(Circuit Court of Appeals, Fifth Circuit. January 25, 1915. Rehearing Denied February 22, 1915.)

No. 2670.

1. EJECTMENT ⟸106—CONFLICTING EVIDENCE—QUESTIONS FOR JURY.
In ejectment, where plaintiff claimed under a paper title and also by adverse possession, and the evidence as to the paper title and the adverse possession was conflicting, the general charge requested by defendant was properly refused.
[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 307–310; Dec. Dig. ⟸106.]

2. APPEAL AND ERROR ⟸699—RECORD—MATTERS PRESENTED FOR REVIEW.
The refusal of requested instructions cannot be held error, where the charge given is not brought up by a bill of exceptions or otherwise.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928–2930; Dec. Dig. ⟸699.]

In Error to the District Court of the United States, for the Southern District of Florida; Rhydon M. Call, Judge.

Ejectment by William A. Dallam against Isaac A. Stewart. Judgment for plaintiff, and defendant brings error. Affirmed.

Isaac A. Stewart, of De Land, Fla., in pro. per.

A. H. King and Alston Cockrell, both of Jacksonville, Fla., for defendant in error.

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

PER CURIAM. This is a suit in ejectment, brought by the plaintiff below, defendant in error here, to recover some 698 acres of land in the state of Florida. The defendant pleaded not guilty, and from an adverse verdict has brought the case here for review upon 55 assignments of error.

We have examined the record in the light of the briefs and oral argument, and we find as follows:

1. That the pleas and objections to the jurisdiction of the trial court, whether based on want of proper parties, or because the case was one collusively brought, and made up for the purpose of conferring jurisdiction, were properly overruled.

2. That there was no reversible error in any of the rulings of the trial court in relation to the admission or rejection of evidence.

[1] 3. That there was no error in refusing the general charge requested by the defendant, as the plaintiff in the court below, not only claimed under a paper title, but also by adverse possession, and the evidence on both paper title and adverse possession was conflicting.

[2] 4. That as the charge of the trial judge given to the jury is not included in the bill of exceptions, nor otherwise found, we cannot hold that there was error in refusing any of the special charges requested by the defendant and refused by the court.

As we find no reversible error in the transcript, the judgment of the District Court is affirmed.

ZITTLOSEN MFG. CO. v. BOSS.

(Circuit Court of Appeals, Eighth Circuit. October 12, 1914.)

No. 4191.

1. PATENTS ⊜177—CONSTRUCTION—GENERAL AND SPECIFIC CLAIMS.
When a patent contains a general claim for a combination of certain mechanical elements and a specific claim for a combination of a specified form, composition, or construction of one of those elements with the other elements of the general claim, the legal presumption is that the two claims secure different combinations, and the general claim is not limited to the specified form, composition, or construction claimed in the specific claim, but protects the element and its mechanical equivalents, though in form, composition, or construction differing from that of the specific claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254; Dec. Dig. ⊜177.]

2. PATENTS ⊜235—INFRINGEMENT—CHANGE OF FORM OR COMPOSITION.
Mere changes of the form or composition of a device, or of some of the mechanical elements of a combination, will not avoid infringement, where the principle or mode of operation of the patented improvement or combination is adopted, unless the form or composition is the distinguishing characteristic of the invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. ⊜235.]

3. PATENTS ⊜328—ANTICIPATION—GRASS COLLECTOR FOR LAWN MOWERS.
The Boss patent, No. 1,039,355, for a grass collector for lawn mowers, is void for anticipation by patent No. 701,255, claim 2, to the same patentee.

4. TRADE-MARKS AND TRADE-NAMES ⊜71—UNFAIR COMPETITION—RIGHT TO PROTECTION.
While a geographical or descriptive name may not be exclusively appropriated as a trade-mark, yet a manufacturer, having adopted such a name as a designation for his goods, is entitled to be protected therein as against unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. ⊜71.]

5. TRADE-MARKS AND TRADE-NAMES ⊜71—UNFAIR COMPETITION.
Where complainant had extensively advertised and built up an extensive trade in its grass catchers for lawn mowers under the name of "Easy Emptying," the use of such designation by defendant in its catalogues and circulars for a different device, whereby purchasers were misled, *held* unfair competition, which entitled complainant to an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 82; Dec. Dig. ⊜71.

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by William Boss, doing business as the Specialty Manufacturing Company, against the Zittlosen Manufacturing Company. Decree for complainant, and defendant appeals. Modified.

Howard G. Cook, of St. Louis, Mo. (James E. Garstang, of St. Louis, Mo., on the brief), for appellant.

Frank A. Whiteley, of Minneapolis, Minn., for appellee.

Before SANBORN and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The appellee, plaintiff below, instituted this action to enjoin the appellant, defendant in the court below, from infringing his letters patent No. 701,255, issued May 27, 1902, No. 829,943, issued September 4, 1906, and No. 1,039,355, issued September 24, 1912, for improvements in grass catchers for lawn mowers, and also unfair competition of the trade-name "Easy Emptying."

The defendant, in its answer, denied that the plaintiff was the first original and sole inventor of the devices set forth in the letters patent, and that they had not been in public use in the United States for more than two years prior to the plaintiff's application for said letters patent. It then sets up a large number of patents previously granted, which it is claimed anticipated plaintiff's devices. It also pleads that said devices were not patentable, and the letters patent therefor are therefore void. It denies that the grass-catching devices made and sold by it were like or similar in kind to those set forth in plaintiff's letters patent, and therefore denies that it has infringed them. It denies that plaintiff ever adopted the use of the words "Easy Emptying" as a trademark for grass-catching devices for lawn mowers, or ever acquired any trade-mark valid in law in and to said words. It admits that it used the descriptive words "Easy Emptying" in its catalogues, circulars, and leaflets in connection with grass-catching devices, but only in connection with its corporate name and place of business clearly printed thereon, not only on the cover page, but on each and every page of said catalogues, circulars, pamphlets, and leaflets. It denies that it ever used the words "Easy Emptying" on grass-catching devices of its manufacture, and only used them in a descriptive sense; denies that their use under the circumstances stated has confused the purchasing public in the exercise of ordinary care, or persons who bought its devices, with those of plaintiff's manufacture, or that the public has in any wise been deceived or defrauded into purchasing its devices as and for those of plaintiff's manufacture. It also claims that the words "Easy Emptying" are not susceptible of exclusive appropriation as a trade-mark for grass-collecting devices, as they are wholly descriptive.

After a hearing the District Court adjudged all of the patents valid (of patent No. 1,039,355, claims 1, 2, and 4), and also found that the defendant had been guilty of unfair competition in its use of the descriptive words "Easy Emptying" in connection with the grass catchers for lawn mowers sold by it. An injunction was granted and a reference made for an accounting of the defendant's profits. The appeal is only to so much of the decree as relates to the findings of infringement of letters patent No. 1,039,355, and unfair competition in the use of the words "Easy Emptying." The validity of the other letters patent is conceded.

The devices of patent No. 1,039,355 are a grass-catching receptacle, removable or detachable from the lawn mower, having an upper and forward wire frame or structure with a metal bottom, and a handle secured to the upper wire frame in such a manner that it is connected at the sides and rear of such frame in substantially the same plane

therewith, which facilitates the nesting of several catchers, which, being supplied with canvas walls, are collapsible. A swinging wire hook is fastened to the center rear portion of the upper wire frame between the space portion of the handle at its rear connection with said frame, which hook is adapted to be hooked over the handle of the mower to support the rear end of the catcher when it is carried by the mower. When the catcher is filled with grass clippings, the operator releases the swinging wire hook from the mower handle, grasps the catcher handle with his hand, detaches the forward hooks from the brackets on the mower frame, carries the catcher by its handle to some selected place of discharge, and there empties the contents by dumping the same by means of the handle, after which he returns the catcher to the mower by engaging the forward hooks with the brackets on the mower frame and re-engaging the rear swinging wire hook over the mower handle.

The claims of plaintiff in his application, upon which the patent was finally granted, were as follows:

"1. The combination, with the lawn mower and its handle bar, of a grass receptacle removably supported at its front end upon a lawn mower, a handle for the receptacle consisting of wire portions formed with terminal hooks at its extreme ends having engagement respectively with the sides and rear of the receptacle and intermediately brought together to form a hand grip and a hook having swing support on the rear of the receptacle alongside the rear hook of the handle portion and detachably engaging the mower handle.

"2. In combination with the lawn mower and handle, a grass-catching receptacle having means at its front ends for detachably engaging with said lawn mower frame, a handle *13* extending from the rear of said lawn mower receptacle to the opposite sides thereof and having separated portions at its point of attachment to the rear side of said receptacle, and an arm having swing support upon said receptacle between said separated portions, for the purpose set forth."

Claim No. 3 is not inserted, as the court granted the injunction only for infringement of claims 1, 2, and 4.

"4. The combination, with a lawn mower and its handle bar, of a grass receptacle detachably supported at its front end upon the lawn mower, a handle for the receptacle consisting of wire portions centrally twisted together, the forward portions diverging forwardly and being formed with terminal hooks engaging the sides of the receptacle, and the rear portions being spaced apart and secured over the top member of the receptacle frame at the rear, and an arm having swing support upon the top member of the receptacle between the spaced wire portions and detachably engaging the handle bar of the mower."

The finding of infringement of the patent is not questioned by the defendant, its validity only being attacked. There are many patents which it is claimed anticipate this patent, but in view of the conclusions reached by the court it is only necessary to refer to plaintiff's earlier patent No. 701,255, issued May 27, 1902, on an application filed August 28, 1890. That was a pioneer patent for the combination with a lawn mower frame of a grass-catching receptacle supported by a wire frame detachably connected at its forward end to brackets on the frame of the lawn mower and a handle connected to the rear of the frame of the receptacle and to the sides of the frame thereof and detachably to the handle of the lawn mower frame. The claims of plaintiff's patent No. 1,039,355 are not for an improvement of the grass catcher, but for a new form of handle for the receptacle. Mr. Boss, the patentee, in his testimony said:

"In the spring of 1906 I found in a store in St. Paul a grass catcher offered for sale, having a long wooden handle like the one used on my first grass catchers. I immediately set about to improve this handle; conceived the idea of making a handle such as is shown in our No. 10 G schedule. This handle is composed of one piece of heavy wire bent double at its center, then bent again near the center, so as to hook over a top wire of the frame at the rear of the grass catcher. The wires were then brought forward—were formed and twisted so as to form a hand grip to be used in lifting and carrying the catcher. The wires were then bent outward, one to each side of the grass catcher; hooks were formed at the ends of the wire, which were closed down securely over the top wire of the frame at the side of the grass catcher. This made a very rigid handle, which balanced the carrier perfectly."

And on cross-examination, when asked the following question:

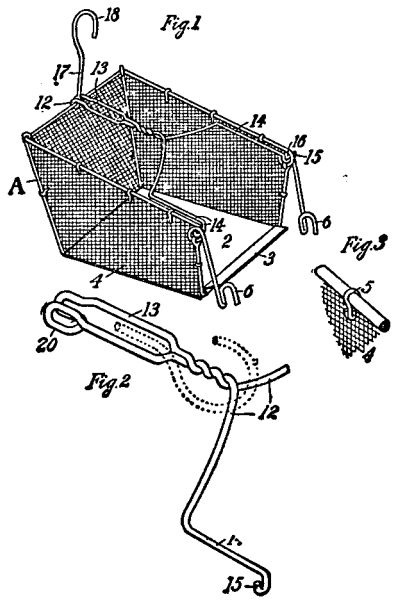
"As a matter of fact, after seeing the Hann Manufacturing Company long handle catcher in 1906, did it not instantly occur to you that you would carry those side wires back and hook them around the rear of the frame and get the same handle feature in a more compact form than in your long handle catcher?"

—his answer was:

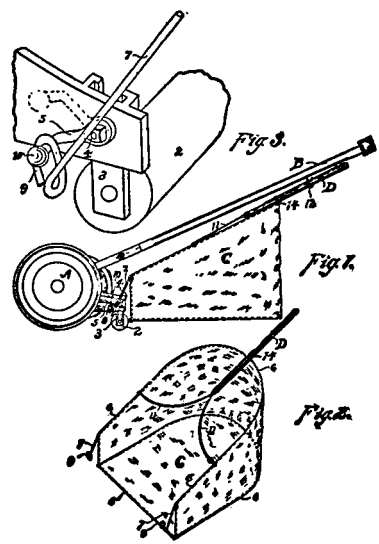
"Not immediately after I saw that handle. When I saw the handle, the question that came into my mind was what to do with the infringement, and how I could better the construction of my catcher. The result was the making of the short wire handle in the fall or winter of the year 1906, offering it to the trade the coming spring."

Under the plaintiff's patent, No. 701,255, the handle was straight, without any hook to fasten it to the lawn mower bar but was detachable, as is the device of the last patent. The illustrations of the two patents show the changes:

PATENT NO. 1,039,355



PATENT NO. 701,255



Therefore the claim for the last patent is the improvement of the handle, substituting the wire handle for the long handle and the wire hook.

Counsel for the appellant contends: (1) That the device disclosed by patent No. 1,039,355 is anticipated by patent No. 701,255; and (2) that the improvement claimed by the former patent was the product of mechanical skill and not of inventive genius. The first propostion cannot be sustained without reversing the third paragraph of the decree below, which reads:

"That said claims 2 and 3 of said patent No. 701,255 are specifically limited to a construction of grass-catching receptacle provided with a long wooden handle as illustrated in the drawings of said patent and described in the specification thereof"

—for the handle claimed in patent No. 1,039,355 has no long wooden handle.

The first question counsel for the appellant compels us to answer is whether or not the third paragraph of the decree is just and valid. Copies of the drawings of patent No. 701,255 appear above. They do not limit the claims of the patent to a long or to a wooden handle. There is no statement in the specification that the handle is necessarily either wooden or long. On the other hand, the specification declares that:

"'The receptacle *C* is provided with a suitable handle *D*, connected with the sides of the top of the frame wires *6* by diverging wires *11*, and is connected with the rear of the frame *6* by a rivet or other equivalent device *14*. As shown in Fig. 1, the handle *B* is removably connected with the handle of the mower by means of a hook *12*, carried by the handle of the mower and adapted to receive the handle of the grass receptacle."

And the inventor writes therein thus:

"I am aware that it is not new to provide lawn mowers with grass-collecting receptacles; but in my construction the receptacle is provided with a handle and removably supported from the handle of the mower."

The patent contains three claims, and the court below adjudged the second and third valid and infringed. They are:

"2. In combination with a lawn mower frame and handle, and brackets carried by the former, a grass-catching receptacle comprising a frame of wire whose front ends detachably engage said brackets, a handle connected to the rear of said frame, wires diverging from the front end of this handle and connected with the sides of the frame, and a hook on the lawn mower handle detachably engaging the handle of the frame.

"3. In combination with a lawn mower frame and handle, and brackets carried by the frame, a grass-catching receptacle, whose front ends detachably engage with said brackets, a straight handle rigidly secured to the rear of said receptacle, said handle projecting rearwardly parallel with the mower handle when the receptacle is in position, and a hook detachably supporting said receptacle handle underneath said mower handle."

The third claim is specifically limited to a combination of a straight handle projecting rearwardly parallel with the mower handle when the receptacle is in position, and of a hook detachably supporting that handle with the grass receptacle detachably connected with a lawn mower frame and the lawn mower frame itself, and it may be too narrow to anticipate the short handle and swinging hook of patent No.

1,039,355. But the second claim is broad and general. It covers the real invention of Boss, which was the combination of a lawn mower frame with a grass receptacle detachably connected therewith and a handle to the receptacle detachably connected with the handle of the lawn mower.

[1] When a patent contains a general claim for a combination of certain mechanical elements and a specific claim for a combination of a specified form, composition, or construction of one of those elements with the other elements of the general claim, the legal presumption is that the two claims secure different combinations, and the general claim is not limited to the specified form, composition, or construction claimed in the specific claim, but protects the element and its mechanical equivalents, though in form, composition, or construction differing from that of the specific claim. J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 267, 93 C. C. A. 561, 569; Risdon Iron & Locomotive Works v. Trent (C. C.) 92 Fed. 375, 378; Los Angeles Art Organ Co. v. Aeolian Co., 143 Fed. 880, 885, 75 C. C. A. 88, 93.

[2] Mere changes of the form or composition of a device or of some of the mechanical elements of a combination will not avoid infringement, where the principle or mode of operation of the patented improvement or combination is adopted, unless the form or composition is the distinguishing characteristic of the invention. Columbus Watch Co. v. Robbins, 64 Fed. 384, 396, 12 C. C. A. 174, 187; New Departure Bell Co. v. Bevin Bros. Mfg. Co. (C. C.) 64 Fed. 859; Machine Co. v. Murphy, 97 U. S. 120, 125, 24 L. Ed. 935; Winans v. Denmead, 15 How. 342, 14 L. Ed. 717; Robinson on Patents, § 141, p. 201; Blandy v. Griffith, 3 Fed. Cas. 678, No. 1,529; Bonnette Arc Lawn Sprinkler Co. v. Koehler, 82 Fed. 431, 27 C. C. A. 200; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 562, 106 Fed. 693, 711.

"If two devices do the same work in substantially the same way, and accomplish * * * the same result, they are the same, even though they differ in name, form, or shape." Machine Co. v. Murphy, 97 U. S. 120, 125 (24 L. Ed. 935).

[3] In the light of these established rules the short handles of the defendant and of the patent No. 1,039,355, with their different forms of hooks for detachably connecting the handles of the grass receptacles with the handles of the lawn mowers, when these handles are combined with lawn mowers and grass receptacles detachably connected to the lawn mowers, do the same work in substantially the same way and accomplish the same result as the combination described in patent No. 701,255. They appropriate the principle and use the mode of operation of the combination of that patent, and are therefore the mechanical equivalents thereof, and the conclusion is that the third paragraph of the decree is erroneous, that the second claim of patent No. 701,255 anticipates and renders void patent No. 1,039,355, and that the defendant's device infringes the anticipating patent.

This conclusion has not been reached without a consideration of the argument of counsel for the appellant that this court cannot lawfully determine the validity of the third paragraph of the decree on

this appeal, because the respondent has not appealed. But the contention of the appellant that patent No. 701,255 anticipates the improvement described in No. 1,039,355 invoked the consideration by this court and gave it jurisdiction of that question. Nor has the court overlooked the patent to Wildermuth, No. 607,899, or the other patents and devices disclosed by the record. But, as the court below correctly held, none of them anticipates the Boss patent No. 701,255 of May 27, 1902, or the combination there patented, because none of them that is prior to the invention of that combination contains or describes all its essential elements.

We turn, therefore, to the second question: Is the change of the handle as shown in the last patent a new invention which is patentable? In Wayne Mfg. v. Benbow-Brammer Mfg. Co., 168 Fed. 271, 277, 93 C. C. A. 573, 579, Judge Sanborn, speaking for this court, said:

"It is a familiar rule that the application of an old machine or device, found in an analogous art, without substantial modification, to a new use, is not invention, or patentable, where its applicability would occur to a person of ordinary mechanical skill."

That the device patented by plaintiff's last letters patent falls within this rule is clearly shown by the illustrations of the two patents. The patentee merely substituted in place of the wooden handle a short wire handle with a hook. The most that can be claimed by plaintiff for his last patent is that it produces better results by reason of the short handle; but the law is well settled that changes in degree, proportion of symmetry in a machine, where it does the same thing in the same way, and by substantially the same means, although it may produce better results, does not amount to a patentable invention. Torrey v. Hancock, 184 Fed. 61, 70, 107 C. C. A. 79.

It is also claimed that, in view of the fact that the lawn mowers under the last patent of plaintiff have gone into extensive use, this is evidence of its utility and the right to be patented. But such evidence would only be considered as evidence of invention in doubtful cases, and is not conclusive, and where there is no invention the extent of the use is immaterial. Boss Mfg. Co. v. Thomas, 182 Fed. 811, 105 C. C. A. 243, and authorities there cited. The fact that the handle in plaintiff's last patent is shorter than the one in the first, and therefore easier handled, and that it is made of wire, instead of other material, cannot be said to make it a patentable invention, as the difference is in minor matters only, such as would suggest themselves to a person possessing ordinary skill in the art. Ansonia Co. v. Electrical Supply Co., 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; Lovell Mfg. Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; Model Bottling Mach. Co. v. Anheuser-Busch Brewing Co., 190 Fed. 573, 111 C. C. A. 389. The changes, in our opinion, involve only mechanical skill, and not invention.

We are of the opinion that the device in this patent is not an invention which, under the law, entitles it to a patent.

[4] As to unfair competition, it is claimed on behalf of the defendant that, as the words "Easy Emptying" aptly describe the particular

characteristic of the plaintiff's device, they are descriptive, and therefore cannot be appropriated as a trade-mark. It is true, as held by this court in Trinidad Asphalt Co. v. Standard Paint Co., 163 Fed. 977, 979, 90 C. C. A. 195, affirmed 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, that no one can appropriate as a trade-mark a geographical or generic name, or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or, symbol which, from the nature of the fact it is used to signify, others may employ with equal truth. The same rule is recognized in Bristol Co. v. Graham, 199 Fed. 412, 117 C. C. A. 644. But, on the other hand, it is equally well settled that, if one palms off his manufactures as those of another, he may be enjoined, although he commits the fraud by the use of names which are not subject to trade-mark property. McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; French Republic v. Saratoga-Vichy Co., 191 U. S. 427, 435, 24 Sup. Ct. 145, 48 L. Ed. 247; Shaver v. Heller & Merz Co., 48 C. C. A. 48, 59, 108 Fed. 821, 823, 832, 65 L. R. A. 878; Buzby v. Davis, 150 Fed. 275, 277, 278, 80 C. C. A. 163, 165, 166, 10 Ann. Cas. 68; Peck Bros. & Co. v. Peck Bros. Co., 113 Fed. 291, 298, 51 C. C. A. 251, 258, 62 L. R. A. 81; Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 165 Fed. 413, 415, 91 C. C. A. 363, 365; Samson Cordage Works v. Puritan Cordage Mills, 211 Fed. 603, 608, 128 C. C. A. 203.

In the Elgin Watch Case it was held that:

"The manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those and other goods; and protection is accorded against unfair dealing, whether there be a technical trade-mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

In French Republic v. Saratoga-Vichy Co. it was said:

"True, the name is geographical; but geographical names often acquire a secondary signification, indicative, not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of palming off the productions of one person as those of another."

In Wolf Bros. Co. v. Hamilton-Brown Shoe Co. this court held:

"While it is true that a geographical name may not be exclusively appropriated as a trade-mark, yet a party, having adopted a geographical name as a designation of its goods, may be protected as against unfair trade. * * * In this case, while complainant is not entitled to relief upon the ground that the words 'The American Girl,' or the numeral applied to its several styles of shoes, are valid trade-marks, yet it is entitled to protection from their use by the defendant in a manner and under circumstances constituting unfair trade; the essential of the rule being that one person shall not, in the sale of his goods, so act as to lead the public to believe that they are the goods of another."

In Hole-Proof Hosiery Co. v. Wallach Bros., 172 Fed. 859, 97 C. C. A. 263, the same rule was applied to a descriptive word (hole-proof), not geographical.

[5] The record discloses that plaintiff has extensively advertised its grass catchers for lawn mowers under the name of "Easy Emptying" and has established a large demand for them; that the words have acquired a secondary meaning, indicating to the prospective purchaser that they are grass catchers manufactured by the plaintiff, apparently to their satisfaction; that the defendant, in its catalogues, circulars, and leaflets, called another device of that nature "Easy Emptying," thereby misleading purchasers into the belief that his grass catchers are the same as those made by plaintiff, and the court below so found.

It is also claimed by the defendant that it is not now, and has not for some time, been using this description. If this is true, the prohibition will do it no harm, and will no doubt be considered in the accounting.

The decree of the court below must accordingly be reversed, and the case must be remanded to that court, with instructions to render a decree in favor of the complainant below which shall contain paragraphs 1, 2, 4, 8, 9, 10, and 11, except that the words and figures "and No. 1,039,355" shall be omitted therefrom, and the word "and" shall be inserted before the figures "829,943" therein, and 12, which shall omit all the other paragraphs of the former decree, and shall contain a new paragraph to the effect that the device disclosed by claims 1, 2, and 4 of patent No. 1,039,355 is anticipated, as is that patent, by letters patent No. 701,255, and that the appellant pay four-sevenths and the appellee three-sevenths of the costs in this court.

And it is so ordered.

EDISON et al. v. ALSEN'S AMERICAN PORTLAND CEMENT WORKS.

(Circuit Court of Appeals, Second Circuit. December 15, 1914.)

No. 15.

PATENTS ⊂=328—INVENTION—CEMENT BURNING APPARATUS.

The Edison patent, No. 802,631, for an apparatus for burning Portland cement clinker, *held* void for lack of invention.

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

On appeal from a final decree of the District Court for the Southern District of New York, dismissing the bill in an infringement suit based upon letters patent No. 802,631, for an apparatus for burning Portland cement clinker, granted to Thomas A. Edison, October 24, 1905. The only claims now relied upon are 2, 5, 6, and 8. Claims 1, 7, and 11, which were relied on in the District Court, have been withdrawn. The opinion of the District Judge is reported in 208 Fed. 20.

Charles Neave, of New York City, for appellants.

Thomas F. Sheridan, of Chicago, Ill., J. Edgar Bull, of New York City, and Carl A. Richmond, of Chicago, Ill., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. At the time application was filed, December 5, 1902, Portland cement was produced by burning a mixture of cement, rock and limestone in long rotary kilns lined with fire-brick and maintained at a slight angle, the heat being produced by the combustion of pulverized coal. A stack was connected at the upper end of the kiln to permit the escape of smoke. These kilns for some years prior to 1902 had been of the standard length of about 60 feet with an internal diameter of about 5 feet. The patentee admits that longer kilns had been suggested for the dry process but he asserts:

"I am not aware that such kilns have been practically utilized or any advantages discovered therewith over the standard 60-foot kilns."

The specification contains seven pages of description, but it is thought that the only important improvement suggested or claimed is the lengthening of the kiln without proportionately increasing its diameter. This is the idea which is constantly asserting itself in the specification and the claims.

Claim 2 will sufficiently describe the alleged invention. It is as follows:

"A cement-burning apparatus for dry material, comprising a tubular kiln, upward of one hundred feet in length and more than twelve times the internal diameter thereof, means for rotating the same, means for creating a combustion zone within the kiln near its lower end, and means for introducing cement material into the kiln at its upper end, substantially as set forth."

The kiln must be upward of 100 feet in length and, as Judge Holt points out, a kiln half an inch more than 100 feet would infringe and a kiln half an inch less than 100 feet would not infringe. The record shows kilns in the prior art over 100 feet in length and, as before stated, the patentee admits that kilns over 60 feet have been suggested though he is "not aware that such kilns have been practically utilized."

There is a dispute on the facts regarding these prior kilns and therefore we find it unnecessary to discuss them for, in the view we take of the situation, it may be conceded that Edison was the first to make a kiln over one hundred feet in length. The question is, Did it require an exercise of the inventive faculties to do this. Was it not rather an improvement due to the natural evolution of the art? It was not an improvement which a poor man could attempt. The experiments and the structures necessary to make the experiments successfully would involve a considerable outlay of money which would make it impossible for him to test his theories, no matter how implicitly he might believe in them. The skilled mechanic, with years of experience and unlimited resources at his command, could make the experiments and enlarge the kiln to meet the increasing demand for Portland cement.

The great demand for this product in recent years, which has steadily increased, created the necessity for larger kilns. As this demand

grew, the kilns were increased in length from 15 feet by progressive additions until at the date of the patent there were many kilns 60 feet in length. No one pretended that it required invention to do this. It was a mere matter of construction. In the same way the stone crushers were made larger as the demand for good roads became insistent, the oil tanks increased in size with the increase of petroleum and elevator bins grew larger with the increased traffic in corn and wheat. We are not at all convinced that any better or different result is reached by the long kiln than by the short kiln. They both produce equally good cement and the only real difference is the one which occurs as a matter of course, viz., that a large machine will produce more product than a small one. But it did not require invention to make the machine longer or larger so long as the only result is to produce a larger output. As pointed out by the trial judge, if mere elongation be patentable, then each builder as he added an additional foot to the original 15-foot machine would have been entitled to a patent. But it is argued that a better result is obtained by the patented kiln because the increased distance from the upper end of the kiln down to the point of the combustion enabled the mixture in the calcining zone to be subjected to a longer application of heat, thus driving out the carbon dioxide before the combustion zone is reached. We agree with Judge Holt in thinking that the relative operation of these zones depends largely upon the method adopted by the operator. Judge Holt says:

"The evidence satisfies me that in kilns of all sizes whether the action in the calcining zone overlaps the action in the combustion zone depends very largely upon the operation of the kiln. The operator can introduce at will a longer or shorter blast; he can revolve the kiln more slowly or more rapidly; he can feed into the kiln a larger or smaller amount of cement material; and it depends largely upon the manner in which the kiln is operated whether the calcining process is substantially completed before the material is subjected to the heat in the combustion zone, and the best results obtained generally."

It is true that Edison made a longer step than any one person before him, but others were bound to reach the advanced position although more time might have elapsed before that consummation was reached.

In short, we are convinced that the enlargement of the kiln was sure to come sooner or later, as the growth of the business demanded. With the increase in length would come the proper increase in diameter and the other necessary changes which any skilled mechanic would know how to make. We find it unnecessary to add further to the opinion of the District Judge.

The decree is affirmed with costs.

ROESSING-ERNST CO. et al. v. COAL & COKE BY-PRODUCTS CO.

(Circuit Court of Appeals, Third Circuit. February 3, 1915.)

No. 1885.

PATENTS ⊜328—VALIDITY AND INFRINGEMENT—GAS-CLEANING PROCESS AND APPARATUS.

The Ernst patents, No. 896,365, for a gas cleaner apparatus, and No. 900,062, for a process for cleaning gases, *held* valid as against defendants, who are estopped to deny their validity, and also infringed.

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Suit in equity by the Coal & Coke By-Products Company against the Roessing-Ernst Company, Alfred Ernst, and the Best Manufacturing Company. Decree for complainant, and defendants appeal. Affirmed.

For opinion below, see 212 Fed. 434.

Charles M. Clarke, of Pittsburgh, Pa., for appellants.

Robert D. Totten, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from the decree of the District Court of the United States for the Western District of Pennsylvania in an action for infringement of letters patent No. 896,365, for a gas cleaner apparatus, dated August 18, 1908, and letters patent No. 900,062, for a process for cleaning gases, dated September 29, 1908, issued to Alfred Ernst.

The patentee assigned the patents in suit to the By-Products Company, and then organized and became president of the Roessing-Ernst Company, which engaged in the business of contracting for and installing by-product coke ovens in competition with the By-Products Company, in the progress of which the Roessing-Ernst Company contracted with the Best Manufacturing Company for the construction of an apparatus, supplying the requisite drawings and specifications therefor, which, like the apparatus subsequently manufactured, it is claimed, conformed to and embraced the essential features of the Ernst patents. These acts constitute the infringement charged. The District Court held the patents valid and infringed. 212 Fed. 434.

As the patents in suit were assigned to the complainant by Alfred Ernst, the patentee, it was not disputed that Ernst was estopped to deny the validity of the patents so assigned. The question whether the Roessing-Ernst Company was affected by the conduct of Ernst, its president, was submitted to this court on appeal from an order by the District Court granting a preliminary injunction (208 Fed. 990, 127 C. C. A. 394), and by this court it was decided that the same principle of estoppel applied under the facts of the case as well to the Roessing-Ernst Company as to Alfred Ernst, its president, and that it applied also to the Best Manufacturing Company, when defending an action charging infringement by the manufacture on the order of the Roessing-Ernst Company of the particular apparatus charged as an infringe-

ment, but not otherwise. There was thus presented the peculiar situation in which all three defendants were held to be estopped to deny the validity of the patents in an action charging the particular infringement mentioned, but one of the defendants, the Best Manufacturing Company, was left free in other suits to contest the validity of the patents when charged with infringement by building apparatus otherwise than upon an order from Ernst or from the Roessing-Ernst Company.

Although the court admitted evidence bearing upon the prior art "as anticipating or *limiting the scope of the patents in suit,*" and sustained the validity of the patents, and refused to restrict their claims to a scope which would permit the defendants to escape the charge of infringement, we assume that the District Court, having before it and appreciating the force of the decree of this court holding that each of the defendants was estopped to deny the validity of the patents, recognized that the defendants were not estopped to offer evidence of the prior art limiting the claims of the patents so as to avoid the charge of infringement. We therefore likewise assume that evidence of the prior art was offered and admitted not to avoid the patents, but to limit the scope thereof, and thereby to avoid the charge of infringement, and that after the court construed the patents in the light of the prior art, it found them infringed, and that the patents were held valid because of the legal incapacity of the defendants, under the ruling of this court in this particular case, to deny their validity. We therefore construe that the part of the decree of the District Court which holds the letters patent in suit to be valid is not an adjudication of the validity of the patents as in an action in which the defendants could raise that question, but is a finding of the validity of the patents as against the defendants, under the facts charged in this suit, thereby leaving the Best Manufacturing Company, under other circumstances, and all other persons not controlled by the principle of estoppel, free to raise the question of the validity of the patents in other actions.

With this understanding of the opinion, and this construction placed upon the decree of the District Court, we direct that it be affirmed, excepting that part which relates to claim 5 of letters patent No. 900,062. This claim was abandoned upon the argument on appeal.

ELLIOTT CO. v. ROBERTSON.

(District Court, W. D. Pennsylvania. January 23, 1915.)

No. 4.

1. PATENTS ⟸328—VALIDITY—ROTARY ENGINE.
   The McIntosh patent, No. 813,815, for a rotary engine, *held* void for anticipation and prior use.
2. PATENTS ⟸328—VALIDITY—ROTARY MOTOR.
   The Van Ormer patent, No. 969,010, for a rotary motor, *held* void for anticipation and prior use.
3. PATENTS ⟸328—INFRINGEMENT—TURBINE.
   The Elliott & Faber patent, No. 983,032, for a turbine, *held* to relate to a different art from the one involved in the suit, and therefore not infringed.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. PATENTS ⟸328—VALIDITY—ROTARY MOTOR.
The Elliott patent, No. 1,045,134, for a rotary motor, with respect to the air space at the rear end of the shaft and the vent leading therefrom claimed therein, *held* void for anticipation; also not infringed.

5. PATENTS ⟸328—VALIDITY—ROTARY MOTOR.
The Elliott, Mills & Holt patent, No. 1,019,771, for a rotary motor, as respects the air chamber and vent leading therefrom to the exhaust, *held* invalid for anticipation and lack of invention.

6. PATENTS ⟸328—VALIDITY—ROTARY MOTOR.
The Mills & Conn patent, No. 1,053,055, for a rotary motor, claim 10, covering the introduction of lubricant into the motor with the motor fluid, *held* void for anticipation.

In Equity. Suit by the Elliott Company against John F. Robertson, trading as the John F. Robertson Company. On final hearing. Decree for defendant.

Bakewell & Byrnes, of Pittsburgh, Pa., for plaintiff.
Gifford & Bull, of New York City, and Synnestvedt & Bradley, of Pittsburgh, Pa., for defendant.

ORR, District Judge. This patent suit is before the court for decision after trial. The plaintiff charges the defendant with the infringement of plaintiff's rights under six several patents, the title to all of which is conceded by defendant to be in the plaintiff. The several patents, with the number and date when issued by the United States, with the names of the patentees respectively, and the name of the apparatus to which each applies, is listed in the bill as follows:

No. 813,815, to R. S. McIntosh, February 27, 1906, for rotary engine.
No. 969,010, to H. Van Ormer, August 30, 1910, for rotary motor.
No. 983,032, to Elliott & Faber, January 31, 1911, for turbine.
No. 1,019,771, to Elliott, Mills & Holt, March 12, 1912 for rotary motor.
No. 1,045,134, to W. S. Elliott, November 26, 1912, for rotary motor.
No. 1,053,055, to Mills & Conn, February 11, 1913, for rotary motor.

All of said patents relate to apparatus especially adapted to removing scale from boiler tubes. The immediate factor in the removal of the scale is a cleaner head of some accepted form, which is fastened to a shaft extending through the motor, and which revolves with said shaft as said shaft is made to revolve by the operation of the motor. The shaft is made to operate by the pressure of air or steam, or some fluid forced through the end of the motor or turbine opposite to that to which the cleaner head is attached. In a turbine the motor fluid is pressed through a diaphragm, and in such way as to operate directly against a turbine wheel, thereby causing it to move with rapidity and force enough to move the shaft which is attached to the turbine wheel, which shaft is also the shaft to which the cleaner head is attached. In the rotary motors, the air or steam is forced along one side of a cylindrical chamber, which is concentric to the motor and concentric to the shaft to which the cleaner head is attached, and is forced into such piston chamber through ports from the inlet passage. The air forced thus into the piston chamber presses against a blade or blades extended

longitudinally therewith and inserted into longitudinal slots in the shaft in such way as to have a lateral movement as the shaft revolves, thereby causing the space in the cylinder around the shaft to be always divided into two or more longitudinal divisions. To relieve the pressure in the cylinder which would be constant if there were no exhaust, a longitudinal outlet is made from ports which extend from the cylinder. The inlet ports and the exhaust ports are less than 180° from each other in one direction. The pressure of the air or steam against a blade forces it and the shaft in the direction of least resistance until the blade passes the exhaust ports, and as it passes the exhaust ports that pressure is relieved, but a new pressure begins by another blade having reached the position where the pressure from the inlet ports continues the revolution of the shaft. Of course, there are bearings provided for the shaft and means by which the apparatus may be lubricated.

It is urged by the plaintiff that the six patents in suit represent successive steps in the attainment of the first successful rotary air motor. In the consideration of them severally, it will be unnecessary to dwell upon the particular elements of each claim involved. Many of the elements are found in earlier patents, but to emphasize the importance given them by the plaintiff it is well to notice the special features of each of the patents.

Patent No. 813,815, to McIntosh, embraces a longitudinally extending exhaust passage in the wall of the piston chamber.

No. 969,010, to Van Ormer, contemplates that the centers of the admission and exhaust ports leading from the respective passages should be less than 180° from each other, and that there should be one piston blade extending through the shaft.

No. 983,032, to Elliott & Faber, emphasizes a casing within which the other parts of the motor are contained and may be held against a rearward movement and from which the other parts may be removed rearwardly.

The next two patents have been designated as the vent hole patents. While No. 1,045,134, to Elliott, is the later patent, it was based upon an earlier application than patent No. 1,019,771, to Elliott, Mills & Holt. Both patents provide for an air chamber at the rear end of the piston shaft, and means for venting said space. The means for venting the space in the Elliott patent was an opening to the outside air. The means of venting in the other patent is by an opening from said space to the exhaust passage.

No. 1,053,055 embraces practically the same thing as the two patents last mentioned, with the addition of means for introducing lubricant into the motor chamber and causing the same to mix with the motor fluid, whereby some of the lubricant will be carried to the rear bearing by pressure leakage.

In the plaintiff's bill of particulars, as amended, it is found that the plaintiff relies upon the following claims of the several patents in suit:

Claim 2 of patent No. 813,815.

Claim 4 of patent No. 969,010.

Claims 35 and 36 of patent No. 983,032.

Claims 1, 2, 3, 4, 7, and 8 of patent No. 1,019,771.

Claims 1, 2, 3, 5, 6, 8, 9, 10, 11, and 16 of patent No. 1,045,134.
Claim 10 of patent No. 1,053,055.

[1] Taking up these several claims in their order, claim 2 of patent No. 813,815 is as follows:

"In a rotary engine, a cylinder or casing having therein a longitudinal, eccentric piston chamber, longitudinally extending inlet and exhaust passages in the wall of said chamber, and communicating therewith, one end of said chamber being closed by a transverse partition wall around which the inlet port extends, and which forms a seat for a piston bearing, and a piston in said chamber, substantially as described."

A careful study of this patent and of the claim thereof in litigation has satisfied the court that it lacks invention. Every element of that claim, with the exception of one, is found in a prior United States patent to Laurence E. Troxler, No. 695,896, under date of March 18, 1902. The only thing that is not found in Troxler's patent, which is found in the claim now under consideration, is the exhaust passage and the ports leading thereto from the piston chamber. Troxler's means of exhaust was by an opening from the piston chamber directly through the forward head of the cylinder. With the inlet passage and its ports constructed within the walls of the cylinder adjacent to the piston chamber, the conclusion is irresistible that an exhaust passage, with ports to it from the piston chamber, could also be made. So far as the evidence in this case discloses, there is no advantage in the exhaust passage of the patent now under consideration over the opening in the Troxler patent. It should not be found, and the court cannot find, that there was any invention in making the exhaust passage embraced in the patent No. 813,815.

The patent under consideration is not only found anticipated by the prior patent to Troxler, but, as will be seen hereafter, was anticipated by prior use.

[2] Taking up next the Van Ormer patent, No. 969,010, claim 4, which is involved in this litigation, is as follows:

"4. In a motor, a cylinder having a piston chamber therein, with circumferential admission and exhaust ports communicating therewith, the center of said ports being less than 180° from each other in one direction, the cylinder having heads provided with bearings for a piston shaft, and a rotary piston journaled in said heads and having a single slot extending diametrically therethrough to seat a piston blade, substantially as described."

There is nothing in this claim which is not found anticipated, although the language is not found in prior patents. The circumferential admission and exhaust ports communicating with the piston chamber have already been considered in commenting upon the McIntosh patent. The fact that the centers of said ports are stated to be less than 180° from each other in one direction is apparent from Troxler, and from the fact that the piston chamber is eccentric with the cylinder in the motor of Troxler. The mere assertion that there is intended a single slot to seat a piston blade does not indicate invention. The patent shows that the single slot extends diametrically through the shaft, and the single piston blade extending through the shaft is the equivalent of two blades, one on either side of the shaft. This construction indicates

a mere mechanical arrangement of features of the prior patents. There is no evidence in the case that more efficient results were obtained.

It is doubtful, from the evidence in this case, whether either the McIntosh motor or the Van Ormer motor were really useful motors, and it could be found as a fact, from the evidence on the part of the plaintiff, that they were not. Evidence, however, on the part of the defendant, was introduced that motors containing all the elements of both the McIntosh and Van Ormer patents were made, sold, and successfully operated by purchasers more than two years prior to the applications for either of the patents. As early as 1899, Henry Van Ormer, then employed as chief engineer of the power station of the Hartford Street Railway Company, made a motor embodying all the features of the McIntosh and Van Ormer patents, which was successfully used for some months in the cleaning of boiler tubes. Some time afterwards, in 1901, he entered into a business arrangement with one Bushnell for the manufacture and sale of motors under the partnership name of Hartford Tube Cleaner Company. In the spring of 1902 Bushnell sold his interest to A. E. Jensen, and Jensen and Van Ormer continued the manufacture and sale of tube cleaners under that name. Several motors were made by that company, were sold, and were successfully used. Some of these motors were used for years—one, made in 1900 or 1901, by the Hartford Street Railway Company; another, made in the spring of 1902, and sold to the Hartford, Manchester & Rockville Tramway Company, which was used by that company successfully for years in cleaning boiler tubes. Another was sold at Norwich, Conn., in the summer of 1902 to the Beebe & Holbrook division of the American Writing Paper Company, at Holyoke, Mass., and was used by that company for five years, being the only tube cleaner used by that company within that period.

Testimony was given, not only by Jensen and Van Ormer, but by other witnesses, who either took part in the manufacture of motors for the Hartford Tube Cleaner Company, or used said motors in the cleaning of boiler tubes, or saw them used by others. The evidence does not justify a finding that the Van Ormer motor of 1899 was a mere experiment and subsequently abandoned, but, on the contrary, leads to the conclusion that the Van Ormer device, as expressed in the various motors, was in public use and on sale in this country more than two years prior to the application for any of the patents in suit.

Counsel for the plaintiff attempted to impeach the testimony of Van Ormer and Jensen in the present case by offering in evidence an affidavit of Van Ormer and testimony given by him and Jensen in interference proceedings in the Patent Office. In other words, they offered to show that those witnesses, at another time and place and under other circumstances, made statements different in some respects from the testimony given by them in this present litigation, and this without calling to the attention of the witnesses the time, place, and circumstances under which the other statements were made as fully as should have been done. The court admitted the offers by the plaintiff of the affidavit and testimony in the proceedings in the Patent Office, and believes that there was error in having done so, because it does not appear in this case that the witnesses had full and sufficient opportunity to ex-

plain why the statements made in the Patent Office proceeding were made.

Inasmuch as the error was committed and the evidence is in this record, the same has been considered. Less weight, however, is given to the proof of the statements in the Patent Office proceeding than would be given to it, had the witnesses had full opportunity to explain such discrepancies as appear to have existed in their respective examinations. But the testimony of others and the evidence of physical exhibits, together with the evidence of Van Ormer and Jensen, although perhaps slightly impeached, lead to the conclusion that the Van Ormer device, as manufactured, sold, and used by others, was a prior use, which invalidated the McIntosh and Van Ormer patents in suit.

[3] Taking up the patent to Elliott & Faber, No. 983,032, we find that claims 35 and 36 are relied upon. These claims are as follows:

"A rotary motor having a casing, a revoluble motor element within the casing, a shaft supporting said motor element and extending forwardly and rearwardly therefrom, the forwardly projecting portion of the shaft having a bearing within the casing, a ported admission member carrying a bearing for the rearwardly projecting portion of the shaft, and means whereby said member is normally held against rearward movement, said member being removable rearwardly from within the casing through its open rear end when the securing means are removed, substantially as described.

"A rotary motor comprising a casing, a front bearing therein, a ported stationary member closing the rear part of the casing and containing a shaft bearing, said ported member being removable through the rear end of the casing, a shaft journaled in the bearings, a rotary element carried by the shaft and located between the bearings, and clamping means for locking the ported stationary member in place, substantially as described."

It is with difficulty that the application of this patent to the present litigation is found. As already stated, the patent is for a turbine, which is, of course, a motor in its broad sense, but which is, nevertheless, limited to specific construction in certain respects. The motor element specified in the claim is the turbine wheel, by the revolution of which the shaft also revolves. That motor element or turbine wheel is made to revolve because of the action against it of a motor fluid forced through peculiarly constructed openings in a diaphragm, which by their arrangement, in connection with the openings through the turbine wheel, cause the latter to revolve. The diaphragm is immovable during the operation of the motor, and contains a bearing for the rearwardly projecting portion of the shaft. In the claims of the patent now under consideration, such diaphragm is designated as the ported admission member. If this patent is relied upon because of its features of locking the ported stationary member in place, the defendant cannot be held to have infringed any rights of the plaintiff under said patent, because none of the suggestions of the patent with respect to clamping means for locking the ported stationary member in place are used by the defendants in the manufacture of their motor. If this patent be offered because a casing is provided for in the claims, there can be no infringement found, because a casing inclosing movable parts is old, and because the casing used by the defendants is not suggested anywhere in this patent. What has been said with respect to the casing

may also be said with respect to the statements in the claims that the ported admission member may be removed rearwardly from the casing.

[4] Taking up next the Elliott patent, No. 1,045,134, we find that the claims thereof in dispute are as follows:

"1. In a rotary motor, a piston shaft, a rear bearing for said shaft, an air space adjacent to said bearing and means for venting said space, substantially as described.

"2. A rotary motor having an air space at the rear end of the piston shaft, and means for venting said space, substantialy as described.

"3. In a motor, a piston shaft and an air chamber adjacent to one of the bearings of said shaft, and having a vent opening leading therefrom, substantially as described."

"5. A rotary motor having a chamber containing a motor element, a shaft on which said element is mounted, said shaft having front and rear bearings, the front end of the shaft extending beyond the front bearings for attachment to a tool, and the rear bearing terminating and being inclosed within the rear end of the motor, means for admitting working fluid to the cylinder through its rear end, and means for relieving the accumulation of fluid at the rear end of the shaft, substantially as described.

"6. A rotary motor having a fluid supply pipe connected at its rear head, and having a longitudinally extending port leading to the cylinder, a motor shaft having its axis parallel to the axis of the supply pipe, the rear bearing for said shaft being located in front of the supply pipe connection, and there being an air space adjacent to the end of said shaft, substantially as described."

"8. A rotary motor having a connection for fluid supply at one end, a shaft for the motor having a bearing terminating in front of the supply connection, an air space located between the supply connection and the rear end of the shaft, and means for venting said space, substantially as described.

"9. A rotary motor having a piston shaft and a socket bearing for the rear end of said shaft, together with means for venting said bearing to prevent an accumulation of pressure therein, substantially as described.

"10. A rotary motor having a shaft extending rearwardly within a bearing, and means for venting pressure which accumulates at the rear end of the shaft, substantially as described.

"11. A rotary motor having front and rear bearings, a motor chamber between the bearings, a supply connection at the rear of the rear bearings, a passageway leading from the supply connection to the motor chamber, and an opening to the atmosphere at the rear end of the shaft, substantially as described."

"16. A rotary motor having a rear ported closure containing a shaft bearing, said bearing having a vent opening leading to the atmosphere, substantially as described."

It is claimed by the plaintiff that the Elliott patent, No. 1,045,134, was the result of Elliott's discovery that the pressure of the motor fluid in the cylinder would extend into the bearing at the rear end of the shaft and cause a forward pressure of the shaft against the forward head, which forward pressure so increased the friction as rendered motors made prior to that time of use for limited periods only, and that Elliott, by providing the chamber and the vent in his patent, furnished a means for relieving such pressure, thus enabling the motors to be operated for indefinite periods.

Elliott's view of his own invention is expressed by his testimony in certain interference proceedings, to which his attention was called in the case at bar. He stated that, in order to be effective for a relief port, the vent would have to communicate with the rear end of the shaft. He further said in such testimony that, if there were no space at the rear of the shaft, the vent port would communicate with a small

percentage of the shaft's surface, and after a little wear the vent port would not communicate at all with the rear end of the shaft, and thus permit the air pressure to accumulate and increase the friction on the front and thrust. His conception of his invention, at the time of his testimony in the proceeding in the Patent Office, must be deemed to have been as correct at least as when he testified in the present case. In addition to this, according to the testimony of Elliott and the witness Faber, Elliott had caused to be prepared drawings of a motor in December, 1903, in which an air space and a vent therefrom were made, just as contemplated in the Elliott patent, which was applied for on January 20, 1908. That Elliott delayed for four years in making application for his patent is a significant fact, which, in connection with the facts that he had a motor made according to the drawings of December, 1903, and used same for but a short time, satisfies the court that Elliott was not of the opinion that he had made an important discovery.

In the meantime P. J. Darlington filed an application on June 17, 1907, upon which patent No. 1,041,040 was issued October 15, 1912, in which there is an air chamber, *12*, at the rear end of the piston shaft, from which chamber a vent or an escape, *34*, opens to the atmosphere through the rear head.

Again, on September 24, 1907, Mills & Conn made application, upon which patent No. 1,053,055 was issued February 11, 1913, which patent is in suit in this case. In the Mills & Conn patent there is a space at the rear end of the piston shaft and an opening therefrom to the outside air. It is true this last patent, when issued, appears to have been assigned to the Liberty Manufacturing Company, now the Elliott Company, the plaintiff in this suit.

In view of Elliott's delay and these two applications prior to his application, the court is constrained to hold that Elliott lost whatever rights he might have had, had he promptly proceeded to procure the advantages which he claims belonged to him by reason of his conception of the air space and the vent. The court has reached this conclusion after careful consideration of the evidence introduced as to the various proceedings in the Patent Office, which were much involved.

[5] Coming now to the other vent hole patent of Elliott, Mills & Holt, No. 1,019,771, we find the claims therein as follows:

"1. In a rotary air motor, a rear head provided with a bearing for a piston shaft, and also provided with a chamber adjacent to and communicating with the bearing, and an escape passage communicating with the said chamber at its rear end, and thence leading through the cylinder wall and opening to the atmosphere at the front end portion of the motor, whereby oil and air escaping from said chamber are discharged forwardly and away from the operator, substantially as described.

"2. In a rotary motor, a removable rear head provided with a rear bearing for a piston shaft, said head having an inclosed chamber at the rear end of said shaft, and an exhaust passage leading from said chamber to the exhaust port of the motor, substantially as described.

"3. In a rotary motor, a cylinder having a longitudinally extending exhaust port, and a removable rear head, said head having a bearing for a piston shaft, and an inclosed chamber at the rear end of the piston shaft, said chamber communicating with the exhaust port by an exhaust passage, substantially as described.

"4. In a rotary motor, a rear bearing for the motor shaft, an inclosed chamber at the end of the motor shaft, and an exhaust port or passage connecting said chamber with the exhaust port of the motor, substantially as described."

"7. In a rotary motor, a cylinder having front and rear heads, and longitudinally extending admission and exhaust ports, and a piston shaft journaled in said heads, the rear head having a space or chamber therein adjacent to the end of said shaft, said rear head having a port leading therethrough in line with the admission port of the cylinder, and also having a port or passage connecting the space or chamber therein with the longitudinally extending exhaust port of the cylinder, substantially as described.

"8. In a rotary air motor, a rear head provided with a bearing for a piston shaft, and also provided with a chamber adjacent to said bearing, the bearing also having a surrounding air space which communicates with the chamber, and a vent passage communicating with the said chamber and leading forwardly therefrom and discharging to the atmosphere, substantially as described."

It has already been noticed that the only difference between this patent and the Elliott patent is that this patent contemplates that the vent shall lead from the air chamber to the exhaust passage at the rear end of the piston blade, whereas the Elliott patent contemplates that the air passage should lead to the outside air. There was no invention in changing the vent from the construction of the Elliott patent to that of the Elliott, Mills & Holt patent.

[6] Taking up now the Mills & Conn patent, No. 1,053,055, we find that claim 10 only is involved, which is as follows:

"10. In a rotary motor, a cylinder, a motor element supported on bearings beyond the ends of the cylinder, the rear bearing being inclosed, means for permitting the escape of pressure leaking from the motor chamber through the rear bearing, and means for introducing lubricant into the motor chamber and causing it to mix with the motor fluid, whereby some of the lubricant will be carried to the rear bearing by the pressure leakage, substantially as described."

The introduction of lubricant into motors with the motor fluid is old, and therefore that specific feature of the Mills & Conn patent was not secured to the patentees by that patent.

As a summary of the conclusions reached by the court with respect to the patents in suit, it is well to restate them as follows:

The McIntosh patent, No. 813,815, is invalid, because of the prior patent to Troxler, No. 695,896, and because of the prior use.

The Van Ormer patent, No. 969,010, is invalid, because of the prior patent to Troxler, No. 695,896, and the prior patent to McIntosh, No. 813,815, and because of prior use.

The Elliott & Faber patent, No. 983,032, relates to a different art. The court does not determine whether it is a valid patent or not, but does find that it has no bearing on the question of the adoption by the defendant of the features of the plaintiff's motor.

The patent to Elliott, No. 1,045,134, may be valid with respect to certain features not considered by the court, but does not protect the patentee with respect to the air space at the rear end of the shaft, and the vent leading therefrom, because such features were anticipated in the prior art by the Darlington patent, No. 1,041,040, and by the Mills & Conn patent in suit, No. 1,053,055.

The Elliott, Mills & Holt patent, No. 1,019,771, may be valid with respect to certain features thereof not considered, but with respect to

the air chamber and the vent leading therefrom to the exhaust the patentees did not secure any monopoly thereof, for the reason that the air chamber was anticipated as above stated, and for the reason that the change of the vent from the air chamber to the exhaust was not invention.

The Mills & Conn patent, No. 1,053,055, may be valid with respect to certain features, but with respect to the feature of introducing lubricant with the motor fluid the patentees did not secure any monopoly, for the same was old.

Taking up the question of infringement, we first observe that the motor of the defendant does not in outward appearance resemble the motor of the plaintiff. It has the piston chamber, the piston shaft and piston blades, and the inlet and exhaust ports in the wall of the piston chamber, all of which are found in the motors used by the Hartford Motor Company, and which, we have seen, the defendant has a right to use, not only because of the prior use, but also because of the Troxler patent. Defendant does not have the construction of the Elliott & Faber patent, No. 983,032. The parts of the motor are not arranged according to any suggestion found in that patent. The means for interlocking the parts are entirely different. The casing of the defendant's motor is a comparatively thin brass cylinder, which does not inclose the heads of the motor. It is not the casing of the Elliott & Faber patent. It has no air space at the end of the rear bearing of the piston shaft. It has, however, in the bearing of the piston shaft, about one-half way from the rear end of the piston chamber to the end of the shaft, a groove which is in shape and construction like the common oil groove used for years in bearings of many kinds, where lubricants are needed, and with which all who have any knowledge of machinery are acquainted. From that oil groove there is a vent to the exhaust passage of the motor.

The plaintiff has not convinced the court that the oil groove in defendant's construction is the equivalent to the air space at the end of the piston shaft, which was the duty of the plaintiff, if we assume for the moment that the vent hole patents in suit are applicable. It is a fact that the original lubrication of a new motor is by the introduction of oil into the piston chamber through the exhaust passage. After that the lubricant is introduced in operation through the medium of the motor fluid. The introduction of the oil into the exhaust passage before operating, when there was a hole from the exhaust passage to the oil groove around the piston shaft, would introduce lubricant to the piston shaft. Infringement cannot be found.

The bill must be dismissed at the plaintiff's cost. Let a decree be presented.

THACHER v. MAYOR AND CITY COUNCIL OF BALTIMORE.

(District Court, D. Maryland. January 28, 1915.)

1. PATENTS ⊂=73—"ANTICIPATION"—PRIOR PATENTS.
A patent is not "anticipated" by a prior patent, where the invention is carried back to a date before the application for such prior patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 118; Dec. Dig. ⊂=73.
For other definitions, see Words and Phrases, First and Second Series, Anticipation.]

2. PATENTS ⊂=22—INFRINGEMENT—EQUIVALENT PARTS.
However limited the range of equivalents to which a patent is entitled, that equivalency must be commensurate with the extent of the invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 1, 7, 8; Dec. Dig. ⊂=22.]

3. PATENTS ⊂=328 — VALIDITY AND INFRINGEMENT — REINFORCED CONCRETE ARCH.
The Thacher patent, No. 617,615, for the combination with abutments and a concrete arch spanning the intervening space of a series of independent metal bars in pairs, one bar of each pair above the other respectively near the intrados and extrados of the arch and one of which at least extends well into the abutments, was not anticipated and discloses invention. Also, *held* infringed by a structure in which in some cases the arches rest on piers instead of abutments.

4. PATENTS ⊂=13—"MANUFACTURE"—ARCH.
An arch of a bridge or like structure is a "manufacture," within the meaning of the patent law.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 11, 12; Dec. Dig. ⊂=13.
For other definitions, see Words and Phrases, First and Second Series, Manufacture.]

In Equity. Suit by Edwin Thacher against the Mayor and City Council of Baltimore. On final hearing. Decree for complainant.

George M. Brady, of Baltimore, Md., and Jones, Addington, Ames & Seibold and Frank H. Drury, all of Chicago, Ill., for plaintiff.

S. S. Field, City Sol., and Alexander Preston, Deputy City Sol., both of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff sues the mayor and city council of Baltimore, hereinafter called the city, for an infringement of the first and third claims of letters patent No. 617,615, issued to him January 10, 1899. According to the patent, the invention relates to:

"Concrete arches for bridges or vault covering or for spanning openings for building construction; and it has for its object an improved arch structure in which iron or steel bars are imbedded in concrete near the outer and inner surfaces of the arch in such a manner as to assist the concrete in resisting the thrusts and bending moments to which the arch is subjected."

The first claim is for:

"The combination with abutments and a concrete arch spanning the intervening space of a series of metal bars in pairs, one bar of each pair above the other near the intrados and the extrados of the arch and extending well into the abutments, each bar of a pair being independent of the other, substantially as described."

The third claim is identical with the first, except that it requires only one bar of each pair to extend well into the abutments.

The defenses are nonvalidity and noninfringement. A number of prior American and foreign patents have been cited. All of them which are seriously relied upon were considered by the Patent Office before the claims were passed to issue. It is unnecessary to review them in detail. Both sides agree that one Monier, a Frenchman, was the pioneer in the art. His original purpose was modest enough. He wished to cover metal boxes and basins for flowers and plants with cement, his idea apparently being to preserve the metal and perhaps to give it a more ornamental appearance. His patent was issued in 1867. He soon found that his invention could advantageously be put to many more uses than he had at first anticipated. From time to time he applied for and obtained those certificates of addition for which the French law provides. By one of them granted in 1873 his invention was made applicable to bridges. In all the forms of his invention and all the purposes to which he sought to apply it, a metallic grillage remained an essential element of the completed structure. Many other inventors followed him into the field in which he had been the pioneer. A number of different ways of combining metal and concrete were suggested by them. Some of them pointed out that their methods of making the combination were specially adapted to arch construction. The patent in suit, it will be noted, is limited to bars, of which one of each pair shall be near the intrados and the other the extrados of the arch. The advantage of this arrangement is clearly explained by plaintiff's expert. He shows that the metallic reinforcement is the more valuable the further it is away from the neutral axis of the arch and the nearer it is to the upper and lower surfaces thereof—that is to say, what in technical language the patentee calls the extrados and the intrados—provided, always, that the metal is sufficiently embodied in the concrete to be thoroughly incorporated therein.

As the very competent experts and engineers examined on behalf of the city did not question this theory, it may be accepted as true.

[1] In recognizing this principle and turning it to practical use, the plaintiff did something which most of the patents cited against him did not. There is one, 583,464 June 1, 1897, to Von Emperger, which embodies this idea. Von Emperger's patent was issued before that of the plaintiff upon an application which antedated his by five months. The Patent Office cited it against plaintiff, who thereupon filed affidavits carrying back his invention to a period prior to the date of Von Emperger's application. Under office rule 75 the patent then issued to him. At the hearing in this court he put in evidence the file wrapper showing these facts. Defendant did not offer any testimony to controvert the truth of the affidavits upon which the patent issued. For the purposes of this case his invention must be held prior to Von Emperger's. Deering v. Winona Harvester Works, 155 U. S. 298, 15 Sup. Ct. 118, 39 L. Ed. 153.

There are other patents in which the metallic reinforcement is on or near the surface of the arch, but it is not in the form of bars in pairs each independent of the other arranged one above the other, and at least one of each pair extending well into the abutments. Each one

of these features peculiar to plaintiff's device is said in combination with the others to have practical merit and utility. It is quite possible to argue that there were so many known forms of reinforced concrete arch constructions before plaintiff devised his that no invention was required to do what he did. On the other hand, the grant of the patent raises a presumption of invention. In this case the presumption is supported by evidence that the invention went largely into use, and that until 1910 there was no serious attempt to infringe upon the exclusive rights of the patentee therein. It is true that down about until that time the company in which plaintiff was interested constructed 90 per cent. of the larger reinforced concrete bridges erected in this country. The evidence of the extensive use of the invention is therefore not as persuasive as to its merits as it might have been, had the business of the bridge building been more generally distributed. There is testimony, however, that others did pay handsome royalties for licenses to build their bridges in the manner shown in the patent in suit. There was absolutely no testimony to the contrary, although the city examined an expert witness of large experience in concrete arch construction as well as the very eminent chief engineer of its sewerage system. The latter frankly admitted that he could not recollect having seen or heard of any bridge or arch constructed in accordance with plaintiff's design before the issue of the patent in suit.

Under the circumstances, I am not prepared to hold that the claims in suit are void either because of direct anticipation, or because, in view of the state of the prior art, they do not disclose invention.

[2] Has the city infringed? It says that the art to which the patent in suit relates was even at the time of the invention described therein crowded, and that its claims must be strictly construed. For the purposes of this case so much may be properly conceded; but, however limited the range of equivalents to which the patent is entitled, that equivalency must be commensurate with the extent of the invention. Schiebel Toy & Novelty Co. v. Clark, 217 Fed. 768, 133 C. C. A. 490.

Distinctions which do not differentiate the alleged infringing structure from the invention described and claimed in the patent in suit are immaterial.

[3] The city points out three respects in which its structure is unlike that shown in the patent. These are that upon its arches rest no spandrel filling, that the upper of each pair of its bars is not in precisely the same vertical plane as the lower, and that its construction consists of a series of arches one end of each of which in all cases, and both ends in most, are supported by piers rather than by abutments. Of these differences in their order.

One of the drawings of the patent shows an arch with a spandrel filling. The patent says that the abutment, the arch, and the spandrel filling there shown constitute the complete structure. In defendant's construction there is no spandrel filling, the roadway being supported on metallic posts which in their turn are sustained by the piers and arches. There is not a word about spandrel filling in the claims. It is utterly immaterial, for any purpose connected with the construction in suit, whether there shall be any or not. Plaintiff's patent would be infringed

the moment the arch was constructed, although neither spandrel filling nor any other covering was ever placed upon it.

That in the city's arches the upper bar of each pair is not vertically directly over the lower is true. In some cases it is an inch and a half out of the vertical lines. The city's engineer says that there was no purpose in so arranging the bars. It was a mere accident in the design of construction. It is not suggested that such a slight departure from the form shown in the patent makes any real difference. It should be remembered that the second claim is not in suit. That does require, as the first and third do not, that one bar of each pair shall be vertically above the other. No opinion is, of course, here intimated as to whether an infringement of even the second claim could be avoided by a change of the arrangement of the bars so slight in fact as to be unimportant in effect.

The city constructed a series of spans and arches which supported a viaduct of considerable length. It followed that in all cases at least one end of each arch was supported by what is technically a pier rather than an abutment. It is perfectly obvious, however, that the word "abutment," as used by the patentee, was intended to include both abutments and piers. If the structure calls for only one span, there will be one arch supported by two abutments. If there be more than one arch, the ends of some of them will be supported by piers. After a pier has been erected, it can be changed into an abutment, or an abutment into a pier.

[4] No question has been raised but that an arch is a manufacture within the meaning of the patent law. In the absence of an express decision of the Supreme Court on the question, it must be held concluded by the more recent construction of the word "manufacture" by various Circuit Courts of Appeals. Crier v. Innes, 170 Fed. 324, 95 C. C. A. 508; Riter-Conley Mfg. Co. v. Aiken, 203 Fed. 699, 121 C. C. A. 655; International Mausoleum Co. v. Sievert, 213 Fed. 229, 129 C. C. A. 569.

The plaintiff is therefore entitled to a decree for an injunction and an accounting. The injunction, however, will be limited to forbidding future infringements. It will do the plaintiff no good to decree the destruction of the present structure, and the city much useless harm.

A decree in accordance with this opinion may be submitted.

HOWARD DUSTLESS DUSTER CO. v. CARLETON et al.

(District Court, D. Connecticut. January 13, 1915.)

No. 1342.

1. TRADE-MARKS AND TRADE-NAMES ⊂=89—UNLAWFUL COMPETITION—SALE OF MATERIAL.

Where defendant manufacturing company made and sold to C. dust cloths, which the latter sold so that they could be and actually were used by C. to mislead the public to believe that they were cloths of peculiar quality, manufactured and sold by complainant, such manufacturing company was a joint tort-feasor with C., and guilty of contributory infringement of complainant's rights.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 99; Dec. Dig. ⊂=89.]

2. TRADE-MARKS AND TRADE-NAMES ⊂=67—UNLAWFUL COMPETITION.

Complainant, in order to protect his rights to the use of particular dress of an article sold by him, need not have an exclusive right in any one element of the dress or packing of the article, size, shape, coloring, lettering, wording, or symbol, so long as the ensemble has come to be a public guaranty of origin and quality.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. ⊂=67.]

3. TRADE-MARKS AND TRADE-NAMES ⊂=97—UNLAWFUL COMPETITION—INJUNCTION.

Where there is added to the defendant's dress of a competing article an inscription which both in its pictorial aspect and its meaning is calculated to confuse, if not to deceive, the public to believe that the article is that manufactured by complainant, he is entitled to an injunction; the sole question being, does the adoption of the collocated features of complainant's style of dress disclose a differentiation from that previously adopted, and by which the public has come to recognize complainant's product? the test being whether ordinary purchasers would be misled by the similarity between the two designs.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ⊂=97.]

4. TRADE-MARKS AND TRADE-NAMES ⊂=84—UNLAWFUL COMPETITION—GOOD FAITH.

In a suit for unlawful competition, the fact that defendants may have acted in good faith and believed that they were not infringing plaintiff's rights is immaterial.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 93, 97; Dec. Dig. ⊂=84.]

5. TRADE-MARKS AND TRADE-NAMES ⊂=84—UNLAWFUL COMPETITION—DEFENSES—DAMAGES.

The fact that careful buyers may not have been deceived by defendants' alleged unlawful competition is no defense, but only goes to minimize the loss.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 93, 97; Dec. Dig. ⊂=84.]

In Equity. Bill by the Howard Dustless Duster Company against L. Clinton Carleton and others. Decree for complainant.

See, also, 187 Fed. 472.

Oliver Mitchell, of Boston, Mass., for plaintiff.

Willard B. Luther, of Boston, Mass., for defendants.

THOMAS, District Judge. This is a bill in equity by the plaintiff for alleged unfair competition by the defendants. In the bill as originally filed, L. Clinton Carleton was sole defendant. The substantial allegations of the bill are that the plaintiff was engaged in the manufacture and sale of a dust cloth put out in a distinctive package with a distinctive circular, and that the plaintiff was a pioneer in making and so marketing such dust cloth; that this dust cloth was made of a specially woven cheesecloth under a secret process, which imparted to it special dust-retaining characteristics, and the material for which was, before being submitted to the secret process to prepare it for a dust cloth, dyed black, and that the dyeing process was adopted by the plaintiff as a means of giving it a distinctive appearance; also that this dyeing has no other purpose than to give the article a distinctive appearance, since this color functionally is somewhat disadvantageous, in that the dust collected shows more plainly upon the black-colored cloth than it would upon cloth uncolored.

The bill of complaint also alleges that the plaintiff has expended a large amount of money in building up and developing the trade connected with the sale and manufacture of these articles, and has put this dust cloth upon the market in packages of a certain size and color, which was the scheme for the outer wrapper of the duster as marketed, and that the defendant Carleton, who was a former agent of the plaintiff, was putting out an imitation thereof in an imitative package and with a circular similar to the plaintiff's, which package was adapted to be used, and was used, by dealers for the purpose of substitution as and for plaintiff's dust cloth.

The bill of complaint then prayed for an injunction that the defendant be restrained:

"1. From selling or offering for sale dust cloths so colored as to present substantially the same visual appearance as complainant's dust cloth, and particularly from selling or offering for sale dust cloths dyed black, in imitation of complainant's dust cloth.

"2. From selling or offering for sale dust cloths so packed or dressed as to be likely to be confused with complainant's package."

The bill of complaint has annexed to it a specimen of the plaintiff's package and of the defendant's package, marked, respectively, "Complainant's Exhibit A" and "Complainant's Exhibit B."

There was a demurrer to this bill by the defendant Carleton, upon which the court reached the conclusion that the first prayer for relief should be granted, and overruled the demurrer. (C. C.) 185 Fed. 999.

Six days subsequent to the filing of the opinion overruling the demurrer, the plaintiff and defendant Carleton entered into a stipulation that the overruling of the demurrer should be treated as a final disposition of the cause, and that final judgment might be entered accordingly. Subsequently a motion was made by Carleton to set aside this stipulation, on the ground that the defendant did not dye his dust cloth black, but purchased it in the open market from a dealer. This motion was granted, for the reason that it was made to appear in the moving papers that the defendant did not dye his

white cheesecloth at all, but bought the cloth dyed from an alleged competitor, the Tate Manufacturing Company, and that this practice of dyeing cheesecloth black was not original with the plaintiff, but had been in use by others than the plaintiff for many years. (C. C.) 187 Fed. 472.

Thereupon, and subsequent to the decision setting aside the stipulation, the plaintiff advertised in its trade circular that it had obtained an injunction against selling or offering for sale dust cloths dyed black.

Thereafter the defendant the Tate Manufacturing Company, which had, with the permission of the court, intervened as a codefendant subsequent to the filing of the second opinion, filed a petition of contempt against the plaintiff and its two managing officers, alleging that this trade circular advertisement did not accurately state the decision as it was finally made, and was therefore in contempt. No action has ever been taken on this petition. Subsequently the court issued ex parte, without any opinion, a temporary restraining order against plaintiff, restraining a violation of the second prayer for relief in this petition.

Later on the plaintiff prepared and published a new circular, in which the page on which it appeared was changed as a whole, although the advertisement itself remained unchanged.

Separate answers were filed by the defendants, which are substantially identical, both of which deny the material averments of the complaint.

[1] In view of the history of the case and of the evidence presented on final hearing, the question of coloring, per se, may be and is eliminated as an issue, and the only question, irrespective of the question of contempt, on the above pleadings and proofs, is whether the defendants have made, sold, or offered for sale dust cloths so packed or dressed as to be likely to be confused with plaintiff's package. If the defendant the Tate Manufacturing Company has made and sold its dust cloths to Carleton, which the latter sold, so that they may or have been actually used by Carleton so as to mislead the public, it became a joint tort-feasor with Carleton, and is guilty of contributory infringement of plaintiff's rights; the means of deceiving purchasers giving a right of action. Hennessy v. Herrmann (C. C.) 89 Fed. 669; Hildreth v. Sparks Mfg. Co. (C. C.) 99 Fed. 484; Reading Stove Works v. S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. (N. S.) 979. The principle governing the infringement of combination patents, that to make or sell a single element with the intent that it shall be united to the other elements is an infringement, is applicable. Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 297, 25 C. C. A. 267, 35 L. R. A. 728; Cortelyou et al. v. Lowe et al., 111 Fed. 1005, 49 C. C. A. 671. Here the existence of such intention is a clear inference from the testimony.

[2] And it is immaterial whether the plaintiff has no exclusive right in any one element of the dress or packing of the article, size, shape, coloring, lettering, wording, or symbol, so long as the ensem-

ble has come to be a public guarantee of origin and quality. If it has, and the proofs show that it has, the plaintiff is entitled to protection against the unfair competition of a competitor. Enoch Morgan's Sons Co. v. Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729.

As was said by Mr. Justice Holmes, then of the Supreme Judicial Court of Massachusetts, in New England Awl Co. v. Marlborough Awl Co., 168 Mass. 154, 156, 46 N. E. 386, 387 (60 Am. St. Rep. 377):

"Of course, a person cannot claim the monopoly of a color in connection with a particular line of trade, and very likely not in connection with the labels of a certain kind of goods generally. But the most universal element may be appropriated as the specific mark of a plaintiff's goods, if it is used and claimed only in connection with a sufficiently complex combination of other things."

[3] And if there is added an inscription which both in its pictorial aspect and its meaning was calculated to confuse, if not to deceive, the plaintiff is entitled to an injunction. New England Awl Co. v. Marlborough Awl Co., supra; Enoch Morgan's Sons Co. v. Whittier Coburn Co. (C. C.) 118 Fed. 657, 661; Hildreth v. D. S. McDonald Co., 164 Mass. 16, 41 N. E. 56, 49 Am. St. Rep. 440; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554; Lever v. Goodwin, L. R. 36 Ch. D. 1.

The sole question in such cases is: Does the adoption of the collocated features of the plaintiff's style of dress disclose a differentiation from that previously adopted, and by which the public has come to recognize the plaintiff's product? De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. (C. C.) 139 Fed. 146, 149.

Indeed, the test of infringement in such cases is the same as is applied in design patents; that is, whether ordinary purchasers would be misled by the similarity between the designs in controversy. Williams v. Brooks, 50 Conn. 278, 279, 47 Am. Rep. 642, citing Gorham Co. v. White, 14 Wall. 511, 20 L. Ed. 731.

[4] And as the purpose to be effected by an injunction in cases of unfair competition is not primarily to protect the purchasers, but to secure to the manufacturer the profit to be derived from the sale of his goods from all who may desire and intend to purchase them, the fact that the defendants may have acted in good faith and believed they were not infringing the plaintiff's rights is immaterial; the injury to the plaintiff remains the same. It is the liability to injury and an actual infringement which the remedy may be invoked to prevent. Williams v. Brooks, supra; Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; N. K. Fairbank Co. v. Luckel, King & Cake Soap Co., 102 Fed. 327, 42 C. C. A. 376.

[5] Furthermore, the fact that careful buyers may not be deceived does not materially affect the question; it only shows that the injury is less, not that there is no injury. Another class of purchasers may be deceived, and, if they may be, the plaintiff is entitled to an injunction. Collinsplatt v. Finlayson (C. C.) 88 Fed. 693; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401; International Silver Co. v. Roger's Corporation, 67 N. J. Eq. 646, 650,

60 Atl. 187, 110 Am. St. Rep. 506, 3 Ann. Cas. 804; Reading Stove Works v. S. M. Howes Co., supra, 201 Mass. 440, 87 N. E. 751, 21 L. R. A. (N. S.) 979; Lever v. Goodwin, supra, 3; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 41, 21 Sup. Ct. 7, 45 L. Ed. 60.

In Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 94, 97, Mr. Justice Bradley said:

"Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another."

Tested by these rules, I am satisfied that the Plaintiff's Exhibit B, annexed to the complaint, is a substantial infringement of Plaintiff's Exhibit A, and that an injunction should issue against the defendants, restraining them from manufacturing, selling, putting up, or offering for sale the particular form of package which has been referred to in the bill of complaint and put in evidence as Plaintiff's Exhibit B, or any part thereof, or any other form of package, or any part thereof, which shall, by reason of the collocation of size, shape, colors, lettering, spacing, and ornamentation, present a general appearance as closely resembling Plaintiff's Exhibit A referred to in the bill, as does the said Plaintiff's Exhibit B.

The Tate Manufacturing Company has not, under the circumstances, been damaged by the advertisement referred to, which is the subject of the petition for contempt; and although the advertisement and its repetition may have been ill-timed and ill-advised, they did not embarrass, impede, or obstruct the administration of justice. The petition for contempt, therefore, is denied.

Decree accordingly.

UNITED STATES v. ACZEL et al.

(District Court, D. Indiana. February 1, 1915.)

No. 212.

1. CONSPIRACY ⊜32—PRIVILEGES OF CITIZENS—RIGHT TO VOTE.

Under Const. art. 1, § 2, providing that the House of Representatives shall be composed of members chosen by the people of the several states, and the electors in each state shall have the qualifications of the electors of the most numerous branch of the state Legislature, and Const. Amend. 17, making similar provisions for United States Senators, and Act June 4, 1914, c. 103, 38 Stat. 384, providing for the election of United States Senators by direct vote of the people, the election to be conducted as near as may be in accordance with the laws of the state regulating the nomination and election of Representatives, the right to vote for Representatives in Congress and United States Senators, and to serve as members of the election boards where such Representative or Senator is to be elected, are rights secured by the Constitution and laws of the United States, within Cr. Code (Act March 4, 1909, c. 321) § 19, 35 Stat. 1092 (Comp. St. 1913, § 10183), making punishable a conspiracy to deprive any citizen of any right or privilege secured to him by the Constitution and laws of the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 58, 59; Dec. Dig. ⊜32.]

---

2. INDICTMENT AND INFORMATION ⊂=125—CONSPIRACY—DUPLICITY.
An indictment for conspiracy, which charges a single combination or conspiracy to commit several different crimes, is not duplicitous.
[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. ⊂=125.]

3. CONSPIRACY ⊂=33—DEFRAUDING GOVERNMENT—CORRUPTING ELECTION.
A conspiracy to corrupt voters at an election for Representatives in Congress and United States Senators and to corrupt the election itself is within the prohibition of Cr. Code, § 37 (Comp. St. 1913, § 10201), making it an offense to conspire to defraud the United States in any manner and for any purpose, since an actual property or financial loss to the government is not necessary to that offense.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⊂=33.]

4. CONSPIRACY ⊂=33—DEFRAUDING GOVERNMENT—CORRUPTING ELECTION—PROPERTY LOSS.
If a property loss is essential to the offense prohibited by Cr. Code, § 37, of conspiracy to defraud the United States, such loss is shown by an allegation in the indictment that one of the objects of the conspiracy was to secure for a person not duly elected to Congress the compensation payable to a congressman.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⊂=33.]

5. POST OFFICE ⊂=35—OFFENSES—USE OF MAILS TO DEFRAUD.
A scheme to corrupt a state election and the voters thereat, so as to secure the election of a certain judge, who was not the real choice of the voters, and thereby to enable one who was not entitled thereto to draw the salary of that office, is a scheme to defraud, within Cr. Code, § 215 (Comp. St. 1913, § 10385), prohibiting the use of the United States mails for the purpose of executing a scheme or artifice to defraud.
[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂=35.]

Alexander Aczel and others were indicted for conspiracy and for using the mails to carry out a scheme to defraud. Demurrers to the indictment overruled.

Frank C. Dailey, U. S. Dist. Atty., of Bluffton, Ind., and Milton W. Mangus, Asst. U. S. Atty., of Indianapolis, Ind.

A. O. Stanley, of Henderson, Ky., and Finley P. Mount, Clarence W. Nichols, and F. S. Roby, all of Indianapolis, Ind., for defendants.

ANDERSON, District Judge. The indictment in this cause is in four counts. The first count is based on section 19 of the Criminal Code, which reads as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

This first count in substance charges that the defendants, on the 1st day of September, 1914, in Vigo county, within the state and district

of Indiana, did unlawfully, knowingly, willfully, wrongfully, and feloniously conspire, combine, confederate, and agree together, and with divers other persons whose names are to the grand jurors unknown, to injure, oppress, threaten, and intimidate certain citizens of the United States, naming them, and each of them, and divers other persons whose names are to the grand jurors unknown, in the free exercise and enjoyment of a right and privilege secured to them, and each of them, by the Constitution and laws of the United States of America, to wit: The right and privilege of voting at a general election, hereinafter named, for a candidate for United States Senator from the state of Indiana, and for a candidate for Representative in the Congress of the United States of America from the Fifth congressional district of the state of Indiana, with the unlawful intent to hinder the free exercise and enjoyment of the right and privilege of them, and each of them, of voting at said general election, hereinafter named, for a candidate for United States Senator from the state of Indiana, and for a candidate for Representative in the Congress of the United States from the Fifth congressional district of the state of Indiana, which said general election was to be, and in fact was, held in the state of Indiana and in said Fifth congressional district thereof, of which said county of Vigo forms a part, on the 3d day of November, in the year of our Lord 1914, at which time a United States Senator from the state of Indiana was to be, and in fact was, voted for, chosen, and elected, and at which time a Representative in Congress of the United States of America was to be, and in fact was, voted for, chosen, and elected from the Fifth congressional district of the state of Indiana, by then and there, by force, threats, and intimidation, and by the use of pistols and other firearms, and by the means of the fraudulent manipulation of voting machines, and by causing others to vote upon their names and in their stead, attempting to prevent, preventing, and intending to prevent said persons, naming them, and divers other persons whose names are to the grand jurors unknown, from voting at said election and from voting for a candidate for United States Senator from the state of Indiana, and from voting for a Representative in Congress from the Fifth congressional district of the state of Indiana. That said persons who were prevented from voting at said election were at said time male citizens of the United States and legal voters of certain precincts and wards in Vigo county, Ind., at said election, and were qualified voters and entitled to vote at said election, which facts were then and there to the defendants well known, and that in pursuance of said conspiracy and to effect the purpose and object thereof the defendants unlawfully, willfully, corruptly, and maliciously injured, and in the manner and ways aforesaid prevented the said voters from voting on said day and from voting at said election.

That the said defendants, at the same time and place, and as a part of the same conspiracy, combination, confederation, and agreement, did unlawfully, knowingly, wrongfully, and feloniously conspire, combine, confederate, and agree together, and with divers other persons whose names are to the grand jurors unknown, to injure, oppress, threaten,

and intimidate certain citizens of the United States, to wit, Harvey Day and Sherman T. Mann, and each of them, and divers other persons whose names are to the grand jurors unknown, in the free exercise and enjoyment of a right and privilege secured to them, and each of them, by the Constitution and laws of the United States, to wit: The right and privilege of sitting and acting and serving as members of election boards at said election; that is to say, as judges of election at said election, by then and there, by force, threats, and intimidation, attempting to prevent, preventing, and intending to prevent them, the said Day and Mann, and each of them, and divers other persons whose names are to the grand jurors unknown, from sitting and acting and serving as members of election boards of said election, to wit, as judges of election. That the persons so prevented from acting as judges of election were male citizens of the United States and qualified electors in the respective precincts in which they resided, and were qualified under the law to be selected, and were, under the law, selected as judges of election in their respective precincts. That said right and privilege to sit and act and serve as judges of election were secured to them by the laws of the state of Indiana and by the laws of the United States of America. That in pursuance of such conspiracy, and to effect the purpose and object thereof, the defendants unlawfully, willfully, corruptly, and maliciously injured and prevented the said Day and Mann, and each of them, and divers other persons whose names are to the grand jurors unknown, from sitting and acting and serving as members of election boards at said election, to wit, as judges of election. That the defendants, as a part of the same conspiracy, combination, confederation, and agreement, planned to prevent and hinder, and by the same means and methods did prevent and hinder, William House and George Splaty, and divers other persons, from sitting and acting and serving as poll clerks at said election, with proper averments that at the time said House and Splaty were male citizens of the United States and were qualified electors, and duly qualified to act as poll clerks at said election. That as a part of the same conspiracy, combination, confederation, and agreement, the defendants planned to hinder and prevent, and did by the same means and methods theretofore set out in the case of judges and poll clerks prevent, Howard P. Greiner and divers other persons whose names are to the grand jurors unknown from acting and serving as an inspector of election at said election, and said Greiner is alleged to have been a citizen of the United States and under the laws of the state of Indiana duly qualified to act as inspector of said election.

That at the same time and place, and as a part of the same conspiracy, combination, confederation, and agreement, the defendants did unlawfully, knowingly, willfully, wrongfully, and feloniously conspire, combine, confederate, and agree together, and with divers other persons whose names are to the grand jurors unknown, to injure, oppress, threaten, and intimidate certain citizens of the United States, naming them, and divers other persons whose names are to the grand jurors unknown, in the free exercise and enjoyment of a right and privilege secured to them, and each of them, by the Constitution and laws of the United States, to wit: The right and privilege of liberty

and freedom from arrest, without due process of law, and the right and privilege not to be placed in, or confined in, detention cells and jails, without due process of law, with the unlawful intent then and there to hinder the free exercise and enjoyment of the right and privilege of them, and each of them, of liberty and freedom from arrest, without due process of law, and the right and privilege not to be placed in, or confined in, detention cells and jails, without due process of law, by then and there, by force, depriving them of their liberty, without due process of law, and by arresting them, without due process of law, for no offense, and with knowledge on the part of the defendants, and each of them, that they had committed no offense, and restraining them of their liberty, without due process of law, and by confining them, without due process of law, in the detention cell of the said city of Terre Haute and in the jail of said county of Vigo. That the defendants Roberts, Holler, Nugent, Joseph Jeffers, Lloyd, and Shea were, during all of said time, agents of the state of Indiana, and in the said conspiracy, combination, confederation, and agreement against said persons, and in all their acts and conduct in relation thereto pretended to and did act by authority of their said offices and their said agency for the state of Indiana, which facts were then and there and at all times well known to all of the defendants herein. The indictment then avers that Roberts was mayor of the city of Terre Haute, that Holler was chief of police of said city, that Nugent was assistant chief of police of said city, that said Joseph Jeffers and Lloyd were policemen in and for said city, and that said Shea was county sheriff of the county of Vigo and in charge of the county jail thereof; that in pursuance of said conspircy and to effect the purpose and object thereof, the defendants unlawfully, willfully, corruptly, and maliciously injured said persons, and divers other persons whose names are to the grand jurors unknown, and arrested them and placed them in the detention cell of the said city of Terre Haute, and in the jail of said Vigo county, without due process of law.

That all of said matters above set forth, upon which the defendants conspired, confederated, and agreed together as aforesaid, including said agreement to prevent said voters from voting, including the said agreement to prevent said men from sitting, acting, and serving upon election boards, including the said agreement to prevent said men from sitting, acting, and serving as poll clerks at said election, and including said agreement to deprive said men of their liberty and to confine them in detention cells and jails, without due process of law, all as aforesaid, constituted one agreement, and were all parts of one conspiracy, combination, confederation, and agreement, entered into at one and the same time and place.

The second count is based on section 37 of the Criminal Code, which reads as follows:

"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, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

This second count in substance charges that the defendants, on the 1st day of September, 1914, in Vigo county, within the state and district of Indiana, did unlawfully, knowingly, willfully, wrongfully, and feloniously conspire, combine, confederate, and agree together, and with divers other persons whose names are to the grand jurors unknown, to defraud the United States of America, by committing a willful fraud upon the law of the United States, that is, article 1, § 2, of the Constitution of the United States, providing for the election of members of the House of Representatives of the Congress of the United States, and an act of the Congress providing a method of conducting the nomination and election of United States Senators, approved June 4, 1914, and by committing a willful fraud upon the Constitution and laws of the United States of America, which provide that an elector shall vote one time only for a candidate for United States Senator at a given election, and one time only for a candidate for member of the House of Representatives at a given election, and further by perverting and obstructing the due administration of said laws, and cause and bring about the maladministration thereof, and by corruptly administering and procuring the administration of said laws, and each of said laws, and by obtaining from the Governor of the state of Indiana a certificate of election certifying that a person whom they intended to elect illegally and contrary to the laws of the state of Indiana and the Constitution and laws of the United States of America was regularly elected Representative in Congress from said district at said election, and by foisting upon the United States and upon the House of Representatives thereof, as a duly elected member of the House of Representatives of the United States of America, a person whom they intended to elect illegally and contrary to the laws of the state of Indiana and the Constitution and laws of the United States of America, as a member of the House of Representatives of the United States of America, and to secure for such person, not duly elected or chosen, the privileges, immunities, and emoluments as a member of said House of Representatives, including the annual salary of $7,500 provided as compensation for a duly elected member of said House of Representatives. That the defendants did unlawfully, knowingly, willfully, wrongfully, and feloniously conspire, combine, confederate, and agree together to violate the provisions of said laws and each of said laws, and pervert and obstruct the due administration of said laws, and each of said laws, and cause and bring about the maladministration thereof, and corruptly administer and procure the administration of said laws, and each of said laws, and commit a willful fraud upon said laws, and each of said laws, at the general election to be held, and which was thereafter held, on Tuesday, November 3, 1914, at which time a United States Senator for the state of Indiana was to be, and in fact was, voted for, chosen, and elected, and at which time a Representative in Congress of the United States of America was to be, and in fact was, voted for, chosen, and elected, in the Fifth congressional district of the state of Indiana, of which the said county of Vigo forms, and during all of said time formed, a part. That the defendants, for said purpose and with said intention, agreed to-

gether to vote and cause to be voted, for candidate for United States Senator, and also for candidate for Representative in Congress at said election, in the various election precincts of said Vigo county, a large number of persons who did not and would not have or possess the qualifications requisite for electors at said election, and were not legal voters at said election, some of them because they had not yet attained the age of 21 years, some because they had not lived and resided in the state or township or precinct the time required by the Constitution and laws of the state of Indiana, and some of whom were not registered voters under the law of the state of Indiana, and for said purpose and with said intention did agree together to vote at said election, and cause to be voted, each more than one time, a large number of voters on the names of other registered voters, and upon the names, both real and fictitious, registered at the regular registration period provided by the laws of the state of Indiana.

This count then sets out a series of acts, which are averred to be overt acts, done in pursuance of, in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design, and purpose of the said conspiracy, combination, confederation, and agreement aforesaid. This second count is based upon that part of section 37 which makes it a crime for two or more persons to conspire together to defraud the United States in any manner or for any purpose.

The third count is based upon that part of section 37 which makes it a crime for two or more persons to conspire to commit an offense against the United States. In substance this count charges that the defendants, in Vigo county, state of Indiana, and the district aforesaid, on the 1st day of September, 1914, did unlawfully, knowingly, willfully, wrongfully, and feloniously conspire, combine, confederate, and agree together, and with divers other persons whose names are to the grand jurors unknown, to commit an offense against the United States, defined and made punishable by the laws of the United States, to wit: To knowingly, willfully, fraudulently, unlawfully, and feloniously devise a certain scheme and artifice to defraud, and for obtaining money by false and fraudulent pretenses, from James Shea, Albert Shea, Wade Duncan, Walter Roach, James Dolan, Philip Burns, and divers other persons whose names are to the grand jurors unknown, and to defraud one Charles Pulliam, and to defraud and for obtaining money by false and fraudulent pretenses from the state of Indiana, which said scheme and artifice to defraud, and for obtaining money by false and fraudulent pretenses was as follows: That the said defendants would represent to the said James Shea and others, each and all of whom at said time and continuously thereafter conducted various saloons and gaming houses in the city of Terre Haute, in the said county of Vigo, state of Indiana, that the said James Shea and others, by the donation of large sums of money to the campaign fund, which the said defendants were to collect, would be given immunity from prosecution and arrest for all violations of the law that they should commit, and would be permitted to conduct gaming devices and gaming houses without hindrance or interference, and would be permitted to keep open their saloons and sell intoxicat-

ing liquors at hours when prohibited by law, and to sell intoxicating liquors to persons to whom the law forbade them to sell, and to conduct dance halls, wine rooms, music, and restaurants in connection with their saloons, in contravention of law, and would keep Terre Haute a wide-open town, and which said scheme and artifice was further as follows: That they would use the money so collected to debauch the electorate of the said county of Vigo at a general election to be held (and which was held) in the state of Indiana generally, and in the said county of Vigo, on Tuesday, November 3, 1914, at which election one Charles Pulliam was a candidate for judge of the Vigo circuit court, and the said Eli Redman was an opposing candidate for the same office. That they would use said money to cheat and defraud the said Charles Pulliam out of said office, and prevent the majority of votes from being rightfully counted in his favor, and wrongfully count and cause to be counted the majority of votes in favor of the said Eli Redman, and wrongfully place the said Eli Redman in said office. That they would employ floaters and repeaters from other counties in said state, and from other states, to falsely register as voters in said county of Vigo at said election. That they would hire many men, each to register many times under assumed names in one precinct, and to register each in various precincts in said county for said election. That they would buy and hire many men, each to vote many times in one precinct, and many men to vote at various precincts in said county at said election, and to hire boys under the age of 21 years and foreign-born citizens who had no right to vote at said election, and many men who had no residence in said Vigo county, and many men who had not registered to vote in said county, to vote at said election. That they would hire and buy all of said men to vote against the said Charles Pulliam and in favor of the said Eli Redman, and purchase members of election boards to commit frauds of all kinds in favor of the said Eli Redman and against the said Charles Pulliam, and would thereby prevent the election of the said Charles Pulliam to said office and fraudulently obtain the same for the said Eli Redman, and would fraudulently foist the said Eli Redman upon the state of Indiana as the duly elected judge of the Vigo circuit court, and that they would thereby cheat and defraud the state of Indiana out of a large sum of money, by obtaining from it, for the said Eli Redman, the annual salary of $4,000 provided by law as compensation for the duly elected and chosen judge of the said Vigo circuit court, and that they would, for the purpose of executing said scheme and artifice, place and cause to be placed a large number of letters in the United States post office at the said city of Terre Haute, Ind., addressed to various persons, to be sent and delivered by the post office establishment of the United States to the respective addresses of said letters.

This count then sets out a number of acts which are averred to have been done in pursuance of, in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design, and purpose of said conspiracy. The offense which the defendants are charged in this count with having conspired to commit is the use

of the mails in a scheme to defraud, denounced by section 215 of the Criminal Code.

The fourth count is based on section 215 of the Criminal Code which, so far as applicable to this cause, reads as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office, or station thereof, * * * shall be fined not more than one thousand dollars or imprisoned not more than five years, or both."

This count in substance avers that the defendants, and divers other persons whose names are to the grand jurors unknown, on the 30th day of September, 1914, did then and there knowingly, willfully, fraudulently, unlawfully, and feloniously devise a certain scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses, from the state of Indiana, James Shea, Albert Shea, Wade Duncan, Walter Roach, James Dolan, Philip Burns, Charles Pulliam, and divers other persons whose names are to the grand jurors unknown, which said scheme and artifice to defraud, and for obtaining money as aforesaid, was then and there as follows: Said defendants had then and there unlawfully, knowingly, willfully, and feloniously conspired, combined, confederated, and agreed together, and with certain divers other persons whose names are unknown to the grand jurors aforesaid, to enter into a certain scheme and artifice to defraud, and for obtaining money, to wit: They, and each of them, would fraudulently represent to the said James Shea, Albert Shea, Wade Duncan, Walter Roach, James Dolan, Philip Burns, and divers other persons whose names are to the grand jurors unknown, that if they would pay to said defendants large sums of money for the purpose of use in the hereinafter described election, that the said James Shea, Albert Shea, Wade Duncan, Walter Roach, James Dolan, Philip Burns, and divers other persons whose names are unknown to the grand jurors, should have the exclusive gambling privilege in the city of Terre Haute, Ind., and should have the exclusive right and privilege of keeping their respective saloons open after legal hours, free from arrest for all violations of law that the said James Shea, Albert Shea, Wade Duncan, Walter Roach, James Dolan, Philip Burns, and divers other persons whose names are unknown to the grand jurors aforesaid, might commit. Said scheme and artifice to defraud, and for obtaining money as aforesaid, and said conspiracy, combination, confederation, and agreement aforesaid, was then and there further to register at the October registration for the general election of November 3, 1914, in Vigo county, Ind., a large number of names of persons who did not reside in the divers precincts where registered in said Vigo county at the time of such registration, and of persons who at the time of said election of November 3, 1914, would not have resided in the respective precincts in said county where registered 30 days immediately and continuously preceding said election. Said scheme and artifice to defraud, and for obtaining money as

aforesaid, and said conspiracy, combination, confederation, and agreement aforesaid, was then and there further to vote at said general election in Vigo county, Ind., November 3, 1914, a large number of persons who would vote in one precinct, then go to another precinct and vote, and then go to as many precincts as said person could, when in fact said person would have the right to vote in only one precinct in said county at said election. Said conspiracy, combination, confederation, agreement, and scheme and artifice to defraud, and for obtaining money as aforesaid, was then and there further to vote persons who were not legally entitled to vote in the precincts where they would vote, and persons whose votes would be purchased. Said conspiracy, combination, confederation, agreement, and scheme and artifice to defraud, and for obtaining money as aforesaid, was then and there further to obtain control of the election boards in divers precincts of said Vigo county, Ind., for said general election, and to instruct, induce, and persuade the election inspectors in said precinct voting places to operate the lever on the voting machines in said precinct voting places, and not permit the voter to operate said lever. Said lever was further to be operated by the said inspectors in such a manner that, should a voter enter any polling place in said Vigo county in said general election who was in opposition to the aforesaid conspiracy, combination, confederation, agreement, and scheme and artifice to defraud, and for obtaining money as aforesaid, said inspectors would then and there forcibly operate said machine, so that the vote of such voter should be registered on said machine in accordance with the aforesaid conspiracy, combination, confederation, agreement, and scheme and artifice to defraud, and for obtaining money as aforesaid, and contrary to the will of such voter.

That said Eli Redman was then and there candidate for election as judge of the Vigo circuit court of Vigo county, Ind., in opposition to the said Charles Pulliam; that a part of the salary of the said circuit judge is payable out of the treasury of the state of Indiana and out of the moneys of the state of Indiana; that said conspiracy, combination, confederation and agreement and scheme and artifice to defraud, and for obtaining money as aforesaid, was then and there and by the aforesaid means to foist upon the state of Indiana the said Eli Redman as the duly elected judge of the Vigo circuit court, when in fact the said Eli Redman would not be the duly elected judge of said Vigo circuit court if said election were conducted honestly, fairly, and in accordance with the laws of the state of Indiana; that the said Charles Pulliam was then and there the duly nominated candidate for judge of the said Vigo circuit court on the Republican ticket. Said conspiracy, combination, confederation, agreement, and scheme and artifice to defraud, and for obtaining money as aforesaid, was then and there further, by the said means, to defeat the said Charles Pulliam, and deprive him, the said Charles Pulliam, of the emoluments of said office of judge of the said Vigo circuit court. Said state of Indiana had, prior to the formation of said conspiracy, combination, confederation, agreement, and scheme and artifice to defraud, and for obtaining money as aforesaid, duly enacted laws for the registration of voters and describing the qualifications and fitness of voters at said general

election; that said conspiracy, combination, confederation, agreement, and scheme and artifice to defraud, and for obtaining money as aforesaid, was then and there to conduct the registration of voters for such general election and to conduct and carry on said general election contrary to and in violation of the aforesaid laws of the state of Indiana, and in such a manner and by such means to defraud the state of Indiana and its laws.

The count then avers that on the 25th day of October, 1914, for the purpose of executing said scheme and artifice, and attempting so to do, the defendant Donn M. Roberts did then and there knowingly, unlawfully, willfully, and feloniously place and cause to be placed a certain letter in the United States post office at Terre Haute, in said district, addressed to Joseph Kennedy, at said Terre Haute, to be sent and delivered by the said post office establishment of the United States to the said Joseph Kennedy, which said letter was then and there an invitation and call to the said Joseph Kennedy to come to the headquarters of the Democratic central committee of Vigo county, of which the said Donn M. Roberts was then and there the chairman, for the purpose of receiving instructions as to the duties of the said Joseph Kennedy, who was then and there to act as election inspector at said general election, in precinct C of the Fifth ward, in said Terre Haute, Vigo county, Ind., at the general election, November 3, 1914, at Terre Haute, Vigo county, Ind., which said letter is now destroyed, and for that reason is not made a part of the indictment, and a more particular description of which is unknown to the grand jurors. And it is further averred in this count that all the others of the defendants aided, abetted, counseled, commanded, induced, and procured the said Donn M. Roberts, for the purpose of executing said scheme and artifice and attempting so to do, to then and there place and cause to be placed in the United States post office at Terre Haute, in said district, the said letter, addressed to said Joseph Kennedy, as aforesaid.

After the return of this indictment, 115 of the defendants were arrested and brought into court. Upon being arraigned, 83 of them pleaded guilty, 5 pleaded not guilty, and the remainder, 27, filed demurrers to the indictment.

As already stated, the first count of the indictment is based upon section 19 of the Criminal Code. The part of this section which is relevant here is as follows:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined," etc.

This count charges a conspiracy to injure, oppress, threaten, and intimidate certain citizens of the United States in the free exercise and enjoyment of the right to vote for a member of the House of Representatives of the Congress of the United States, and the right to vote for a United States Senator, and to injure, oppress, threaten, and intimidate certain other citizens of the United States in the free exercise and enjoyment of the right and privilege of sitting upon election boards and acting as judges, inspectors, and poll clerks at the election held

November 3, 1914. It is further charged in this count that the defendants at the same time, and as a part of the same agreement and conspiracy, conspired to deprive certain citizens of the United States of the right to be free from arrest, etc., without due process of law. In determining the sufficiency of this count, it will not be necessary to refer to this latter averment.

The theory of the government is that the right to vote for members of the lower house of the Congress of the United States and for United States Senators, and the right to sit and act as election officers at elections where such Representatives and Senators are elected, are rights and privileges secured by the Constitution and laws of the United States. The demurring defendants contend that such right to vote is not a right secured by the Constitution or laws of the United States, but that the right to vote is a right given exclusively by the state. This was the principal contention at the argument upon the sufficiency of this first count, and nothing has been said by counsel for the defendants upon argument or in briefs as to the right to sit upon election boards and act as members of boards of election. It is also objected that this count charges more than one offense and is bad for duplicity.

[1] Is the right to vote for a member of Congress or a United States Senator a right secured by the Constitution or laws of the United States? Article 1, section 2, of the Constitution of the United States provides:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature."

The seventeenth amendment to the Constitution of the United States provides:

"The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislatures."

On June 4, 1914, Congress passed "An act providing a temporary method of conducting the nomination and election of United States Senators." The first section provides:

"That at the regular election held in any state next preceding the expiration of the term for which any Senator was elected to represent such state in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter."

The second section reads as follows:

"That in any state wherein a United States Senator is hereafter to be elected either at a general election or at any special election called by the executive authority thereof to fill a vacancy, until or unless otherwise specially provided by the Legislature thereof, the nomination of candidates for such office not heretofore made shall be made, the election to fill the same conducted, and the result thereof determined, as near as may be in accordance with the laws of such state regulating the nomination of candidates for and election of members at large of the national House of Representatives: Pro-

vided, that in case no provision is made in any state for the nomination or election of representatives at large, the procedure shall be in accordance with the laws of such state respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire state: And provided further, that in any case the candidate for Senator receiving the highest number of votes shall be deemed elected.

This seventeenth amendment to the Constitution and the statute just quoted are too recent to have received any judicial construction or interpretation, but so far as the right to vote for a member of the House of Representatives of the Congress of the United States is concerned the Supreme Court of the United States has repeatedly decided that such right is fundamentally based upon, and given and secured by, the Constitution of the United States.

In Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, this question was squarely decided. The defendants in that case had been convicted of a violation of section 19 (then section 5508 of the Revised Statutes). The case originated in the Supreme Court by an application for a writ of habeas corpus, upon the claim that defendants were held under a judgment which was null and void. After setting out the indictment, the court says:

"Stripped of its technical verbiage, the offense charged in this indictment is that the defendants conspired to intimidate Berry Saunders, a citizen of African descent, in the exercise of his right to vote for a member of the Congress of the United States. * * *"

It was claimed in that case that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each state respectively. The court said:

"But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election."

The court then quotes article 1, section 2, of the Constitution of the United States, and proceeds:

"The states, in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those eo nomine. They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state."

In Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84, the plaintiff sued an election board to recover damages for wrongfully and willfully rejecting his vote for a member of the House of Representatives of the United States, at the election held November 6, 1894. In that case the court said:

"The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the state in which they

are chosen, but has its foundation in the Constitution of the United States. This is clearly and amply set forth in Ex parte Yarbrough, 110 U. S. 651 [4 Sup. Ct. 152, 28 L. Ed. 274], in which this court, speaking by Mr. Justice Miller, upheld a conviction in a Circuit Court of the United States under sections 5508 and 5520 of the Revised Statutes for a conspiracy to intimidate a citizen of the United States in the exercise of his right to vote for a member of Congress, and answered the proposition 'that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each state respectively,' as follows:"

—and then quoted the extract last herein above set out from the decision in Ex parte Yarbrough.

In Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005, the court reiterates the same doctrine. Swafford brought suit against the defendants to recover damages for wrongfully refusing to permit him to vote at a national election for a member of the House of Representatives, held on November 6, 1900. The declaration expressly charged that the plaintiff was a white man, that he was a duly qualified voter at the place where he sought to vote, and as such had the right to vote for members of Congress, and that he had been illegally deprived of such right by the defendants when serving as election officers at such election. The court below dismissed the action on the ground that it was not one within its jurisdiction. The Supreme Court said, Mr. Justice White writing the opinion:

"The sole question is: Did the Circuit Court err in dismissing the action, on the ground that it was not one within the jurisdiction of the court? An affirmative answer to this question is rendered necessary by the decision in Wiley v. Sinkler, 179 U. S. 58 [21 Sup. Ct. 17, 45 L. Ed. 84]."

After stating the case of Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84, and the decision of the court thereon, Justice White proceeds:

"It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress, a right, as declared in Ex parte Yarbrough, 110 U. S. 655, 664 [4 Sup. Ct. 152, 28 L. Ed. 274], 'fundamentally based upon the Constitution of the United States, which created the office of member of Congress, and declared that it should be elective, and pointed out the means of ascertaining who should be electors.' That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifications of electors for members of Congress, those prescribed by the state for electors of the most numerous branch of the Legislature of the state."

In Felix v. United States, 186 Fed. 685, 108 C. C. A. 503, the Circuit Court of Appeals of the Fifth Circuit decided the exact question which we are now considering. Felix and others were indicted and convicted of a conspiracy to injure and oppress certain citizens of the United States in the exercise of a right secured to them by the Consti-

tution and laws of the United States, by depriving them of the right to vote for a member of Congress. The court said:

"The statute [section 5508] on which the first count of the indictment is based is applicable to conspiracies to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. The statute is applicable for the protection of 'any citizen' without other limitation. The rights or privileges protected by the statute are limited. The statute embraces and protects only those which are secured to the citizen 'by the Constitution or laws of the United States.' The indictment charges that the defendants with others conspired to injure, oppress, threaten, and intimidate certain voters in the free exercise and enjoyment of the right and privilege to vote for members of the House of Representatives of the United States. It is contended by the learned counsel for the accused that the right or privilege to vote at an election for a member of the House of Representatives of the United States is not a right or privilege secured by the Constitution or laws of the United States, and that, therefore, such right is not within the meaning of section 5508 (section 19). That contention presents the controlling question in this case."

The court held that the right to vote for a member of Congress was fundamentally based upon the Constitution of the United States, which created the office and declared that it should be elective, citing article 1, section 2, of the Constitution of the United States, Ex Parte Yarbrough, Wiley v. Sinkler, and Swafford v. Templeton, supra.

In United States v. Stone et al. (D. C.) 188 Fed. 836, the District Court for the District of Maryland, Judges Morris and Rose sitting, decided that the right to vote at a congressional election is a right secured by the Constitution and laws of the United States, and sustained an indictment under section 19 for a conspiracy to deprive certain voters of that right.

The cases mainly relied upon by counsel for the demurring defendants to sustain their contention are United States v. Reese, 92 U. S. 214, 23 L. Ed. 563, United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, and James v. Bowman, 190 U. S. 127, 23 Sup. Ct. 678, 47 L. Ed. 979. The Reese Case was pressed upon the Supreme Court in Ex parte Yarbrough, and held by that court not to affect the decision in that case. To state what was involved in the cases of United States v. Reese and United States v. Cruikshank would unduly extend this opinion, nor is this necessary in view of the case next to be cited.

In the case of Lackey v. United States, 107 Fed. 114, 46 C. C. A. 189, 53 L. R. A. 660, the Circuit Court of Appeals of the Sixth Circuit, composed of Lurton, Day, and Severens, Circuit Judges, the opinion being written by Judge Lurton, the court had before it the question of the validity of section 5507, providing that:

"'Every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery or threats,' etc., shall be punished, etc."

In the opinion the court discusses and distinguishes the cases relied upon here by the government and those relied upon by the demurring defendants, and said:

"Both U. S. v. Reese and U. S. v. Cruikshank were decided upon the ground that discrimination on account of color, race, etc., is essential to the commission of any offense against the United States at a state election. In Ex parte Yarbrough * * * this limitation was held not to apply at elections where congressmen were to be chosen, because the right to vote for congressmen is a right secured by and dependent upon the Constitution of the United States, the office being created and the qualification of voters being determined by that instrument."

Nor does the case of James v. Bowman affect the question here. In that case the defendants were indicted for the violation of section 5507. The court said:

"The single question presented for our consideration is whether section 5507 can be upheld as a valid enactment, for, if not, the indictment must also fall, and the defendant was rightfully discharged. On its face the section purports to be an exercise of the power granted to Congress by the fifteenth amendment, for it declares a punishment upon any one who by means of bribery prevents another to whom the right of suffrage is guaranteed by such amendment from exercising that right. But that amendment relates solely to action 'by the United States or by any state,' and does not contemplate wrongful individual acts."

In other words, section 5507 plainly purported to punish the purely individual action of persons in preventing, hindering, controlling, or intimidating another from exercising, or in exercising, the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, and as the fifteenth amendment simply provided that "the right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude," it was ruled that this amendment did not authorize the enactment of section 5507, which was also the ruling in Lackey v. United States, supra.

The right to vote for a member of Congress being a right secured by the Constitution and laws of the United States, it is perfectly plain that the right to vote for a United States Senator, since the adoption of the seventeenth amendment to the United States Constitution and the passage by Congress of the act of June 4, 1914, is also a right secured by the Constitution and laws of the United States. If the right to vote for a Representative in Congress or a Senator of the United States is a right secured by the Constitution and laws of the United States, then it appears that the right and privilege to serve as a member of an election board where such Representative or Senator is to be elected is likewise a right or privilege secured by the Constitution and laws of the United States. If a man has a right to vote, he has a right to have his vote received and counted by the proper election officers; otherwise, the right to vote is but an empty right. The act of Congress of June 4, 1914, as we have seen, provides, so far as this state is concerned, in the election of a United States Senator:

"The procedure shall be in accordance with the laws of such state respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire state."

Thus the law of Congress expressly provides that there shall be election inspectors, judges, and poll clerks at the election where a Senator is to be elected, as provided by the election laws of the state of Indiana, and the right of the duly selected and properly qualified persons under the law of Indiana to act as such election officers at an election where a United States Senator is to be elected, is a right secured by the Constitution and laws of the United States. As we have seen, the Supreme Court in Swafford v. Templeton, supra, used this language:

"The ruling [in Ex parte Yarbrough] was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or *from the violation of a state law which affected the exercise of the right to vote for a member of Congress.*"

As the laws of Indiana provide for election inspectors, judges, and poll clerks, and prescribe their duties, and as the act of June 4, 1914, provides that the election of United States Senators shall be in accordance with those laws, the laws of the state in this regard, therefore, affect the exercise of the right to vote for such Senators. Numerous decisions of the Supreme Court support this view. In United States v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673, the right to perfect a homestead entry under a federal law was held to be a right or privilege within section 19. In Re Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080, it was held that the right to aid in the execution of federal laws, by giving information to the proper authorities of the violation of those laws, was a right or privilege within section 19; and in Motes v. United States, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150, the Supreme Court said:

"It was the right and privilege of Thompson, in return for the protection he enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws of his country by giving information to the proper authorities of violations of those laws. That right and privilege may properly be said to be secured by the Constitution and laws of the United States. And it was competent for Congress to declare a conspiracy to injure, oppress, threaten, or intimidate a citizen because of the exercise by him of such right or privilege to be an offense against the United States."

In Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, the Supreme Court held that the right to safety and protection while in custody of federal officers was a right and privilege secured by the Constitution and laws of the United States. In United States v. Davis (C. C.) 103 Fed. 457, defendants were indicted under section 19 for conspiring to prevent a United States marshal from making a lawful arrest. It was held that the right of the marshal to make the arrest on legal process was a right secured by the Constitution and laws of the United States.

[2] Is this first count bad for duplicity? It charges a single conspiracy or combination to commit several crimes. This does not make the count multifarious or bad for duplicity. In State v. Kennedy, 63 Iowa, 200, 18 N. W. 885, it was held:

"A conspiracy is but a single offense, even though it aims at the commission of several distinct crimes; and an indictment charging such a conspiracy is not demurrable for duplicity."

In that case the court said:

"The crime of conspiracy consists in the unlawful and corrupt agreement of the parties. It is entirely distinct from the crimes or unlawful acts which the parties have in view when they enter into the conspiracy, or the object which they intend to accomplish in pursuance of it. The crime is complete whenever the agreement is entered into, and it is not essential to it that any overt act be committed in pursuance of it. Hence the parties who enter into a conspiracy are, by that act, guilty of but one offense, whether their agreement is to commit one crime or many crimes. 2 Bish. Crim. Law, § 192; State v. Sterling, 34 Iowa, 443. The indictment before us, while it alleges that the parties conspired to commit more than one crime, charged but one conspiracy."

In Noyes v. State, 41 N. J. Law, 418, it is held:

"An indictment charging a single conspiracy to commit two or more crimes would not be open to the exception of being double."

In disposing of the contention that the indictment in that case was double, the court said:

"But the fundamental fallacy in the position on the part of the defense consists in this: That it confounds the crime, which is the conspiracy, with the objects of the conspiracy. A combination to commit several crimes is a single offense, and the offense can always be laid according to the truth. No matter how many violations of law may be concerted by the confederates, if the concert take place at one time, the crime is single. Therefore in this case, if it were the fact that these conspirators on a single occasion confederated to violate the law in question in two distinct particulars, with respect to such combination, the criminal act was a unit, and it appears as such on the face of this indictment."

In State v. Nugent, 77 N. J. Law, 84, 71 Atl. 485, it is held:

"An indictment for conspiracy is not multifarious because charging a design having a multitude of objects."

To the same effect is the case of People v. Herlihy, 66 App. Div. 534, 73 N. Y. Supp. 236.

[3] The second count of the indictment is based upon that part of section 37 of the Criminal Code which makes it a crime for two or more persons to conspire "to defraud the United States in any manner or for any purpose." Attention is at once arrested by the broad language here used. The manner of defrauding is not material, for the statute says in any manner; nor is the purpose material, for the statute says for any purpose. The question then comes to this: Is a conspiracy to corrupt and debauch voters at an election where a United States Senator and a member of Congress are to be elected, and to fraudulently manipulate and corrupt and debauch the election itself, as averred in this second count, a conspiracy to defraud the United States? The far-reaching consequences of so holding require us to keep well within the principles of the decided cases. That the government is interested in keeping the elections in which members of Congress and Senators are chosen free from the influence of violence and corruption, and that Congress has the right and power to enact legislation appropriate to accomplish such purpose, has been declared

by the Supreme Court. In Ex parte Yarbrough, heretofore referred to, the Supreme Court said:

"It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption. In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources. If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety. If the government of the United States has within its constitutional domain no authority to provide against these evils—if the very sources of power may be poisoned by corruption, or controlled by violence and outrage, without legal restraint—then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force on the one hand, and unprincipled corruptionists on the other."

It has been decided many times by the Supreme Court and by other federal courts that it is not essential to charge or prove an actual financial or property loss to make a case under the branch of the statute which we are now considering. Haas v. Henkel, 216 U. S. 462, 480, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112.

This second count is sustained by the case of Curley v. United States, 130 Fed. 1, 64 C. C. A. 369. The Curley Case was decided by the Circuit Court of Appeals of the First Circuit. A petition for a writ of certiorari was denied by the Supreme Court. The decision of the Court of Appeals thus has the sanction and approval of the Supreme Court of the United States. The prosecution in the Curley Case was under section 37. The first count of the indictment charged that one Hughes, desiring to procure an appointment as letter carrier, a position in the classified civil service of the United States, and for the purpose of procuring the placing of his name on the list of persons eligible to appointment as letter carriers, and for the purpose of defrauding the United States, unlawfully agreed with Curley that Curley should impersonate Hughes at a civil service examination and do all acts required by the board of examiners, and sign the name of Hughes to such examination papers as should be delivered to Curley for examination while he should impersonate Hughes; that Curley, in pursuance of said conspiracy, gained entrance to the examination, and for the purpose of defrauding the United States did certain things to effect the object of the conspiracy. This first count is based upon that part of section 37 which makes it a crime for two or more persons to conspire to defraud the United States. In considering the sufficiency of that count, the court said:

"The principal contention of the defendants here is that the word 'defraud,' in its ordinary common-law acceptation, has reference to property and property rights, and the case largely, and perhaps wholly, depends upon the sense in which the word 'defraud' was used in the statute under consideration. Was it intended to limit the scope of the statute to frauds upon property and property rights of the government, or was it intended to use the word in a broader sense, and for the protection of intangible rights, privileges, and functions of the government?"

After a full discussion of this question, the court held the first count of the indictment in that case good. In the course of its opinion the court said:

"It is, perhaps, not going too far to say that this section is generic in terms, generic in the sense of including in the first part of the section all conspiracies to commit offenses against the United States, therefore all of a class, and then, under an enlarged scope, embracing all conspiracies to defraud the United States in any manner or for any purpose. It is generic in the sense of including all conspiracies to defraud, thus covering the whole subject of fraudulent conspiracies against the government—conspiracies to wrong the government through fraud and deception not constituting an offense, as well as conspiracies to commit offenses against the government."

And again:

"The language of the statute in question is very broad—'if two persons shall conspire to defraud,' etc. Now, it is, we think, not only reasonable, but the duty is upon us, in considering this statute, to have in mind the object of government in respect to a statute of this kind, as we would have in mind the object of a statute directing itself against wrongs destructive of individual property rights. The chief aim of government being that of protection and service, it may safeguard itself against conspiracies or combinations, or acts intended to impair its proper administration, or conspiracies to impair any of the functions of the government. It may declare it unlawful to combine for the purpose of doing any act which obstructs or interferes with the operations of government or any of its departments. The government may unquestionably safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the people."

And again:

"It is an inherent and unquestionable right of the government to administer itself according to law, and, while all citizens have the right and are at liberty to become an instrument of the government under the rules and regulations established by law, they are not at liberty and have not the right to subvert the lawful purposes of the government through a conspiracy to attain government power and emolument by means of fraudulent acts calculated and intended to defraud and deceive the government in respect to its right to administer the mail service according to law. This results from the fundamental rule that the rights and liberties of a people may be regulated by law."

And again:

"The general purpose of the legislation, as well as the general intent of the statute, was to protect the government from impositions through conspiracies to defraud or cheat. The purpose was broad enough, therefore, to include fraudulent conspiracies to injure the government in respect to its rights and privileges as well as in respect to its property."

In Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112, the Supreme Court has spoken directly upon the question here involved. In that case the court had before it the suffi-

ciency of indictments charging a conspiracy to commit an offense against the United States and indictments charging a conspiracy to defraud the United States. In the latter indictments the conspiracy charged was averred to have been formed between one Haas, one Theodore Price, and one Edwin S. Holmes, Jr., who was an associate statistician in the Department of Agriculture. The charge was that these three defendants conspired to defraud the United States by secretly obtaining information from Holmes, which he should acquire in his official character as associate statistician, and should, in violation of his official duty, give out secretly to his co-conspirators information as to the probable contents of certain official cotton crop reports in advance of the time when these reports were to be promulgated according to law. The court said:

"The indictments are of such great length that it is not feasible to set them out in full or to state the substance of their several counts. It is for the purposes of this case enough to say that it is averred that the Department of Agriculture includes a Bureau of Statistics established by law; that one of the governmental functions exercised by that department, particularly through the statistical bureau, is the acquirement of detailed information from time to time in respect to the condition of the cotton crop of the country; that this information comes through thousands of correspondents, some official and others not, through the reports of local agents scattered through the cotton region and through traveling representatives of the department; from these and other sources a report is made estimating acreage, condition and the probable size of the crop; comparisons with former reports are made, and every explanation furnished which may throw light upon the present condition and prospect of the growing crop; that the purpose is to complete and promulgate at stated times fair, impartial, and reliable reports, and that said reports are issued about the 3d day of the months of June, July, August, September, October, and December; that the information thus officially acquired and compiled and the estimates thereon are of value and do greatly affect the market price of the crop; that such reports are required to be submitted to and approved by the Secretary of Agriculture before publication, and that under the custom, practices, and regulations of the Secretary of Agriculture all officers and employés are required to keep secret the information so gathered, and from in any way divulging same or giving out any information forecasting such report in advance of its official approval and promulgation. It is averred that the said Holmes was an employé or an official in said Department, and in the Bureau of Statistics; that by virtue of his duty as such official and assistant statistician he acquired much of the information upon which such reports are based, and, as an official, came into knowledge of the probable contents of the regular reports; that neither Haas nor Price had any official connection and were not authorized to obtain information about such reports in advance of their promulgation; that the conspiracy was to obtain such information from Holmes in advance of general publicity and to use such information in speculating upon the cotton market, and thereby defraud the United States by defeating, obstructing, and impairing it in the exercise of its governmental function in the regular and official duty of publicly promulgating fair, impartial, and accurate reports concerning the cotton crop. * * *

"Do the counts which charge a conspiracy to defraud the United States charge any offense? The authority for the indictments charging a conspiracy to defraud is section 5440, Rev. Stat. Its language is plain and broad: 'If two or more persons conspire * * * 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,' etc. These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation,

with deductions, comparisons, and explanations involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the Department in general estimation, and that there would be a real financial loss. But it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government. Assuming, as we have, for it has not been challenged, that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial, and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled"

—citing cases, and among others Curley v. United States, 130 Fed. 1, 64 C. C. A. 369.

If any conspiracy which is calculated to obstruct or impair the efficiency and destroy the value of the operations and reports of the Bureau of Statistics of the Department of Agriculture as fair, impartial, and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation, it is perfectly plain that a conspiracy which is calculated to obstruct and impair, corrupt, and debauch an election where Senators and Representatives in Congress are to be elected, would be to defraud the United States by depriving the government itself of its lawful right to have such Senators and Representatives elected fairly and in accordance with the law.

[4] But if the averment of a property loss to the government were essential, this count of the indictment alleges that one of the objects of the conspiracy was to secure for a person not duly elected a member of the House of Representatives, the annual salary of $7,500 provided as compensation for a duly elected member of such House.

[5] In count 3 the defendants are charged with conspiring to commit an offense against the United States; that is, the offense denounced by section 215 of the Criminal Code, commonly spoken of as the use of the mails in a scheme to defraud. It is to be observed that by section 215 Congress does not attempt to punish the perpetration of the scheme or artifice to defraud, whether such scheme or artifice be a crime against the state or the United States. It merely prohibits the use of the mails "for the purpose of executing such scheme or artifice, or attempting so to do."

The conspiracy or combination is properly averred in this count, and the only question that can arise on it is whether the acts which the defendants are charged with conspiring to do constitute the offense denounced by section 215. The language of this section is also very broad. It says "any scheme or artifice to defraud." This count in apt words charges that the defendants devised a scheme and artifice to obtain money from certain persons by false representations, which false representations were promises of immunity from prosecutions for

crime, which promises the defendants had no power to make, and further, by the use of the money thus obtained, to debauch an election, and cheat and defraud a certain candidate for judge out of his election, and prevent the majority of votes from being rightly counted in his favor, and wrongfully count the majority of votes in favor of a candidate who would not be elected, and fraudulently foist a person who would not be elected upon the state of Indiana, and thereby cheat the state out of the annual salary payable to such judge. It is further averred that the intention of the defendants was to place, and cause to be placed, a large number of letters in the United States post office at the city of Terre Haute, in said district, for the purpose of executing said scheme and artifice.

Count 4 is based on section 215 alone. It charges that the defendants devised a certain scheme and artifice to defraud, and for obtaining money by means of false and fraudulent pretenses, which scheme and artifice to defraud is the same as that set out in count 3, though described in somewhat different language, and that on the 25th day of October, 1914, "for the purpose of executing said scheme and artifice, and attempting so to do," the defendant Roberts placed, and caused to be placed, in the United States post office at Terre Haute, in said district, a certain letter, describing it, and that the other defendants, with the same fraudulent intent and purpose, aided and abetted Roberts in so placing said letter in said post office.

The demurrers should be overruled; and it is so ordered.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (and four other causes).

(District Court, S. D. New York. December 18, 1914.)

Nos. 2–19, 2–33, 2–149, 3–37, 3–114.

1. STREET RAILROADS ⊜58 — RECEIVERS — LIABILITY FOR USE OF LEASED LINES.

   The receivers for a street railway system, which includes leased lines, unless and until they adopt a lease, are not liable for rent thereunder; but, so long as they operate a leased line without objection from the lessor, they are accountable, on its surrender, only for its net earnings.

   [Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. ⊜58.]

2. STREET RAILROADS ⊜58—RECEIVERS—SURRENDER OF LEASED LINE—ACCOUNTING FOR EARNINGS.

   In computing such earnings, where such line is one of a large number comprising the system, and is operated in connection with the others, there is no more practical method than to prorate the total receipts on a mileage basis, and the general operating expenses on a car mileage basis.

   [Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. ⊜58.]

3. STREET RAILROADS ⊜49—RECEIVERS—SURRENDER OF LEASED LINE—ACCOUNTING WITH LESSOR—CONSTRUCTION OF LEASE.

   Under a provision in a lease of a street railway line requiring the lessee, on termination of the lease, to return the equipment, except what has

passed from existence by death or destruction, and also substitutes, increments, and additions, where motors in use in electric cars were replaced by the lessee by new and improved patterns, the lease cannot be construed to require receivers for the lessee to return, not only the substituted motors, but the old ones also; but, on surrendering the property to the lessor, they are required only to return the cars with the new motors therein, in the condition in which they received them.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. ⊂⇒49.]

4. STREET RAILROADS ⊂⇒58—RECEIVERS—SURRENDER OF LEASED LINE—ACCOUNTING WITH LESSOR.

In such case, where the receivers of the system which included the leased line, after taking possession of such line, and before electing not to adopt the lease, expended money out of the general funds of the receivership in electrifying a portion of the line they are entitled on an accounting with the lessor, to an offset of the amount of such expenditure.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 135; Dec. Dig. ⊂⇒58.]

In Equity. Suit by the Pennsylvania Steel Company and another against the New York City Railway Company and the Metropolitan Street Railway Company, with four other causes. On claim of the Second Avenue Railroad Company and George W. Linch, receiver, against receivers of defendant Metropolitan Street Railway Company. Recommitted to special master.

Following are the opinions of William L. Turner, Special Master:

Use and Occupation Proceeding.

Counsel for the claimant receiver urges that for the whole period of use and occupation of Second Avenue properties from September 24, 1907, to November 13, 1908, by the receivers of the Metropolitan Company, the claimant is entitled to have its compensation paid on the basis of the stipulated rentals. The replicant says that this question is not referred. Subdivision (6) of the order of reference, as amended by the two subsequent orders, is as follows:

(6) What amounts, if any, the New York City receivers and the Metropolitan receivers should pay over to the Second Avenue Company on account of net income from the operation of the property of the Second Avenue Railroad Company, after deducting all proper charges against such net income?

This language is such as to suggest a doubt as to whether *unpaid* installments of the rentals reserved in the Second Avenue-Metropolitan lease which accrued during this period are within the scope of the reference, although the opinion of the court in pursuance of which the order was entered apparently asks an expression of opinion from the master. The contention of claimant respecting these unpaid installments is that it is legally entitled both to rentals paid and unpaid during the period, although the amount is concededly much in excess of the net income from operation for that period, which would make any inquiry into net profits from operation wholly unnecessary, if it be sound. The right of the claimant, under the language quoted, to retain installments of rentals voluntarily paid by the receivers under instruction from the court, is, however, clearly within its scope, because it involves a determination as to whether such payments are "proper charges" against that *net* income which is what the replicant receiver is claiming them to be.

If any expression of opinion be invited as to claimant's right to rentals for the period not paid, I should say that the declaration of the Circuit Court of Appeals for this circuit in the opinion just handed down since this case was submitted here settles it adversely. Respecting this matter the court says: "The subsidiary lessors of lines to the Metropolitan Company were in

a position to re-enter their properties whenever default was made, but did not do so. They acquiesced in the operation of these lines by the receivers until the receivers returned them. The termination of these leases is, therefore, fixed at these dates respectively. During the period of experimental operation, the receivers operated these lines for the benefit of the lessors; they being entitled to the net profits, if any, and obliged to bear the deficiency, if any. Termination of Lease Proceeding, 198 Fed. 725, 117 C. C. A. 503." Pennsylvania Steel Co. v. New York City R. Co., 216 Fed. 463, 132 C. C. A. 518.

In the termination of lease proceeding the court considered substantially all of the cases relied on by claimant, with the possible exception of the Sunflower Oil Co. Case, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025. That was a case where the net earnings (from freights) exceeded not only expenses, but rentals as well, and to these, as was held, the lessor became entitled, which is in accordance with the rule as above expressed, when applied to the particular facts of that case. In any event, it must now be regarded as settled in these litigations that default was notice to the lessor, and that the operation of the road by the receivers during the period defaulted on must be deemed to have been carried on with its acquiescence, subjecting its property to whatever loss might result, and if less than rentals reserved, entitling it only to net profits, if any.

The receivers, however, did not default until June 1, 1908, after upward of eight months of experimental operation, and their demand for a credit of the amounts paid under the lease during this time, suggests a question which is not only within the order of reference, but has not been settled in their favor by anything that the courts have decided in these proceedings, as I read those decisions. If this credit is to be allowed, it exceeds the net profits admitted by the receivers, and is but some $7,000 less than that demanded by the claimant for the whole period of occupation. The circumstances under which these payments were made were briefly these:

When, back in October, 1907, application was made to make the receivership permanent, the court in its opinion on that application, after referring to the importance of preserving the system as a unitary system, which involved the payment of rentals under underlying leases, default in which might result in forfeiture of the line involved, and after referring to the necessity of that investigation and experience, upon which reports from the receivers essential to a complete view of the situation might be based, said: "For the present, therefore, the receivers will continue to pay such rentals and mortgage interest." So, further, it said: "Before default is made in any case petition will be filed, setting forth all the facts bearing on the question, and asking instructions, and a day will be fixed on which not only parties to the suit, but all in any way interested, could be heard, as to the most equitable and wisest course to pursue." (C. C.) 157 Fed. 446. The decree entered provided, what had been provided in almost identical language in the order appointing the temporary receivers, that "they are authorized in their discretion from time to time out of the funds in their hands to pay the expenses of operating the said properties and executing their trusts. * * * Also, with the approval of this court, to pay all taxes and assessments upon the said properties or any part thereof and all such rentals and installments as may fall or become due for the use of any portion of said railroads and other property."

It is, of course, true that neither the expressions in the opinions nor the orders themselves were such as to justify a belief that the rentals would continue to be paid indefinitely, but, exercising the discretion reposed in them, the receivers did pay rentals and interest until they defaulted on the rental payment due June 1, 1908, and as long as they continued to do that it is clear that the claimant was hardly in a position to demand its property, although a demand at any time would doubtless have resulted either in prompt surrender or a definite adoption of the lease. As late as March 7, 1908, the receivers, on their application for leave to issue receivers' certificates annexed to their petition a schedule of accruing interest and rental payments, among which were payments to accrue to the Second Avenue Company as late as July, 1908, respecting which schedule the petition stated "in our judgment

it is advisable that all these fixed charges should be paid as they accrue. So far as we can now determine it is inadvisable to default on any of them because the revenue derived from the operation of the various lines seems sufficient to meet such charges. In other words, the lines are fully self-supporting, and it seems inadvisable under these circumstances from our standpoint to keep the present operating system intact." Subsequently, and on April 28, 1908, they paid an installment of interest which was their last payment in the nature of a rental payment.

These payments, made under the circumstance disclosed and by instruction of the court, were, I think, voluntary payments which cannot be recovered back. The opinion of the court in pursuance of which the order of reference was entered contains a passage in the light of which that subdivision above quoted under which this inquiry has been conducted must be construed. It says: "The case is within the principles enunciated in Quincy R. R. v. Humphreys, 145 U. S. 82 [12 Sup. Ct. 787, 36 L. Ed. 632]; but receivers should account for whatever receipts came into their hands from the operation of lessor's road *during the period for which no rent has been paid,* deducting whatever is properly chargeable against the same" (italics mine). This language clearly recognizes the right of claimant to retain rentals actually paid, and confines the inquiry as to net profits to the period during which no rent was paid. It becomes important, therefore, to determine what that period is.

Counsel for claimant insist that it begins with the 1st of June, 1908, the date of the first default, and the contention depends upon the language of the lease itself. There the lease covenants to "pay quarterly, on the 1st days of June, September, December, and March of each year, to the party of the first part, an annual rental of eight (8) per cent. on the par value of the capital stock of the party of the first part, such par value being $100 per share, and such capital stock consisting of 18,620 shares, for and during the first three years, commencing March 1, 1898, and 9 per cent. thereon for the remainder of the term and renewals." The quarterly payment thus reserved was, therefore, not payable in advance, but accrued at the end of the quarter, so that, when the receivers defaulted on the June payment in 1908 and thereafter, they failed to pay rent from March 1st of that year, and the period for which no rent had been paid would be from March 1st to November 13th.

Counsel for claimant demands the rent for this quarter ending June 1st, because the receivers had occupied without default up to that date. "They could not change the nature of their holding prior to default nunc pro tunc," it is said. So they also demand the franchise taxes for 1907 and 1908. The taxes, as reduced, are for 1907 $36,757.98, and $38,594.56 for 1908, and the Metropolitan's obligation to pay them is in the nature of a rental payment. The reason assigned for the demand for the quarterly rental clearly does not apply to this franchise tax for 1908, because that did not become due and payable until long after default, and after foreclosure of the Second Avenue properties was begun, and even after definite notice of rejection of the lease. Whether it applies to the 1907 tax suggests a different question, to be presently passed on; but so far as this quarterly payment (which at the 9 per cent. reserved amounts to $41,895), I think that the default must be held to relate back to the first day of the quarter. The claimant, as one of the lessor lines, had notice at the very beginning of the receivership as to the nature of the occupation by the court through its officers. It was not necessary for it to be a party to the litigations in order to know this, as in their reply brief counsel assert.

The court, as the opinions and orders cited show, had directed payment of rentals under underlying leases tentatively only and "for the present," until the advantage of the leased line to the trust estate could be determined. This was its attitude toward the leased lines at the very beginning of the receivership, and as claimant's counsel urge, though in a different connection, it is to be assumed "that it [the Second Avenue Company] informed itself as to the attitude which the court and the receivers had taken with reference to the retention of its property." It is clear that from the beginning the nature of the holding, which counsel urge could not be changed, was experi-

mental only, even though for a short time the court did direct payment of rentals, and that it was subject to default at any time, and to the legal consequences which followed, so that in effect it was not changed. I think, therefore, that the claimant is not entitled to the rent installment accruing June 1st, but is limited to the net profits for that quarter, and that the period of the accounting is from March 1st of 1908 to the following November 13th.

The taxes for 1907 accrued on October 7th, the very day that the decree was entered directing their payment. The reason that they were not paid, unlike that in the case of the June rental, which the receivers had definitely determined not to pay, was because certiorari proceedings were pending to review them. Otherwise they doubtless would have been paid as the court directed. It would seem that the claimant is entitled to their allowances, as that should be regarded as done which should have been done.

The receivers in this case have filed their account of what they claim the receipts and expenditures to be from and for the Second Avenue lines for the whole period from September 24, 1907, to November 13, 1908. The claimant has attacked many of the items on both sides of this account for the long period. It has also submitted two accounts for the shorter period from June 1 to November 13, 1908; one based on its claim of what the account for the longer period should be, and the other on the figures given by the Metropolitan receivers in their account. Neither side has furnished any account for the period from March 1st to November 13th, but study of the briefs has convinced me that, when the contentions respecting the items for the long period have been disposed of, the basis for the account for the period named will have been determined, and the figures can readily be checked by the auditors for insertion in the report.

The first item of receipts objected to is the credit given for receipts from the Eighty-Sixth Street branch of the claimant's line of $55,628.23, which it is insisted should be $81,075.71. The claimant concedes apparently the justice of the actual service basis on which receipts from fares have been apportioned, which in view of the general transfer system prevailing during the period suggested a delicate and difficult problem. The receivers have divided the receipts of the Eighty-Sixth Street line, determined on this basis in the proportion which the length of track owned by the Second Avenue Company bore to the total length of that line which is 34.31 per cent. The claimant asks an equal division, because, as its eastern terminus was at the Astoria Ferry, it claims to have "controlled" the bulk of the business. Doubtless the great proportion of Eighty-Sixth Street passengers east and west were ferry passengers, but that fact should not, in view of the principle adopted in determining the receipts of all the Second Avenue lines, give the claimant a superior claim respecting this line. It did not own or control the ferry, and the replicant receivers for the same reason might with as much justice ask a departure from the basis of division adopted, for it undoubtedly furnished the bulk of certain business done at intersections of main Second Avenue lines with its own lines, as for example at Thirty-Fourth street and Second avenue, which is near the Thirty-fourth Street Ferry, and Twenty-Third, Fourteenth, and Eighth streets, which are near ferries.

The only other item of receipts that the claimant objects to is the division of the receipts for the period for the privilege of inserting advertisements in the street cars of the whole system. The total receipts were $267,843.70, and of this amount $30,005.15 are first allocated to the Second Avenue lines on the basis of the proportion which electric cars assigned to Second Avenue lines have to those assigned to the whole system during the period. This the receivers again reduce on the strength of the opinion of witnesses as to the relative purchasing power of those traveling on claimant's lines as compared with those using other lines, which is estimated to be about one-fifth, and which they say suggest a value for the advertising privilege which, reduced to dollars, would be $6,001.03. The reasons assigned give the opinion some plausibility, and I do not altogether agree with counsel for claimant that the subsequent experience of claimant's receiver respecting advertising in his cars proves the opinion to be wholly unfair. The fact that a contract for $23,333 per annum for more than two years was immediately entered into for advertising exclusively in Second Avenue cars is partly explained, and the other

fact that the outstanding contract is for $7,000 only certainly has significance, if I were permitted to consider it. I am, nevertheless, of the opinion, taking all the contentions suggested by the parties into consideration and the bases on which this account has been made up, that the car mileage basis of division should be applied to this item of receipts in simple fairness, just as it has been applied to the many items of expenditures incapable of specific allocation, where such application may result to the possible disadvantage of the claimant. I understand a division on that basis is $24,371.85, which, subject to verification, I adopt.

The next item of receipts suggesting contention is the amount of $23,930.07 for storage of cars in the Ninety-Sixth Street car house for this longer period, which claimant urges should be $28,362.62; but as the car house burned down in February, 1908, and no cars were stored there after March 1st, when the period of accounting is held to begin, this item is not considered.

The credits for rentals of tracks and ducts are conceded as claimed by claimant; the remaining credit for miscellaneous interest of $702.22 demanded by claimant being disputed. It is a division suggested by claimant of interest on bank deposits made by the receivers from September 24, 1907, to January 1, 1909; such interest amounting to $7,316.61 for the long period of occupation. The suggested division is in the proportion which cash fares on claimant's lines bear to the total cash fares of the system. Respondents point out that receivers on September 25, 1907, had cash in banks of $607,291.33, which is larger than they had on hand at the beginning of any month thereafter, so that it seems impossible to attribute the interest to the difference, if any, between cash fares thereafter deposited and disbursements, rather than to this original balance.

Coming now to the items of expenditures in operation, the first to suggest dispute is that for maintenance of way, ordinary. Like many other items of expenditures made for the Metropolitan system generally, which benefited the Second Avenue lines, the item is incapable of specific allotment, because the Metropolitan books were not kept that way, and it has been determined on the car mileage basis, the general fairness of which the claimant concedes. Respecting this item the receivers insist that the amount is $106,432.38, while the claimants urge that it should be diminished by $14,662.83 for certain items which it claims the evidence shows were not used on the Second Avenue lines during the longer period at all. If this be so, the deduction should be allowed, and the receivers' engineer does testify that those items were not used. Receivers urge that he was mistaken, and that the testimony of the assistant engineer shows that these items were used. The testimony of the latter respecting it leaves it in doubt, however. At most it is hardly more than an expression of belief that they must have been, and not a statement of positive knowledge and recollection. While it is possible that some expenditures may have been made on Second Avenue lines in the beginning of the longer period, it seems clear that during the period beginning March 1st none was, if testimony of claimant's witnesses is to be accepted. I therefore allow this deduction as claimed.

The next item in dispute is maintenance of equipment. It is divided into ordinary and extraordinary; the latter alone suggesting contention, as the former, apportioned on the car mileage basis, is accepted. As to this item of extraordinary maintenance, it is unnecessary for me to consider the arguments suggested in the briefs, since it has already been decided in the "motors" branch of this proceeding. Referring to the amounts expended for the rehabilitation of the 275 cars during this period of occupation, it was said that the fact would be reported "that the respondents expended $50,400 on the rehabilitation of the 100 open cars delivered, but nothing on the remainder, with the conclusion that the Metropolitan estate is entitled to credit for that amount." In their reply brief counsel for receivers assert that the master asked "whether this charge [for extraordinary maintenance of cars] was to be asserted in the motors branch, or the use and occupation branch, of this proceeding." What was asked was whether counsel had not claimed the charge in the motors proceeding—a very different question (see stenographer's minutes). It *was* claimed, sharply litigated, and decided as indicated, and I do not think that it should be reopened. It can be reported

as a credit in the motors branch, or as a charge against receipts in this branch, of the proceeding, as counsel may desire.

The next item is wages of car house employés. This is for wages of car house foreman, watchman, car placers, car shifters, car and motor inspectors, car cleaners, lamp and headlight tenders, car oilers, car stove firemen, trolley oilers, and other car house employés not engaged in making repairs or renewals. The receivers claim to be able to determine this on a specific basis, as they assert that on February, 1908, the accounts were kept in a way to show the expenditures for these purposes on cars of each line, and they claim $38,944.63. The claimants insist on an apportionment on the car mileage basis, admitting only $36,333.92, a difference of $2,607.91. Their argument in support of this contention loses much of its force after the destruction of the Ninety-Sixth Street car house by fire, and as the accounting is to be confined to a period subsequent to that event, the amount actually expended during the period of the accounting should be taken as the charge for this item.

The next item suggesting dispute is for tube cleaning, included under the head of "other charges," and the difference involved amounts to $1,234.61 for the long period. Claimants' contention is based on the contention that the evidence shows that little or no tube cleaning was done on two of the Second Avenue lines for the last two or three months of the period of occupation. On the whole, I think that the charge urged by the receivers on the car mileage basis should be allowed, as differences tend to equalize each other.

The next item is cost of power, for which claimant is charged for the long period $185,739.83. Claimant urges two other amounts: first, $114,975.98; and, second, $144,975. The former is less than the latter charge, because claimant insists that it is entitled to share in profits made by the Metropolitan estate by reason of sales of power to third parties. I do not agree. Claimant would have as much right to share in profits from the Broadway lines as from sales of power. The larger charge eliminates only two items from those on which the receivers' cost is based; those eliminated being depreciation in power house and substations and interest on investment. The objection is not to the amounts, but because the claimant insists that it has an interest in the power house under the contract of March 8, 1900, by which the Metropolitan Company, in consideration of $750,000 par of bonds of the Second Avenue Company, agreed to furnish the latter power at cost. The receivers, however, rejected this contract, and are not bound by its terms; and I think that the deductions, for the reason assigned, cannot be allowed.

The next charge is for legal and claim expenses in connection with injury claims; the amount in dispute being approximately $13,000. The receivers base this charge on opinion testimony that experience has shown that the expense of securing settlements amounts to about 50 per cent. of the amounts paid in settlement. I may not grasp it fully, but it seems to me that the claimants' theory, based on amounts paid to outside counsel, leaves many factors out of consideration, and is not as satisfactory as the theory, tested by experience extending over many years, and used on other systems. The charge as claimed is allowed.

Certain objections are made to the apportionment on the car mileage basis of general expenses, the first of which relate to law expenses; the amount claimed by the receivers being $7,582.90, and that allowed by the claimant being only $1,107.50. Claimant does not object to the basis of apportionment, but urges that it is applied to a total which includes many items that could not have benefited Second Avenue properties, which is, of course, true of all the general charges. These they eliminate from the receivers' total before applying the car mileage rate, and the greater part of the amount eliminated is the salary of the general counsel for the receivers. These latter rendered services in certiorari proceedings affecting Second Avenue lines, in the preparation of contracts, in the collection of insurance on large fire losses, in the severance of transfer relations with Third Avenue lines, in conferences with Second Avenue bondholders, and in other matters directly occasioned by the fact that the Second Avenue lines were part of the system.

The charge asserted, determined on the car mileage basis, does not seem excessive, while that allowed is obviously too small. The receiver's charge is allowed, as are the two other charges claimed by him and objected to under this general heading, viz., salaries of general officers and miscellaneous general expenses.

The respondent is not entitled to charges for any taxes which were paid from Metropolitan funds which became due and payable prior to March 1, 1908. These were in the nature of rental payments, made under the direction of the court. Charges for taxes which accrued subsequent to that date and paid from Metropolitan funds are allowed. The gross earnings tax will be allowed at 1 per cent. on the gross earnings from March 1, 1908, to November 13, 1908, when and as determined.

The charge of $3,061.54 for wages accrued prior to September 25, 1907, is disallowed.

The foregoing passes on all items in dispute involved in the long period, and indicates what should and should not be included on both sides of the account for the period of the accounting from March 1, to November 13, 1908, but does not, of course, determine specific credits and charges for the shorter period, nor the principle on which each should be deduced from amounts allowed for this longer period. Receipts from transportation for the period of the accounting should, I think, be allowed on the basis of actual service rendered, and those from advertising on a car mileage basis for the period. Specific charges allowed, which were incurred and paid during the period, fix themselves, and other charges as allowed, which were apportioned on the car mileage basis for the longer period, will be apportioned on that basis for the shorter period; the purpose being to apply to charges paid during the shorter period the same principle of apportionment applied to charges conceded or disputed and disposed of for the longer period.

Let the respondent receiver prepare and present an account for this shorter period in accordance herewith at a hearing to be had on June 24, 1914, at 2 p. m., on notice, if it suggest dispute.

Motors Proceeding.

The order in this proceeding is intended to settle all questions unadjusted between the Metropolitan and Second Avenue estates arising out of the experimental operation of Second Avenue properties by Messrs. Joline and Robinson as officers of this court between September 27, 1907, and November 13, 1908. The purpose of that operation was to determine whether, as receivers of the Metropolitan Company, the respondents should adopt the lease of those properties to it, and it resulted in its rejection, as the direction of the order shows. Some of those questions the court by such order determined, among others, that the claimant Second Avenue receiver should accept certain electric cars, 275 in number, described in Schedule D annexed to the answer, as Brill closed, open, and combination cars, mounted on Brill maximum trucks, and equipped with G. E. 1000 motors, as constituting all the cars purchased with funds of the Second Avenue Company, except as the order thereinafter provided. Other matters, eight in number were referred for proof, to be reported with conclusions. Of these matters that numbered (6) in paragraph third of the order relates to the amounts, if any, payable to the claimant on account of net income from the operation of Second Avenue properties during this period, after deducting all proper charges, and by consent of counsel it has been conducted as a separate proceeding, known as the "use and occupation proceeding," pari passu with this proceeding, called for convenience the "motors proceeding," which includes all the other seven matters set forth in such paragraph. Though separately conducted, both proceedings are but branches of the one general inquiry commanded by the order, having for its object the determination of what property and money, if any, one estate owes the other as the result of this operation during the period in question.

The inquiry itself is governed by the principles established in these very proceedings by the decision of the Circuit Court of Appeals in the "termination of lease proceeding" (198 Fed. 721, 117 C. C. A. 503), which holds in effect that, whatever words of description they may have used, the respondents

during the period of experimental occupation must be considered as operating the leased road for the benefit of its owner. From this it results that losses during this period, whether from operation, or by destruction or depreciation of its property, are to be borne by the Second Avenue estate, and that expenditures for the benefit of that property from Metropolitan estate funds suggest credits to the latter and charges against the former which are clearly within the scope of the inquiry. No determination of net profits could be had which failed to take into account such losses and expenditures, and it is quite immaterial whether these latter be ascertained now or in the "use and occupation proceeding" which is but a part of that at bar. A further result of the decision cited is that a delivery of property by the respondents in compliance with the command of the court to the claimant, although depreciated by use by respondents, satisfies any obligation of the estate surrendering, and that the retention of property, by command of the court pending a determination of its title, is in no sense to be regarded as a conversion of that property, and a delivery now, if title be in claimant, in the condition in which it was at the time of the surrender of Second Avenue properties, would similarly satisfy such obligation. Thus it results that measures of damages which may be invoked in actions in tort and rules determining the propriety of set-offs and counterclaims in such actions have no application in an inquiry such as this.

Of the seven matters involved in this proceeding, those designated by the numbers (3) and (4) in the paragraph of the order mentioned have not been pressed, and are to be deemed abandoned. That designated as (5), involving the question as to whether the Metropolitan receivers were bound specifically to perform a certain contract of March 8, 1900, between the two companies, to furnish power at cost to the Second Avenue lines, was held on the hearings not to be binding upon them, as they had not elected to adopt it. The matters remaining for report at this time are those designated (1), (2), (7), and (8), hereinafter considered in that order; that designated as (6) and known as the "use and occupation proceeding" being left for future disposition.

(1) The inquiry contained in the order is "whether the Metropolitan receivers are under obligation to deliver to the Second Avenue receiver other motors and connections than those attached to the 275 cars at the time of their delivery, and, if so, on what terms said motors and connections should be delivered or the value thereof should be accounted for by said Metropolitan receivers."

The claimant receiver was appointed by the Supreme Court of New York, in a foreclosure action of the Second Avenue properties on September 19, 1908, instituted therein after this court had declined jurisdiction of a similar action. From such of the 275 cars, subsequently delivered in pursuance of the direction of the court above mentioned, as had what are known as "G. E. 57 motors" attached, the respondents on the following day removed such motors, and attached to each of said 275 cars two motors known as "G. E. 1000 motors"—550 in all, which were on the cars when delivered. The claimant insists that long prior to the New York City and Metropolitan receiverships the Second Avenue Company, through the acts of the Metropolitan and of the City Company as its lessee and sublessee, had acquired title to 550 of the G. E. 57 motors, and that therefore 550 of these latter should have been surrendered by respondents in place of, or in addition to, the G. E. 1000 motors attached to the 275 cars which by the court's direction they delivered at the expiration of the period of experimental operation on November 13, 1908. It is agreed by the parties that delivery of the actual motors is not at this late date convenient to either side, and that, assuming title as claimed, their value should under the order be accounted for. Much the greater part of the record to be reported in this "motors proceeding" is concerned with an inquiry as to such title and value, both of which suggest vigorous dispute on facts and law.

The lease of the Second Avenue to the Metropolitan was entered into on January 28, 1898, and rent began to accrue from March 1st of that year. Prior to its making, a change of motor power had been begun by the lessor company and was then in progress; contracts for the reconstruction of road and roadbed, as appears from recitals contained in the lease, having been

entered into previously by the lessor, but not apparently for its equipment. It appears, too, that the lessor, just prior to the lease, had mortgaged its properties to the Guaranty Trust Company to secure a proposed issue of $7,000,000 of bonds, none of which had then been issued, and it undertook to issue and dispose of such bonds to an amount sufficient to meet such construction contracts. Further of such bonds it agreed, at the request of the lessee, to issue, sufficient "to supply suitable cars, rolling stock, equipment and motive power to its said railroad to enable the party of the second part [Metropolitan lessee] to operate the railroad hereby [thereby] leased and demised by the underground system of electricity or by any other motive power." The reconstruction of the roadbed had apparently been completed and operation begun by April of 1898, and at a meeting of Second Avenue directors held on May 11, 1898, there was presented a request for bonds by the lessee, accompanied by a statement showing expenditures for purposes within the language I have quoted, on which statement appear the two following entries:

Paid for 125 large box cars, Brill	$325,000
Cost of 125 large open cars, ordered and to be paid for	275,000

At a similar meeting upwards of a year later, on May 22, 1898, a similar statement, dated May 1, 1899, showing expenditures for similar purposes, was submitted and acted on, and it contained these items:

Cost of Car Equipment.

125 large box Brill cars and 125 large open Brill cars	$642,000.51
25 combination Brill cars	61,437.50
	$703,438.01

These two statements suggest the inference that prior to May 11, 1898, the 125 large box cars had been delivered, as they had been paid for, and that prior to May 1, 1899, the 125 open cars mentioned in the first statement as ordered, with 25 combination cars, had likewise been delivered, as by the second statement they appear to have been paid for, and I understand that it is conceded that such an inference *is* suggested. It is also conceded that, when delivered, each of the 275 cars was equipped with two motors, and that the Second Avenue Company never thereafter paid for any motors, except those then delivered. There is, however, a sharp dispute as to what the motors delivered were. The respondents insist that they were G. E. 1000 only, and claim that fact, as matter of law, to be decisive of the controversy. The claimant, on the other hand, while not denying that, after the Second Avenue line was opened to electric operation in the spring of 1898, long cars were operated over it with the G. E. 1000 motors, insists that the evidence requires an inference that prior to May 1, 1899, the G. E. 57's had been installed, and are to be regarded as the motors included in the final payment of $703,438.01 above set out.

Careful reading of the testimony, however, convinces me that there is no justification for this latter inference. The evidence shows that about this time the Metropolitan Company was equipping, not the Second Avenue line only, but its whole system, with long double truck cars necessitated by the change to electricity then recently installed on others of its lines, or in process of installation, and that the method of acquiring the equipment was to purchase the bodies and trucks from the manufacturer and to assemble the complete car in its own shops by the addition of parts needed; that an estimate of the cost of the assembled car, made by Mr. Root about May 1, 1898, to which I attach more importance than claimant's counsel is willing to concede to it, includes motors at $780 per pair of motors, which, as I think the undisputed evidence shows, was the price of the G. E. 1000 motors, and that such estimated cost accords with the price at which the cars were billed as stated in the above-mentioned statements on which bonds were issued. It further shows that, compared with the number of G. E. 57 motors subsequently installed on long box, open, and combination cars used in the system as a

whole, the number installed prior to May 17, 1899, the date of the last billing, was insignificant, amounting to not more than 72, and this forbids any inference that the 57's were among those paid for, even if, prior to that date, some long cars equipped with such motors did pass over Second Avenue lines.

Neither do I think that Exhibits 26 and 27 lend support to the contention. The testimony of the auditor, correcting the testimony given by him before the court, mistakenly based on those statements, shows their precise value, and while they indicate the number of those motors in use at a later date, and are of much importance in that connection, they have no value as showing the number in use prior to May, 1899. I think it clear that the Metropolitan intended to demand and accepted payment and that the Second Avenue paid for G. E. 1000 motors only, and shall report that to be the fact to the court.

I do not, however, regard that fact as decisive of the controversy. By 1900 the inefficiency of the G. E. 1000 motors to operate long cars had been fully demonstrated, not only on the Second Avenue line, where the grades are steep and the conditions peculiarly difficult, but throughout the system generally, and G. E. 57's had been installed in their stead. It is a matter of inference from the evidence that prior to the lease of the Metropolitan to the City Company this change had been effected, and that thereafter neither the Metropolitan, its lessee, the City Company, nor the receivers themselves, attempted to operate the long cars, open, closed, or combination, with G. E. 1000 motors, or with any motors other than the G. E. 57's or their equivalent in power. It is difficult to read the evidence without concluding that both the Metropolitan and City Companies, long prior to the receivership, intended definitely to abandon the G. E. 1000's and to substitute motors of the G. E. 57 type of adequate power in the traction of long cars, and that the change had been completed long prior to 1905 the Exhibits 27 and 28, prepared for use in the franchise litigations of 1905, clearly show. It is true that there is evidence showing that changes were made in spring and fall of 57 motors from closed to open cars and vice versa, but there is no evidence that after 1900 the G. E. 1000's were used in the operation of long cars over the Second Avenue, or of any other of the long cars in the system.

It may well be, as counsel for respondents contend, that out of the 57 G. E. motors purchased by the Metropolitan, amounting to some thousands, it did not, by any definite act, actually segregate 550 as belonging to the Second Avenue Company, and as part of the equipment of 275 cars purchased for its account and paid for by it, any more than it seems to have segregated the cars themselves. Thus the cars paid for cover 125 closed, 125 open, and 25 combination, while those surrendered were 150 closed, 100 open, and 25 combination cars. What it did do was definitely to abandon the G. E. 1000's in long-car traction, and definitely to adopt the 57's, or their equivalent, for that purpose; and the question is whether, under the terms of the Second Avenue lease, these facts gave the lessor a right to the surrender of 550 of the motors, without which the cars surrendered could not be successfully operated, but for which it had not originally paid.

Provisions of the lease which is in terms of "cars, equipment, and personalty hereafter [thereafter] acquired," which are urged as relevant are that the lessee covenants that it will "keep the personalty hereby demised in good working order, condition, and repair, so that the traffic and business of said railroad shall be encouraged and developed, and reasonable accommodation given to the public," and that it "will deliver up the said railroad or railroads, and all the buildings, fixtures, and appurtenances thereof, at the expiration of this lease, or whenever the same shall become inoperative in good order and repair." It further agrees "that it will at the termination of this lease, or when for any cause it may cease to be operative, transfer, deliver, and return to the party of the first part, in good condition, the horses, harnesses, cars, tools, implements, machinery, equipments, stable equipments, office furniture and fixtures, and all property of every kind leased to and used by the party of the second part in the maintenance and operation of the railroad and railroads aforesaid, except that which is hereby absolutely transferred or which has passed from existence by death or destruction, and

shall also deliver the substitutes, increments, and additions provided or made by the party of the second part; and the substitutes for the property impossible to deliver by reason of death or destruction shall be equal in value to that for which they are substituted."

It may be said, in passing, that the construction of this language imposing an obligation to deliver substitutes insisted upon by the learned counsel for the respondents is one with which I do not agree. They urge that it is confined to substitutes for property which has passed from existence by death or destruction. The obligation to deliver substitutes, even though at the termination of the lease the property for which the substitution was made be still in existence, clearly results from this language; the obligation to deliver substitutes equal in value to property no longer existing evidently being intended as an additional protection to the lessor, but not as limiting the substitutes to the delivery of which the lessor shall then become entitled. Indeed, as to property still in existence, for which substitutes have been made, it would seem that the lessor becomes entitled to both. If, at the termination of the lease, the property for which substitutes had been provided were still in existence, the obligation to deliver both made any provision as to the value of either unnecessary; but, if it had passed out of existence, the substitute was to be equal in value to that for which it was substituted. Thus there is suggested by the language used a perfectly intelligible scheme for the lessor's protection when the lease ended, and it had again to discharge its duty to the public, as well as to the owners of its bonds and stock, to which the construction contended for does violence, and which, in my opinion, is not required by the language used.

Still other significant language contained in the lease, following the obligation of the lessor to issue its bonds for reconstruction and equipment purposes, is that "the party of the second part further agrees that after said railroad shall be reconstructed and the motive power changed, and the cars, rolling stock, and equipment provided, it will cause all renewals of such rolling stock, equipment, and motive power to be made at its own expense, and keep the same renewed and the said railroad supplied therewith."

The contention of the respondents is that, notwithstanding this language, the Second Avenue Company could have acquired title to the 550 G. E. 57 motors only if the Metropolitan intended it to, or by virtue of the rule of accession irrespective of intention, and that the Metropolitan did no voluntary act evidencing such intention; the rule of accession being inapplicable to detachable personalty, such as these motors were. The undisputed facts, however, are that as long ago as 1900 the Metropolitan had definitely abandoned the use of the G. E. 1000 motors in long-car traction, and had installed the more powerful motors on all such cars, including those used on the Second Avenue lines. This clearly was a "renewal" of equipment, which it is not denied experience had then demonstrated to be wholly insufficient, and, so far as this lessor company is concerned, it was, within the language quoted, a renewal of equipment, to be made at the lessor's expense, which the lessee was bound by its contract to meet. The record is entirely barren of any affirmative evidence that by installing 57's on long cars used on the Second Avenue lines the lessee did not intend to comply with its obligation, and I think that in the absence of such evidence it must be presumed that it did. The fact urged that it did not actually segregate 550 from all the 57's which it purchased, and affirmatively identify them as belonging to the Second Avenue Company, in no way affects such a presumption, for that they were not obliged to do while the lease was in force; the title of the lessor turning on the obligation to surrender substitutes, which is what I think these 57's were, whether actually segregated or not. Arnold v. Hatch, 177 U. S. 276, 20 Sup. Ct. 625, 44 L. Ed. 769.

If such a contention were to prevail, then the lessor did not have title to the 275 long cars delivered under the order herein, for these had not been segregated, and as those delivered were, as has been seen, not uniformly of the type paid for, they cannot be said to have been identified after their original purchase by any affirmative act of the lessor or its sublessee as belonging to the lessor company, so that the claimant's right to their delivery—a right recognized and enforced by the court—clearly did not turn on any

such act. What we have at the end of the period of occupation is that the respondents had in their possession motors sufficient in number and powerful enough to move all cars of the system of the type delivered, of which 550 motors—not, perhaps, theretofore apportioned to the lessor, in the sense that they were tagged as belonging to it—were in use on the Second Avenue lines when they took possession, had been in such use for nearly seven years prior thereto, and could not then have been identified as belonging to any other company in the system. In other words, I think it may fairly be said on the evidence here that the situation existed described by Judge Lacombe on the Central Park Company's application ([C. C.] 165 Fed. 474), where he held, respecting cars and horses not previously identified as belonging to that company by any affirmative act of the lessee or sublessee, but in use on the line when receivers took possession, and not capable of identification as belonging to some other lessor, that such property should be assumed to be "substitutes" to be returned to the lessor when the road itself was returned. Indeed, if it had not been for the facts that the 550 G. E. 57's cost considerably more than the G. E. 1000 motors, and that the Second Avenue paid for the latter only, I doubt whether, in the discharge of the duty which they owed to the Metropolitan estate, the respondents would have felt compelled to raise any question as to the claimant's right to the surrender of the former as substitutes because of any difficulty in identifying them as such. Precisely the same difficulty existed as to the 1000 G. E. motors actually delivered, for none of these had been attached prior to September 19, 1908, to the cars delivered, but had been in use generally in the system, either on small cars or for the most part on snowplows and the like. As I think that the language of the lease bound the lessor to renew inadequate equipment at its own expense, substituting therefor that which was adequate, and that its acts long prior to the receivership require the presumption that in installing 57's it intended to comply with its obligation, I shall report a conclusion to the court that the respondents were under an obligation to deliver 550 G. E. 57 motors.

As it is agreed that it is not now convenient to deliver such motors and connections, the remaining question under the order is on what terms their value should be accounted for. If there were now in the possession of the respondents 550 G. E. 57 motors, their delivery in the condition in which they were at the end of the period of experimental operation would fulfill any duty which the respondents as conservators of the estate now represented by the claimant owed to it. Obviously the value to be accounted for is the value of the motors in the condition in which they then were, and, if that value had been depreciated by use by lessee, sublessee, or respondents themselves, the loss is one which, under the principles referred to, the estate represented by the claimant must bear. Values based on what respondents may have said it would cost to furnish adequate motor equipment on the 275 cars delivered, or on the actual cost of such equipment to the claimant, or on measures of damage, either punitive in their nature, or based upon the fact that the property converted was of special value to the owner, applicable in actions of conversion, have clearly no application. As has been said, there was here no conversion, nor anything but a detention of property by direction of the court until its title was determined—a detention clearly demanded by the duty which the respondents owed to the estate of the Metropolitan Company, as the recital of the foregoing facts suggesting the reasons for it abundantly shows.

The evidence, of course, is that the G. E. 57 motors in the Metropolitan system had been depreciated by a use of nearly 10 years, and the respondents adduced the testimony of their superintendent of rolling stock, who had a general knowledge of their condition at the end of this period of experimental operation, and who testified that their value at that time, determined by a yearly deduction for depreciation, estimated in accordance with the best railroad practice, as to which he showed himself fully qualified to speak, was $570 per car, or $285 a motor. Some light is thrown on the fairness of this estimate by the evidence offered pro and con on the theory that secondhand motors in fair operating condition had a market value at this time, which is not, however, conceded by the claimant, who insists that about November

13, 1908, the supply was so limited that they cannot be said to have had a market value then. However this may be, considerable quantities of these secondhand motors were on the market just prior to that date, and some time subsequent thereto, and on the evidence of experts the contention of the respondents is that the value of such motors was not more than $225 a motor, while the respondent insists that it was $350, between which limits there are other varying estimates.

While I do not think that the theories of damages in support of which this evidence was supplied are necessarily controlling, it indicates that the figures suggested as the result of an application of the independent method applied by the respondents' superintendent, by which, I think, the respondents, having offered it, should be bound, suggest the usual approximation adopted by triers of the fact of value based on conflicting expert testimony, being about midway between the two extremes. I have no hesitation in accepting it independent of this evidence, and shall report the value to be $285 for each of the 550 motors, or $156,750.

The respondents insist, however, that any amount arrived at as representing this value must be diminished, first, by the amount actually expended in putting 550 G. E. 57's in good secondhand operating condition, which they claim to be $28,900; second, by the cost of rehabilitating the 275 cars delivered to the claimant, which they estimate as $118,581.25. I may say generally that the right of respondents to credit for Metropolitan moneys actually expended by them on Second Avenue property during the period of experimental operation is undoubted on the authorities already referred to, and that such credits are within the scope of the order of reference under one or the other of the subdivisions of its third paragraph, subject, of course, to the limitation that they be allowed but once. They are not to be rejected from consideration in this connection, as claimant's counsel insists, because they are offsets based on contract, express or implied, to a claim sounding in tort, for the reason already suggested, and may be as properly considered now as in the "use and occupation proceeding" to which he would refer them, since that, though independently conducted, is but a part of this proceeding.

Taking up the first of the deductions insisted on, it will be noted that the method adopted by respondent's expert which suggests the figure to be reported as the value of the motors proceeds upon a theory which excludes any expenditures for rehabilitation, so that, as claimant is not to get the motors, it should not be deducted; that in effect having already been done. As to the second item of $118,581.25, it is based again on the testimony of Mr. Adams, respondents' superintendent of rolling stock, upon an estimated apportionment of actual expenditures in rehabilitating closed and open cars in the system during 1908, which fixes $555 as the amount expended on each closed car and $504 as that expended on each open car.

Counsel for claimant urges, among others, two objections to its allowance. One is that it is merely an estimate. The evidence shows, however, that it is based on the actual expenditures; the amount expended on each car having of necessity to be apportioned, as the work for the most part was done in respondent's own shops. I have no hesitation in accepting the figures suggested as fairly representing the amounts expended per car on cars of each type actually rehabilitated. The second objection is that there is no evidence in the record at bar to show that any moneys were actually expended by the respondents on any of the cars delivered by respondents under the order herein. Careful reading of the record convinces me that this statement of counsel is accurate. It is shown that expenditures on a large number of long cars were made, but not on all the cars then in the system, and it cannot be assumed that any were made on the cars delivered. I may, however, take notice that this question of fact was litigated between the same parties in the Second Avenue breach of lease proceeding and that the finding of fact reported to the court, and confirmed by it, contains the direct statement that 96 of the open cars delivered were thoroughly rehabilitated in the summer of 1908, and suggests the inference that the other 4 had been, too, although when they were delivered their platforms were lacking. It suggests the further inference that none of the other 175 cars had been rehabilitated by the respondent receivers at all after they took posses-

sion on September 25, 1907, and up to the date of delivery (see master's opinion).

This finding and the order of the court confirming it, which is, I take it, conclusive on the parties here, have not been offered in evidence in this proceeding, and an opportunity will be accorded to offer it before the report herein is signed. It will be the basis of a finding of fact to be reported that the 100 open cars delivered had been rehabilitated by the respondents during this period of experimental operation, and that no moneys had, during that period, been expended by them on the remaining 175 cars delivered. The testimony of the respondents' superintendent of rolling stock in this proceeding that $504 represents the amount actually expended in the rehabilitation of each open car is accepted, and I shall report the fact that the respondents expended $50,400 on the rehabilitation of the 100 open cars delivered, but nothing on the remainder, with a conclusion that the Metropolitan is entitled to credit for that amount.

The respondents claim a further credit of the value of the 550 G. E. 1000 motors delivered with the 275 cars on November 13, 1908. I think that under the lease, at its termination, title to property then in existence for which other property had been substituted in accordance with its terms remained in the lessor. The respondents do not question that title to *these* motors was in the lessor, for that is their assertion. The reason for this conclusion has been given in connection with the language of the lease which suggests it, and it of course means that the Metropolitan estate is not entitled to this credit. It will, however, be convenient to report the value of these motors to the court in the event that it differ, and this the evidence in connection with certain findings by the court in the Second Avenue breach of lease proceeding between the same parties enables me to do. The evidence shows that there was a market value for secondhand G. E. 1000 motors in good operating condition on the date of delivery of $100 per motor, which figure I adopt. The value of 550 of such motors in that condition would therefore be $55,000.

Respondents suggest that sums were expended by them in rehabilitating the motors delivered, and say they were in such condition when delivered; but I think the evidence shows the contrary. In any event, it has been found as a fact by the court in the proceeding referred to that they were badly out of repair on November 13, 1908, and that $78.25 *per pair* would be needed to put them in that condition. The total cost of such rehabilitation at that time for the 550 motors at that rate would be $21,518.75, which should be deducted from the value of $55,000 fixed for such secondhand motors in good condition, leaving $33,481.25 as the value of the secondhand motors as and when delivered, which will be reported as a fact, with the conclusion that the sum suggested is not a charge against the estate represented by the claimant.

The answer to the question asked by the court in subdivision (1) of paragraph third of its order will therefore be that the Metropolitan receivers were under obligation to deliver to the Second Avenue receivers 550 G. E. 57 motors in addition to those attached to the 275 cars at the time of their delivery on November 13, 1908, and that, as it is agreed that they cannot now be delivered, the terms on which their value should be accounted for are that the estate represented by the latter should be credited with $156,750 as the value of said motors in the condition in which they were on November 13, 1908, the date when they should have been delivered, and that the Metropolitan estate represented by the respondents is entitled to an offsetting credit to the extent of $50,400, being the amount expended on the rehabilitation of 100 of the 275 cars delivered during the period of their experimental operation of the Second Avenue properties between October 1, 1907, and November 13, 1908.

(2) Whether the Metropolitan receivers are under obligation to pay over to the Second Avenue receivers any sums on account of the property that was destroyed or damaged by the fire at the car barn of the Second Avenue Company at Ninety-Sixth street and Second avenue on February 29, 1908; and, if so, what amount and upon what terms?

The date of this fire, it will be noted, was subsequent to the appointment

of the respondents, and during the period of experimental operation by them of the Second Avenue properties. The agreed value of the car house at the time of the fire is $525,000, and the damage to the building $309,258. The insurance companies agreed to pay $227,000, which the parties agree was all that could be collected under the policies. The actual amount collected and turned over to the claimant was $203,299.48. A further sum of $15,716.24 was collected by respondents and retained pending the determination of the ownership of a fire protection system installed by them prior to the fire. Counsel now agree that this system, when installed, became fixtures, which means that they were the property of the Second Avenue Company, so that the right of claimant to this fund of $15,716.24, which was placed in the Astor Trust Company, with accumulated interest, is conceded. On January 1, 1912, the interest credited was $1,167.49, which added to the principal is $16,883.73, the sum demanded for claimant in the brief of counsel. He is of course entitled to such further accumulations as there may be. Certain drafts for the balance of the amount agreed to be paid by the insurance companies were protested, which amounted to $6,295.28, to the Metropolitan rights in which it is agreed that the claimant is entitled to be subrogated.

Claimant insists, however, upon a credit either of the difference between the amount of the fire damage and the amount of the insurance collected which he states to be $105,958.52, but which should now be diminished by the above-mentioned amount of $15,716.24, leaving $90,242.28, or the difference between the amount expended by him in the reconstruction of the car house, which was $465,700.20, and the amount of the insurance collected, stated at $203,299.48, leaving $262,400.72, but which should now be similarly diminished by the same sum, leaving $246,684.48. The respondents say that this matter is not referred, and I agree. The court below, long before the decision of the Court of Appeals in the "termination of lease proceeding," had held that losses occurring to property leased, during a period of experimental operation prior to the rejection of the lease, were with the lessor (C. C.] 165 Fed. 474, supra), and the language of its order is not to be extended by construction to include a matter about which there could be no dispute.

If it be referred, however, the loss is clearly one which the Circuit Court of Appeals has held that a lessor must bear.

The answer to be made to question (2) will therefore be: The Metropolitan receivers are under obligation to pay over to the Second Avenue receiver on account of property that was destroyed or damaged by fire at the car barn of the Second Avenue Company at Ninety-Sixth street and Second avenue on February 29, 1908, the sum of $15,716.24 deposited in the Astor Trust Company, with all accumulations of interest credited thereon by said Trust Company, and that said Second Avenue receiver is entitled to be subrogated to the rights of the respondents in the unpaid and protested drafts issued by the insurance companies, amounting to $6,295.28.

As no claim is made under the questions proposed in subdivisions (3) and (4) in the paragraph third of the order, the report will so state.

(5) Whether the Metropolitan receivers are under obligations specifically to perform a certain contract, dated the 8th day of March, 1900, executed by the Metropolitan Street Railway Company, party of the first part, and the Second Avenue Railway Company, party of the second part, whereby Metropolitan Street Railway Company agreed to furnish power at cost, and, if so, upon what terms?

The answer to this question is in the negative, and will be reported accordingly.

(7) What are the rights, if any, of the receivers of the New York City Railway Company and of the Metropolitan receivers by reasons of moneys expended subsequent to their appointment in putting the First Avenue line of the Second Avenue Company between 59th street and 125th street in fit condition to run, and by reason of their expenditure of other moneys in and about the property of the Second Avenue Company?

The contention of the learned counsel for the claimant that the Metropolitan Company by the lease assumed the payment of the bonds which it became entitled to demand by reason of expenditures of the nature indicated

in the question has been disposed of adversely by the court in the Second Avenue breach of lease proceeding. In any event such expenditures, when made by respondents, would stand on a different footing from those made by the lessee itself for such purposes. The further contention that the Second Avenue Company is not bound by the proceeding in which the expenditures were authorized, as it was not a party to them, is also answered adversely by the reasoning of the opinion of the Court of Appeals in the "termination of lease proceeding" (198 Fed. 721, 117 C. C. A. 503), which rules that such expenditures, especially for betterments, as here, when authorized by a court having jurisdiction of the res, are binding on the owner lessor, even though not a party, for it could have become such. The Second Avenue Company will get the benefit of the betterments, for which it would be inequitable to compel the Metropolitan creditors to pay. So, too, under that decision it would seem that respondents are quite as clearly entitled to a lien for such expenditures superior to the lien of the mortgage of the Second Avenue Company to the Guaranty Trust Company, as the holders of receivers' certificates would have been, had such been authorized by the state court having jurisdiction of the action in which the claimant was appointed, and their proceeds devoted to the same purposes.

As to the suggestion that these payments subsequent to the receivership of October 1, 1907, might have been used as a set-off in the Second Avenue breach of lease proceeding—to my mind an altogether doubtful proposition—it is sufficient to say, again on the authority of the "termination of lease proceeding" that, not having been urged there, they are available here as credits to the Metropolitan estate arising out of things done during the period of experimental operation against any offsetting charges similarly arising and are clearly within the inquiry commanded by the order.

Finally, to the suggestion that they are available only in the so-called "use and occupation proceeding," which means that they are payable only out of net earnings, if any, accruing during the period of experimental operation, and that they may not be repaid at all, it may be said that it can be based only on the theory that to allow them as a credit against a debit for the value of the motors is to allow an offset based on contract against a claim sounding in tort—a theory which has already been considered and rejected, for reasons stated.

Claimant interposes objections to certain items included in this cost of electrification of First Avenue. The first of these relate to the remodeling of the First Avenue section of the Ninety-Sixth Street car house, necessitated by the change in motive power and in installing fire protection apparatus, amounting to $78,153.82. It proceeds upon the theory that, as there is no express provision for it in the order of the court authorizing the electrification of the First Avenue line, it should not be allowed; but I think that the authority for it was implied. So with reference to a second sum of $1,507.32 for manholes, objected to on the same ground, I think the authority to construct these, as a necessary incident of the change to electric traction, was also implied.

A third objection is to an item of $2,025 for steel drawings for the remodelling of the section of the car house referred to, which were ordered by the respondents during the period of experimental operation, before, I assume, they had determined to reject the lease. They were ordered in good faith, of course, on the assumption that the duty of making the change might devolve upon them. They did not make the change, however, as this was done by the claimant, and he did it on plans from others that he himself secured. This objection seems to be based on alleged facts that the claimant never had the plans and could not get them, but it is clear on the evidence that if he had gotten them he never would have used them, as he had determined to make the change in his own way. I think that, on the authority of Ames v. U. P. R. R. Co. (C. C.) 74 Fed. 335, the item is properly chargeable against the Second Avenue estate.

The last item objected to relates to the alleged cost of "clearing up car house ruins" after the fire, amounting to $30,047.27, included in the total credit claimed under this heading. The figure given is part of a larger cost for the removal, not only of building débris, concededly chargeable only

to the Second Avenue Company, but of car débris as well, which is chargeable solely to the Metropolitan estate. It is an apportionment based on the testimony of respondent's accountant, and is larger than the figure of $20,000 for the same item reached by the insurance adjusters. Both are of necessity estimates, but for the reasons suggested in his testimony I accept the conclusion of the accountant, whom have I found in these proceedings to be not only accurate, but fair.

The respondent's brief states the matter respecting this item as follows:

Clearing up car house ruins		$30,047 27
Adjusting loss		1,945 27
Legal expenses		348 25
Restoration of property		10,581 55
		$42,922 34
Less Credits.		
Deposit of insurance moneys	$15,716 24	
Salvage	10,353 98	
Legal expenses paid	181 57	26,251 79
Balance		$16,670 55

This item of insurance deposit of $15,716.24 has been allowed as a credit to claimant in the answer to the second of the questions referred, and should not be again allowed. Accumulated interest was also allowed. This balance should therefore be increased by this amount, making the item for "clearing up car house ruins," $32,386.79. The total amount of the affirmative claim of respondents against claimant will then be as follows:

Electrification of First Avenue line	$173,682 43
Remodeling of First Avenue section of car house and installation of fire protection	84,110 48
Removal of car house débris	32,386 79
Total	$290,179 70

The answer to the question proposed in subdivision (7) of the order will therefore be: The respondents, as receivers of the Metropolitan Street Railway, are entitled to a credit of $290,179.70 by reason of moneys expended subsequent to their appointment in putting the First Avenue line of the Second Avenue Company in fit condition to run and upon the property of that company, and are entitled to a lien for the balance of such sum, if any, after deducting credits to the claimant allowable as the result of this proceeding, with interest at 6 per cent. from November 13, 1908, and to a lien for such balance on the property of said company prior to the lien of its mortgage to Guaranty Trust Company.

(8) What ducts and feeder cables located on franchises belonging to the Second Avenue Company belong to the Metropolitan Street Railway Company?

By stipulation the question of ownership of the ducts was reserved, unless the New York Railways Company required its consideration, which it has not done. The respondents, at whose instance, doubtless, this paragraph was inserted in the order, insist that what are known as the "A. C." or alternating current feeder cables in the ducts along the Second Avenue lines belong to the Metropolitan estate, but concede that what are known as the "D. C." or direct current feeder cables feeding Second Avenue lines belong to the claimant.

A. C. cables were used in conveying alternating or high tension current from various power stations owned or controlled by the Metropolitan System, none of which was owned by the Second Avenue Company, to various substations in different parts of the city, none of which, as is stipulated, belonged to the latter company. In these power stations the alternating current is converted into direct current and conveyed by the D. C. cables, mediately or immediately, to ducts along the lines in the operation of which the direct current which they carried was used. A. C. cables, which were carried in

ducts along the Second Avenue line, were used for the most part in conveying the alternating current from a power house on First avenue and Ninety-Sixth street to these various substations, and such cables are used solely for that purpose. The Second Avenue ducts used to carry any of these A. C. cables were only a link in the chain of ducts needed to carry it from power house to substation, for none of these substations was on the Second Avenue lines. These A. C. cables were installed in the ducts by simply drawing them through from manhole to manhole, which are about 400 feet apart, and there splicing them. They are not attached, so as to be irremovable, and can be readily drawn out. They are susceptible of ready identification, and are in fact identified by a metallic tag bearing a number. The uncontradicted evidence shows that they were paid for by the Metropolitan Company, and not by the Second Avenue Company, which did, however, pay for the D. C. cables from the substations serving its own line, ownership in which is conceded. The Metropolitan also used these ducts to carry D. C. cables from substations to lines in its system other than Second Avenue lines, which it paid for, and which, too, are removable and capable of identification.

The learned counsel for the claimant urges that these cables, whether paid for or not, became fixtures when they were threaded through the ducts. Whether personalty takes on the legal characteristics of real property depends as much upon the intention of the parties between whom the question arises as upon anything else, and the intention which the facts suggest, or which the law declares that they suggest, controls. Here it cannot be assumed, so far as the A. C. cables are concerned, which were not charged to the Second Avenue Company, and which were useless to it, as it owned neither power house nor substation, that the parties intended that title should vest in it simply because a portion of such a cable on its way from power house to substation was passed through ducts on its line; and the same is true of D. C. cables to lines other than Second Avenue lines, which the line using them paid for, and which happened to pass in part through Second Avenue ducts. Such facts suggest only a contrary intention. Neither do I think it of any importance whether such A. C. or D. C. cables happened to be in the ducts at the time the Second Avenue lease went into effect. It is inferable from the evidence that the Metropolitan, while not nominally, was actually, in control of the work of electrification then in progress and begun in anticipation of the lease, and if it strung cables through these ducts for use on other lines for which the Second Avenue was never asked to pay, and for which it would not under the lease have been bound to pay, that fact would not be sufficient to give the claimant title.

Subject to criticisms of counsel as to form, I suggest the following answer to the question (8) contained in the order: The question of the title to ducts located on franchises belonging to the Second Avenue Company has been reserved by stipulation. All alternating and direct current feeder cables in such ducts, except such direct current feeder cables as were paid for by the Second Avenue Company, and which are shown in Respondent's Exhibit JJJ in this proceeding, with that portion of two feeder cables numbered 127 and 128 in ducts on First avenue, from Ninety-Sixth street to Eighty-Sixth street, and on Eighty-Sixth street from First to Second avenue, belong to the Metropolitan Street Railway Company; the alternating current feeder cables being shown in Claimant's Exhibits 34b, 35, and 36, of January 1, 1913.

Respondents will file and serve a proposed report accordingly; claimants to file and serve objections and proposed amendments thereto within ten days after such service, to be passed on at a hearing thereafter, on a date to be fixed at convenience of counsel.

John W. Griggs, of New York City, for claimants.

Strong & Mellen, of New York City (Charles H. Strong, of New York City, of counsel), for receiver of Second Ave. R. R. Co.

Masten & Nichols, of New York City (Arthur H. Masten and William M. Chadbourne, both of New York City, of counsel), for receiver of Metropolitan St. Ry. Co.

LACOMBE, Circuit Judge. This claim has been treated by the special master in two separate opinions, viz., "Use and Occupation Proceeding" and "Motors Proceeding." As a single report covers both, they will be disposed of here in a single opinion.

[1] 1. The main discussion is on the question whether the Second Avenue is entitled to recover rental (taxes being considered rental) stipulated in the lease for the entire period of occupation by receivers, or, as the special master held, for a part of that period, or the net earnings of the property during the entire period. Whatever may have been held in other cases, many of which are cited on the briefs, and none of which it is thought precisely fit the complications of this particular system, it seems to me that the several deliverances of the Circuit Court of Appeals in the above-entitled causes have settled the question for this court. As to each and every one of the many leased lines, "unless and until [receivers] adopt the lease, there is no privity [between lessor and receivers] and no liability upon the lease." 198 Fed. 721, 117 C. C. A. 503. From the very beginning, all these lessors knew that the whole system was in receivers' hands, and knew that the latter were under no obligations to pay stipulated rental. If they were unwilling to have their property used and occupied under such an arrangement, which might end in their receiving net earnings only for such use and occupation, the court was open to them for application to have a prompt determination made as to whether the lease would or would not be adopted. None of them made such application, for the very good reason that they well knew that these rentals were all fixed in more prosperous times at high figures, amounting to more than could then be earned from the operation of the roads. Presumably it was hoped that with the lapse of time conditions would improve, and that either receivers or a reorganization company would eventually adopt the leases.

It might well be better to wait in uncertainty rather than to force a decision which would convert the uncertainty into a disastrous certainty. There seems to be no special equity which should call for a modification of the rule laid down by the Circuit Court of Appeals. The amount to be paid for use and occupation by receivers from September 25 to November 12, 1908, when the road was turned back to the lessor, is the net earnings of the road for that period. The total revenue from the operation of the road should be first ascertained, and from it should be deducted the proper charges against such revenue; the result will be the net. Although all the figures were before him, the special master has apparently made no finding as to all of these items of charge and countercharge, except for the period from March 1, 1908, to November 12, 1908. In consequence it will not be possible for this court itself to determine the amount; the case will have to go back to the special master, with a statement of the opinion of this court as to various controversies which have arisen on the accounting.

[2] 2. In figuring as he did the amount of receipts for the shorter period, the special master prorated total receipts on the basis of mileage. It is objected that there should be a larger allowance to the Eighty-Sixth Street (branch) Line, because its eastern terminus was the

Astoria Ferry, which claimant insists "controlled" a large part of the business. The master's method is the only practical one; the other proposed method involves too many speculative elements.

3. Receivers contended that the pro rata of receipts from advertising in the cars should be reduced, on the theory that the advertising of the Second Avenue was only one-fifth the value compared to the rest of the system, because "the purchasing power of the passenger" determines the value of the line for advertising. This also is too speculative; the master's method of determining these receipts was correct.

This disposes of all items on the one side of the account. Next to be considered are the items in controversy on the expenditure side of the account.

4. The first of these treated of in the report is "Maintenance of Way, Ordinary." It seems entirely clear upon the evidence that the amount of that can be determined only on the car mileage basis. The master so finds, although he does not give the figures for the full period. He allows, however, a deduction of $14,662.83, as his conclusion from conflicting testimony. In controversies concerning the large sums involved here, it would be a waste of time, costing more in the end to every one, to go into the details of so small a sum. The master's finding is approved, but if, when it comes to a question of deductions from the pro rata for the longer period, claimant undertakes upon evidence already in to increase the amount of this deduction to a more substantial sum, this court will consider the whole amount of the claimed deduction open, and will examine into it.

It is understood from the opinion that the item "Maintenance of Equipment, Ordinary," is not in dispute.

5. The next item is "Maintenance of Equipment, Extraordinary." By reason of the unfortunate division of this single claim into two proceedings, the master seems to have concluded that he could not make an allowance for this amount. It is therefore referred to him to find what is the amount of such expenditures, directly chargeable on the proof to Second Avenue equipment for the whole period, exclusive of the motors, which will be referred to later on.

6. The next item is "Wages of Car House Employés." There does not seem to be any objection to the master's finding of this amount, and it is approved. Whether accounting for net earnings during the full period will produce some exception to his ruling cannot be told, until the accounting on that basis is concluded.

7. The next item is for "Tube Cleaning," as to which there seems to be no exception to the master's finding, which is for the full period, and which is affirmed.

8. The next item is for "Power Charges" during the long period. No argument against his finding is presented, and it is affirmed.

9. The same disposition is made of the item "Legal and Claim Expenses" for the same reason. Also general expenses—prorated on mileage basis.

[3] 10. The next subject of controversy is the motors G. E. 1000 and G. E. 57. The subject is most fully and carefully discussed in the master's separate report, "Motors Proceeding." His conclusion that

the receivers should have turned over to the claimant the motors of the later type, which, before their advent on the scene of operations, had been substituted for the older type as more efficient, is entirely correct. So, also, are his findings as to value; it being agreed all around that physical delivery is undesirable now. It is understood that $156,750 represents the value in November, 1908, when equipment was turned over, and these G. E. 57 motors should have been. Receivers, however, were bound only to turn over the substituted motors in the condition in which they found them. If they spent money to put them in an improved condition at the time when they should have turned them over, but did not turn them over in the condition in which they were in September, 1907, that would be a proper reduction.

To the proposition that claimant is to have its semiobsolete motors, as well as the higher type motors which have been substituted in their place to make its cars more efficient, I cannot assent. This conclusion is based solely on the text of the lease, which provides that on termination the lessee will return equipment, except what has passed from existence by death or destruction, and also substitutes, increments, and additions. As construed, this would lead to the following result: Having received a small car carrying 20 passengers and a team of horses worth $200, the lessee substituted a larger car carrying 40 passengers, which this team of horses was too light to haul. Therefore it bought a new team of heavier horses worth $300, and substituted them for service on this road, turning over the lighter team to other branches of the system, where the lighter cars were still run. The clause as construed would require the lessee to turn over, not only the more valuable new team, but also the old team, for which the new had been substituted, unless it had taken the precaution to shoot the new team the day before the lease terminated, so that "death or destruction" would eliminate them from further consideration. There is no argument in the briefs—other than the text of the clause—to support this construction, and I find it so difficult to conceive that intelligent men would have agreed on such a contract, for no obtensible reason, that it is much easier to conclude that the draftsman of the document was not gifted with the faculty of clear expression in his use of language. Quite possibly he drew a perfectly intelligible and intelligent paragraph, into which amendments, intended to cover some special points, have been so inartificially injected as to distort its meaning.

The proper construction seems to be this: If the particular piece of equipment still exists and there has been no substitute installed, it is to be returned. If there has been a substitute installed, that is to be returned. If the substitute is less valuable than the original, the lessor shall have his original, not the inferior, substitute. If the original has perished, so that he cannot get it, then to the returned substitute there must be added enough money to make it equal to the original. Therefore from the $156,750 there should be deducted the value in November, 1908, of the G. E. 1000's turned over.

11. The master's conclusions as to the item of claim on account of the destruction of the car barn at Ninety-Sixth street are fully concurred in.

12. There does not seem to be any contention that the master erred in his conclusions as to furnishing power; they are confirmed.

[4] 13. The master's conclusion as to the offset by receivers of the amounts *they* expended for electrification of First Avenue Line, etc., are fully concurred in. The decision of the Circuit Court of Appeals in the constroversy between lessor and lessee requires no different disposition of this item. Receivers occupy a very different position from that of the lessee. They expended general funds for the express benefit, and, since the lease was not adopted, for the sole benefit, of the Second Avenue, and it would seem grossly inequitable that the latter should have its property thus improved at the expense of all others interested in the fund.

14. The master's conclusions as to ducts and feeder cables located on franchises are also affirmed.

15. It is found on the proofs that the amount due by receivers for use of surplus space in Second Avenue car house during the period of occupation is $28,362.62.

As stated before, the entire subject-matter of this claim, argued here in two subdivisions, is sent back to the special master for a revised report in conformity to views above expressed. It might be possible, with the assistance of some concessions on both sides as to figures, to amend the findings and conclusions on the record now here. But the items are so numerous, and there is such a mass of detailed figuring, that it would be unsafe to do so, and much time would be lost in the attempt; the special master, being thoroughly familiar with the details, can dispose of them more accurately and expeditiously. Especially so because the sending of the case back to him for reconstruction of the report on the lines indicated in this opinion will not necessarily open the door to the taking of any additional testimony, except as indicated. When his revised report comes here, it may be affirmed pro forma; all exceptions to the original and the revised report being reserved to objectors. It may then go to the Court of Appeals.

A decretal order may be entered, recommitting the report to the special master for revision in accordance with the views expressed in this opinion.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al. (and three other causes).

(District Court, S. D. New York. November 27, 1914.)

Nos. 2-9, 2-33, 2-149, and 3-37.

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 lines of the system, the lessee covenanted to make good any deterioration in the property leased, and also in effect to perform the conditions of the prior leases, which contained similar covenants with respect to deterioration, so long as its own lease continued in force. On the termination of such lease by the insolvency of both parties and the appointment of receivers for both, the lessor's receivers surrendered its leased lines to the original

lessors, who were subsequently awarded damages under the deterioration clause in their leases, which were made charges against 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 their receivers the lessor was entitled to recover the amount it should be required to pay in dividends to its own lessors; such amount, however, to be paid in full, and not merely allowed as a claim against the insolvent estate of the lessee.

[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. In the matter of the claim of the Metropolitan Street Railway Company against the New York City Railway Company. On settlement of decretal order.

For former opinion, see 217 Fed. 423.

LACOMBE, Circuit Judge. When the special master's report came up for confirmation, the items of damage were separately discussed. In one group there were included deterioration of track, etc., on the lines owned by the Metropolitan or held by it under leases which had not been terminated by receivers and the lines returned to lessors. In another group there were included the like deteriorations on the lines such as Second Avenue and Central Park, which had been thrown off from the system during receivership. Apparently these were separately presented and discussed, because the Court of Appeals had held that the leases of those lines had been assigned to the New York City Company, and had sustained claims of those lessor roads for deterioration against the estates of both defendant companies.

By reason of this circumstance the court's attention was given exclusively to a consideration of the respective obligations of the companies arising merely under assignment of the several leases. The conclusion was that the Metropolitan could prove against the City Company only such sum as it might itself actually pay to each lessor company for deterioration. As neither estate is solvent, the result would be that the Metropolitan could prove only the amount of the dividend each lessor company obtained from its estate, but that dividend, being proved against an insolvent's estate, would be itself scaled down and become, in cash recoverable, only a part of the cash the Metropolitan will have to pay out.

This seems inequitable, and attention has now been called to the clauses in the Metropolitan-City lease under which claims for deterioration of the owned lines were liquidated. These claims were overlooked by this court when the claims arising on these segregated leased lines were being considered. They were broad enough to cover leased lines as well as owned lines, and would justify the liquidation of Metropolitan claims against City Company for deterioration equal to the full amount of such deterioration. This result, however, would be inequitable, because the dividend which the Metropolitan estate will pay to its general creditors will be less than the dividend which the City Company

will pay to its general creditors. In consequence, the Metropolitan estate would receive from the City estate more than it will pay out to the lessor claimants.

It is now suggested that an equitable disposition of the matter will be to decree that the Metropolitan estate shall be paid from the City estate the precise sum in cash which the former may have to pay to these lessor claimants. There seems to be no serious objection to such disposition of these claims, and the decretal order may be so framed as to provide for it.

MONTGOMERY LIGHT & WATER POWER CO. v. MONTGOMERY TRACTION CO.

(District Court, M. D. Alabama, N. D. December 1, 1914. On Motion for Modification of Final Decree, December 9, 1914.)

No. 303.

1. INJUNCTION ⇐58—NATURE OF RELIEF—ENJOINING VIOLATION OF CONTRACT.

A court of equity may, where the facts of the case are such that equity requires such relief, restrain the violation of negative stipulations in a contract, when the affirmative covenants are of such a nature that they cannot be specifically enforced.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 111–113; Dec. Dig. ⇐58.]

2. SPECIFIC PERFORMANCE ⇐55 — CONTRACTS ENFORCEABLE — CONTRACTS AGAINST PUBLIC POLICY.

A contract between a street railway company and a power company, by which the latter agrees to furnish to the former the electric power to operate its cars, is not against public policy, as a delegation by the street railway company of a part of its duty to the public as a common carrier, in such sense that it may not be specifically enforced in a proper case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 173–176; Dec. Dig. ⇐55.]

3. CORPORATIONS ⇐657 — FOREIGN CORPORATIONS — NONCOMPLIANCE WITH STATE LAW—VALIDITY OF CONTRACT.

Complainant, a power company, entered into contracts with two street railroad companies to furnish electric power for the operation of their cars for a term of years. The two contracts were essentially alike, but differed in some of their provisions. Subsequently defendant succeeded to the property and rights of both of the street railroad companies, and thereupon a new contract was made between complainant and defendant, abrogating one of the prior contracts, and recognizing the other as the one to be observed thereafter. *Held*, that the fact that at the time the last contract was made complainant, which was a foreign corporation, did not have on file with the Secretary of State a designation of an agent on whom process could be served as required by the law of the state, did not render such contract invalid as a recognition and reaffirmance of the prior contract, and that the recognition and subsequent observance of such contract by both parties for a number of years rendered it binding on defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536–2541, 2550, 2552–2554; Dec. Dig. ⇐657.]

On Motion for Modification of Final Decree.

4. APPEAL AND ERROR ⇐80—FINALITY OF DECREE.

A decree for specific performance of a contract by which complainant agreed to furnish defendant with electric power to operate its street cars

for a term of years, to be paid for by defendant monthly, and also finding the amount due thereunder to the date of the decree and awarding execution therefor, is a final decree, from which an appeal lies, and is not rendered interlocutory by the fact that the cause is retained for the purpose of enforcing payment of such other sums as may become due under the contract, which provision is merely in aid of the execution of the decree for specific performance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494–509; Dec. Dig. ⊂⊃80.]

In Equity. Suit by the Montgomery Light & Water Power Company against the Montgomery Traction Company. On final hearing. Decree for complainant.

See, also, 191 Fed. 657.

Steiner, Crum & Weil and John R. Tyson, all of Montgomery, Ala., for complainant.

Rushton, Williams & Crenshaw, of Montgomery, Ala., and Gregory L. Smith, of Mobile, Ala., for respondent.

CLAYTON, District Judge. This cause is submitted upon the report of the special master and the exceptions thereto filed by the respondent, and for final decree upon the pleadings and proof.

The relief sought by the complainant, as shown by the original bill as amended and the supplemental bill, is to enjoin the respondent company, its officers and agents, from disconnecting its wires and lines from the power plant and wires of the complainant, and from receiving or using direct electric current, for propelling and lighting respondent's cars and for other purposes, from any person, firm, or corporation, other than complainant, under and in accordance with the contract entered into between the predecessors of the complainant and the respondent, respectively, on December 13, 1902. This contract provided that the electric current needed and used by the predecessor of the respondent should be obtained exclusively from the predecessor of the complainant. And it is also sought to have ascertained the amount due from the respondent to the complainant for electric current supplied by the complainant to the respondent since the filing of the original bill and for the month in which it was filed, and for decree requiring the respondent to pay complainant such amount ascertained to be due for electric current so supplied.

The complainant alleges that it has faithfully carried out its obligations to the defendant, imposed by the terms of said contract; that it had continued to do this from the beginning of the operation of the contract to the time of the filing of the bill; that the respondent had, since entering into the contract, accepted its performance; that said contract covered a period of 15 years, and that the unexpired portion of said contract was 7 years; that the complainant was able, ready, and willing to carry out and perform every obligation of said contract, and was desirous of so doing, but that, notwithstanding, the respondent, in disregard of the obligations imposed upon it by said contract, was preparing to discontinue the taking of electric current from the complainant, and that the respondent had the intention of disconnecting its

wires from complainant's power house and wires, for the purpose of taking the necessary electric current from the new power plant, which was then about completed in the city of Montgomery, and which was to be operated by the principal stockholder of the respondent; that unless restrained, as prayed for in the bill, the respondent would violate its contract with complainant, and discontinue the taking of electric current from complainant for the operation of its street cars; that respondent would receive its entire current, for the purposes provided in the contract, from the new power plant; and that if such acts, threatened by the respondent, were consummated, irreparable injury would be done the complainant, and so recurrent in its nature, and so uncertain of ascertainment, as to render inadequate any remedy in a court of law.

It is averred in the amended bill, and it is admitted in the answer, that the contract, the violation of which is sought to be restrained, was entered into December 13, 1902, by the Montgomery Light & Power Company, a West Virginia corporation, and the Montgomery Street Railway Company, an Alabama corporation. On January 8, 1903, the Montgomery Light & Power Company transferred and assigned to the complainant all the property, rights, franchises, and privileges owned by it, which assignment carried with it the contract made by the Montgomery Light & Power Company with the Montgomery Street Railway Company on December 13, 1902, and that on March 19, 1903, the complainant entered into a contract with the Montgomery Traction Company, an Alabama corporation, operating a street railroad system in and near the city of Montgomery, separately and distinct from the Montgomery Street Railway Company.

In the month of April, 1906, the several street railroad companies, which had entered into the contracts above mentioned, were consolidated into one corporation under the name of the Montgomery Traction Company. At that time the complainant was supplying to the several street railroad companies all the electric current used for their operation under the two contracts hereinbefore described, and after the consolidation complainant continued to furnish the electric current to the Montgomery Traction Company to January 31, 1909, and for the current so furnished rendered to the traction company bills, which were paid or settled monthly in due course of business. The two contracts, the one with the Montgomery Street Railway Company, entered into December 13, 1902, and the other with the Montgomery Traction Company, entered into March 19, 1903, were substantially the same so far as concerns the obligations from the power company to the street railroads. The only material difference between the two contracts is that in the latter the power company was to supply current of a voltage not exceeding between 550 and 600 volts, while in the former contract the voltage was not to exceed 550 volts, and, further, the former contract, that of December 13, 1902, provided for liquidated damages to be paid the street railway company, in the event the power company failed or refused to supply the current, in the sum of $300 per day of 24 hours, and at the same rate for any fractional part of a day, during the period of such failure; while in the second contract, that of March 19, 1903, it

was provided that for failure on the part of the power company to supply the traction company with current for more than 4 hours, in accordance with the terms of the contract, the power company would pay to the traction company the sum of $100 per day as liquidated damages "for each and every failure on its part, which sum the traction company is hereby authorized to retain and deduct from any payment that may be due or to become due to the power company hereunder."

On January 30, 1909, and after the consolidation of the street railroad companies, there was a contract entered into between the complainant and the consolidated company, the respondent here, by the terms of which it was—

"mutually agreed that the contract between the Montgomery Light & Water Power Company and Montgomery Traction Company, dated the 19th day of March, 1903, is hereby in all things canceled and annulled, and the present Montgomery Traction Company and the present Montgomery Light & Water Power Company, as they are now incorporated and as they now exist, hereby further mutually agree that the only contract in existence between them, as to the matters mentioned in either of said contracts, in the future shall be that certain contract entered into between the Montgomery Light & Power Company, to which the Montgomery Light & Water Power Company is the legal successor, and Montgomery Street Railway, to which the Montgomery Traction Company is the legal successor, and all the terms of said contract, as the same was originally written and agreed to, shall hereafter be binding and obligatory on each of the parties hereto."

And the contract contained this further provision:

"Nor does this contract in any way annul or affect or destroy any other contract between said companies other than the contract between the original Montgomery Traction Company and Montgomery Light & Water Power Company, dated March 19, 1903."

In the amended answer filed by the respondent the execution of the contracts is admitted.

Several grounds of defense were raised by the demurrers to the bill, and these have heretofore been considered and passed upon, as will hereinafter be more fully stated. In the answer the respondent interposed several defenses, which may be summarized as follows:

(1) That at the time the contract between the complainant and the respondent was made, on January 30, 1909, which provided that the contract of December 13, 1902, should be the contract under which complainant was to continue to furnish to the respondent electric current, the complainant, a foreign corporation, had not complied with the laws of Alabama, in that at the time of the making of said contract of January 30, 1909, there was not on file with the Secretary of State a certificate designating an agent at complainant's known place of business in Alabama, and that therefore the contract was void.

(2) That the complainant had failed continuously to furnish respondent with sufficient current for the operation of its street cars when there were unusual crowds in the city of Montgomery on occasions such as baseball days, circus days, fair days, or days of expositions in said city.

(3) That complainant had failed for 2½ years preceding the filing of the bill to install and equip its power plant with such apparatus as

was necessary to furnish and deliver to the respondent current in the quantity required by respondent's railroad system, and also had continuously for many years failed to furnish a liberal reserve capacity above the actual requirements of the street railroad system; that the apparatus employed by the complainant for furnishing power to the respondent was not in the best of repair, but was inadequate and ineffective.

(5) That for 2½ years preceding the filing of the bill the complainant had failed to so have its apparatus operated as to make the supply of current to the respondent, for its street railroad, satisfactory, effective, or reliable.

(6) That the complainant—

"during the fair of 1909, and during 1910, and for the first six months of 1911, violated said clause in said contract which provided that complainant should keep and maintain its apparatus and so operate the same as to make the supply of current to said street railroad effective, satisfactory, and reliable, in that during said time it failed to adjust the circuit breakers on the switchboard from time to time so as to permit the various circuits of defendant's feeder system to receive sufficient current for the operation of its cars, and on many occasions complainant's agents or servants, in charge of said switchboard, well knowing that there was a demand for current on said circuits, in excess of the setting of said circuit breakers, failed to raise the setting of said circuit breakers to enable the circuit so requiring additional current to receive the necessary current with which to propel the cars."

(7) That there was not at all times maintained by the complainant a reserve plant of sufficient capacity and properly equipped, in condition for immediate operation, to supply current required by respondent's street railroad in the event of the failure of the water power or complainant's transmission lines, but that, during the two years prior to the filing of the bill, complainant's plant was not a reserve plant, and that the power generated thereby was continuously used by the complainant for the purpose of generating current to be supplied the respondent, and that frequently all the power generated by both steam and water power plants was required to furnish sufficient current to supply the respondent for the operation of its cars, and that then the complainant had no sufficient reserve.

It was admitted in the answer that it was the intention of the respondent to discontinue the taking of electric current from the complainant, which intention, it was further admitted, and insisted by respondent, was occasioned by the continued breach of the contract on the part of the complainant in failing to supply sufficient amount of current to respondent. It was also admitted that the intention on the part of the respondent to discontinue the taking of electric current from the complainant would have been carried into effect, but for the restraining order of this court. It is contended by the respondent that, in carrying out this intention or purpose, the respondent was acting within its rights, and had, as a matter of fact, so far as it could do so under the restraining order of this court, notified the complainant of the termination of said contract.

The foregoing statement contains substantially the issues that were presented or raised by the pleadings in the cause at the time of the appointment of the special master and the order of reference. It will

be observed that in setting out the defenses (see paragraph 6) the amendment to subdivision (e) of paragraph 6 of respondent's answer is quoted. The amendment was filed December 10, 1913, and modifies to some extent subdivision (e) of paragraph 6 of the answer, as filed December 23, 1911.

The case was heard on demurrer to the bill by Judge Jones, whose great learning is appreciated and whose death is lamented by the court and members of the bar. Every question of law in the case presented by the record, except one, was well considered and decided by him. The one such question not specifically passed upon, but which is now insisted upon, is that the complainant did not have an authorized agent, as required by the Constitution and statute of Alabama on January 30, 1909, when the contract of that date was executed, and that such contract is void.. But this will be considered hereafter.

In my opinion Judge Jones' conclusions, sustaining on demurrer the equities of the bill, are supported both by reason and authority. The style of the case is Montgomery Light & Water Power Co. v. Montgomery Traction Co. (C. C.) 191 Fed. 657.

[1] Whether or not a court of equity will by injunction restrain the violation of negative stipulations in a contract (in the instant case, enjoin the respondent from taking current from any source, except the complainant), where the affirmative covenants are of such a nature that they cannot be specifically enforced, is sometimes a difficult question, and it is not an easy matter to reconcile the decisions in adjudicated cases. However, it may not be too much to say that the seeming conflict is attributable to differences in the facts and circumstances of the particular cases. In Wesley v. Eells, 177 U. S. 370, 376, 20 Sup. Ct. 661, 664 (44 L. Ed. 810), the Supreme Court said:

"In Hennessey v. Woolworth, 128 U. S. 438, 442 [9 Sup. Ct. 109, 111 (32 L. Ed. 500)] this court said: 'Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case' [citing other cases]."

In the light of the authorities relied on by Judge Jones, in his opinion delivered in passing upon the demurrers in this case, and upon consideration of other cases, including those cited by complainant's and respondent's counsel, respectively, I am convinced that the bill in this case contains equity, and that, if the evidence sustains the facts averred therein, the complainant must be granted the injunctive relief prayed for. In addition to the authorities cited in the opinion of Judge Jones, I refer to the following: Central T. Co. v. Wabash, etc., Ry. Co. (C. C.) 29 Fed. 546; Texas Co. v. Central, 194 Fed. 1, 114 C. C. A. 21; Union Pac. Ry. Co. v. Chicago, etc., Co., 51 Fed. 309, 2 C. C. A. 174; Prospect, etc., R. Co. v. Coney Island, etc., Ry. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; Southern Ry. v. Franklin P. R. R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; Schmidt v. L. & N. R. R. Co., 101 Ky. 570, 41 S. W. 929, 38 L. R. A. 809; Lumley v. Wagner, 1 De G., McG. & G. 604; Pomeroy's Equity Jurisprudence, 775.

[2] Counsel for the respondent, by oral argument and brief, insist that the contract involved here, providing for the supplying of electric

current to enable the respondent to operate its street railroad, is against public policy, and that, this being the case, a court of equity will not enforce such a contract. The contention is that the respondent is a public service corporation, and is bound by its charter to serve the public as a common carrier of passengers; that the contract between the respondent and the complainant, the basis of this suit, is an attempt to surrender or delegate the duties imposed upon respondent to another; and that therefore the contract is against public policy and void. Of course, no court will lend its aid to the enforcement of an executory contract entered into by a corporation which is ultra vires or against public policy. This is the real gist or principle of the decisions referred to by respondent's counsel. Notably this is true in Thomas v. Railroad Co., 101 U. S. 71, 25 L. Ed. 950, a leading case on the subject. There the court decided, Mr. Justice Miller delivering the opinion, that a contract by which a corporation renders itself incapable of performing its duties to the public, imposed upon it by its charter, or attempts to absolve itself from its obligations to the public and the state, without the consent of the state, violates its charter, that public policy forbids it so to act, and that its actions of this nature are void. This case is often referred to in subsequent decisions of the Supreme Court. The principle there declared is not hostile to the opinion now entertained by this court. Branch v. Jesup, 106 U. S. 478, 1 Sup. Ct. 495, 27 L. Ed. 279; Oregon v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Pennsylvania Ry. Co. v. St. Louis, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Central Trans. Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; Beasley v. Texas Pacific Ry. Co., 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274; Texas & Pacific Ry. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; Pope Mfg. Co. v. Gormully, 144 U. S. 237, 12 Sup. Ct. 632, 36 L. Ed. 414. Fully recognizing the legal principle enunciated in the cases just cited, the court is of opinion that it is not applicable to the present case.

By the respondent's charter it assumed the duty of serving the public as a common carrier of passengers in and about the city of Montgomery. The contract here under consideration, by the terms of which the power company was to furnish to the street railway company current for propelling and lighting, and thereby operating, its cars, in order to comply with its charter rights and duties, cannot be construed to be a delegation by the respondent street railroad company to the complainant power company of the duty of the respondent as a common carrier of passengers. On the contrary, it is evident that such contract merely provided a means by which respondent was to perform the duty imposed upon it by its charter and the discharge of which it owed the public. The street railroad company, the respondent, could have erected and maintained its own power plant, and could have purchased from the operators of coal mines fuel to generate electric current; and it had the option, and the lawful right, to enter into a contract with the power company to buy and get its power direct for propelling its street cars, etc. In other words, it was not in contravention of public policy or ultra vires its charter for the street railroad company, the respondent, to acquire the means or power of propelling its street cars, either

by building a plant, buying coal, employing the necessary labor, and generating the current itself, or by buying the current from some one else.

[3] The respondent says that the contract entered into between the complainant and the respondent on January 30, 1909, is void and unenforceable upon the ground that at the time it was entered into complainant did not have on file with the Secretary of State of Alabama an instrument in writing designating an agent at its known place of business in Alabama on whom process could be served as required by the laws of said state. Section 232 of the Constitution of Alabama is as follows:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The Legislature shall, by general law, provide for payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

Section 3642 of the Code of Alabama of 1907 is as follows:

"3642. (1316) Foreign Corporation must File Instrument of Writing Designating Agent and Place of Business in This State.—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents * * * designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state."

The evidence shows that the complainant in 1903 filed with the Secretary of State of Alabama a proper instrument designating W. F. Vandiver as its agent at its known place of business in Alabama, which agent had died before the execution of the contract of January 30, 1909, purporting to cancel the contract with the original Montgomery Traction Company, and reinstating the contract between the Montgomery Light & Power Company and the Montgomery Street Railway Company, and declaring the latter contract to be the only one in force between complainant and respondent. This instrument designating Vandiver was the only one on file with the Secretary of State (the officer named in the statute), although on April 24, 1907, complainant had filed with the State Auditor a document certifying that Robert J. Chambers was its agent. As stated, Vandiver died, on December 8, 1908, and complainant did not file another such instrument with the Secretary of State until June 11, 1909, at which time it duly filed an instrument as required by the Alabama laws designating said Chambers as its agent. Chambers was the first vice president and general manager of the complainant, and was in the active management of its business for a long time prior to the death of Vandiver and the filing of the instrument designating him, Chambers, as complainant's agent.

As before stated, at the time of entering into this contract of January 30, 1909, there was then in existence the contract made December 13, 1902, with the Montgomery Street Railway Company and the contract made by complainant with the Montgomery Traction Company on March 19, 1903, and the terms of said contracts were in all essential particulars the same, with two exceptions, one relating to the quantity of the voltage, and the other to the amount of liquidated damages. So far as such damages were concerned the contract of December 13, 1902, was more favorable to the street railway company. This contract provided that the power company should supply current not "exceeding 550 volts," and this contract further provided that when the power company failed or refused—

"to supply the current hereinbefore agreed to be supplied, * * * it shall and does hereby agree to pay the street railway, as liquidated damages, the sum of three hundred dollars per day of twenty-four hours, and at the same rate for any fractional part of the day during the period of such failure."

Whereas, the contract of March 19, 1903, stipulated that the power company should supply current in voltage "between 550 and 600 volts," as the traction company might require, and for any failure on the part of the power company—

"for more than four hours to supply the traction company with current in accordance with the terms of this contract, the power company shall forfeit and pay to the traction company the sum of one hundred dollars per day as liquidated damages for each and every failure on its part, which sum the traction company is hereby authorized to retain and deduct from any payment that may be due or to become due to the power company hereunder."

It is doubtful whether or not, under the pleadings in this case, the court is now called upon to pass upon this question. This ground of defense was interposed and set forth in the fourth paragraph of the answer filed by the respondent on December 23, 1911. On January 8, 1912, the complainant filed exceptions to this answer. The first of these was directed specifically to that portion of paragraph 4 of respondent's answer which set up the fact that at the time of the entering into of this contract of January 30, 1909, complainant did not have on file with the Secretary of State of Alabama an instrument in writing designating an agent at its known place of business in Alabama. Upon the submission of the case to the court, upon the exceptions filed to the answer, Judge Jones, then the judge of this court, sustained the exceptions directed to the averments setting up this ground of defense, and, in passing upon the exceptions filed March 11, 1912, used the following language:

"In making this ruling the court is of opinion that, if the complainant was fully complying with the terms of its contract at the time the defendant attempted to rescind the same, breaches prior thereto, for which the defendant may have had the right to rescind it, and did not do so, are not a good defense to the action, if complainant was then, in fact, complying with the terms of its contract."

In view of this ruling, it would appear that this question should not be taken into consideration as constituting one of the issues of law and fact now to be passed upon.

Pretermitting such a conclusion, however, let us state the relations of the parties, this complainant and this respondent, at the time the contract of January 30, 1909, was entered into and subsequent thereto. Prior to January 30, 1909, the two contracts were in force and operation, and they were, in every essential particular, except as to voltage and liquidated damages, the same. These differences have been hereinbefore stated. On January 30, 1909, the street railroad companies had been consolidated into one company, as heretofore stated, and this company took the place of the two companies named in the two separate contracts, that of December 13, 1902, and that of March 19, 1903. The new or consolidated company, standing in the place of both of these companies, was the possessor of both contracts and all the rights thereunder. These contracts were inconsistent, in the matter of the voltage to be supplied, and in the matter of liquidated damages to be awarded. After the contract of January 30, 1909, was entered into, the voltage was supplied on a basis of 550 volts (as per the contract of December 13, 1902), and not between 550 and 600 volts (as per the contract of March 19, 1903), and the liquidated damages were on the basis of $300 per day (as per the contract of December 13, 1902), and not $150 per day (as per the contract of March 19, 1903). For the many claims for interruptions that had been made the parties settled on the basis of $300 per day, as provided in the contract of December 13, 1902. The evidence further shows that claims for liquidated damages continued to be made by the parties, and settlements continued to be had of these claims according to the terms of the contract of December 13, 1902, up to the filing of the original bill herein on September 30, 1911.

Admitting, for the sale of argument, that on account of the failure of the complainant to comply with the statute of Alabama, relating to the designation of an authorized agent, the contract of January 30, 1909, was void and did not establish any rights of the parties thereto, still this contract of January 30, 1909, is evidence of a mutual understanding between the parties, and contained recitals which could be looked to for the purpose of clarifying any inconsistency or ambiguity as to the rights of the parties that arose by reason of there being in existence two separate contracts between them relating to the same subject-matter and differing as to the matter of liquidated damages to be allowed. In addition to this there is undisputed evidence showing a continuous recognition on the part of both parties of the force and operation of the contract of December 13, 1902, which resulted in a practical construction by themselves of what was considered their rights under the contract which had been previously made. And surely, if the contract of January 30, 1909, is a nullity, it cannot be looked to to abrogate the contract of December 13, 1902, under which the parties, as a matter of fact, continuously acted and dealt with each other.

Contracts and dealings between natural persons, or corporations, until completely executed, are open to change or modification, and such change or modification requires no other consideration to uphold it than the agreement of the parties. *Such agreement may not necessarily be expressed, but may be implied from the circumstances and the conduct of the parties.* Decatur B. & I. Co. v. Neal, 97 Ala. 717,

721, 12 South. 780; Sheffield F. Co. v. Hull C. & C. Co., 101 Ala. 446, 477, 14 South. 672; Chicago v. Sheldon, 9 Wall. 50, 54, 55, 19 L. Ed. 594.

It is not disputed that the two contracts, that of December 13, 1902, and that of March 19, 1903, made prior to the death of Vandiver, the designated agent, were valid. The subsequent failure of the complainant to name another agent, or the failure to subsequently comply with the Alabama law, could not, and did not, affect the existing contracts. See S. S. & L. Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753. In other words, the contracts, having been made in compliance with the statute requiring a designated agent, were binding and existing prior to the death of Vandiver, the designated agent, and the making of an agreement between the parties, determining by which one of the two contracts they were subsequently to be bound, if void because there was no designated agent in the state at the time of the making of this subsequent contract or agreement, then the original contract remained in force. This agreement, even if void, did not terminate the contracts which had been lawfully entered into and had not otherwise been terminated. Savings Inst. v. Michael, 81 Md. 487, 32 Atl. 189, 340, 33 L. R. A. 628, and note; Bernhisel v. Firman, 89 U. S. (22 Wall.) 170, 178, 179, 22 L. Ed. 766.

As we have said, the voltage prescribed in the contract of December 13, 1902, was 550 volts, and that of March 19, 1903, for 550 to 600 volts, and the former contract provided that liquidated damages should be fixed at $300 per day; whereas, under the latter, they were fixed at $150 per day. In these respects one or the other of the contracts must prevail, for they both could not operate in these particulars at the same time. This contract of January 30, 1909, is not a novation, but is in legal effect nothing more than a mere election or a *verbal recognition* that the contract of December 13, 1902, and not that of March 19, 1903, should prevail in the matter of voltage and in the matter of liquidated damages, and the conduct of the parties after having entered into the contract of January 30, 1909, constituted *acted recognition* of the force and operation of this contract of December 13, 1902.

Again, and finally, if the agreement of December 13, 1902, is void, the subsequent conduct of the parties fixed their status under the contracts with the Montgomery Street Railway Company (the respondent, as its legal successor) and the complainant, and both parties to the controversy are bound thereby. Hertz v. Montgomery Journal P. Co., 9 Ala. App. 178, 62 South. 564; Southern Bitulithic Co. v. Hughston, 177 Ala. 559, 58 South. 450.

In Pine River Logging Co. v. United States, 186 U. S., at page 290, 22 Sup. Ct., at page 924, 46 L. Ed. 1164, it is said:

"Defendants' main reliance, however, is upon the construction of these contracts by the parties themselves, including the United States, and in support of their position they invoke the general rule that where both parties to a contract have by their subsequent conduct given it a construction different from what the law might have given it, the courts will adopt that construction. * * *"

In Insurance Co. v. Dutcher, 95 U. S. 269, 273 (24 L. Ed. 410) the court, recognizing this rule, said:

"The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant than to see what they have done. Self-interest stimulates the mind to activity and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

In Huntting Elevator Co. v. Bosworth, 179 U. S. 415, 435, 21 Sup. Ct. 183, 192 (45 L. Ed. 256), it is declared:

"The dealings and conduct of the parties in executing the contract dispel all question as to the proper interpretation to be given it."

See, also, Topliff v. Topliff, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 30 L. Ed. 1110, and Lowrey v. Hawaii, 206 U. S. 206, 215, 27 Sup. Ct. 622, 51 L. Ed. 1026.

I conclude, therefore, irrespective of whether the complainant was, at the time of entering into the contract of January 30, 1909, remiss in not having filed with the Secretary of State an instrument in writing designating an agent at its known place of business in Alabama, the conduct of the complainant and the respondent running over a period of some years, continuously recognizing the existence of only one of the original contracts, and uniformly treating the other as if it were rescinded, and said contract of January 30, 1909, being at least evidence of what was the intention of and declaration on the part of the parties, that it is not now open to the respondent to say that the contract of December 13, 1902, was not in force at the time of the filing of the bill or at this time.

Having determined that the principles of equity involved in this case are with the complainant, and that it has the right to maintain this suit, provided, of course, that the facts averred in its pleadings are sustained by the evidence, we are brought to a consideration of the report of the special master and the exceptions thereto.

The order of reference, made by the former judge of this court, contained the following provision:

"It is ordered by the court as follows: (1) Phares Coleman, Esq., is hereby appointed special master, to whom the above cause is referred to take the evidence and to make report thereof to the court, and he is directed to take such testimony as may be offered by either of the parties upon the several issues involved therein, and to report his findings of fact thereon to the court at the earliest reasonable time practicable, together with a transcript of the evidence introduced by the parties. * * * (4) After the evidence introduced shall have been taken, the special master shall make a full report to the court of his findings of fact upon the issues involved, and copies thereof shall be delivered to the several counsel for the complainant and the respondent, respectively."

The special master began the taking of the testimony on July 15, 1912, and proceeded from time to time, completing such taking February 14, 1913. The examination of the witnesses covered a wide field of inquiry, as shown by the report and the transcript of the evidence. Much of the testimony was of necessity highly technical, and comprises several large volumes of nearly 2,000 pages, besides a great number of exhibits. The report was filed in the court July 3, 1913. The duties

imposed upon the special master were industriously and ably performed, which fact is attested by his well-considered, comprehensive, and plain report.

The court has carefully considered each of respondent's exceptions to the report of the special master, together with the exhibits attached to such exceptions, and the testimony and exhibits introduced before the special master, and has come to the conclusion that none of said exceptions to the report of the special master is well founded. It would serve no good purpose to discuss in detail the separate exceptions and the evidence bearing thereon, inasmuch as the court is satisfied that the evidence introduced sustains the report of the special master and is sufficient to overturn the exceptions.

This conclusion is reached without regard to the rules and practice and the decisions of the Supreme Court, which hold that the master's report is prima facie correct and that exceptions thereto will not be sustained unless error is clearly shown. Metzker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654; Girard Life Ins. Co. v. Cooper, 162 U. S. 529, 16 Sup. Ct. 879, 40 L. Ed. 1062. Suffice it to say the evidence shows to the reasonable satisfaction of the court that, at the time the respondent attempted to rescind the contract under which it was being supplied with electric current by the complainant, the complainant had fully complied and was complying with the terms of the contract. In addition to this, the court also finds that the apparatus of the complainant, for furnishing power to the respondent, under the contract here involved, measures up to the requirements of the contract, and has been kept and maintained by the complainant in such condition and so operated as to make the supply of current furnished to the respondent as effective, satisfactory, and reliable as possible. In other words, the court finds that the complainant has, on its part, complied in every particular with the contract, and that the respondent had no just cause to rescind it.

The last exception, filed by the respondent to the special master's report, is addressed to that portion of the report which ascertains the amount of the liability from the respondent to the complainant for current furnished for the month of September, 1911, and each of the months thereafter, down to and including January, 1913, and raises the contention that the ascertainment of any indebtedness from the respondent to the complainant was not referred to the special master. It is manifest that under the order of reference the special master was directed to take such testimony as might be offered by either of the parties upon the several issues involved in the case, and to make report to the court upon his findings upon the issues and facts. The supplemental bill was filed January 8, 1913, in which complainant asked that respondent be required to account to it and pay for the current furnished during the month of September, 1911, and since the filing of the original bill. The respondent answered, making a general denial. However, prior to that time the complainant had filed its petition praying for the ascertainment of this amount. It is also evident from the record that counsel for the respondent, in the examination of the witnesses, treated this as one of the issues involved in the reference before the master, and as within his province to determine.

Aside from this, however, under the evidence adduced, the correctness of the special master's finding of the amount due by the respondent to the complainant for current furnished during the period referred to cannot be doubted, inasmuch as it involved nothing more than a calculation of the amount due, with interest, upon bills rendered and which were not disputed by respondent. Clearly, it is the province of the court, upon ascertaining the correctness of such calculation, to adopt the same.

A decree will be entered in accordance with the views herein expressed.

On Motion for Modification of Final Decree.

[4] The complainant sought by the original bill the specific performance of the contract between the complainant and the respondent, and by the supplemental bill an accounting for the indebtedness accruing under the contract subsequent to the filing of the original bill.

The decree adjudged that, upon every material issue of law and fact presented by the pleadings and evidence, the complainant was entitled to the relief prayed for in the original bill as amended and in the supplemental bill. Further and specifically the decree states (1) that the several exceptions of the respondent to the master's report are overruled and the report is confirmed; (2) that the complainant have the relief prayed for in the original bill as amended and in the supplemental bill, and that the respondent, its officers and agents, be perpetually enjoined from taking electric current from any person, firm, etc., other than the complainant, during the time covered by the contract, and so long as the complainant performs its part of the contract; (3) that the complainant have and recover of the respondent $78,064.72, being the amount ascertained by the court to be due as principal for current furnished to the respondent up to the 1st day of February, 1913, together with the interest thereon, which principal and interest were ascertained to be $93,613.75, and for this sum execution was ordered; (4) that this cause be retained in the court in order that the complainant might have an accounting from the respondent for all amounts that have accrued since February 1, 1913, and that may hereafter accrue, for current furnished and to be furnished under the contract between the parties, and complainant was given leave to apply to the court for such further and other orders as might be necessary in the premises; and (5) that the complainant have and recover of the respondent all costs, etc.

The respondent moves to modify the decree by striking therefrom so much thereof as ascertains and awards the amount of money due by the respondent up to the 1st day of February, 1913, or to stay the execution for the collection of this amount until the court shall hereafter render a decree ascertaining the entire amount due and to become due down to the time when the contract, the specific performance of which has been decreed, shall be ended, and bases the motion upon the contention that the decree is interlocutory, and that therefore execution is not a proper process for the collection of the amount which has been found to be due to the complainant by the respondent up to the 1st day of February, 1913, and that, because the decree is interlocu-

tory, as the respondent contends, the respondent is deprived of the right to supersede the decree for said sum of money and to obtain a review of it by the Circuit Court of Appeals.

After having heard the oral arguments of the counsel for the respondent and the complainant, and after having considered and read the authorities cited in the briefs, I entertain no doubt that the decree is a final one, and that an appeal will lie from it, and that the appellate court will review the case on its merits.

The main purpose of the suit has been accomplished, in that the specific performance of the contract has been decreed. The cause is retained in the court solely for the purpose of having a further accounting for the electric current furnished to the respondent by the complainant since the 1st day of February, 1913, according to the terms fixed in this contract. This accounting is no more than an *inseparable incident* to the performance of the contract which has been decreed. The bill was filed September 30, 1911. The special master took the testimony in the case and found the amount due each month, from and including September, 1911, and down to and including January, 1913, to be $78,064.72, averaging $4,592 per month. Under the contract the complainant is required to furnish and the respondent to receive the current or power, and the respondent is required to pay on the 5th of the month for the current or power furnished to it during the preceding month. It certainly would not be in conformity to the contract, nor would it be equitable, to postpone these monthly payments until the contract is ended February 1, 1918. I entertain no doubt that the litigation of the parties as to the merits of the case is terminated by the decree here sought to be modified, and that nothing now remains to be done but to carry into effect what has been decreed, namely, the specific performance of the contract, and, as a necessary incident thereto, payment for the electric current according to the terms of the contract. The fact that the cause is retained for an accounting for the electric current or power furnished by the complainant to the respondent under the contract, pending the litigation, and for such as complainant may hereafter furnish, does not change the character of the decree from a final to an interlocutory one. As I have stated, the cause is retained in the court solely for the purpose of carrying the final decree, which fully and finally determines the rights of the parties, into execution.

In Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94, the bill sought to require certain shares of stock to be transferred on the books of the company to the complainants in specific performance of the contract. The decree directed this transfer, and, further, that an account be taken and stated of the amount paid and to be paid for the stock and as to dividends accrued and to be credited under the contract. There it was contended, as it is here, that the decree was not final, because it left undetermined the state of the account between the parties. In that case (Thomson v. Dean) the court applied the rule laid down in Forgay v. Conrad, 6 How. 204, 12 L. Ed. 404, and on page 346 of 7 Wall. (19 L. Ed. 94) the opinion quotes from the latter case as follows:

"When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be

sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed."

The court then further said:

"The reasoning in the case just cited fully vindicates this rule, in our judgment, as a sound construction of the acts of Congress relating to appeals, and is sustained by the authority of several decisions. And it is quite clear that the appeal under consideration is within this rule. The decree for which it was taken decided the right to the property in contest, directed it to be delivered by defendant to complainant by transfer, and entitled the complainant to have the decree carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership."

In Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898, the bill sought to set aside as fraudulent the proceedings of a stockholders' meeting and to have a receiver appointed. It was decreed that the meeting was fraudulent, that the lease executed in accordance with the authority then given was void, that a receiver should be appointed with power to continue the business, and that an account be taken of the profits realized from the use of the leased property and from royalties derived from ores mined by the defendants. There it was contended that the decree was not final, because it left undetermined the account to be taken of profits derived from the use of the leased property and from royalties upon certain ores mined. It was held, on appeal, that the decree was final, because the main purpose of the suit had been accomplished, and that the accounting was ordered in aid of the execution. The court said:

"The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill, which contemplated nothing more than a rescission of the authority to execute the fraudulent lease, or a cancellation of the lease if executed, and a transfer of the management of the affairs of the company from a board of directors, whose personal interests were in conflict with the duty they owed the corporation, to some person to be designated by the court. The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of an appeal. Bostwick v. Brinkerhoff, 106 U. S. 3 [1 Sup. Ct. 15, 27 L. Ed. 73], and the cases there cited."

See, also, the following authorities: McGourkey v. Toledo O. C. R. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; West v. East Coast C. Co., 113 Fed. 742, 51 C. C. A. 416; Chase v. Driver, 92 Fed. 783, 34 C. C. A. 668; Grant v. E. & W. R. R. Co., 50 Fed. 795, 1 C. C. A. 681.

I have carefully examined the cases relied upon in support of the motion, and I do not find that they are opposed to the cases which I have referred to and quoted from. While there are expressions to be found to the effect that the whole litigation must be disposed of in order for the decree to be a final one, yet an examination of each case cited for respondent will reveal the fact that this means nothing more than that all of the equities and the rights of the parties, as pre-

sented by the pleadings in the cause, must be determined. And whenever a decree does determine the equities of a bill and the issues presented by it, the decree is a final one, notwithstanding the cause may be retained for an accounting between the parties and an accounting ordered in aid of the execution of the decree.

Of course, fairness and justice require that the respondent be not deprived of the right to have a review of the action of this court. But, as I have said, I am satisfied that the decree heretofore rendered in this cause is a final decree, and that upon appeal the action of the court will be fully reviewed.

The further contention is made that the decree awarding an execution for the sum ascertained to be due, in response to the issues presented and determined under the supplemental bill filed in this cause, violates equity rule No. 8 (198 Fed. xxi, 115 C. C. A. xxi). I have carefully examined this rule, and it is clear to my mind that complainant is entitled to an execution to enforce the collection of the amount adjudged to be due it, in aid of the execution of the final decree adjudging complainant's right to have the contract performed by the respondent.

The motion to modify the decree heretofore rendered in this cause on December 1, 1914, must be denied, and a decree will be entered accordingly.

NOTE.—The United States Circuit Court of Appeals at New Orleans, La., about December 15, 1914, refused to issue a mandamus to Judge Clayton requiring him to modify this decree; this court holding, as Judge Clayton did, that the decree was final.

In re CROOK et al.

(District Court, W. D. Washington, N. D. January 14, 1915.)

No. 5351.

1. COURTS ⊜366—EXEMPTIONS—CONSTRUCTION OF STATE LAWS.

In a bankruptcy proceeding, the federal court is concluded by the construction of state exemption laws by the state court of last resort.

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

2. EXEMPTIONS ⊜52—SELECTION IN LIEU OF EXEMPT PROPERTY—"OTHER PROPERTY."

Though "other property," in Rem. & Bal. Code Wash. § 563, subd. 4, exempting from execution and attachment to each householder two cows with their calves, etc., and providing that, in case such householder shall not possess or desire to retain such animals, he may select from his property and retain other property not exceeding $250 in value, has been construed by the Supreme Court of the state as not including money, a debtor may select, in lieu of the animals specified, any other personal property other than money; the rule of ejusdem generis having no application.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 40; Dec. Dig. ⊜52.

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

3. EXEMPTIONS ⊜4—STATUTORY PROVISIONS—LIBERAL CONSTRUCTION.
Courts have no power to add to or take from exemption statutes, but such statutes must be liberally construed with a view of effectuating the object of the lawmakers.
[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 4; Dec. Dig. ⊜4.]

4. STATUTES ⊜205—CONSTRUCTION—MEANING OF LANGUAGE USED.
Words or phrases used in a statute are not to be taken separately, but are to be considered in relation to the entire statute, under the general meaning applied to the main purpose.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. ⊜205.]

5. EXEMPTIONS ⊜52—STATUTORY PROVISIONS—SELECTIONS IN LIEU OF PROPERTY MENTIONED.
Even though the maxim, "Noscitur a sociis," applies to Rem. & Bal. Code Wash. § 563, subd. 4, exempting from execution and attachment certain animals, and providing that, if the householder shall not possess or desire to retain such animals, he may select from his property and retain other property not exceeding $250 in value, any property possessed by a debtor, described or referred to in that section, may be selected in lieu of such animals, though not described or referred to in subdivision 4.
[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 40; Dec. Dig. ⊜52.]

In Bankruptcy. In the matter of J. H. Crook, doing business as the J. H. Crook Electric Company, bankrupt. On exceptions to report of the referee. Referee's decision reversed.

G. D. Eveland, of Everett, Wash., for bankrupt.
Louis A. Merrick, of Everett, Wash., for trustee.

NETERER, District Judge. This is an application on the part of bankrupt to set aside, as exempt, personal property, other than money, of the value of not to exceed $250, in lieu of the animals provided in subdivision 4 of section 563, Rem. & Bal. Annot. Codes and Statutes of Washington. It is admitted that the bankrupt is the head of a family and is entitled, under said section, to exercise the right of exemption; that, at the time of filing his petition in bankruptcy and schedules, he did not have the animals specified in subdivision 4, supra, and did have the personal property selected, and did at that time, in writing, in conformity to the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9585 et seq.]), express a desire to select such personal property.

[1, 2] The referee denied the right of the bankrupt to select the property selected in lieu of the animals, for the reason that the Supreme Court of Washington, in Creditors' Collection Association, Appellant, v. Frank E. Bisbee et al., Respondents (Wash.) 141 Pac. 886, filed July 7, 1914, held that the words "other property" could refer only to property of a like nature. This court, in the absence of a construction of the exemption statute by the Supreme Court of the state of Washington in Re Swanson (D. C.) 213 Fed. 353, filed May 5, 1914, held that selection could be made of other property not to exceed $250 coin in value, where the bankrupt did not possess, or did

not desire to select, the animals named in subdivision 4, supra, and that money would come under the term "other property." The Supreme Court of Washington, in Creditors' Collection Ass'n v. Bisbee, supra, based its conclusion upon Carter v. Davis, 6 Wash. 327, 33 Pac. 833; In re Gerber, 186 Fed. 693, 108 C. C. A. 511; In re Scheier (D. C.) 188 Fed. 744; and Ballard v. Waller, 52 N. C. 84. These cases were all considered in Re Swanson, supra, and the decision of the state court does not change my personal view; and being concluded upon the question of the construction of a state statute by the decision of the state court of last resort (St. Louis Southwestern Ry. Co. v. State of Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. ——, U. S. Supreme Court decision, filed December 7, 1914), and the issue being of such vital concern in the administration of bankruptcy estates, and the first impression being so radically opposite to what I believe the law to be, I have carefully examined the opinion and the cases upon which it is predicated, and am convinced that the only thing the court desired to say was that money cannot be selected in lieu of the animals named in the statute.

The portion of the statute in question, reads:

> There shall be exempt, "to each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such * * * animals for six months: Provided, that in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value."

The state Supreme Court says:

> "The words 'other property' * * * can refer only to other property of a like nature to that specially mentioned, under a well-known rule of statutory construction. To hold that money falls within the phrase 'other property' is to do violence to the rule of ejusdem generis."

And then discusses generally the relation of this provision to all property, and further says that the court held in Carter v. Davis, supra:

> "'It was sought to base the exemption right as a lieu exemption upon subdivision 3 of section 563, exempting to each householder certain enumerated animals and 'other household goods, utensils, and furniture, not exceeding $500 coin in value.' This contention was denied; the court holding that no right was conferred upon the debtor to retain other property of a different character in lieu of that authorized to be retained as exempt."

The court confuses subdivision 3 and subdivision 4, supra. Subdivision 3 provides:

> "To each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding $500.00, coin, in value."

The additional selection under this subdivision must be made from other household goods, utensils, and furniture, and clearly there is no provision of statute whereby a person could claim as exempt certain enumerated animals in lieu of household goods, etc. Subdivision 4, supra, provides for the selection of other property in lieu of the animals named, but does not require it to be of a like character, but

simply provides, in general terms, that where the party does not possess the cows with their calves and the five swine, or, having them, does not care to retain them, he may select from his other property and retain property, in lieu of the animals, not exceeding $250 coin in value, and in this selection he may take household goods, utensils, and furniture, if he should happen to possess them, because there is no limitation to the provision, but he could not, under the provisions of subdivision 3, select the animals in lieu of household goods, because this subdivision limits the selection to other household goods, etc.

The state court quotes the Circuit Court of Appeals in Re Gerber, supra, in support of its contention. The Circuit Court of Appeals made some reference to a quotation from the Carter Case, but did not decide the issue here presented. On page 700 of 186 Fed., on page 518 of 108 C. C. A., the court said:

"The rules and forms prescribed by the Supreme Court under and by virtue of the Bankruptcy Act have the force and effect of law, and it therefore seems to us to result necessarily that the bankrupt here, even though it should be conceded that he was not limited to the species of property specified in the statute of Washington, as hereinbefore indicated, lost any right he may have had to the exemptions claimed, by his failure to make the claim * * * within the time legally prescribed therefor."

No consideration was given to the provisions of subdivision 4, supra, as distinguished from subdivision 3, supra; nor does it appear that the courts' attention was called to these provisions. It does appear, however, that only a general reference was made to the Carter Case, which, as will be shown, did not determine, or attempt to determine, the matter.

In the Carter Case, Davis, acting under the direction of certain writs of attachment against the property of Carter, levied upon and took into his possession certain described live stock, consisting of horses, mules and cattle, together with other property. Afterwards a portion of the property was sold and two horses were sold for $165, and also all of the live stock, except one cow and two calves, which were claimed and received by the respondent at the time of the sale, for which he received more than $250. Afterwards, on January 19, 1892, Mrs. Carter, "acting for her husband and in his absence," duly and regularly claimed of the appellant, as exempt from attachment and sale as being community property of the respondent and the said R. P. Carter, certain household goods and furniture not involved in the litigation and not exceeding $150 in value, and also $250 in coin, the proceeds of the sale of live stock selected in lieu of the exemptions provided for in subdivision 4 of section 486 of the Code of Civil Procedure, and also the sum of $165, proceeds derived from the sale of the horses and other property. The court said:

"It will be observed that it does not appear that the respondent was a householder residing in this state at the time of the levy of the attachment, and, as such, entitled to the benefits of the exemption law. Nor does it appear that she intends to carry on the business of farming in the absence of her husband. But it does appear that, in claiming the property in question as exempt, she was acting for R. P. Carter in his absence. Now, conceding that R. P. Carter was a householder at the time of the levy, and it

appearing that his family consisted of his wife, the respondent, only, he had a right as such householder, if entitled to any exemption whatever, to retain one bed and bedding, and other household goods and utensils and furniture, such as he might select, but not exceeding $500 coin in value. Code Procedure, § 486, subd. 3. The respondent, as his representative, selected the 'bed and bedding' and certain other household goods, utensils, and furniture, not exceeding $150 in value, none of which was levied upon by the appellant, and then demanded of appellant, in lieu of other property of like character which was not selected, and perhaps not even possessed by her husband, $250, the proceeds of the sale of the live stock above mentioned, none of which was claimed to be exempt at all, and also the sum of $165, the proceeds derived from the sale of the two horses. * * * The claim to this $250, in the hands of the sheriff, is manifestly unfounded in law. The section of the statute referred to authorizes the selection of 'other household goods, utensils and furniture,' and prescribes the method and by whom such property may be selected, but confers no right to retain or select other property of a different character, in lieu of that authorized to be selected and retained. But it is claimed by the appellant that in no event can the judgment in this action be sustained, for the reason that the Legislature has expressly provided that the property of a person who has left the state with intent to defraud his creditors shall not be exempt from execution or attachment. Code Civil Procedure, § 489. Such being the law, the judgment must be reversed, irrespective of other considerations, unless the respondent has shown that she has some right or interest in the property claimed on behalf of her husband, beyond that which could be asserted by him, and we are unable to perceive that she has done so. The husband himself could only claim the property in controversy as a householder and a farmer, but, having absconded, he lost all right of exemption in either capacity. And what the husband could not do the respondent could not do for him, as his agent or representative. His rights can in no way be enlarged by the mere fact that the statute permits his wife to select as exempt, in his absence, such property as he might select if personally present."

Nowhere in the discussion of the issue in the Carter Case by the court was subdivision 4, supra, referred to, nor was its effect considered in the court's conclusion.

The state court further says:

"In the Scheier Case, Judge Rudkin, in considering this same provision, holds that, if the bankrupt is not possessed of the animals specifically mentioned, he is not entitled to retain from his assets other property of the value of $250 in lieu thereof."

The court has misconceived the issue in the Scheier Case. The only matter in issue in that case was whether a partner could claim exemptions from the partnership property, and Judge Rudkin said:

"In Charleson v. McGraw, 3 Wash. T. 344 [17 Pac. 883], the Supreme Court of the territory held that a partner could not claim exemptions from partnership property under similar facts. * * * How far the decision of the Supreme Court of the territory is binding on this court may admit of question. * * * The construction placed upon a statute by the highest court within the jurisdiction of the law-making body becomes a part of the statute, and, if the Legislature cannot add to the exemptions without impairing the obligation of existing contracts, certainly no court should accomplish the same results by a mere change in its decisions. However, if I should disregard the decision of the Supreme Court of the territory entirely, the overwhelming weight of judicial authority would lead me to the same conclusion."

Again:

"The fact that the other partner has consented to the allowance of the exemption does not change the rule."

And further said on page 746 of 188 Fed.:

"The second question certified must be answered in the negative for the same reason, and for the additional reason that the statute does not permit the debtor to select other property in lieu of provisions and fuel for his family and feed for the animals therein named."

The only issue was whether a person could claim, as exempt, partnership funds, and the further reference that a person cannot select other property in lieu of "provisions and fuel for his family and food for the animals therein named," and no statute appears anywhere authorizing a person to select, in lieu of provisions and fuel for his family and food for the animals named, other property.

The state court further says on page 888 of 141 Pac.:

"The North Carolina case (Ballard v. Waller), considering a like provision, says, 'The enumeration of particular articles, one cow and calf,' etc., concluding with the words 'and such other property,' by an established rule of construction restricts it to other property of a like kind."

An examination of the case and the language of the statute discloses an intention to restrict the property to a like kind. No such language is employed by the Washington statute, except in relation to household goods. The debtor may retain other property under the Washington statute from his property, not from such other property, nor from like property, clearly referring to all properties of which the bankrupt may be possessed and from which selections may be made.

The state court further says:

"The case of McLarty v. Tibbs, 69 Miss. 357, 12 South. 557, in applying this rule to an exemption statute, says: 'This is so palpably plain as to require no argument.'"

A glance at the decision of the Mississippi court shows it is not germane to the issue before the Washington state court. The court says (Woods, Judge):

"Tibbs, the defendant, is a laborer, over the age of 21 years, unmarried, and not the head of a family. Are his wages as such laborer, to the amount of $100, exempt from garnishment or other legal process? Unless we are to disregard the structure of the statute (paragraph 8, § 1224, Code 1880), and all rules of legal and grammatical interpretation, the exemption referred to is conferred upon heads of families only. The first and third paragraphs of the section create the exemptions peculiar to mechanics and laborers. Paragraph 8 creates an additional exemption, in pursuance of the general policy of our laws for the protection of families, in favor of all heads of families, regardless of the calling of such heads. The exemption sought by the appellee is found, not only in the paragraph conferring exemptions upon the heads of families, but in the very sentence so conferring such exemptions. By every rule of grammatical construction, the exemption is limited to the heads of families; and by that simple rule of legal interpretation, the general words, 'every laborer or mechanic,' following the particular words, 'each head of a family,' are to be referred to and controlled by such first used particular words; and the true reading will therefore be, 'The wages of every laborer or mechanic who is the head of a family, to the amount of one hundred dollars, shall be exempt,' etc. But this view is so palpably plain as to require no argument."

None of the cases cited by the Washington court lead to a solution of the issue here.

The Washington statute provides for exemptions from real property and from personal property, two general classes into which property is divided by all modern writers. Exemption of property in lieu of property specifically exempted from either class, "real" or "personal," must be taken from that class, unless further limited, in which case it must be taken from the property to which it is limited. No distinction is made in the Washington statute with relation to any classes of personal property. Webster defines "property" to be "the exclusive right of possessing, enjoying, and disposing of a thing; ownership; an estate, whether lands, goods or money." The rule of ejusdem generis, contended for by the trustee and as discussed by the state court cannot be invoked. The provisions of the statute are plain, and it seems to me there can be no doubt as to the legislative intent. A reading of subdivision 3, supra, where the additional exemption of household goods is allowed to the amount of $500 in value, but in which the selection is limited to "other household goods," etc., and subdivision 4, supra, where "he may select from his property and retain other property," than the animals, without any limitation, would seem to be conclusive that the selection can be made from any other property within that class, which is personal property, and which does include money. The Legislature, in the adoption of the exemption statute, dealt with limitations. It limited the provisions of subdivision 3, but did not limit the provisions of subdivision 4, which, to me, is conclusive that no limitation was intended.

[3] From a consideration of this statute in the light and purpose controlling such enactments, which is to prevent a householder and his family from being deprived of the immediate means of subsistence, in connection with the fact that the welfare of the unfortunate is the special object of the law's concern in the adoption of exemption statutes, and the further fact that these statutes have, from the earliest period of judicial determination in the territorial and state courts of Washington, been liberally construed with a view of effectuating the object of the lawmakers, it would seem that the conclusion is inevitable that the debtor may select from his chattel property other property than the animals referred to, without limitation. Courts have no power to add to or take from exemption statutes. Justice Allyn, for the court, in Mikkleson v. Parker, 3 Wash. T. 527, 19 Pac. 31, in a consideration of the personal property exemption statute, said:

"It is a firmly established principle that exemption laws must be liberally construed in favor of the poor debtor. They are based upon sound principles of justice and mercy. The right thus given must not be forfeited, unless exact justice demands it."

Judge Hoyt, in Dennis v. Kass & Co., 11 Wash. 353, 39 Pac. 656, 48 Am. St. Rep. 880, said:

"Exemption statutes should receive a liberal construction, and the aim of courts should be to see that those entitled to the benefits thereof receive the same."

In Puget Sound Dressed Beef & Packing Co. v. Jeffs, 11 Wash. 466, 39 Pac. 962, 27 L. R. A. 808, 48 Am. St. Rep. 885:

"Statutes exempting real property from sale on execution have received a liberal construction by nearly all the courts of this country. * * * And if

statutes exempting real property should be so construed, there is no good reason why those exempting personal property should not receive a liberal construction. * * * And a very great majority of the courts of this country now liberally construe all exemption statutes without regard to the property to which they relate. Such courts say that such statutes are remedial and should receive such a construction as to give effect to the intention of the Legislature."

In Becher v. Shaw, 44 Wash. 166, 87 Pac. 71, 120 Am. St. Rep. 982, Judge Rudkin, speaking for the court, said:

"We think that a liberal construction of the statute requires us to so hold, and that any other construction would in a measure defeat the beneficent purpose the Legislature had in view."

In North Pacific Loan & Trust Co. v. Bennett, 49 Wash. 34, 94 Pac. 664, the court said:

"Appellant's third contention calls for a strict cosntruction of the law, whereas courts have almost universally given a liberal construction to statutes of this character. In view of their benevolent purpose, it is highly appropriate that they should be liberally construed."

And in State ex rel. McKee v. McNeill, 58 Wash. 47, 107 Pac. 1028, 137 Am. St. Rep. 1038, Judge Parker said:

"We do not think that the spirit of our exemption laws contemplates such a strict construction as counsel seeks to apply to this provision. * * * Following the general rule, this court has liberally construed our exemptions in favor of the poor debtor."

Circuit Judge Ross, for the court, in Re Gerber, supra, 186 Fed. 696, 108 C. C. A. 514, said:

"While it is well-established law that exemptions in behalf of unfortunate debtors are to be liberally construed in furtherance of the object of such statutes, it should never be forgotten that courts have not the power to legislate, and can no more add an exemption not fairly included within the statute than they can take one from the statute."

The issue in the case at bar I do not believe to have been determined by the decision of the state court in Re Creditors' Collection Agency, supra. In that case the matter in issue here was not in issue. While the discussion by the state court was general and was not in terms restricted to the question of whether money was intended to be considered as "other property," I am led to the conclusion, from the language employed, that it was not the intention of the court to include, within "the rule of ejusdem generis," cows with their calves and swine, etc., only, even though it applied the rule, but rather that the lieu selection must be made from the debtor's personal property enumerated in the exemption statute (section 563, supra), and that, since money was not named in the statute, it could not be considered as of the same kind or class and within the rule.

"The doctrine of ejusdem generis" is that "where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind." Spalding v. People, 172 Ill. 40, 49 N. E. 993.

"By application of the maxim 'ejusdem generis,' which is only a restriction of specific application of the broader maxim 'noscuntur a sociis,' general and specific words, which are capable of an analogous meaning being associated together, take color from each other, so that the general words are restricted

to a sense analogous to the less general (End. Interp. Stat. § 400); but it has never been supposed that the rule required the rejection of the general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated (State v. Williams, 2 Strob. [S. C.] 474). On the contrary, it must yield to another equally salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force." Misch v. Russell, 136 Ill. 22, 25, 26 N. E. 528, 529, 12 L. R. A. 125.

"The rule of ejusdem generis," in statutory construction, is by no "means a rule of universal application, and its use is to carry out, and not to defeat, the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give a coloring to the general word, but for a distinct object, and when, to carry out the purpose of the statute, the general word ought to govern, it is a mistake to allow the ejusdem generis rule to pervert the construction." State v. Broderick, 7 Mo. App. 19, page 20.

[4, 5] Applying the well-known rules of statutory construction to this statute, first, that it shall be liberally construed (Washington court, supra); second, that words or phrases used are not to be taken separately, but considered in relation to the entire section under the general meaning applied to the main purpose; third, that, if the main purpose is to afford protection to the family, the application of the maxim "noscitur a sociis" must be understood to apply to any other property described or referred to in section 563, supra, and not restricted to subdivision 4, in the absence of express limitation. Applying this rule, upon a strict construction of the statute, would not include money, but would include, even under a strict construction, any other property possessed by the debtor and enumerated in this section.

The issue in Creditors' Collection Ass'n, supra, was whether money instead of animals could be selected. The state court said:

"To hold that money falls within the phrase 'other property' is to do violence to the rule of ejusdem generis."

And then refers to the cases herein cited, and holds that money cannot be selected in lieu of the animals named.

I have, through the courtesy of counsel, examined the briefs of appellants presented to the state court on appeal in Creditors' Collection Ass'n, supra, and the discussion in the briefs and the issue which was presented, approached from every viewpoint, is conclusive, to my mind, that the act of the Legislature of Washington, exempting current wages or salary to the amount of $100 for personal services rendered by any person having a family dependent upon him for support, from garnishment, except that, where the garnishment be founded upon a debt for actual necessaries furnished, the exemption shall not be in excess of $10 out of each week's wages for a longer period than four consecutive weeks, was conclusive of the issue presented, and that the discussion, with relation to subdivision 4, was incidental and pertained only to the relation it bore to the said act, except that under subdivision 4 money could not be selected in lieu of the animals named. Any other conclusion would be reading into the statute language which is not there, and would extend a broader scope and meaning to the expression of the court in saying that money does not fall within the phrase "other property," under the rule of ejusdem generis, and would

lead to harsh and illogical conclusions. If the debtor did not have two cows with their calves and five swine, he could not select two other cows with their caves and five other swine, nor could the ordinary man select $250 worth of fuel or provisions in addition to the six months' supply already provided for under this section. No such limitation was intended, nor did the state court so intend. Such limitation could only benefit the farmer. That is the only class who have such animals. It would deprive more than 60 per cent. of the householders of the state of this benefit of the act. I am satisfied that what the court said with relation to the lieu selections provided in subdivision 4, as applied to personal property in general other than money, is purely obiter dictum, and the court does not express an opinion of subdivision 4, as it relates to other property, except that money cannot be selected in lieu of the animals named, and that the act of 1907, supra, controls. The decision of the referee is therefore reversed, with directions that the lieu selections be set apart to the bankrupt.

PHILADELPHIA & R. RY. CO. v. UNITED STATES et al.

(District Court, E. D. Pennsylvania. January 16, 1915.)

No. 1307.

1. COMMERCE ⇐88—INTERSTATE COMMERCE COMMISSION—ORDERS—CONFORMITY TO COMPLAINTS.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 (Comp. St. 1913, § 8565), making it unlawful for any common carrier to subject any particular locality to any undue or unreasonable prejudice or disadvantage, section 13 providing that any person, etc., complaining of anything done or omitted by any common carrier in contravention of that act, may apply to the Commission by petition, and giving the Commission the same powers on its own motion as when appealed to by complaint or petition, and section 15 providing that when the Commission shall be of the opinion that any practices of any carrier are unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of that act, it may make an order that such carrier or carriers shall cease and desist from such violations, where a manufacturer of cement at Evansville filed a complaint charging that a carrier's rate on cement from that point to Jersey City discriminated against it and against Evansville, and the Commission, having found that such rate discriminated against Jersey City, granted a rehearing, and upon the rehearing made a like finding and ordered the carrier to cease charging such rate; its order was not in excess of the Commission's power, because the complaint was not made by Jersey City nor by any citizen thereof as the Commission is more of an administrative than a judicial tribunal, and is not restricted in its procedure by the technical rules prevailing in judicial tribunals nor restricted in its finding or its order to the precise point in dispute presented by the pleadings, but may extend its inquiry and affix its order to other matters germane to the matter in inquiry and involved in the consideration of the principal point in controversy, provided the parties are not taken by surprise and are afforded an opportunity to present evidence, and the carrier was afforded an opportunity on the rehearing, if not on the original hearing, to defend against the charge of discrimination against Jersey City, while discrimination against Jersey City, by reason of a rate between Evansville and

---

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

that point, was necessarily related to the question of discrimination against Evansville by reason of the same rate.

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

2. COMMERCE ⊂⊃88—INTERSTATE COMMERCE COMMISSION—POWERS—DISCRIMINATORY RATES.

Where a railway company united with other companies carrying cement from a particular district in fixing relatively uniform rates to all points east and south, except Jersey City, and charged the same rate as such other companies to Jersey City on cement destined for transshipment to coastwise points, but charged a higher rate for cement shipped to Jersey City for local consumption, an order finding that this last-mentioned rate discriminated against Jersey City, and ordering the company to cease charging such discriminatory rate, was not beyond the powers of the Interstate Commerce Commission on the theory that it based a finding of discrimination on the mere fact that such railroad company did not conform to the rates charged by competing companies, as the discrimination consisted in the railroad company's own act in excepting Jersey City from the advantages of relatively equal rates accorded all other localities, especially as the function and jurisdiction of the Commission is the regulation of commerce and not the regulation of railroads, except in so far as they are instruments of commerce.

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

In Equity. Bill by the Philadelphia & Reading Railway Company against the United States and another, to annul an order of the Interstate Commerce Commission. Bill dismissed.

William L. Kinter and Henry S. Drinker, Jr., both of Philadelphia, Pa., for plaintiff.

Joseph W. Folk, of St. Louis, Mo., and Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

Blackburn Esterline, Special Asst. Atty. Gen., for the United States.

George W. Aubrey, of Allentown, Pa., and Chester N. Farr, Jr., and William A. Glasgow, Jr., both of Philadelphia, Pa., for Allentown Portland Cement Co.

Before HUNT and WOOLLEY, Circuit Judges, and DICKINSON, District Judge.

WOOLLEY, Circuit Judge. By the prayer of the bill filed in this case, the court is asked to revoke and annul an order made by the Interstate Commerce Commission against the complainant and other carriers, commanding that they cease and discontinue certain unreasonable prejudices and disadvantages found to have been occasioned certain localities by tariffs imposed, under the following circumstances:

The cement manufacturing plant of the Allentown Portland Cement Company is situate at Evansville in a cement region in Pennsylvania known as the "Lehigh District." Located elsewhere in the same district are many other cement plants. The mill of the Allentown Company is served only by the Philadelphia & Reading Railway Company, which, excepting at Evansville, serves no other cement mills in the district. The other mills are served by other carriers, which do not serve the mill of the Allentown Company.

The Lehigh district is treated by all the carriers as a "locality," and all the carriers serving all the mills located therein participate in making and maintaining relatively the same rates for transporting cement from mills variously situated in the district to destinations east and south, excepting to Jersey City. With respect to this exception, the several carriers, which serve the mills of the Lehigh district, other than the mill of the Allentown Company, charge a rate of 80 cents per ton from their respective points of shipment to Jersey City; and the Reading Company, which serves exclusively the mill of the Allentown Company, charges two rates from the plant at Evansville to Jersey City, namely, 80 cents per ton for cement destined for transshipment to coastwise ports, and $1.35 a ton for cement intended for local consumption.

The Allentown Company filed a petition with the Interstate Commerce Commission alleging that the rate of $1.35 from Evansville to Jersey City for cement for local consumption charged by the Reading Company was, first, unjust and unreasonable; and, second, that it unduly discriminated against it and against the locality in which its plant was located. No contention was made that, in fixing rates for cement from Evansville and from other points upon its line, the Allentown Company or the locality of Evansville was thereby discriminated against. The contention was that in participating with the other carriers serving other mills in the same district in making and maintaining for the district the same relative rates to all competing points, save Jersey City, the Reading Company by this exception discriminated against the Allentown Company and against Evansville as the locality in which its plant was situate. The Commission did not find the rate unreasonable, nor did it expressly find that by the rate the Allentown Company or the locality of Evansville was discriminated against, although in its report the Commission expressed the opinion that by the rate the Allentown Company was caused to labor under a prohibitory disadvantage in marketing its product in Jersey City in competition with other mills in the same manufacturing district, but found that, by the rate, Jersey City was prejudiced and discriminated against. Upon the report of the Commission, the Reading Company filed a motion for a rehearing. The motion was allowed, and a further hearing had, at which further testimony was taken. Upon the rehearing, the Commission made a like finding that, by the rate imposed, the locality, not of Evansville, but of Jersey City, was prejudiced and discriminated against, and upon that finding based the order now before us for review, directing the Reading Company to cease and desist charging the rate complained of and to establish another that would avoid the prejudice and discrimination occasioned by the former.

It is conceded that findings of fact by the Interstate Commerce Commission are not reviewable, but it is urged by the complainant that the matters here submitted are questions of law, which involve the power of the Commission to perform the act complained of, and, when specified, are: First. (a) Whether the Commission has power to make a finding of discrimination against a locality, when that locality or one of its citizens is not a complainant. (b) Whether, under the pleadings, the Commission has power to find discrimination against a locality not therein specially designated as the locality discriminated against. And,

Second. Whether undue discrimination against a locality, as contemplated by the statute, is restricted to discrimination in rates by a carrier between points exclusively upon its own line, entirely without regard to its effect upon commerce or the movement of traffic, or extends to a discrimination against a locality caused by a carrier fixing a rate from one point to another on its own line that is relatively different from rates which it and other carriers participate in making for competing points upon the lines of all of them.

[1] First. The order in controversy was made under section 3 of the act to regulate commerce, which, among other things, provides:

"That it shall be unlawful for any common carrier * * * to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The manner of invoking the protection of this provision of the act appears in sections 13 and 15, as follows:

"That any person, firm, corporation, company or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of any thing done or omitted to be done by any common carrier * * * in contravention of the provisions thereof, may apply to the said Commission by petition, * * * whereupon * * * such common carrier, who shall be called upon to satisfy the complaint, or to answer the same. * * *"

It is further provided that:

"The said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 15, as amended, provides that:

"Whenever,. after a full hearing upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any * * * practices whatsoever of such carrier or carriers * * * are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to * * * make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist. * * *"

The question whether the Interstate Commerce Commission has power to find discrimination against one locality in a proceeding instituted upon complaint, charging discrimination against another locality, depends, first, upon the related circumstances of the case, and, second, upon the purpose for which the Commission was created and the mischief which it was intended to remedy.

The Interstate Commerce Commission, while possessing quasi judicial powers, is primarily an administrative body. From the legislative and judicial history of the act it appears that the purpose of the act under which the body was created "is to promote and facilitate com-

merce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences and discriminations." Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 233, 16 Sup. Ct. 666, 680 (40 L. Ed. 940). In the case of United States v. Louisville & Nashville Railroad Co. et al., 235 U. S. 314, 35 Sup. Ct. 113, 59 L. Ed. ——, decided December 7, 1914, the Supreme Court of the United States, speaking through Mr. Chief Justice White, said:

"It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed, * * * and the amendments by which it came to pass that the findings of the Commission were made not merely prima facie but conclusively correct, in case of judicial review, * * * show the progressive evolution of the legislative purpose."

The promotion and facilitation of commerce being the purpose for which the statute was enacted and the Commission created, with power conclusively to determine the existence of prejudice and discrimination, the Supreme Court has from time to time recognized the administrative character of the Commission as the instrument to effectuate that purpose. The Commission, therefore, being more of an administrative than a judicial tribunal, is not restricted in its procedure by the technical rules that prevail in tribunals that are entirely judicial. In its capacity of a judicial tribunal, the Commission may decide questions between shippers and carriers upon complaint filed by one or the other in proceedings regularly instituted by one against the other, or, within its broader sphere, it may regulate commerce in respect to a matter in which there may exist no distinct parties in controversy, or as a consequence of which damage may not be claimed or sustained by any party to the investigation. It may institute of its own motion an inquiry as to a matter within its jurisdiction, and make and enforce its orders as in a proceeding instituted by an injured party. With such power, and with all the parties before it in a proceeding instituted by petition, as the one under consideration, it is not contemplated that the Commission, acting within its administrative sphere, should be restricted in its finding or its order to the precise point in dispute presented by the pleadings, as in an action at law, but may extend its inquiry and affix its order to other matters developed in the proceeding, which may be germane to the matters in inquiry, and which are involved in the complaint and included in the consideration of the principal point in controversy, provided always that the parties are not taken by surprise, and to them is afforded an opportunity to present evidence upon which the Commission may make a finding concerning both the original and the related matter. New York Central & H. R. R. Co. v. Interstate Commerce Commission (C. C.) 168 Fed. 131, 138.

In the case under consideration the defendant was summoned to answer and defend the charge that the rate complained of was a rate on cement between Evansville and Jersey City prejudicial to the locality of the former. It has been held by the Supreme Court that:

"In considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the lo-

calities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment." Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 233, 16 Sup. Ct. 666, 680 (40 L. Ed. 940).

Whether or not the defendant was conversant with this rule and was unprepared to defend the charge of discrimination against Jersey City by the rate in controversy, it was aware of the Commission's view upon its first report, and then was given an opportunity to defend, and did defend, on a rehearing, against the charge of discrimination against Jersey City. Therefore, while the defendant may not have entered the proceeding with a knowledge of all it had to meet, it was afforded an opportunity to meet all that was charged against it before the hearing was closed and the final order made. Furthermore, the record fails to disclose any objection by the defendant to the scope of the inquiry.

The petition in the proceeding instituted by the Allentown Company, while charging discrimination by the defendant against it and the locality in which its plant was situate, nevertheless charged that the rate imposed for the shipment of cement from Evansville to Jersey City was the discriminatory act which formed the basis of its complaint. The rate was one imposed for the transportation of cement from one locality to the other, in the first of which existed the seller, and in the latter of which resided the purchaser. The defendant was notified that it was called upon to defend that rate; and, although discrimination is charged against the former locality, it is difficult to see, in a case like this, how discrimination against one locality will not correspondingly affect unjustly the other—that is, it is difficult to see how a discrimination against the purchaser at one point is not a discrimination against the seller at the other point. When discrimination respecting traffic between the two points is the only question in issue, the carrier cannot complain that it was not afforded an opportunity to defend the tariff imposed, nor to defend against a possible finding of discrimination against the locality of the purchaser at one end of the route, as well as against the locality of the shipper at the other end. The whole question of discrimination related to the whole transaction of commerce and its movement in trade from the maker to the consumer. The route was the same. The rate was the same, and, if discriminatory, the injury existed as well to one locality as to the other, in that it impeded commerce and prevented a purchaser buying as well as a vendor selling. In this case, the finding of the Commission that the rate prejudiced Jersey City was based upon evidence to meet which an opportunity by a rehearing was afforded the defendant, and the fact that much of the evidence upon which the finding was based was the same that was introduced for the purpose of proving prejudice to the locality of the seller is unimportant, inasmuch as it was likewise sufficient to find prejudice against the locality of the purchaser. The thing that was made the subject of the order was involved in the complaint and established by evidence.

Is there any question that the Commission, with the parties before it, could have made the finding of discrimination against Jersey City, if the inquiry had been based upon the complaint of Jersey City, or upon

a like proceeding instituted of its own motion? If not, then with the parties before it, and with the discriminatory effect of the rate against the locality of Jersey City, being necessarily linked with and related to any question of discrimination against the locality of Evansville, and being openly made a part of the controversy, we see no reason why, in that proceeding, the Commission could not make the same finding and order as it could have made if the proceeding had been otherwise instituted. We are of opinion that traffic with the locality of Jersey City is so related to traffic with the locality of Evansville, the two localities being the termini of the journey for which the rate in controversy was fixed, that in the proceeding, as instituted and conducted, the Commission possessed the power to find discrimination against either one locality or the other.

[2] Second. The remaining question presented from the viewpoint of the defendant, briefly stated, is whether the Commission, in finding discrimination, is restricted to discriminatory rates fixed by a carrier between different points upon its own line, or whether the Commission has power to find discrimination against a locality, because a carrier, serving that locality, does not conform its rates to lesser rates fixed by competing carriers. We do not think that this case presents in the abstract the question thus suggested by the defendant; nor do we think the Commission compelled the defendant carrier to adjust its rate, because independent carriers charged lesser rates.

At first view it would appear that the defendant carrier established a rate from one locality to another on its own line, and that other carriers established on their lines lesser rates between the same localities, and for that reason the defendant was coerced to lower its rate, with the result that its rate was not fixed by itself but was fixed by its competitors. That is not the reason which underlies the order of the Commission. The reason for the Commission's order exists in the fact that joint rates on cement from the Lehigh district to points of distribution east and south had been made by all the carriers serving the different mills in that district. In this joint tariff, the Reading Company uniformly and consistently participated, excepting in the rate to Jersey City. Even in that rate the Reading Company participated when the cement delivered for carriage was destined for transshipment to coastwise ports, but for cement intended for local consumption it made an exception, and fixed a rate from Evansville to Jersey City that excluded the Evansville cement from the Jersey City market. The act of excepting Jersey City from the advantages of traffic rates, which, in participation with other carriers, it accorded other localities, was the act of the Reading Company and not the act of its competitors. The act of withdrawing from Jersey City the right it afforded all other localities on relatively the same terms to procure the transportation of Evansville cement was the act of the Reading Company and not of its competing carriers. The act which in effect prohibited the sale of Evansville cement in the Jersey City market, and conversely prohibited the Jersey City market resorting for cement to the Evansville locality, thereby stopping commerce in that commodity between the two localities, was the act, not of its competitors, but of the Reading Company itself.

From these acts of the Reading Company, which were all acts of its own, and by which Jersey City was singled out as the one locality to be excepted from the advantages of relatively equal rates accorded all other localities of cement distribution, the Commission found that the Reading Company had discriminated against Jersey City, and accordingly ordered it to cease and desist from maintaining a rate that produced such a prejudice and discrimination.

The effect of excepting Jersey City from relatively the same rates which the Reading Company had participated with other carriers in prescribing for traffic from the Lehigh cement region to markets south and east was to stop traffic in cement from Evansville to Jersey City and make impossible the purchase of Evansville cement either in Jersey City or in New York City below Forty-Third street by consumers in either or both of those very large purchasing districts. The power of the Commission to find discriminatory such an exception to the joint traffic arrangement entered into depends in this case upon the purpose and intent of the act which created the Commission. The purpose of the act, as pronounced by the Supreme Court, "is to promote and facilitate commerce." This is its primary object. This is the end sought to be attained. This is the thing intended to be accomplished. To effectuate this purpose, there is conferred upon the Commission power to adopt "regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations," and, "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation." The Supreme Court has further held that in the exercise of its jurisdiction, in promoting and facilitating commerce, as applied to the situation before it, the tribunal "may and should consider the legitimate interests, as well of the carrying companies as of the traders and shippers; and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment"; and when the act "says that no locality shall be subjected to an undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also under the terms and the spirit of the act to enter into the question." Texas Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 220, 233, 16 Sup. Ct. 666, 675 (40 L. Ed. 940).

The situation in this case embraces two localities, and the welfare of the locality to which the goods are sent enters as readily into the situation as the welfare of the locality from which they are sent. If the jurisdiction of the Commission were restricted to the regulation of the railroads, as distinguished from the regulation of commerce, the question presented might be different; but as the function and jurisdiction of the Commission is the regulation of commerce and not the regula-

tion of railroads, except in so far as they are instruments of commerce, the question resolves itself into the power of the Commission to regulate commerce between the localities affected by the rate in controversy.

The Commission has found, as a matter of fact, that in excepting the rate between Evansville and Jersey City from its otherwise complete participation in the relative rates established by all carriers from the Lehigh district to points of distribution, commerce in cement between Evansville and Jersey City has been impeded, traffic arrested, undue advantage afforded shippers from other points in the same shipping district, and undue prejudice and discrimination exerted against purchasers in the purchasing district. This finding of fact cannot be disturbed by this court if the Commission in so finding acted within its powers. It is difficult to lay down any general principle defining or limiting the purpose of the act and the power of the Commission created under it, and such is not attempted in this case; but, under the facts of this case, we are of opinion that a finding by the Commission of undue discrimination, effected by the rate imposed, was within its power, and as that finding was a finding of fact, concerning the wisdom or expediency of which this court has nothing to do, the order should not be disturbed.

The bill is dismissed.

DESTRUCTOR CO. v. CITY OF ATLANTA.

(District Court, N. D. Georgia. October 15, 1914.)

No. 53.

1. COURTS ⟸347—PROCEDURE—MOTION TO DISMISS.

A motion to dismiss a bill in equity under the new equity rules must be considered as admitting, for the purpose of the motion, the truth of everything alleged in the bill that is well pleaded, as in the case of a former demurrer.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⟸347.]

2. MUNICIPAL CORPORATIONS ⟸254—CONTRACTS—PERFORMANCE—REMEDY.

Where complainant contracted to build an incinerating plant for defendant city for a specified price, the final payment to be due when the plant was in successful operation as shown by tests provided for—one at a time fixed by complainant, and the other at a time to be agreed upon between complainant and the city, within six months after the plant was ready for useful operation—a bill alleging that the plant had been completed, but that the city refused to pay or participate in the tests, stated a cause of action for equitable relief; complainant being absolutely entitled under its contract to have the tests made.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 696–700; Dec. Dig. ⟸254.]

3. MUNICIPAL CORPORATIONS ⟸254 — CONTRACTS — PERFORMANCE — ACTS OF MAYOR.

In a suit against a city to compel performance of a contract to purchase and pay for an incinerating plant erected by complainant, allegations of the bill, reciting acts and conduct of the mayor personally ad-

verse to complainant and not within his official capacity, were improper and would be stricken.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 696–700; Dec. Dig. ⟸254.]

In Equity. Suit by the Destructor Company against the City of Atlanta. On motion to dismiss the bill. Denied.

Evins, Spence & Moore, of Atlanta, Ga., and Martin, Fraser & Speir, of New York City, for plaintiff.

James L. Mayson and W. D. Ellis, Jr., both of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a bill in equity filed by the plaintiff against the defendant. The present hearing has been on a motion made by the defendant to dismiss the bill.

The bill, after the necessary jurisdictional averments, sets out that on July 9, 1913, the Destructor Company made a contract with the city of Atlanta for the erection by the company of a plant for the destruction of the city's refuse. That contract, consisting of several documents, is attached.

It is further alleged: That about a year before this contract was made the company had made a previous contract with the city providing for the erection by the company of substantially the same plant and an electric generating plant for the utilization of the steam produced. That this contract had been made with a previous city administration and had been based upon a practice which had then been current in the city of Atlanta for many years under which one city administration, in making contracts for important public works, pledged the moral obligation of the city to fulfill them in part during the succeeding administrations. That a suit was instituted against the city and the Destructor Company, in the superior court of Fulton county, to have this contract declared illegal and invalid. That the superior court held the contract to be legal, and the case was taken to the Supreme Court of the state, which reversed the decision of the lower court and declared the contract illegal as being beyond the power of the city government. When this decision was announced, the Destructor Company had done a large part of the work of erecting the plant, under the first contract, and on the city's land, relying in good faith on the advice of counsel of both the city and the company that the contract was legal and that the city would fulfill the moral obligation to perform it, and had expended large sums in such performance, but had received no payments from the city. That in this situation the present contract was made. It differed from the previous contract mainly in cutting out the electric generating plant, and thus making no provision for the utilization of the surplus steam produced in the operation of the plant, reducing the contract price, which was $274,750 plus about $8,000 for extras allowed for excavation and foundation, by over $22,000, to the sum of $260,000, and providing that this reduced price be paid $125,000 cash upon the execution of the new contract and the balance of $135,000 when the plant was completed and proved by tests as prescribed in the

specifications to meet all requirements. That the $125,000 was paid by the city to the company under the present contract, but the payment was delayed by the mayor about 30 days after the agreement as to terms had been reached. That on the signing of the present contract the company entered upon the work of completing the plant, and, in accordance with the terms of the contract, the plant was ready for useful operation by August 15, 1913, and the company thereupon notified the city that the plant was so ready. That the city, a few days later, began regular delivery of the city's refuse at the plant, and the company has been operating the plant ever since and has kept the plant in continuous operation and destroyed all of the city's refuse which has been brought to the plant, with a few unimportant exceptions.

It is then alleged that the contract contains certain guaranties of performance in the matter of capacity, steam production, etc., and provides that the fulfillment of these guaranties shall be determined by tests of 24 hours' duration, with a refuse mixture of certain specified proportions. The contract provides that the first test shall be made at a time fixed by the company and the second test at a time to be agreed upon between the city and the company, within six months after the plant was ready for useful operation.

Certain clauses in the contract are then quoted, which relate to the right of the company to make changes in the incinerator if by doing so it may be made to satisfactorily fulfill the requirements of the guaranty, and with reference to the work being done to the satisfaction of the city of Atlanta and with reference to the percentage of garbage, stable manure, ashes, and rubbish of which the refuse of the city of Atlanta is represented approximately to consist and that the plant was built by the company to burn substantially the proportions of the substances to be furnished as stated; that the proportions in the refuse so furnished was not in accordance with that provided in the contract, but varied extremely therefrom.

It is then alleged that the company, on finding the actual condition so very different from those represented by the city and specified in the contract, to meet which the plant had been designed, did not lie back and claim that under the contract the plant need only burn refuse of the composition represented by the city, but, on the contrary, the company spent every possible effort and a large amount of its own money to make such changes in the plant as were needed to make it meet guaranties under actual conditions; and that, furthermore, the company has made these changes under the extra difficulty of all the time keeping the plant in operation and burning the city's refuse; that the expense and effort of installing the needed changes would have been very much less had the company shut down the plant to make the changes.

It is then alleged that the company, at the time the bill was filed, had fulfilled its contract with the city, and that on August 8, 1914, on a test of the crematory plant, it complied with all the guaranties and requirements of the contract. It is then alleged that the city refused to pay, and still refuses to pay, the balance due.

It is alleged that, after the plant was completed and in operation and the city's refuse being delivered, the company, in pursuance of its right

under the contract, wrote the city that the company would be ready to run the first test in the early part of the week beginning December 29, 1913, and requested the city to make arrangements accordingly to deliver at that time refuse of the quantity and character called for by the contract for the test, and that the city refused to have the official test made at that time or to supply the refuse for it; that this refusal prevented the running of the first test; that the city has been requested by the company to reconsider its former action, and on January 5, 1914, a request was made on the mayor and general counsel for the city to co-operate in running a test; that arrangements had been made for running a test at the time the severe storm occurred on February 13, 1914, but the test was prevented by the fact that ice covered the streets of Atlanta to such an extent that it was impossible to collect the material for the test. It was then postponed until February 17th, and at that time the refuse at the plant, as the allegations are understood, was insufficient for a test, and during the next few days the requisite material for a test was not furnished.

It is alleged that the company persistently tried to have a test run, and a test was finally agreed upon on March 14th, and it was accordingly run on that day. On this test the crematory satisfactorily destroyed all the refuse but fell 10 per cent. short in the amount destroyed in 24 hours. That is, the contract provided for the destruction of 250 tons in 24 hours, and the plant destroyed 225 tons.

It is then alleged that after this test the company, as permitted by the contract, made certain slight changes in the equipment of the furnaces, so as to make them better fulfill both the requirements and the guaranties of the contract, and also meet the actual conditions prevailing in Atlanta. After stating that the company had great difficulty in making the necessary changes and keeping the plant in operation at the same time, and after alleging certain correspondence with the mayor and a personal interview between the president of plaintiff company and the mayor, the bill proceeds to state that it was agreed for a test to be made on August 8, 1914, and the required material was accordingly gathered and brought to the plant for the test on that date. The further allegation on this subject is as follows:

"The guaranteed capacity of the plant is 250 tons per 24 hours, of refuse containing 15 per cent. of ashes. Within 24 hours of the time agreed upon for beginning the test, the city delivered at the plant 284 tons of practically pure garbage, containing almost no ashes. To incinerate this material it was necessary to add 30 tons of ashes which the company had collected at its own expense. There was also about 20 tons of material in the pit. At the plant rating, this 334 tons of material, which was an overload of 84 tons of its daily capacity, would require 32 hours to incinerate; but because it had not been disposed of in 28½ hours the mayor refused to take part in the test. The test, however, was run. Although the proper mixture of material had been collected, the city, during the first four hours of the run, delivered 61 per cent. of garbage, six tons of which was pure watermelons, and only 39 per cent. of rubbish and ashes—instead of 50 per cent. of rubbish and ashes as specified. The city also refused to deliver into the pit over 139 tons of material, and the company was obliged to deliver as much of the remaining tonnage as possible at its own expense. It was impossible to get the full amount, and over 50 tons of pure garbage, instead of test mixture, had to be used to complete the test. This test was run by Gabriel R. Solomon, Esq., of the Solomon-Norcross Com-

pany of Atlanta, an unbiased engineer employed to run an impartial test. His report shows that the test showed compliance with all the guaranties and requirements of the contract."

In an amendment recently filed to the pleadings, it is alleged that at the time the original bill was filed herein, to wit, August 19, 1914, complainant had fulfilled its contract which it had with the city of Atlanta, and that:

"On the test of said crematory plant held on August 8, 1914, the plant complied with the guaranties and requirements of said contract."

So, as I understand the bill, it is now clearly alleged that, while at the test made on March 14, 1914, the plant lacked 10 per cent. of destroying the amount of material required by the contract, thereafter certain changes were made which brought the plant up to the required capacity.

The substance of the other allegations is that, the plant having now been completed in compliance with the contract of the Destructor Company with the city, the company asks for another test, and, if the plant fails in any way to comply fully and strictly with the contract, it be allowed reasonable opportunity to make such changes as will remedy defects and bring the plant up to every requirement of the contract. It is alleged that the city refuses to accept the plant, although it is continually using the same and has been since August 13, 1913, and also that the city refuses to pay the remaining $135,000.

The prayers are:

(1) For an injunction restraining the city from taking possession of the plant until it has paid the amount due under the contract.

(2) For a receiver to take charge of the plant and operate it.

(3) That the receiver be instructed to afford the company every reasonable opportunity to install at its own expense such improvements as it may deem necessary to increase the efficiency of the plant.

(4) That the plaintiff's interest in or lien upon the plant be declared, protected, and enforced by foreclosure of the lien or otherwise.

(5) That in order to do complete justice the court may determine the amount due the plaintiff for building the plant, and decide by running a test whether the company has complied with its contract, and, if not, give it reasonable opportunity to make such improvements and run such further tests as shall show that the plant complies with all the guaranties of the contract and that the contract be specifically enforced in this respect.

(6) That, if necessary, the provision of the contract for the settlement of all disputes by arbitration be enforced by the running of a fair test by arbitrators under the court's supervision.

(7) That an accounting be had as to the amount due the company from the city for the building and operation of the plant and the extra expenditures caused the company, for which the city is responsible.

(8) That the final amount due from the city having been determined, and the amount realized by the foreclosure of the company's lien having been applied thereon, a judgment for the deficiency be given against the city.

Then for subpœna and general relief.

[1] There is a motion to dismiss this bill on various grounds. Of course, a motion to dismiss, under the new equity rules, must be considered in the same way a demurrer would be; that is, it concedes, for the purpose of the motion to dismiss, the truth of everything alleged in the bill that is well pleaded.

The first four grounds of the motion to dismiss are that the court will not appoint a receiver for the company's plant on its own request.

As the court has no purpose at present of appointing a receiver, it is unnecessary to consider these grounds.

The next is on the ground that there are no mutual accounts, and therefore, so far as it is a bill for an accounting, it should not be sustained.

It is doubtful if this prayer for an accounting would be sufficient to sustain the bill, except as it is intermingled with other matters in the bill.

The next ground is that the charge that complainant has a lien is not sustained by the allegations of the bill. It is said that no contract lien is pleaded and that no statutory lien is shown to exist.

[2] This is a peculiar case in this respect. The plant in question is devoted, by the city, to a public use, and consequently there could probably be no enforcement, by execution, or otherwise, of any judgment the plaintiff might obtain, against this particular property. This plant is built on property belonging to the city and has been built at large expense and under the supervision of the city, in accordance with the contract. It must be assumed from the allegations of the bill, and indeed it was stated by counsel for both plaintiff and defendant, in open court, that a fund is now set apart and available to pay for this plant when the Destructor Company has fully complied with its contract and it stands the tests required. When this contract has been fully complied with and the plant stands the tests prescribed, the company certainly will be entitled to payment and should clearly have same enforced in some way.

It is alleged by the company that the city absolutely refuses to assist it in making the test and in its having reasonable opportunity, if the plant is not satisfactory, to make it so. It is clearly entitled to this under the contract. Whether by decree for specific performance, as prayed, or by the enforcement of a lien, or by a mere money decree for the balance of the purchase money, may be determined hereafter. It may be proper to consider here the new Equity Rule (Rule 22, 198 Fed. xxiv, 115 C. C. A. xxiv), which is as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

If the application of this rule should be necessary, it can be made as the case proceeds.

[3] There is a motion to dismiss on certain parts of the bill, as follows:

"This defendant excepts to the voluminous charges against the mayor of unfairness, newspaper publicity, or prejudice, etc., upon the grounds that

the mayor is not the city nor is the city liable for his statements or his talk or his prejudices or his acts, beyond the scope of his authority, and no authority is shown therefor anywhere in the complaint."

"Therefore this defendant moves to strike the allegations of paragraphs 23, 27, 28, 29, 30, 33, 34, 35, 37, 38, 39, 40. 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54. 55, 57, 59, for the reason that same refer to various positions of the mayor that have no connection with the contract nor with the city, but simply undertake to show that the mayor of the city was personally antagonistic to complainant, abused them in the newspapers, writes about them, etc., with all of which the city of Atlanta is not shown to have anything to do. Certainly they cannot add to nor take from the written contract. This appears from the petition, and all this reference to the mayor is immaterial, irrelevant, and comes under the head of pleadings known as scandalous, and should be stricken. This motion is made also with reference to the following language in paragraph 36, to wit, 'with the deliberate and unfair purpose of injuring the company.'"

I think this motion should be sustained as to paragraph 23. As to paragraph 27, some of it refers to acts of the mayor personally, and some of it refers to acts of the city by name. So much of it as refers to the acts of the mayor should, I think, be stricken, and the same is true of paragraph 28. Paragraph 29 seems to deal, as I gather it, more with the acts of the city than those of the mayor, which is true also of paragraph 30. The only part of 33 which appears to refer to the mayor personally seems to be the last sentence. This, I think, should be stricken. As to paragraphs 34 and 35, I do not think there can be any objection. Commencing with paragraph 37, I think the paragraphs should be stricken down to and including paragraph 59, with the exception of paragraphs 56 and 58, or very largely at least. It is almost impossible to separate those acts which are charged against the city and those which are charged personally against the mayor and are alleged to have been done on account of the mayor's personal feeling of hostility to the company and to the plant. So far as they relate to the acts of the mayor which are claimed to have been done by him by reason of his personal feeling, they could not be charged against the city, unless ratified by the governing body of the city, the mayor, and general counsel. The parenthetical language in paragraph 36, as follows, "with the deliberate and unfair purpose of injuring the company," I think should clearly be stricken.

Summing up, the whole case is this: The Destructor Company contracted with the city of Atlanta to build a plant for the destruction of its refuse. The plant, it is alleged, has been built according to the contract and is now ready to destroy, and is destroying, the refuse of the city as contemplated and as provided for in the contract. The city was to pay the company $260,000 for this plant. It has paid $125,000, and still owes $135,000. The latter amount ($135,000) was to be paid when the plant was completed in accordance with the contract and when the same, after being subjected to the tests provided, is shown to be satisfactory. The company says it has completed the plant and the city refuses to have the test which would show this compliance.

Clearly, if this be true, the company is entitled to relief against the city in some way. Whether this can be shown, if the city denies these allegations, will appear from the proof submitted.

The case of Castle Creek Water Co. v. City of Aspen, 146 Fed. 8,

76 C. C. A. 516, 8 Ann. Cas. 660, is more like the case at bar than any case cited by counsel or of which I have any knowledge, and seems to me an excellent authority for the retention of this case in a court of equity. So I think the peculiar situation and the peculiar facts surrounding the matter make it a case cognizable in equity.

Therefore the motion to strike is overruled, except in the respects mentioned above. The paragraphs and portions of paragraphs which should be stricken can be more readily determined and provided for in an order to be taken denying the motion to strike.

WATTS v. S. M. HAMILTON COAL CO.

(District Court, E. D. New York. January 22, 1915.)

1. DISMISSAL AND NONSUIT ⟸81—SETTING ASIDE—ADMISSIONS IN ANSWER.
On an application to set aside a judgment dismissing an action for commissions for procuring a certain contract on plaintiff's failure to appear when the case was reached for trial, in which plaintiff claimed that the answer on file was not that originally filed, that the answer originally filed contained an admission that he procured the contract and was not properly verified, and that his attorney refused to enter judgment upon the unverified answer containing this admission, where it appeared that the answer on file must have been in existence prior to the filing of the alleged original answer, the alleged admission in the answer as originally filed could only avail plaintiff as evidence on the trial, and did not affect the relief which should be granted, as, had the court entered a judgment against defendant by default through a mistake in the papers originally filed, it would have been opened on proper application.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 182–192; Dec. Dig. ⟸81.]

2. DISMISSAL AND NONSUIT ⟸81—OPENING—TIME FOR APPLICATION.
Where, because of a misunderstanding between plaintiff and his counsel, plaintiff failed to appear when the case was reached for trial over a year after it was noticed for trial, and it was thereupon marked for dismissal by the court and notice given to plaintiff's attorneys to provide against accidental default, and subsequently an order was made that the complaint be dismissed for failure to prosecute, and that defendant have judgment accordingly, with costs, and execution therefor, the judgment would not be treated as one on the merits which could not be set aside after the term of court, but rather as a mere technical striking of the case from the calendar, coupled with the entry of a judgment for costs to be met before the default could be opened; and hence the default might be set aside, though the application was not made within the term.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 182–192; Dec. Dig. ⟸81.]

3. COURTS ⟸339 — UNITED STATES COURTS — PROCEDURE — DISMISSAL FOR WANT OF PROSECUTION.
Notwithstanding the provision of the Revised Statutes making state laws and procedure applicable so far as may be to actions in the federal courts, the court's right to dismiss a case for plaintiff's failure to appear when it was reached for trial was not limited by the rule in the state courts allowing a dismissal if later issues have been tried.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 914; Dec. Dig. ⟸339.]

At Law. Action by James R. Watts against the S. M. Hamilton Coal Company. On application by plaintiff to compel his attorney of record to deliver certain papers to him and for an order opening a judgment of dismissal and restoring the action to the trial calendar. Motion to open the default granted.

McLear & McLear, of New York City, for plaintiff.
Herbert Barry, of New York City, for defendant.
Meyer Levy, of New York City, for Friedman.

CHATFIELD, District Judge. The plaintiff in the above-entitled action has made an application to compel his attorney of record to deliver to him the papers relating to the various proceedings in the action, and has in connection therewith applied to the court for an order opening a judgment dismissing the action on default and restoring it to the trial calendar.

It appears that the complaint was served and filed in August, 1907, upon an alleged cause of action arising out of transactions in the months of May and December, 1904.

The defendant is a corporation organized under the laws of Baltimore, but doing business in the county of New York, and its officers are located in Baltimore, Md.

It appeared by attorney in this action in the Supreme Court of Richmond county, and removed the action to the United States court, in which a certified copy of the record was filed upon the 2d day of October, 1907. A paper was filed upon the 3d day of October, 1907, in a back marked "answer." This back is the printed form of Davies, Stone & Auerbach, who were then attorneys for the defendant, and bears the file mark of the clerk of the court upon the outside of the paper. The "answer" consists of four sheets of paper containing the same watermark and exactly identical in every way with the copy of the proposed answer prepared by Mr. Barry, in the office of Davies, Stone & Auerbach, prior to the 20th of September, 1907, when, as shown by the correspondence, the original proposed answer and another copy were received by mail by the president of the corporation, who thereupon verified the original and retained the copy in the files of the coal company.

The particular four sheets of paper comprising the answer on file have been made up in the so-called "judgment roll" since the 20th day of April, 1909, and show, upon inspection, no apparent changes in text, with the exception that the words "Supreme Court, Richmond County," have been erased, and the words "United States Circuit Court, Eastern District of New York," written by a different typewriter in their place.

The answer, as filed, is signed in typewriting by Davies, Stone & Auerbach, verified by Howard Adams, as president, and contains the signature of the notary public, Florence Barrett, whose seal is affixed, and the certificate of the clerk of the superior court of Baltimore city, also under date of September 20, 1907, as to the authority of the notary to take acknowledgments, etc.

A copy answer was served upon the attorney for the plaintiff, and the case placed upon the calendar on November 8, 1907, by the plaintiff's attorney. The attorney for the plaintiff had served, upon the 4th of November, 1907, a notice of trial for the 18th, and received admission thereof, and a cross-notice had been served by the attorneys for the defendant upon November 8th.

As was predicted by the clerk of the court to the plaintiff, the case was not actually reached for trial until April, 1909, although apparently called upon the calendar before that time. Upon the day when the case could have been tried, the 5th day of April, 1909, it was marked for dismissal by the court, on motion of the defendant, because of the failure of the plaintiff to appear. In order to provide against accidental default, the court directed the attorneys for the defendant to serve their proposed order for judgment upon the plaintiff's attorney, and this was done, giving him two days' notice of settlement and also of taxation of costs, and upon the 20th day of April, 1909, an order to the following effect was entered:

"Ordered that plaintiff's complaint herein be dismissed upon failure to prosecute, and that defendant have judgment accordingly, with costs as taxed, amounting to the sum of $34.95, and that defendant have execution therefor."

This order recites that no one appeared upon the call of the calendar, and that due notice of trial had been given to the plaintiff's attorney. Judgment was entered accordingly, and nothing more was heard of the matter until the summer of 1914, when the plaintiff, through his present attorneys, came to a judge of the court and requested opportunity to examine the papers in the case. The clerk had hesitated about allowing this examination without order by the court, because of a previous statement by the plaintiff that the papers in the action had been tampered with. The plaintiff thereupon made his motion to compel his former attorney to surrender to him the papers in the matter as above recited, and in a short time thereafter a second motion to open his default. Opposition to the latter was based primarily upon the ground that the term of court at which the judgment by default had been entered had long since expired, but numerous questions involving the charge of altering the record of the court, and the propriety of orders made by the court, have been included as a part of this motion. Much acrimonious discussion between the plaintiff's former attorney and the plaintiff himself, with an examination in open court of that attorney and his former clerks, by the parties to the present proceeding, resulted in an order by the court that this attorney deliver all the papers, including his correspondence with respect to the matter, to the clerk of the court, with an intimation that the question of compensation, as claimed by him, would be withheld from determination until the proceedings as to the action were completely disposed of. Much dispute arose over the question as to whether this attorney's clerk had been at Staten Island searching for the plaintiff and had appeared in court on the day the case was called. His motive for refusing to make an affidavit to that effect was assailed, and it appears that the recollection of all the parties, while positive, in proportion to their feelings in the matter, was

of little reliability from the standpoint of clearing up the questions in dispute.

The plaintiff alleges that he called at the clerk's office of this court on the 29th day of October, 1907; that he then saw the answer filed by the defendant; that he was accompanied by his wife, who also makes an affidavit to the same effect; that he read the answer and made extracts therefrom; that the paper filed as an answer contained an admission, in the third paragraph, that the plaintiff had "procured the contract," for obtaining which he claimed commission. The plaintiff and his wife also allege that this paper filed for an answer was incomplete in that it did not contain the words "notary public" nor the seal of the notary, although it purported to be signed by a notary.

The plaintiff and his wife immediately went to their attorney's office and there claimed to have seen in his possession an answer exactly like the one on file. Shortly afterwards (that is, upon the 6th day of November, 1907) the plaintiff and his wife again called at the office of their attorney and asked if the answer had been amended. The plaintiff then requested his attorney to enter judgment upon the "unverified" answer, but which contained in the plaintiff's opinion the admission that he had procured the contract in question, and the attorney refused to do so, as he had done upon the previous occasion. The plaintiff then told his attorney not to serve the notice of trial or file a note of issue, so as not to lose the right to enter judgment.

It now appears that previous to this the attorney had already served a notice of trial, and upon the 11th day of November, 1907, the plaintiff called at the office of the clerk of this court and found that the note of issue, above referred to, had been filed. This contains the words in ink "October 3, 1907," as the date of issue, written by the clerk in place of the typewritten words "September 4th."

The plaintiff then examined the original answer and claims to have copied the words "procured the contract." He asked the cost of a certified copy, and on the following day, November 12th, he again called at the clerk's office with his wife and discovered that the first page in the third paragraph of the answer then contained the words "contributed to the procuring of such contract" in place of the words "procured the contract," and also that the notary's seal and the date and the words "notary public" had been filled in under the notary's signature. He also testifies that the deputy clerk, who is still in the office of this court, told him that some one had been in the day before, after the plaintiff left, and had asked for the answer, taking it to a table and sitting thereat. The clerk could not recollect whether it was a man or a woman.

Mr. Watts and his wife then left the office of the clerk and went to the office of his attorney and told him that the answer had been changed so that it amounted to a forgery. The attorney did not consider the alleged change of the paper after filing as of serious moment, and then produced and showed to the plaintiff his copy of the answer which the plaintiff alleges was different from the answer that he had previously seen in his attorney's office on the 29th of October, in that the body of the answer (that is, the third paragraph) was like the answer then on

file, stating that the plaintiff contributed to the procuring of the contract. But this copy answer in the attorney's possession was still blank as to the notary public's signature and other particulars of the verification.

The plaintiff thereupon wrote to his attorney to enter judgment for the full amount, and the attorney upon the 15th of November wrote the plaintiff that his case was upon the calendar for the 18th, and to call at his office without fail upon the 16th of November, 1907. The plaintiff did not receive this letter until the 18th, and then came to Brooklyn, learning that the case would not be tried for two or three years. On the 22d of November, 1907, the plaintiff obtained a certified copy of the answer as then on file and let the matter run until February 12, 1910, when he wrote his attorney, asking him what the status of the case was, and followed this by a registered letter upon the 15th of February, 1910, which letter was received by the attorney and the receipt returned in the mail of 11 a. m., February 16, 1910. In the same mail a letter with the same postmark, from the attorney to the plaintiff, contained the following statement:

"Yours of the 12th inst. received. In view of your continued neglect to reply to my letters, I was surprised to receive same from you. On account of your nonappearance in this matter, an order was made on April 20, 1909, by the court dismissing this action and directing judgment against you with costs in the amount of $34.95."

The plaintiff alleges that he had resided from 1906 to 1911 in the same house on Elizabeth street, West New Brighton, S. I., and that mail merely addressed to him at Staten Island would be delivered to him.

The plaintiff thereafter called upon the clerk of the court and was advised that the term at which the judgment was entered had expired, and that an application to open the default would probably not be considered by the court. He then consulted other attorneys, who gave him the same advice, but apparently the success of his present attorneys in disposing of another matter, which had been running since 1900, led him to take up the present question with them, and they advised him that the motion might be considered.

The copy of the answer shown to the plaintiff upon the 6th of November by his then attorney and now presented to this court bears the indorsement in his handwriting, "Recd. Nov. 1st, 07." The back is entitled in the "United States Circuit Court, Eastern District of New York," while the first page of the complaint shows as well the erasure of the words "Supreme Court, Richmond County," and this erasure is shown upon the cover. A comparison of the typewriting of these covers and of the contents, including the watermark in the paper, shows them to be identical in every respect with the one on file, except that, as claimed by the plaintiff, the blank for the verification and the certificate by the clerk of the court are not filled out in any way. In this respect this copy of the answer corresponds with the one furnished by the defendants from their files, and in which the words above, upon the cover and on the first page, "Supreme Court, Richmond County," have not been erased. The two copies referred to are evidently carbons of

the paper contained in the so-called judgment roll of this court, while the cover in each instance is a ribbon original.

The plaintiff points out that the copy answer indorsed by his attorney upon November 1st should have been served before that day, and that he could not have seen this answer upon the 29th of October, as he and his wife allege they did then see a paper similar to that which they also allege was upon the court's files on the 11th day of November, 1907. It also appears that the copy answer produced from the files of the coal company, and shown to have been in its possession since September 20, 1907, has the eyelet holes throughout the cover and the four sheets of paper punched uniformly, while the copy answer produced by the attorney has eyelet holes punched through the cover, but the two sheets containing the text of the answer and the sheet containing the certificate of the clerk of the court in Baltimore have had the brass binders forced through the paper without the prior punching of a hole therefor. In the same way, the copy of the answer on file has holes punched through the cover and the sheet of paper signed by the notary, while the two pages of the answer proper and the page signed by the court clerk have again had the brass binder forced through the paper without the punching of a hole.

At the time of the occurrence in question, under the removal law then in force, an answer had to be filed in the United States court within such period after the filing of the record on removal as remained of the time to answer in the state court when the application for removal was made. As removal occurred upon October 2d, and the answer was filed upon October 3d, it is evident that the defendant was in time in filing its answer, for it applied in the state court upon the 21st of September for an order of removal, and its time there to answer expired upon September 24th. There was no definite rule requiring any particular service of an answer, and one of the strange circumstances in the case is that the attorneys for the defendant have no copy of its answer and no admission of service, while the plaintiff's copy purports to have been received by his attorney, as has been said, upon November 1st, or 27 days after the answer was filed, and subsequent to the time when Mr. Watts testifies that he saw an answer in the attorney's possession.

It is impossible to reconcile the statements of plaintiff with all of the inferences presented by the papers now on file. It may be that some clerk, in filing an answer in the court, filed an incomplete copy instead of the original, and that later the original sheet, with the signatures of the notary and clerk of the court, was substituted for the incomplete copy on file. But this would not account for the language which Mr. Watts and his wife say was changed in the first page of the answer, and which appears in the copy of the answer sent to Baltimore when the original answer was mailed to that city for verification.

[1] The copy of the answer in the possession of the former attorney for the plaintiff has none of the signatures of the person making the verification, the notary, or the clerk of the court, and the only difference charged as to that copy is in the text of the answer. Again, as the text is the same as that of the answer sent to Baltimore, the

mystery relating to the date of November 1st on the paper, and the mystery with relation to his attorney's action, if the plaintiff be correct, was apparently of no effect, except in so far as it caused a misunderstanding between the attorney and client. The answer actually on file with the court seems to consist of the original sheets (that is, the ribbon copy of the papers typewritten in the office of the attorneys for the defendant, before the original set and another copy were sent to Baltimore to be verified), and therefore must have been in existence, exclusive of verification and signatures, at a time long prior to that on which the plaintiff and his wife say they saw an answer more favorable to the plaintiff in its admission as to his work in procuring the contract in question.

Inasmuch, therefore, as the court would not have entered a judgment against the defendant, except on notice and after an investigation, and the result would certainly have been that the default would have been opened (if default through mistake in the papers had existed) upon such terms as would have seemed proper, it cannot now be held that any provision as to a different admission by the defendant can be of further avail than to offer it as evidence, if the case ever comes to trial.

On this situation the serious difference arising between the plaintiff and his attorney has had an unfortunate result. The plaintiff's attorney knew that the case was on in court, and, as has been said, a serious disagreement has again arisen between this attorney and his clerk as to just what statements the clerk has made about his attendance upon the call of the calendar. But this is immaterial, except from the standpoint of the credibility of the parties and the conduct of the attorney, for the reason that the attorney did know of the case and of the application for judgment, and the judgment of dismissal seems to have been properly entered.

[2] It is impossible to determine, also, whether or not the letters sent to Mr. Watts reached him. Inasmuch as they did not contain definite information that the case was upon the calendar, no particular help or harm is done to the present application, even if we assume that Mr. Watts received the letters. If he did not, then the misfortune arising from the misunderstanding with his attorney became greater, and the sole question now presented, upon which any action can be predicated, is whether the dismissal of an action for lack of prosecution, with a judgment for costs, can be opened by the court after the expiration of the term at which the case was tried.

It may be assumed that, if the defendant had put in its case and received a verdict upon the merits, application would have had to have been made within the term of court in order to set aside that judgment. Whether or not responsibility for failure to keep in touch with his client and to proceed with the action could be thrown by the client upon the attorney would have nothing to do with the disposition of the case upon the merits, for parties must be bound by the authority of their attorneys, when they appear in court by attorney, and when no mistake is shown other than that the attorney and the client have previously

reached a position where the client might seek to have a different attorney substituted.

[3] The plaintiff contends that the rule invoked in the state courts, allowing the case to be dismissed, if later issues have been tried, should be used as the criterion of procedure in this court; but it is evident that the Revised Statutes, making the state laws and procedure applicable so far as may be, cannot control the dismissal of a case by this court for failure to try the case when reached. The question is rather whether the dismissal upon the request of the defendant, with notice to the plaintiff that the cause of action was being dismissed, was a dismissal upon the merits and equivalent to a verdict directed by the court upon default, or whether it was a mere technical striking of the case from the calendar, coupled with the entry of a judgment for costs, which would have to be met before the default could be opened.

The court was not bound on a default to give notice of any hearing of the case upon the merits, nor of a dismissal for the default; but, by serving notice upon the attorney, the court sought to prevent injustice, if the default were accidental.

In The Palmyra, 12 Wheat. 1, at page 10 (6 L. Ed. 531), it is said the court has "power to reinstate any cause dismissed by mistake"; and in the case of City of Manning v. German Ins. Co., 107 Fed. 52, 46 C. C. A. 144, the court says that:

"The only exceptions to that rule (requiring a motion within the term) are that clerical mistakes, such mistakes of fact not put in issue or passed upon as may be corrected by writ of error coram vobis or on motion in lieu of that writ, and mistakes in the dismissal of a case, may be corrected after the expiration of the terms."

In the present application the mistake shown was not in a dismissal of the case nor in anything connected with the procedure, but was due entirely to the responsibility of the attorney in representing his client; but inasmuch as the defendant, instead of seeking judgment upon the merits, merely had the action dismissed from the calendar and entered a judgment for the taxable costs up to date, it would seem that the responsibility of the plaintiff for the acts of his attorney should be measured only by the explanation given by the plaintiff of the matters which put the attorney in the position where the responsibility existed.

The defendant makes out fairly well a showing of circumstances which would indicate that it may be able to defeat the plaintiff's case, but it cannot be said that the plaintiff is so likely not to succeed upon a trial that the action should not be heard; and the court is of the opinion that entry of judgment for costs upon the dismissal of the action for failure to appear upon the calendar is not a judgment upon the merits, and that the mistake of the party in allowing the default can be corrected, if it be shown that the positions of the parties have not changed subsequently thereto.

There would seem to be no reason why the present action could not be tried, and the motion to open the default will therefore be granted, upon the condition that the judgment for costs be satisfied by the plaintiff within such time as may be specified in the order of restoration.

UNITED STATES v. CHICAGO, M. & P. S. RY. CO.

(District Court, D. Idaho, N. D. December 15, 1914.)

No. 448.

1. MASTER AND SERVANT ⊂=13—HOURS OF SERVICE—STATUTORY PROVISIONS.
Where a railroad company made a rule that, if a train was held over 30 minutes at a siding where there was no open telegraph office, the conductor should report to the dispatcher for orders, using a telephone, if no operator was available, and, to make that possible, installed telephones at various points where no telegraph operators were employed and no regular stations were maintained, a train conductor by using the telephone, pursuant to such order, did not come within the proviso of section 2 of the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, § 8678]) that no operator, train dispatcher, or other employé, who, by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be permitted to remain on duty for longer than 9 hours or at certain offices 13 hours in any 24-hour period.

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

2. MASTER AND SERVANT ⊂=17—HOURS OF SERVICE—ACTIONS FOR PENALTY—COMPLAINT.
Assuming that the conductor was within such proviso, the complaint, in an action for a penalty, was insufficient where it failed to show that he used the telephone after the lapse of either 9 or 13 hours.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 16; Dec. Dig. ⊂=17.]

Action by the United States against the Chicago, Milwaukee & Puget Sound Railway Company, to recover a penalty. On demurrer to the complaint. Demurrer sustained, and cause dismissed.

James L. McClear, U. S. Atty., of Cœur d'Alene, Idaho, J. R. Smead, Asst. U. S. Atty., of Boise, Idaho, and Otis B. Kent, Sp. Asst. U. S. Atty., of Washington, D. C.

George W. Korte, of Seattle, Wash., for defendant.

DIETRICH, District Judge. [1] The action is brought to recover a penalty under the provisions of what is commonly known as the Hours of Service Act (34 Stat. 1415). The defendant is an incorporated railroad engaged in interstate commerce, and is subject to the act. On December 27, 1913, it issued a general order, of which the following is the material part:

"Should a train be held over thirty minutes at a siding where there is no open telegraph office, the conductor will report to the dispatcher for orders, calling the day operator, if there is one available, and if there is not, using the telephone."

To make obedience to the order possible, the defendant installed at various points where no telegraph operators were employed, and no regular stations maintained, telephones for the use of its conductors. On February 11, 1914, one G. W. Perry, a conductor in defendant's service, regularly and generally engaged in and connected with the movement of its trains in interstate commerce, went on duty at 3:15

a. m., with instructions to meet another train of the defendant at a siding called Pandora. After waiting 30 minutes at the siding, Perry, in compliance with the regulation, used the telephone installed at that point for the purpose of communicating with the train dispatcher. Thereafter he remained on duty until 5:40 p. m., and was therefore on duty continuously from 3:15 a. m. to 5:40 p. m., a period of 14 hours and 25 minutes. The record does not disclose at what particular hour the telephone was used.

The question at issue arises in this way: If, under the provisions of section 2 of the act, Perry be deemed to have been a conductor only, and hence a person "actually engaged in or connected with the movement" of a train in interstate commerce, it was the right of the defendant to permit and require him to remain on duty for a period not longer than 16 consecutive hours, whereas, if, by reason of his use of the telephone, he falls within the proviso of the section, then he could not lawfully be kept in service for a period of more than 13 or 9 hours, as the case may be. The proviso is as follows:

"That no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than 9 hours in any 24-hour period, in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than 13 hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency," etc.

The contention of the government is that, by using the telephone at Pandora siding, Perry became an "employé who, by the use of the * * * telephone, reports, transmits, receives, or delivers orders pertaining to or affecting train movement," and that therefore automatically he became subject to the limitation applicable to the class of employés covered by the proviso.

[2] It may be said in passing that, there being no averment in the complaint that Perry used the telephone after the lapse of the 9-hour or 13-hour period, upon that ground alone it should be held that there is a failure to state a cause of action. But it is unnecessary to rest the decision upon so casual a circumstance. Primarily Perry was a conductor and not an operator or a train dispatcher. By resort to the strict letter of the proviso, doubtless the language may be made to cover such a case; but the statute should have a sensible construction, and its general purpose may be effected without adopting a view so harsh and onerous primarily to the railroad company but ultimately to the public, upon whom the burden of expense must finally rest. The purpose undoubtedly was to protect the lives both of passengers and of employés, and also to safeguard freight in transit. It was understood that, if one who is engaged as an operator or a train dispatcher were required to remain on duty continuously for more than a certain length of time, through weariness and the need of sleep he might become inattentive to his duties and fail to hear or see that which he ought to hear and see. But no such peril arises in a case like this. If, through weariness, the conductor should fall asleep, or fail to resort to the telephone, as directed by the general order above quoted, there could be

no danger, for in such a contingency his train would remain in a place of safety; and, upon the other hand, if he does resort to the telephone, the very necessity of acting gives assurance that he will be awake and sufficiently alert to report and receive his orders. Certainly, under such conditions, it would require no greater degree of consciousness or mental activity to properly transmit and receive a telephone message than it would to receive and correctly read an order transmitted from the dispatcher's office by telegraph and delivered by the local operator. While the government is insisting upon a literal acceptation of the language of the proviso in this particular, it is under the necessity of applying a more liberal rule to other phrascology contained therein. Here is a siding with no station, but with a telephone instrument presumably attached to a telegraph pole. If, by reason of his use of the telephone, Perry fell within the limitations prescribed, which period are we to adopt, 9 hours or 13 hours? The statute provides that an operator shall not remain on duty for a longer period than 9 hours "in all towers, offices, places, and stations continuously operated night and day." Clearly this was not such a place. And for no longer period than 13 hours "in all towers, offices, places, and stations operated only during the daytime." It is equally clear that this was not such place. At least, there is no more reason for saying that it was a place "operated only during the daytime" than a place "continuously operated night and day." And there is no other alternative. The truth is that, strictly speaking, it is not a place operated either day or night.

It is deemed to be unnecessary to pursue the discussion at any great length, for I am inclined to think that the construction put upon the act in Missouri Pacific Railway Co. v. United States (C. C. A. 8th Circuit) 211 Fed. 893, 128 C. C. A. 271, is the correct one, and there is little to be added to the reasoning there adopted. Upon principle the facts of the case cannot be distinguished from those here involved. Switch tenders, whose primary duty was to throw the switches, made use of a telephone leading from a shed in the yards for the purpose of communicating with the tower men at the depot. The tower men used the telephone from time to time to inform the switchmen what was wanted. The court said:

"The difference in the hours of labor fixed by section 2 was based upon the character of the service rendered by the employé, not upon the use of the telephone. R. Connell and J. W. King (switchmen), beyond question, were not operators or dispatchers. * * * The proviso ought not to be construed so broadly as to annihilate the general language of the section. We think that, under a well-established rule of construction, the words 'or other employé,' found in the proviso, must be construed to mean an employé engaged in the same character of service as a train dispatcher or operator, who, by the use of the telegraph or telephone, performs the work described in the proviso. In other words, Congress intended the 9-hour provision to apply to employés whose primary duty was to dispatch, report, transmit, receive, or deliver orders pertaining to or affecting train movements. * * * Where general words follow an enumeration of particular classes of persons or things, they will be construed as applicable only to persons or things of the same general nature or class as those enumerated. * * * The words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of like kind or character. * * * As the word 'employé,' in the proviso of section 2, includes 'operator' and 'train dispatcher,' for the latter are both employés,

the conclusion here is irresistible that Congress intended, by the use of the words 'other employé,' to mean an employé engaged primarily in the same class of service as would be performed by an operator or train dispatcher. If this be the right construction to place upon the proviso, then R. Connell and J. W. King were not in any sense employés, whose primary duty was to dispatch, report, transmit, receive, or deliver by the use of the telegraph or telephone orders pertaining to or affecting train movements, within the meaning of the proviso. While, as has been said before, we must give the law such a construction as will promote the purpose of the law, in our zeal to do so, however, we must not attempt to legislate ourselves."

If these views be correct, it follows that the demurrer must be sustained, and the cause dismissed; and such will be the order.

THE PUTNEY BRIDGE.

THE M. I. MANDAL.

(District Court, D. Maryland. February 1, 1915.)

1. COLLISION ⟸37 — STEAM VESSELS CROSSING — VIOLATION OF STARBOARD HAND RULE.

The steamships Putney Bridge and Mandal, on crossing courses, came into collision at sea at night a few miles east of Cape Henry. The night was dark, but clear, and the lights of each should have been seen by the other in ample time; but the Mandal did not see the lights of the other vessel, nor give any signal, until a very short time before the collision, when she signaled her intention to cross ahead, although the Putney Bridge was on her starboard side, which signal was not answered. The Putney Bridge kept her course and speed, as required by the rules. *Held*, that she was not in fault for not answering the signal or for not changing her course under the circumstances, having the right to expect, until it was too late, that the other vessel would obey the rule; that the Mandal was solely in fault for not paying proper attention to the lights and for violation of the starboard hand rule, which required her to keep out of the way and not to cross ahead.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 34–36; Dec. Dig. ⟸37.]

2. COLLISION ⟸41—FAULT—FAILURE TO ANTICIPATE VIOLATION OF RULES.

The burden of showing that a vessel which was navigated in obedience to the rules could have avoided a collision due to the fault of the other rests on the latter, and she will not be held in fault if her master exercised the sound judgment of a competent navigator.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 41; Dec. Dig. ⟸41.]

In Admiralty. Suit for collision by A. Westergaard, master of the steamship M. I. Mandal, against the steamship Putney Bridge, E. T. Atkins, master, and cross-libel. Decree in favor of the Putney Bridge.

Daniel R. Randall, of Annapolis, Md., and R. E. Lee Marshall, of Baltimore, Md., for the M. I. Mandal.

Convers & Kirlin, J. Parker Kirlin, and William H. McGrann, all of New York City, and Ritchie, Janney, Griswold & Hamilton and Robertson Griswold, all of Baltimore, Md., for the Putney Bridge.

ROSE, District Judge. [1] On November 26, 1914, at a few minutes after 5 a. m., the Danish steamship M. I. Mandal was in colli-

sion with the British steamship Putney Bridge at a point in the Atlantic Ocean about 20 miles east of Cape Henry. The night was dark, but clear. The ships came together at about right angles, the Mandal striking the Putney Bridge a little aft of amidships. Considerable damage was done to each vessel. Each libeled the other. The cases were consolidated and have been tried together. None of the witnesses were heard in open court. All their testimony was taken on deposition. The Putney Bridge was in ballast bound from Algiers to Baltimore. The Mandal was carrying a cargo of grain from the latter port to Copenhagen. There is no question that the Putney Bridge was on a course west northwest, and was making about nine knots an hour. Neither her course nor speed were changed at any time between the period at which she first saw the Mandal and the time of the collision. The Mandal was making about eight knots an hour. According to the allegations in her pleadings, she was on a course east by north. Her helmsman says he does not know what her course was; that he kept her on the course on which she was sailing when he took charge of the wheel. The captain says that when he went below about 4 o'clock the course was east by north one-quarter north, and the mate testifies he looked at the compass and knows that that was the course upon which she was proceeding shortly before the collision. On the other hand, from the direction in which each of the ships bore to the other, as testified to by all the witnesses on both sides, it is demonstrably impossible that she should have been on such course. Her very able counsel, candidly dealing with the problems raised by the testimony, has demonstrated that her course must have been somewhere between northeast by north one-quarter east, and northeast by north one-quarter north. There is no discoverable reason why she should have taken any such direction, but it seems to be certain that she did. This fact would itself seem to indicate that her navigation was not being conducted at the time with even ordinary care and skill. Her lights were seen from the Putney Bridge about 17 minutes before the collision. According to the testimony of her witnesses, they did not see those of the Putney Bridge earlier than about 4½ minutes before the ships came together. The lookout and the wheelsman claim that they first saw a very faint point of white light which they supposed was a vessel four or five miles away; that almost immediately it brightened out into the masthead light of a steamer, and they then saw that it was not over three-quarters or a mile away; that they saw for a moment both the steamer's green and red lights, and then the green light was obscured and was not afterwards seen by them. The officer in charge of the navigation of the ship did not see the white light while it was dim, nor the green light at all. That the Putney Bridge was equipped with excellent lamps, that they were in perfect order and were burning brightly throughout the entire night, is overwhelmingly proved. That they were not seen from the Mandal many minutes before they were, I am persuaded was owing to the lack of attention on the part of those on the deck of the latter.

The officer in charge of the Mandal, at some time after he saw the lights and before the collision, blew two blasts and put his helm hard astarboard with the intention of passing across the bow of the Putney

Bridge. He says this was in his judgment the only course he could take to avoid all risk of collision. At some time after he gave the two blast signal, he blew three blasts and reversed his engines. As the Mandal was the burdened vessel and bound not to cross the bow of the Putney Bridge, its fault is clear. On its behalf it is, however, argued that the Putney Bridge also failed in its duty by not taking proper precautions on its part to prevent the collision. What it should have done, if anything, depends in some measure upon the time at which the Mandal gave the two blast signal. As usual in such cases, the witnesses estimate the time which elapsed between this signal and the collision differently, and there is no agreement on that question even among all the witnesses on the same ship. I am persuaded, however, from the various circumstances in evidence, and which it is unnecessary here to recapitulate, that there was the shortest of short intervals between the blowing of the two blasts and the blowing of the three, and that very little time elapsed after the three blast whistle before the ships were together.

The Putney Bridge neither gave nor answered any signal, and by the international rules was not required so to do. The officer in charge of her navigation kept her on her course and speed, as under ordinary circumstances the privileged vessel should be kept. There was no signal which he could give that would indicate that that was what he proposed to do. His giving none indicated that his intention was to adhere to the rules. Until the vessels were close together, there was no reason for him to assume that the Mandal would not do what the laws of navigation required she should do. I think that, when she indicated by her two-blast signal that she proposed to do something else, the vessels were so close together that it was exceedingly doubtful whether anything which then could have been done by the Putney Bridge would have prevented the collision, and certainly it could not have been clear to the officer in charge of the Putney Bridge at that time that any possible course would have obviated, or even reduced, the risk of the ships coming together. In the exercise of his best judgment, the officer in command of the Putney Bridge believed that his best chance, even then, to escape an accident, was to maintain his course and speed. He was not far wrong in this. A quarter of a minute more would have carried him clear of danger.

[2] There is here presented a case in which one of the vessels has been navigated with what appears to be a great lack of care, skill, and watchfulness, and has acted in direct defiance of the rules of navigation. Even, under such circumstances, if her intention to persist in so doing is made clearly manifest in time for the other ship to avoid the danger thus created, it is the duty of that other so to do. But the burden of showing that the otherwise innocent vessel could have rendered harmless the fault of the guilty rests on the latter. All doubts in such case must be resolved in favor of him who has obeyed the rules. Whether he neglected something he should have done must be determined, not by the result, but by the situation as it presented itself to him at the time. In solving it he is not required at his peril to forecast the future or to display intuitive genius. If he exercised the sound judgment of a competent navigator, he has done all that can

be required of him. I am not prepared to hold that, measured by this standard, the officer in charge of the Putney Bridge was in fault. The Mandal must bear the entire loss resulting from this collision.

SALTER v. WILLIAMS et al.

(District Court, D. New Jersey. October 21, 1914.)

BANKS AND BANKING ⊂=248—LIABILITY OF STOCKHOLDERS—RESCISSION OF PURCHASE OF STOCK.

Under Rev. St. § 5151, providing that shareholders of every national banking association shall be individually responsible for all contracts of the association to the extent of their stock, in addition to the amount invested therein, upon the failure of a national bank, the rights of creditors attach, and a purchaser of stock who has held it for several months, and made no complaint until after the appointment of a receiver, cannot thereafter, as against creditors, have the purchase rescinded because of false representations by the bank's president as to the solvency of the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913–915, 919–931; Dec. Dig. ⊂=248.]

In Equity. Suit by William D. Salter against Christopher L. Williams, receiver, and another. Application for injunction denied, and complaint dismissed.

Plaintiff sets up that the First National Bank of Bayonne was duly organized in 1906, with a capitalization of $100,000, divided into 1,000 shares of stock, of the par value of $100 each; that on December 6, 1913, the bank became insolvent, and that defendant is the duly qualified receiver; that about April 4, 1913, the bank, by its president, offered to sell to the plaintiff 30 shares of the capital stock of the bank for $6,000, and then and there falsely and fraudulently represented to plaintiff that the bank was solvent and had a large surplus; that its shares were worth over $200 each; that plaintiff believed such representations, and was induced thereby to buy from the bank 30 shares of its stock, for which he paid to the bank $500 in cash and made and delivered to the bank his promissory note for $5,500, and thereafter, when the note became due, made payments on account of it until he had paid in all $1,600 in cash and owed a balance of $4,400, for which the bank held plaintiff's promissory note, dated November 10, 1913, payable one month after date; that upon April 4, 1913, the bank was not solvent, but was hopelessly insolvent, and that its stock was worthless, all of which was known to the president, and that prior to April 4, 1913, the Comptroller of the Currency of the United States had notified the president and officers of the bank that the bank was carrying much worthless paper and that certain securities must be charged off and replaced, but that the officers and directors failed to comply with the direction of the Comptroller; that the president of the bank made false representations, knowing them to be false, with intent to induce plaintiff to buy stock and thereby to defraud him; that in the report of the receiver to the Comptroller for the quarter ending June 30, 1914, it appears that of the alleged assets of the bank $334,263.38 are worthless, and $398,910.15 are doubtful, making a total of $733,173.53, and that nearly all of the assets were of little or no value about April 4, 1913, and at least $300,000 worth of the assets were worthless on that date; that plaintiff made demands upon the receiver to be allowed to examine the books of the bank, for the purpose of obtaining the names of the debtors and the exact amounts of the debts due, but that the receiver has refused to comply with the demands; that plaintiff did not know of the fraud perpetrated until

the Comptroller closed the bank, and that thereupon plaintiff repudiated and rescinded, and hereby does repudiate and rescind, the purchase and ownership of the stock, and has tendered and does hereby tender a return thereof, and of the dividends received by him.

Plaintiff then sets up that the Union Trust Company of New Jersey, a solvent banking corporation, offered to take over the business and assets of the defunct bank, and to pay the depositors in full upon certain terms, but that after several months of negotiation the proposition failed, and that another institution made an effort to purchase, which included the paying of the depositors 75 per cent. of their claims, and perhaps more, but that negotiations were unsuccessful; that, if either of these offers had been carried out, plaintiff would not have been liable to an assessment upon his stock. Plaintiff sets up the demand of the Comptroller of the Currency under the Revised Statutes of the United States and the National Banking Act, the institution of a suit to recover $3,000, the assessment upon the 30 shares of stock owned by the plaintiff, together with interest, and that in an action at law plaintiff could have no relief. Wherefore he prays that the action at law to recover the assessment be enjoined, and that an action begun by the receiver against plaintiff for $4,400 upon the promissory note referred to, which action is now pending and undetermined in the District Court of the United States for the District of New Jersey be restrained and enjoined, and that the sale of the 30 shares of stock be rescinded, and that the $1,600 paid to the defendant bank be returned.

Defendant, as receiver of the bank, and the bank, move to dismiss the complaint for lack of equity.

Aaron A. Melniker, of Jersey City, N. J., for complainant.

George M. Burditt and Barber, Watson & Gibboney, all of New York City, for receiver.

HUNT, Circuit Judge (after stating the facts as above). The case is disposed of by the application of the views of the Supreme Court of the United States in Scott v. Deweese, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822. There the court referred to the liability of a shareholder in a national bank under section 5151 of the Revised Statutes, and, after discussing the inability of the shareholder to escape from the liabilities after he has claimed and been accorded by the bank the rights of a shareholder, said that it might be that a suit would lie, if brought before the suspension of the bank, for the purpose of canceling a subscriber's subscription, but that immediately upon the failure of the bank the rights of creditors attached under section 5151, and that a shareholder who was such when the failure occurred could not escape the individual liability prescribed by this section, upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so. Again the court said:

"If the subscriber became a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position."

The allegations in the present complaint do not withdraw plaintiff's position from the pertinency of these rules. On the contrary, plaintiff avers that he was a purchaser, that he held for several months,

that he was a shareholder at the time of the insolvency of the bank, and that he never made any complaint until after the appointment of a receiver. The rights of the creditors, however, intervened when the bank suspended, and it is now too late for him to come into court and claim to be relieved upon the ground of misrepresentation and deceit by any person who was an officer of the bank at the time of the purchase of his shares. In Scott v. Abbott, 160 Fed. 573, 87 C. C. A. 475, the Circuit Court of Appeals for the Eighth Circuit stated this general rule:

"That when one has for a considerable period of time prior to the failure of a corporation occupied the position of one of its stockholders, and exercised and enjoyed the rights, privileges, and fruits of that relation, including the chance of enhanced value of his holdings, when fortune frowns, and the chances turn against him, it is too late to assert, as against creditors of the corporation, the right to rescind his contract of stock subscription on the ground of false representations after a state of insolvency has supervened, and after proceedings to wind up the corporation for the benefit of creditors have been or are about to be instituted." Hood v. Wallace, 97 Fed. 983, 38 C. C. A. 692, affirmed in 182 U. S. 555, 21 Sup. Ct. 885, 45 L. Ed. 1227.

For lack of equity, the complaint is dismissed, and the plaintiff's application for injunction is denied.

UNITED STATES v. HEE.

(District Court, D. New Jersey. February 1, 1915.)

INTERNAL REVENUE ⊂⊃42—ORDERING RETURN OF PROPERTY SEIZED.

Under Rev. St. § 3453 (Comp. St. 1913, § 6355), authorizing the seizure by revenue officers and the forfeiture through appropriate proceedings of certain property used or designed to be used to avoid the payment of internal revenue taxes, where revenue officers wrongfully and illegally seized property which it was intended to use as evidence at the trial of the owner for an offense, but did not assume to act pursuant to any judicial authority or process, and had taken no steps to have the property forfeited, the District Court had no jurisdiction in a summary proceeding on petition of such owner to order the property returned to him, as the revenue officers were not acting as officers of the court.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 114–116; Dec. Dig. ⊂⊃42.]

Criminal prosecution by the United States against Charles Hee. On petition by defendant to have certain personal property, alleged to have been illegally seized by revenue officers, returned to him. Petition dismissed.

Charles F. Lynch, Asst. U. S. Atty., of Paterson, N. J.
Thomas S. Henry, of Newark, N. J., for defendant.

HAIGHT, District Judge. The petitioner claims that his place of business, in the city of Paterson, N. J., was forcibly entered by certain officers, connected with the Treasury Department of the United States, without a warrant of any kind; that he was arrested without a warrant, lodged in jail, and certain personal property in his place of busi-

ness seized and taken away. The crime with which he is charged is a violation of section 1 of the act of Congress approved January 17, 1914 (38 Stat. 277, c. 10) entitled "An act regulating the manufacture of smoking opium within the United States, and for other purposes." In making the seizure the officers assumed to act under authority of section 3453 of the Revised Statutes (3 Fed. Stat. Anno. p. 797), which authorizes the seizure, by revenue officers, and the forfeiture, through appropriate proceedings, of certain property used or designed to be used in avoiding the payment of taxes imposed by the government. The defendant alleges that it is the intention and purpose of the district attorney to use some of the property so seized as evidence at the trial of the defendant. This is not denied.

The defendant has petitioned the court to order a return of the property to him, upon the ground that the entry and seizure was without warrant and violated the defendant's rights under the fourth and fifth amendments to the federal Constitution. The procedure followed in making this application is that recently approved by the Supreme Court in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652. The answer, which has been filed, admits the arrest and the seizure. It alleges, however, that the articles are still in the custody and under the control of the revenue officers, and claims that the seizure was legal. It challenges the power of the court, in a summary proceeding of this kind, to order the return of property seized by officers of the Treasury Department and still under their control. It will be assumed, for the purposes of this motion, as alleged in the petition, that the officers entered the defendant's premises and seized the property in question without a search warrant and without his consent, and that the seizure was illegal. It is entirely well settled that the court has the power, in a summary proceeding such as this, to order the return to the accused of papers and documents wrongfully seized and in the possession of the district attorney, or other *officers of the court.* Weeks v. United States, supra; Wise v. Henkel, 220 U. S. 556, 31 Sup. Ct. 599, 55 L. Ed. 581; United States v. Mills (C. C.) 185 Fed. 318; United States v. McHie (D. C.) 194 Fed. 894; United States v. Wilson (C. C.) 163 Fed. 338.

In United States v. McHie, supra, and in Rex v. Barnett, 3 C. & P. 600, and in Rex v. Kinsey, 7 C. & P. 477, power to summarily order the return of personal property, other than papers and documents, was recognized and exercised. There would seem to be no good reason for any distinction between the kinds of personal property which may be ordered returned, where the seizure has been illegal. The question at once arises: Has the court the same power, in a summary proceeding of this kind, to order a revenue officer to return property wrongfully seized, and which is still under his control? This question calls primarily for a determination as to whether a revenue officer, in making seizures and retaining possession of property by virtue of the above-mentioned section of the Revised Statutes, is an officer of the court. As far as anything before me shows, no proceedings have been taken to enforce the forfeiture provided for in section 3453 of the Revised Statutes. It was held in the case of In re Chin K. Shue, 199 Fed. 282

(D. C. Mass.), that customs officers, assuming to act by authority of a similar statute, were not, in making the seizure and dealing with the goods *before the collector had proceeded against them for forfeiture,* acting as officers of the court, and the power of the court, upon petition, to direct the collector to return the property so seized, was denied. In United States v. One Case of Silk, 4 Ben. 526, Fed. Cas. No. 15,925, where the question presented was whether the marshal or the collector of customs was entitled to the custody of certain goods which had been seized by the collector for a violation of the revenue laws, Mr. Justice Blatchford (page 254, 27 Fed. Cas.) said:

"The property is, in contemplation of law, after process, in the custody of the court, although the marshal does not take it into his custody, provided it remains in custody, under a seizure for forfeiture, while the proceedings in court against it are pending. The collector is its official keeper, for the court, after process, and the court has, after process, as full control over it in the hands of the collector, and as full power to compel obedience by the collector to all orders of the court respecting it, as if it were in the hands of the marshal, under process."

The views there expressed are in harmony with those of Justice Story in Burke v. Trevitt, 1 Mason, 96, Fed. Cas. No. 2,163, and were quoted, with approval, in the case of The G. G. King, 16 Fed. 921 (D. C. S. D. Fla.). In all of those cases, however, the property was not considered to be in custody of the court until *after process in forfeiture proceedings* had been issued. That feature distinguishes the case at bar and In re Chin K. Shue, supra, from the cases last cited, and, I think, is decisive.

I am entirely well satisfied that the conclusion reached by Judge Dodge in the In re Chin K. Shue Case was correct, and that revenue officers, who have seized property pursuant to assumed legislative authority, are not officers of the court, in the sense that the court has power, in a summary proceeding of this kind, to order the return of property illegally seized, at any rate before steps have been taken to have it forfeited. They are officers of another branch of the government, and, in this case, did not assume to act pursuant to any judicial authority or process. If the seizure was unlawful, the defendant undoubtedly may have redress in a plenary action. The question whether the property seized can be used as evidence against the accused on the trial of a criminal indictment is not, and cannot be, presented in a proceeding of this kind.

The petition will therefore be dismissed.

MEMORANDUM DECISIONS

HOUSTON OIL CO. v. HUGHES. (Circuit Court of Appeals, Fifth Circuit. February 8, 1915. Rehearing Denied March 1, 1915.) No. 2620. In error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. Action by Thomas Hughes against the Houston Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed. H. O. Head, of Sherman, Tex., Oswald S. Parker and T. M. Kennerly, both of Houston, Tex., and Charles T. Butler, of Beaumont, Tex., for plaintiff in error. W. D. Gordon, of Beaumont, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. This is a suit in ordinary form of "trespass to try title" to recover nine sections of land, of 640 acres each, situated in Hardin and Tyler counties, state of Texas. On the trial, after hearing the evidence, the court instructed the jury to find a verdict for the plaintiff for an undivided interest of 617 acres of land in the nine sections sued for, and, such verdict having been returned, the court rendered a judgment in favor of the plaintiff accordingly. The assignments of error raise no question upon the sufficiency of the pleadings, or as to the admission or rejection of evidence, and present only the question that the evidence did not warrant the instructed verdict. From a careful consideration of the evidence in the transcript, we find no reversible error in instructing a verdict for the plaintiff in the case. The only debatable proposition involved is whether the amount of recovery for an undivided portion was excessive. The objection urged at the time as to any excess was too general, not specifically pointing out the amount of the claimed excess. The amount of recovery under the evidence was necessarily the result of intricate calculations. The transcript does not show what rule the trial judge followed. Counsel in this court disagree decidedly. The judgment of the District Court is affirmed.

NATIONAL MERCANTILE CO. v. WATSON, et al. (Circuit Court of Appeals, Ninth Circuit. February 1, 1915.) No. 2496. Appeal from the District Court of the United States for the District of Oregon. For opinion below, see 215 Fed. 929. Wilson, Neal & Rossman, of Portland, Or., for appellant. Martin L. Pipes, Walter H. Evans, Dist. Attys., and Arthur A. Murphy, Deputy Dist. Atty., all of Portland, Or., for appellees.

PER CURIAM. On motion of counsel for appellees, and it appearing that appellant abandoned prosecution of appeal, ordered: Motion granted, and appeal dismissed, with costs in favor of appellees and against appellant.

ROBERTS et al. v. SOUTHERN PAC. CO. et al. (Circuit Court of Appeals, Ninth Circuit. January 4, 1915.) No. 2070. Appeal from the Circuit Court of the United States for the Northern Division of the Southern District of California. For opinion below, see 186 Fed. 934. Francis J. Heney, of Los Angeles, Cal., for appellants. Guy V. Shoup, and D. V. Cowden, both of San Francisco, Cal., for appellees.

PER CURIAM. Pursuant to stipulation of counsel filed December 8, 1914, decree of Circuit Court, made and entered March 21, 1911, dismissing complainants' bill of complaint, etc., affirmed, with costs in favor of appellees and against appellants.

WHITE v. GRAYSON. In re GRAYSON. (Circuit Court of Appeals, Ninth Circuit. February 1, 1915.) No. 2487. Appeal from the District Court of the United States for the Northern Division of the Western District of Washing-

ton. For opinion below, see 215 Fed. 449. Clay Allen, U. S. Atty., of Seattle, Wash., and G. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for appellant. Noah Shakespeare and Louis A. Merrick, both of Everett, Wash., for appellee.

PER CURIAM. Pursuant to stipulation of counsel, filed January 28, 1915, motion to dismiss appeal granted, and appeal dismissed.

YOST v. DALLAS COUNTY. (Circuit Court of Appeals, Eighth Circuit. February 1, 1915.) No. 4186. Appeal from the District Court of the United States for the Western District of Missouri. Bill by David Yost against Dallas County. Bill dismissed, and complainant appeals. Questions certified to Supreme Court. Questions answered. 236 U. S. 50, 35 Sup. Ct. 235, 59 L. Ed. —. On motion for certificate of additional questions. Motion denied. Before SANBORN and ADAMS, Circuit Judges.

PER CURIAM. The arguments in support of the motion for a certificate to the Supreme Court of questions of law in addition to those heretofore certified have been heard. The additional questions are determinable by a consideration of the statutes of Missouri and the decisions of the Supreme Court of that state. Counsel for the appellant doubtless presented these statutes and decisions to the Supreme Court at the hearing on the former certificate. 236 U. S. 50, 35 Sup. Ct. 235, 59 L. Ed. —. If, as this court presumes, those statutes and decisions were presented to and fully considered by that court, its answers to the former questions certified answer the additional questions, and for that reason the motion for a certificate of further questions is denied.

END OF CASES IN VOL. 219